RENDERED: DECEMBER 23, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001468-MR

STEVEN FIELDS — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 97-CI-00090

REGINA FIELDS — APPELLEE

OPINION
AFFIRMING
* * * * * * * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM, and JOHNSON, Judges.

BUCKINGHAM, JUDGE. Steven Fields appeals from a judgment of the Ohio Circuit Court dividing the marital property in a divorce proceeding with Regina Fields. Steven claims that the trial court erred in valuing three farms, in failing to consider the contribution of his father to the value of the farms, in granting Regina interest on her share of the divided marital property, in failing to divide the marital property in just proportions, and in taking into account other allegations of error. Having considered the record, the arguments of counsel, and the applicable law, we affirm.

Steve and Regina married in September 1980 and separated in January 1997. Regina filed a petition for dissolution of marriage in March 1997, and the trial court entered a decree of dissolution on June 24, 1997. The decree reserved the remaining issues of child support, child custody, property settlement, and other matters for a future determination.[1]

On May 15, 1998, a domestic relations commissioner ("DRC") entered a supplemental report disposing of the remaining issues, which was adopted by the trial court on June 1, 1998. Regina was awarded $308,250 as her share of a farming operation known as Fields Brothers Farms which is operated by Steve and his brother, Mike. She was also awarded her personal vehicle, her IRA, and one-half of the parties' Keough plan valued at $76,000.[2] This appeal by Steve followed.

At the time of their marriage, Steve was nineteen years old, and Regina was eighteen. Regina apparently had minimal property at the time of the marriage, and Steve claimed that he had $2,000 in household goods and furnishings, a 1979 Ford Thunderbird worth $8,000, and $3,000 in cash. Steve's father, Robert Fields, was a prominent farmer in the Ohio County area. Steve and Mike were working on their father's farm when Steve and Regina married, and Robert was helping them become established. As a result, a farming operation known as Fields Brothers Farms

[1] The parties had twin teenage sons, whose custody and support are not in dispute in this appeal.

[2] Only Regina's share of the partnership assets is now in dispute.

was formed. Steve and Mike worked full-time in the farming operation and were equal partners.

In April 1985, Steve and Mike purchased the Black farm for $100,000 in cash and the assumption of an $80,000 note. Steve's and Mike's parents, Robert and Ruth, financed the $100,000 cash payment, and a mortgage to them in that amount plus interest at the rate of ten percent per annum was filed of record. No payments have ever been made on that mortgage. In December 1988, Steve, Regina, and Mike purchased the Dunn farm for $600,000. There was a $200,000 down payment from Robert and Ruth, and a mortgage was filed in that amount. The mortgage does not provide for interest, and there was no note produced as further evidence of the indebtedness. In January 1996, Steve, Regina, and Mike purchased the Clark farm for $440,000. Mortgages amounting to $400,000 were filed in favor of lending institutions. There were no mortgages to Robert and Ruth on this farm.

At the trial of this case, Bobby McPherson, a real estate appraiser and former bank loan officer who also farms, testified as a witness for Regina concerning his appraisals and valuations of the farm real estate owned by Fields Brothers Farms. McPherson valued the Black farm at $285,000, the Dunn farm at $1,066,000, and the Clark farm at $570,000, for a total of $1,921,000. The DRC and the trial court accepted McPherson's valuations of the farms, valued partnership farm equipment at $200,000, valued other partnership assets at $135,000 and $100,000, and recognized indebtedness on the farms, including the

mortgages to Robert and Ruth. After computing all of the figures and determining that Steve's share of the partnership equaled $616,500, the trial court awarded Regina one-half of that amount as marital property. It also directed Steve to pay that amount to Regina within sixty days and that the amount would bear interest from June 24, 1997, the date the interlocutory decree was entered.

Steve's first argument is that the trial court erred in adopting McPherson's appraisals without making appropriate adjustments. He claims that McPherson based his appraisals on an amount of acreage which differed from the acreage shown in the deeds for the three farms. He also asserts that McPherson's appraisals were gross over-valuations. McPherson, on the other hand, testified that he did not use a per-acre value in his appraisals and that it was common to use the ASCS figures to appraise real property. He stated that such figures tended to be more accurate as to farm land. McPherson also testified that, due to the lapse of time and the improvements made on the farms after they were purchased by the partnership, the value of each farm had increased substantially.[3] Steve did not present any further assessment or expert witness with regard to the value of the farms. The only evidence Steve provided regarding these values were his own estimates.

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[3] McPherson testified that he was first contacted by Steve and later by Regina's counsel to assess the value of the real estate in light of the divorce proceedings. He testified that he was friends with both parties and that he initially turned down the offer. He stated that only after both Steve and Regina mutually agreed and wanted him to do the appraisals did he agree to do so.

"A trial court's valuation [of marital property] in a divorce case will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence[.]" Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 444 (1992). Further, an owner of land shall not be presumed adequately qualified to express an opinion of its market value by reason of ownership alone, but must establish his qualifications. Commonwealth, Dept. of Highways v. Fister, Ky., 373 S.W.2d 720, 723 (1963). Steve never established his qualifications for making his valuations, making them insufficient evidence on which to base any judgment. Therefore, the only expert testimony as to the value of the farms was that of McPherson. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rule of Civil Procedure (CR) 52.01. We conclude that the trial court did not err in valuing the farms in accordance with McPherson's testimony.

Steve's second argument is that the trial court erred in failing to consider Robert's contributions to the values of the farms. We note first that the trial court did recognize the principal indebtedness on the mortgages to Robert and Ruth as partnership debts on the Black farm and the Dunn farm. The court also recognized interest owed on the Black farm mortgage to Robert and Ruth as a partnership debt. The court did not, however, deduct interest accruing on the mortgage held on the Dunn farm from partnership assets because no promissory note was produced. Furthermore, neither of the mortgages was listed on

the financial statements Steve and Mike submitted when they attempted to borrow money to purchase the Clark farm. In short, we find no error in the court's disallowance of interest on the mortgage on the Dunn farm as a partnership debt.

Steve also asserts that Robert allowed them to use his farm equipment in their farming operation and that the trial court erred in not recognizing this contribution. Robert testified that he intended for the partnership to reimburse him for the use of his equipment as part of his "retirement" and that the equipment was not a gift. There was no written evidence of such a debt. There was, however, evidence that Steve and Mike both continued to work on Robert's farms in various ways and were not compensated for their work. In fact, Steve's and Mike's mother characterized the relationship between the parents and the sons as "we all farm together." Again, we conclude that the findings of fact of the trial court in this regard were not clearly erroneous and should not be set aside.

Steve argues alternatively that even if the use of Robert's equipment to improve the Fields Brothers Farms was a gift and not a debt, it was a gift to Steve and Mike and the farming operation and should therefore be construed as nonmarital property. Steve concedes that his interest in Fields Brothers Farms is marital property, and Robert testified that he allowed Steve and Mike to use his equipment for the improvement of the farming operation. Thus, assuming the use of the farm equipment was a gift from Robert, it was a gift to the partnership, half of which was the marital property of Steve and Regina.

Steve's third allegation of error is that the trial court erred in ordering him to pay interest from the date the divorce decree was entered rather than the date the property was divided by supplemental order and judgment.[4] We note first that it was Steve who wanted the interlocutory decree entered before any property issues were settled. The decree was entered over Regina's objection, since its entry cut off the accrual of marital property.

Steve cites Clark v. Clark, Ky., 487 S.W.2d 272 (1972), in support of his argument concerning interest. In Clark, the court reversed the trial court's allowance of prejudgment interest on a wife's share of marital property in a divorce case on the ground that "until an adjudication was made (in the final judgment) as to what was Mabel's share, she had nothing more than an unliquidated claim against John." Id. at 274. Regina, on the other hand, argues that it would be inequitable to apply Clark to this case or, alternatively, that Clark should be overturned. We agree with Regina that Clark should not be followed in this case.

When the trial court ordered that interest would accrue from the date of the interlocutory decree, it essentially ruled that Regina was entitled to prejudgment interest on the supplemental order and judgment. An allowance of prejudgment interest on an unliquidated claim rests in the discretion of the trial court. Nucor Corp. v. General Elec. Co., Ky., 812 S.W.2d

[4] The trial court awarded interest from the date of the interlocutory decree even though Regina's motion only requested interest from the date of the supplemental order and judgment.

136, 143 (1991). See also Middleton v. Middleton, 287 Ky. 1, 152 S.W.2d 266 (1941). Although the Clark case recognized the wife's interest in marital property as an "unliquidated claim," it appeared to hold that interest should only be allowed from the date of judgment and that there is no discretion in the trial court to allow interest. In light of Nucor, we conclude that a trial court has such discretion.

In Dalton v. Mullins, Ky., 293 S.W.2d 470, 477 (1956), the court held that an allowance of prejudgment interest on an unliquidated claim should be determined by whether justice and equity demand it. See also Friction Materials Co. v. Stinson, Ky. App., 833 S.W.2d 388, 392 (1992). Because Steve insisted that the interlocutory decree be entered over Regina's objection, thereby cutting off the further accrual or growth in marital property, and because Steve controlled all the business assets from the date of the interlocutory decree until the date of the supplemental order and judgment, we conclude that the trial court did not abuse its discretion in awarding prejudgment interest back to the date of the interlocutory decree.

Steve's fourth argument is that the trial court erred in failing to divide the marital property in just proportions as required by KRS 403.190(1). His complaint appears to be that it was inequitable for the trial court to have awarded Regina $308,250, which is a one-half share in Steve's interest in the partnership. Regina was a homemaker raising twin boys for almost seventeen years. She also worked part-time and later full-time outside the home. The trial court's award of a one-half share to

Regina in Steve's interest in the partnership does not appear to this court to be clearly erroneous. Merely because Steve does not have cash on hand to pay Regina for her share does not mean that she should be awarded any lesser amount.

Steve's final argument is that the trial court erred by failing to restore his nonmarital property to him and by ordering him to pay an additional $3,000 in cash to Regina. Concerning the restoration of nonmarital property, we note that the trial court did not specifically address this issue. Steve has failed, however, to comply with CR 76.12(4)(c)(iv) by showing how he properly preserved any error in this regard for review. Having reviewed the exceptions Steve took to the DRC's report, we find no evidence that he took any exception to the DRC's failure to restore nonmarital property to him. Such a failure to file exceptions precludes Steve from raising this issue on appeal. Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997). Furthermore, Steve has not indicated that he traced the assets which he brought into the marriage into assets owned at the time of the separation. In the absence of tracing, we cannot say that the trial court erred when it refused to restore nonmarital property to Steve. See Brunson v. Brunson, Ky. App., 569 S.W.2d 173, 176 (1978).

Steve also argues that the trial court erred in finding that he had $6,000 in cash and ordering him to pay $3,000 to Regina. As Steve listed in his answers to interrogatories that he had $6,000 in his bank account, we conclude that the trial court did not err in this determination.

The judgment of the Ohio Circuit Court is affirmed.

JOHNSON, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

GUDGEL, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART. Respectfully, I dissent from so much of the majority opinion as affirms the award of prejudgment interest from the date of the interlocutory decree. The longstanding rule adopted in Clark v. Clark, Ky., 487 S.W.2d 272 (1972), specifically applies to divorce cases, and I am of the opinion that we are bound to follow it. SCR 1.030(8)(a). The general rule adopted in Nucor Corporation v. General Electric Co., Ky., 812 S.W.2d 136 (1991), upon which the majority relies, in my view applies only to civil actions for damages. To apply that precedent to this divorce action interprets the scope of the Nucor decision far more broadly than is warranted, especially since an existing precedent governs divorce actions. More important, I believe the award of interest herein amounts in any event to an abuse of discretion. In the first place, as the majority acknowledges, appellee requested or demanded interest only from the date of the supplemental order and decree, and not from the date of the interlocutory decree. Further, it appears uncontroverted that appellant is land-rich but cash-poor, with the result that he will have great difficulty paying the sum owed to appellee within sixty days as ordered by the court. To saddle appellant with the additional obligation of also paying a significant sum as prejudgment interest within that same sixty-day period is both

unfair and unwarranted. In short, in the circumstances presented here, I believe the award of prejudgment interest constitutes a clear abuse of discretion.

For the reasons stated, I dissent from so much of the majority opinion as affirms the award of prejudgment interest.

BRIEFS AND ORAL ARGUMENTS FOR APPELLANT:	BRIEF AND ORAL ARGUMENTS FOR APPELLEE:
W. Currie Milliken Bowling Green, KY	Mike McKown Hartford, KY