

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003002-MR

MATTHEW BRYNE BECK

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 97-CI-00409

DELENA BEARD (FORMERLY
DELENA BEARD BECK)

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: COMBS, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Matthew Bryne Beck appeals from an August 3, 1998, judgment of the Taylor Circuit Court dissolving his marriage to Delena Beard, disposing of the couple's property, and apportioning their debts. Beck contends that the property and debt assignments were based on erroneous findings of fact and were so inequitable as to constitute an abuse of the trial court's discretion. Although we do not reach all of Beck's contentions, we are persuaded that the meager record thus far compiled does not adequately support many of the trial court's

findings. We remand this matter, therefore, for additional proceedings.

Beck and Beard married in June 1996. Both of them were in their early twenties. They separated in November 1997, Beard petitioning for dissolution that same month. No children were born during this brief marriage, nor did the parties acquire a substantial estate. In June 1998, the trial court convened a hearing to address property and debt issues. Prior to the hearing and in compliance with a pre-trial order, Beck had filed a document allegedly summarizing the estate and proposing a division of its assets and liabilities. According to Beck, the couple's assets consisted primarily of household goods, including some jewelry, and two automobiles, a Pontiac Trans-Am and a Ford pick-up truck. Beck's summary also listed some shares of Kroger Co. stock and suggested that Beard had acquired them through an employee purchasing plan. The liabilities Beck listed were auto-related obligations to two banks and four credit-card balances.¹

¹Beck's summary estimated the estate and proposed its division as follows:

ASSETS	BECK	BEARD
Household goods	\$1,227.00	\$8,260.00
Jewelry	1,675.00	355.00
Ford F-150		13,498.52
Pontiac	16,585.00	
Kroger Stock Exchange		470.00
Kroger Savings Plan		4,200.00
Subtotal	\$19,487.00	\$26,783.52
LIABILITIES		

(continued...)

At the June 1998 hearing, Beck sought to supplement his pre-trial summary by tendering an itemized list of the couple's household goods. The list purported to indicate the value of each item, whether it was marital property or non-marital, and who had possession of it in the division the parties had already effected. Beard tendered a similar list of household goods, although hers did not include values. According to Beck, Beard had possession of about \$8,200.00 worth of the household goods, and he had possession of household goods worth about \$1,200.00. Beard objected to the introduction of Beck's documents, both the summary and the itemized list, on the ground that the values represented on them were inaccurate and had not been properly established. In the discussion that followed, the trial court declared that it would not entertain detailed proof concerning the value of the household goods. The case should not, Beard's

¹(...continued)

Star Bank (Ford)		(\$20,277.20)
Sears	(827.52)	(240.48)
Community Trust (Pontiac)	(16,166.29)	
Helzburg		(3,148.00)
VISA		(1,800.00)
Discover	(600.00)	(2,556.00)
Subtotal	(\$17,266.29) [This should be (\$17,593.81)]	(\$28,349.20) [This should be (\$28,021.68)]
Grand Total	\$1,893.19 [Beck's grand total comports with the corrected sub- total.]	\$1,893.20 [This should be (\$1,238.16)]

counsel asserted and the court agreed, become a fight over the value of sugar bowls. Thereupon, Beck acknowledged that he did not oppose what he believed was an unequal division of the household goods provided the overall division of the estate was otherwise made equal along the lines of his tendered proposal. In particular, he indicated a strong preference for the Pontiac rather than the Ford.

The trial court apparently understood Beck to mean that the only dispute was over the Pontiac, and thus that evidence concerning the rest of the estate was unimportant. Beard's objection to Beck's documents was not ruled upon, nor was Beck's motion to introduce them into evidence. Instead, the parties testified briefly as to whether a washer, dryer, and treadmill were marital property or non-marital, and Beck testified that the Pontiac had a current value (apparently a blue-book value) of about \$16,500.00. He also argued that the debt on the Pontiac could currently be retired for about \$16,000.00,² although the parties agreed that if the debt were extended for the full period of the loan the amount to be repaid was in excess of \$19,000.00 (52 payments outstanding x \$371.00/payment). The parties also agreed that the payments on the Ford were about \$327.00/month, but there was no evidence concerning the Ford's current value, and, aside from counsel's assertion that three years remained "on

²Sometime after the hearing, Beck submitted a statement from the creditor bank corroborating this assertion.

the lease,"³ the number of monthly payments outstanding was not specified.

Nor was there any proof concerning the existence or the amount of any of the credit-card debts, with the exception of Beck's tendered balance sheet and Beard's testimony that the treadmill had been purchased on credit from Sears and that she had been making the payments. Evidence was lacking as well on Beard's alleged workplace savings. Beck's summary of the marital estate implied that Beard had worked for Kroger during the marriage and that she had accumulated Kroger Co. stock or retirement benefits, but nothing else in the record established the existence of this alleged asset, its character as marital or non-marital property, or its value.

Indeed, the trial court's initial disposition of the estate did not even mention Beard's alleged Kroger Co. asset. Instead the court acknowledged the "list of property furnished by counsel . . . [that] reflects the items which are now in the hands of each of the parties," and found that the following debts had accumulated during the marriage:

Visa	\$1,800.00;
Sears	\$1,068.00;
Student Loans	\$20,000.00;
Helzburg diamond store	\$3,148.00;
Discover Card	\$2,556.00.

The court apportioned the first three of these debts to Beard and the last two to Beck. Without attempting to value

³If the Ford was in fact leased, then only the value of the lease (if any) and not the value of the vehicle would figure among the estate's assets. This is another matter that, if necessary, may be addressed on remand.

either the car or the goods, it also awarded to Beard the Pontiac with its associated debt and all of the household goods that had been in her possession at the time of the hearing.

Beck promptly moved for additional findings and an amended judgment. By his calculation, the court had awarded Beard approximately \$29,000.00 of the roughly \$50,000.00 in estate assets and had apportioned to her only about \$19,000.00 of the estate's liabilities, which totaled approximately \$46,000.00. Why, Beck wondered, should there be a \$16,000.00 discrepancy⁴ in the division of an estate with a net value of less than \$5,000.00. Beard's student loans could not account for the difference, he maintained, because their existence had not been proven; they had simply materialized in the trial court's findings. Even if they existed, they were Beard's non-marital debts, Beck asserted, and thus were not properly included in the marital estate. The effect of their inclusion in the decree, Beck claimed, was to obscure what was otherwise a clearly inequitable division of the parties' assets and liabilities.

In response to Beck's motion, the trial court supplemented its August 3, 1998, decree with an order entered October 28, 1998. In the supplementary order the court observes that the student loans are Beard's non-marital debts, but it does not explain how they came to the court's attention. The court also finds, contrary to Beck's summary of the estate, that the

⁴Beard's net award, according to Beck, was approximately \$10,000.00, whereas Beck claims that his net award was approximately \$21,000.00 (assets) - \$27,000.00 (liabilities) or negative \$6,000.00.

household goods were divided equally and that the two automobiles had equal equity. Supplementing the decree's conclusions, the order also provides that Beard's Kroger Co. stock should be deemed her non-marital property, in light of the marriage's brevity; that Beck should retain jewelry in his possession; and that the apportionment of the credit-card debt in the original decree was based on

who incurred the debt, who received the benefit of same, who received the property purchased as a result of the debt and further, in consideration of the equities in the distribution of all personalty.

It is from the August 3, 1998, decree as thus supplemented that Beck appeals.⁵

KRS 403.190 governs the property dispositions necessitated by marriage dissolutions, and, in general, trial courts are expected to use a three-step process when settling marital estates. First, the court must determine what property is available for distribution. KRS 403.190(2)-(4). Second, the court values the property. Third, the court divides the marital property in "just proportions." KRS 403.190(1). There is no presumption or requirement that marital property be equally divided. Rather, as noted,

the court must . . . divide the couple's marital property in "just proportions,"

⁵Beck requested the trial court to reconsider its October 28, 1998, order, but that request, as Beard notes and as Beck apparently acknowledges, amounted to an improper, successive motion for CR 59 relief. Cloverleaf Dairy v. Michels, Ky. App., 636 S.W.2d 894 (1982). That motion not serving to sustain the trial court's jurisdiction, we have disregarded the trial-court proceedings pertaining to it, although we may note that the trial court summarily denied Beck's request.

without regard to marital misconduct and in light of the following factors: each spouse's contribution to the acquisition of the marital assets, including homemaking duties; the value of each spouse's non-marital property; the duration of the marriage and the economic circumstances of each spouse at the time of distribution.

Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994) (citations omitted). This Court reviews the trial court's factual findings under the clearly erroneous standard of CR 52.01 and its exercise of discretion for abuses thereof. Herron v. Herron, Ky., 573 S.W.2d 342 (1978); Purdom v. Purdom, Ky., 498 S.W.2d 131 (1973).

Beck maintains that several of the trial court's factual findings were clearly erroneous. We agree. A finding, of course, may not be deemed clearly erroneous if it is supported by substantial evidence of record. Johnson v. Johnson, Ky. App., 564 S.W.2d 221 (1978). Evidence is substantial only if it has sufficient probative value to induce conviction in the minds of reasonable persons. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986); Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972). Where the evidence lacks that power, however, or where it is simply lacking, the trial court is not at liberty to fill the void with its own extra-evidentiary knowledge unless the particular fact is so commonly known that it may be given judicial notice. Colley v. Colley, Ky., 460 S.W.2d 821 (1970); Brunson v. Brunson, Ky. App., 569 S.W.2d 173 (1978). Unfortunately, several of the trial court's findings in this case lack adequate evidentiary support.

The most glaring instance is the finding that Beard is encumbered with student loans. We have little doubt that this

statement is true, and if properly proven it is a fact that could legitimately bear on the distribution of the marital estate. KRS 403.190(d). But there is no evidence in the record to establish it. The finding, therefore, is clearly erroneous and should not have appeared in or had any bearing upon the decree.

Nearly as unsupported are the findings implicit in the court's rulings to the effect that Beard acquired Kroger stock during the marriage and that the parties' credit-card debts were apportioned according to which party caused the particular debt and benefitted from it. As noted above, the evidence does not even establish that Beard worked for Kroger, much less that the alleged stock was acquired during the marriage.⁶ And, while individual responsibility may well be a valid basis for apportioning marital debts in some cases, there is no evidence in this case tending to show that either party individually caused a particular credit-card transaction or, indeed, what was purchased--aside from a treadmill--in any of them. These findings, too, then, are clearly erroneous.

Also troublesome is the trial court's finding regarding the value of the couple's household goods. We are familiar with how difficult and unsatisfying proof of value tends to be. Such proof is particularly vexatious where the values to be determined are numerous and relatively insignificant. It is always to be hoped that a divorcing couple will divide their household goods

⁶If it was acquired during the marriage, however, it may not simply be deemed non-marital. Its character as marital or non-marital property must be determined in accordance with KRS 403.190(2)-(3).

by agreement or at least that they will stipulate values or a range of values for them. Where there is neither agreement nor stipulation, however, and the question of value is not otherwise waived, the trial court has no alternative but to entertain proof on this question in some manner. This is not to say that the trial court's reluctance to expend hearing time on the minutia of a divorcing couple's personalty was unreasonable or hard to understand. Evidence of the value of household goods may better be gathered perhaps, in some other way, such as a commissioner's hearing or depositions. But be that as it may, where the issue of value is engaged, evidence, however gathered, is necessary to resolve it.

Beard contends that there was an agreed division of the household goods in this case, which obviated proof of value, but the "agreement," the record makes clear, was conditioned from Beck's point of view on what he considered an equalizing division of other property, particularly the automobiles, and the condition did not occur. Beck assuredly did not agree that the already-effected division of the household goods was equal, just as Beard assuredly did not stipulate that Beck's proffered values were accurate. The issue of value was thus engaged and evidence was necessary. Beck's attempt to introduce evidence, however, was cut short, and Beard proffered none. Nevertheless, the trial court found that the household goods had been divided equally. The only possible basis for this finding is the trial court's own estimate of the property's worth, an inappropriate exercise of

"judicial notice." See Colley v. Colley, *supra*. This finding, then, is also clearly erroneous.

Beck also challenges the trial court's finding that the automobiles had equal equity. As noted above, the evidentiary basis for this finding was again scant, although in this instance it may have been sufficient. We need not address that question, however, for the errors already noted require that this case be reconsidered. We are mindful that the parties have been divorcing now for longer than they were married. We are also mindful that, equity in the division of marital estates being left largely to the trial court's discretion, the division of this estate may, upon a proper record, be shown to have been within that discretion. The parties are entitled, however, (Beck in particular in this instance) to the assurance that the trial court's discretion has been exercised on the basis of facts. Those should only be facts that the parties have had a full and fair opportunity either to prove or to controvert. For the reasons discussed above, the record before us does not provide that assurance. Accordingly, we vacate those portions of the August 3, 1998, decree (as modified by the October 28, 1998 order) disposing of the marital property and remand for reconsideration of that disposition in light of new evidentiary proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David A. Nunery
Campbellsville, Kentucky

BRIEF FOR APPELLEE:

Theodore H. Lavit
Theodore H. Lavit &
Associates, P.S.C.
Lebanon, Kentucky

