

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000367-MR

WILLIAM GRANT SMITH

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 97-CI-01105

REBECCA JEAN MILLS

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; BARBER, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, William Smith ("Bill"), Respondent below, appeals from the Findings of Fact, Conclusions of Law and Order upon Exceptions entered by the Franklin Circuit Court, on January 10, 2000. Finding no error, we affirm.

The marriage of Bill and Rebecca Jean Mills ("Becky") Smith was dissolved by (bifurcated) decree entered October 9, 1997; the parties property and debts were to be valued as of October 1, 1997. Bill raises several issues on appeal over the calculation of equity, classification of debt, and a credit for tax refund. The issue regarding the value of the marital real

estate has been withdrawn, because the real estate has been sold to third parties.

I

Equity in marital residence

The Domestic Relations Commissioner ("DRC") determined that indebtedness on the property was \$113,290.00, as of October 1, 1997, leaving equity in the home of \$53,459.00. The DRC determined that Bill shall be awarded the marital residence, as he requested, provided that he pays all outstanding indebtedness and pays one-half of the equity or \$26,729.00 to Becky. The trial court gave Bill 45 days to obtain the necessary funds to do so; otherwise, the court ordered that the property be listed for sale with the proceeds to be split between the parties after payment for the remaining indebtedness. Although Bill had paid the mortgage payments, the court denied his request for a credit because Bill had occupied the home and benefitted from Becky's equity in the home since the separation. Beck had had to pay rent since the separation, thus had been unable to build her equity in the home.

Bill contends that the trial court's calculation of equity in the marital real estate was clearly erroneous, because he was not given credit for reduction in principal for mortgage payments made from the date of separation to the October 1, 1997 valuation date, and from that date forward. Bill stated that at the hearing on the exceptions, Becky's counsel stipulated that he was entitled to credit for reduction in principal from October 1, 1997. Becky contends that the evidence demonstrated that she had

to find another residence for her and her son and pay rent during the parties' separation, while Bill remained in the marital residence.

Bill notes that the trial court failed to mention the stipulation regarding credit for mortgage payments; however, he failed to bring that omission to the trial court's attention. Thus we will not consider it on appeal. CR 52.04 requires a motion for additional finding of facts when the trial court has failed to make findings on essential issues. Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal. Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982).

In support of his argument for a credit, Bill relies upon Gibson v. Gibson, Ky. App., 597 S.W.2d 622 (1980). Gibson is distinguishable upon its facts. There, the wife and the parties' eight year old child had remained in the marital residence and the husband was required to make the mortgage payments until the child turned 18. The court held that the husband was entitled to reimbursement for any amount of the mortgage payments that he made since the entry of the decree which reduced the principal balance of the indebtedness, with the remaining proceeds divided equally between the parties. By contrast, in the case *sub judice*, Bill remained in the marital residence, and Becky moved out and paid rent. There was no error.

Bill also contends that he should have been given a credit for certain withdrawals against a home equity loan account

at Commonwealth Credit Union, because he had no knowledge of the use of the funds withdrawn, despite his signature on the line of credit. Bill does not state where this issue was addressed; it does not appear to have been decided by DRC or the trial court, and no request was made for additional findings. Cherry, supra. We decline to consider this issue.

II

Equity in the two motor vehicles

The trial court found that the DRC had not placed a specific value on the parties' motor vehicles; "however substantial evidence exists to support [such] a finding Based on the evidence, the court finds that the value of the Ford Truck is \$2,880 with no indebtedness, . . . the Pontiac has a value of \$10,867 and an indebtedness of \$8,573.55. Based on the close relationship in the equity value of the Pontiac and the actual value of the Ford Truck, the court concludes that the DRC . . . correctly awarded each party the vehicle in his/her possession."

Bill admits that "the testimony and evidence present on this issue was, at best, confusing." Nevertheless, he argues that the trial court should have used a different loan balance in valuing Becky's Pontiac, because the \$8,573.33 was the amount of the original loan at the time of purchase. Bill failed to bring this matter to the trial court's attention by way of a motion for additional findings; thus, that issue was not preserved for review. Cherry, supra. Regardless, we cannot say that the trial court's valuation of the motor vehicles was clearly erroneous.

As Becky noted, there was other evidence in the records that the Ford truck had a higher value than found by the trial court; further, Becky made all the payments on the Pontiac after the parties divorced. KRS 403.190 vests the trial court with wide discretion in the division of marital property. "We cannot agree with the appellant that the court erred in its division and award of marital property to the appellee. This court may not disturb the findings of the trial court in a case involving dissolution of marriage unless those findings are clearly erroneous." [citation omitted]. Johnson v. Johnson, Ky. App., 564 S.W.2d 221, 223 (1978). The trial court did not commit reversible error concerning the value of the motor vehicles.

III

Classification of debts

The court found that the two debts assigned to Bill by the DRC - the Farmers' Bank loan and the State Bank loan - were correctly determined to be non-marital. According to Bill, the Farmers Bank debt of \$7,721.11 was for money he had borrowed to enable the parties' son, Phillip Mills, to purchase a truck. Bill contends that they financed what Phillip could afford to pay on his own, and that the rest was financed through the note with the bank. Bill contends that the parties were doing what most parents do - assisting their son financially - and that it was error to categorize this as a non-marital debt. The State Bank loan, with a balance of \$5,983.00, was borrowed for a horse trailer for Phillip.

Becky contends that from time to time Bill obtained loans from both of these banks to finance his construction jobs. Bill had his own construction bank accounts. Becky asserts that she never received any money from these construction jobs and that none of that money was deposited into the parties joint checking account at Commonwealth Credit Union. Becky did not sign the notes or agree to pay the loans in question. Becky notes Phillip's testimony that the money Bill borrowed for the horse trailer was a gift to him.

The trial court explained that although the State Bank debt (for the truck) was incurred during the marriage; the presumption that it was marital was rebutted by the "circumstances surrounding the debt between the Respondent [Bill] and his son; specifically the lack of Petitioner's [Becky's] name being placed on the debt and the reason for which the debt was incurred." According to the DRC's report, there was some confusion about the purpose of his debt, and Becky had argued that Bill used the truck for his construction projects. Based upon that the finding that Becky had received no benefit therefrom, the court concluded the debt was non-marital. The trial court also overruled Bill's exception to the DRC's report assigning the Farm Bank (horse trailer) debt to him for the same reason.

Despite conflict in the evidence, neither the truck nor the horse trailer was purchased for Becky's benefit. Although we may have reached a different conclusion than did the tier of

fact, we cannot say that it was clearly erroneous to classify the debts as non-marital.

IV

Credit for income tax returns

Bill contends that Becky cashed income tax refund checks issued in 1995, 1996, and 1997, totaling \$2,087.40, without his knowledge, and that he does not know whether the money was spent by Becky "personally" or to pay marital bills. The DRC denied Bill's claim relating to the tax refunds. Bill filed an exception which the trial court overruled. The parties separated on or about June 2, 1997. The refunds were for years during which the parties were married. It was not clearly erroneous to deny Bill's claim relating to the tax refunds.

We affirm the Findings of Fact, Conclusions of Law and Order of the Franklin Circuit Court.

ALL CONCUR.

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