

RENDERED: October 22, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002507-MR

WILLIAM CARSON GRAY

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE LEWIS B. HOPPER, JUDGE  
ACTION NO. 98-CI-00865

BETTY JOYCE GRAY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

McANULTY, JUDGE: Appellant Carson Gray appeals the decree of dissolution of marriage entered by the Laurel Circuit Court which terminated his marriage to appellee Betty Gray. Carson contends that the court's division of property was grossly disproportionate in terms of what the parties actually received.

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

He further alleges that the inequitable division resulted from the court's improper consideration of fault by Carson. Finally, he alleges for the first time on appeal that the trial judge was personally biased against him, which governed the court's rulings in the case, including Carson being found in contempt and serving time in jail.

We conclude that the trial court's division of property was equitable and within the court's discretion. The court considered fault as it pertained to Carson's violation of orders the court had entered in an attempt to stop him from dissipating and concealing assets. The contempt order was warranted. Further, Carson's claims of bias do not amount to palpable error. Thus, we affirm.

The drawn-out history of the dissolution proceedings below is necessary for understanding the outcome in this case. Carson filed his petition for dissolution on November 12, 1998. The parties filed some discovery in the spring of 1999, including Carson's answer to interrogatories. There was a brief attempt at reconciliation at the same time, during which the action was abated.

But the parties did not reconcile and instead Betty took out an emergency protective order and Carson sought a restraining order. Betty also sought a restraining order on the grounds that Carson had been collecting rents from Betty's share

of tenants in the parties' storage building business. Carson had stated in his interrogatory responses that the parties divided the rent from the buildings, and he claimed he received \$2285 a month from his share of the storage business, and Betty received \$2135 a month from hers.

The court set the case for a pretrial conference. On July 29, 1999, Carson filed his pretrial disclosure statement. Betty filed a motion alleging that Carson further interfered with Betty's collection of rent and had interfered with the attempt to have a real estate appraiser come onto the marital property. The court entered an order on August 30, 1999, which gave Betty temporary possession of the marital residence, land and the storage buildings thereon. The court gave the appraiser the right to come upon the land, and ordered Carson to pay Betty's share of rentals to her attorney.

A short time later, Betty filed a motion seeking to prevent Carson from dissipating assets and for an accounting, alleging that he had hidden or sold equipment and pull trailers. The court granted Betty's motion and entered an order requiring an accounting. The court appointed a receiver to receive funds from the rental business and the trailer sales, and distribute the proceeds equally to the parties.

Some three months later, however, Betty filed a motion to hold Carson in contempt because he had not provided an

accounting and had failed to turn over rental income. Betty and the receiver had been trying since early in the litigation to learn of the number of renters of Carson's storage units and their identities. The parties entered into an agreed order on July 14, 2000, that Carson would produce an itemized accounting of the rents received from storage units in his control from November 1, 1999, to the date of the order. The order also required that Carson produce any verification that he paid rents to the receiver.

Carson's accounting, which was filed late, stated he had earned \$3665 total from the storage buildings in that eight month period, considerably less than the \$2285/month he earlier claimed to receive from his share of the storage business. He stated that his earnings were lower than usual because he had 37 empty buildings. He also said he spent all of the money on expenses and had no verification of money paid to the receiver.

The court held a hearing and found Carson in contempt of court after he admitted his failure to provide an accounting. The court ordered Carson to pay \$3600 to the receiver, and to provide the court with the number of trailers he had received for sale. The court in the same order gave Betty control of the rental business. Carson later filed a statement that he had sold two trailers, and provided an invoice that showed he had received 13.

The court deferred sanctions on the order of contempt, and ordered the marital home and business sold. However, about a month later Betty filed a motion to show cause alleging that Carson refused to comply with the order to sell the property. On July 9, 2001, Betty filed a second motion for contempt alleging interference with the storage rental units she was operating. Betty subsequently filed motions alleging that Carson was having mail sent to a post office box in order to hide assets, and Betty asked to be able to inform lessees of the correct address rather than the post office box. The court entered an order giving the receiver control over the post office box for collection of the rentals.

On March 5, 2002, the court entered an order which stated that Carson had not provided an accounting of income received by him since the court ordered him to in December of 1999. The court found in contrast that Betty had forwarded the rentals that came into her hands. The court ordered Betty to have complete and total possession of the parties' real properties and Carson was not to go on them. The court shortly thereafter entered an order that Betty might sell any of the pull trailers on the property and that Carson must inform her of the listing price.

The court ordered Carson to provide a list of trailers he had sold and the price received. The court also ordered him

to provide his best recollection of the identity of the renters of the storage units, and for Betty to provide a similar list and to collect the rents. The court ordered Carson not to receive any rent of any kind from renters. The court ordered Carson not to dissipate any property or sell any trailer. In another order on that date, the court ordered Carson's private mail sent to Carson's attorney to be forwarded to the receiver instead of to the separate post office box Carson set up. Carson then provided an affidavit stating that he had sold three trailers for a total of \$1920.

On May 22, 2002, the court found Carson in contempt for his failure to comply with various orders of the court over three years. The court listed its reasons: his failure to provide a list of renters, failure to provide Betty the fair market value of the trailers, failure to surrender keys, and his entry on the property twice. The court found that Carson offered no good reason for his habitual disobedience, and noted the commissioner's recommendation of a sentence of six months. The court sentenced Carson to six months in jail.

Betty filed an amendment to her verified preliminary statement in which she submitted copies of checks she had found which showed thousands of dollars in checks Carson had written to trailer companies for purchases in the years since the divorce proceedings began. The domestic relations commissioner

held a lengthy hearing with the parties on September 11, 2002. The parties thereafter filed exceptions to the commissioner's report and the court held a hearing on the exceptions. The court entered a final order and decree of dissolution on November 13, 2002. This appeal follows.

Carson's first argument states that the court failed to make an equal property division because Betty was awarded the bulk of the property the parties accumulated during the marriage. The total amount of the assets awarded to Carson was \$412,274.28, whereas the amount awarded to Betty was \$391,432.12, a roughly 51% to 49% split. The trial court's decree of dissolution shows that the court awarded Betty the marital home and neighboring storage business, as well as two other real estate properties, two vehicles, personal property, and the cash which had been collected by the receiver from storage building rentals and trailer sales. Carson received a single piece of real estate, one vehicle, equipment and personal property. He was credited with two vehicles which were dissipated by him. The majority of the award to Carson was \$150,000.00 in trailer sales for the three years between the petition for dissolution and the decree, and \$109,425.00 in rental proceeds Carson "received for 3 years and converted to his use."

Carson contends that the trial court lacked proof to include \$150,000 dollars in trailer sales to him, and to impute \$100,000 in rental proceeds to him since Betty received the storage building rentals. In addition, Carson argues that the trial court overvalued the Dodge Club Cab at \$30,000 when he only paid \$24,000 for it; that he was awarded \$17,560.28 for a bank account which was virtually empty; and he was credited with tools and jewelry based only on Betty's claims that Carson had taken them and what their value was.

Carson also believes Betty's share was disproportionate because the marital home and business were undervalued; she owned certificates of deposit which were not divided; guns awarded to her were undervalued; and her nonmarital property was overstated since she spent some of it before investing the remainder in the marital business. Carson argues that if the errors he alleges in valuation are corrected, the division of property was in the range of a 16 to 84% division in Betty's favor, and thus inequitable.

A trial court has wide discretion in dividing marital property and the division need not be equal, but only in "just proportions." KRS 403.190(1); Davis v. Davis, Ky., 777 S.W.2d 230, 233 (1989). Addressing Carson's contentions that the amount he was awarded was overstated, we find that the trial court properly awarded the sales and rentals to Carson on the



basis that he attempted to conceal these marital assets and prevent Betty from receiving her share. Carson's actions in collecting money, secreting it and reinvesting it in his trailer sales business were acts of dissipation. Dissipation is spending marital funds for a nonmarital purpose. Robinette v. Robinette, Ky. App., 736 S.W.2d 351, 354 (1987). When a court is faced with a spouse who has dissipated assets, the court may appropriately consider the dissipation in the property division when there is a clear showing of intent to deprive one's spouse of his or her proportionate share of the marital property. Id.

The awards based on dissipation were supported by evidence in the record. Betty's counsel estimated the amount of dissipated rentals by subtracting the amount of the rentals collected from Betty by the receiver from the amount that would have been obtained if the monthly amounts Carson cited in interrogatories were collected and turned over. Certainly the exact amount of rents is not known, but the court attributed this to Carson's dissipation. Carson admitted his failure to turn over funds to the receiver. We find a sufficient factual basis for the trial court's estimate.

As to the trailer sales, the court took the amount of purchases Carson made from the invoices Betty provided, which exceeded \$77,000. Betty could not subpoena invoices from the out-of-state manufacturers; thus she believed the amount of

purchases to be much higher. Betty testified that Carson had indicated in the past that he made \$400-600 profit from each sale. The trial court's order on this issue stated:

Based upon four of fourteen manufacturing companies, who responded to Betty's subpoenas, Mr. Gray purchased, since the separation, more than Seventy Seven Thousand Dollars (\$77,000.00) worth of trailers. If the Court extrapolates that to other manufacturers, it would appear that Mr. Gray purchased nearly Three Hundred Thousand Dollars (\$300,000.00) worth of trailers since the parties [sic] separation. Most of those trailers have been sold. Eight (8) trailers remain to be sold. Based upon the testimony of Ms. Gray that Mr. Gray told her that he had sold at least Fifteen Hundred (1,500) trailers prior to October 1998 and that he had then eventually had the best three years ever during the parties separation from 1998 until August 2001, the Court believes that Mr. Gray would have realized and did realized [sic] at least One Hundred and Fifty Thousand Dollars (\$150,000.00) net profit since the parties [sic] separation from the sale of trailers.

We conclude that the trial court's estimate was within its discretion given Carson's concealment of crucial facts. Carson was ordered to inform the receiver and the court of the number of trailers he purchased, the number sold and the amount of profit he made on them. Since it is Carson's fault that these numbers had to be estimated, he should not be heard to complain. The trial court's estimate was supported by a factual basis and we uphold it on appeal.

The bank account was similarly treated as a dissipated asset. The figure of \$17,560.28 was taken from Carson's pretrial disclosure statement, not from Betty's testimony as Carson asserts. Carson asked for this account, in the amount he had listed. This account was in Carson's control, and so if the money therein was gone it was due to Carson's dissipation. He did not request or receive permission from the court to spend this money, and was under orders from the court not to dissipate assets. Dispersal of marital assets without an accounting is sufficient justification to include the unaccounted for amount in the total marital assets. Bratcher v. Bratcher, Ky. App., 26 S.W.3d 797, 799 (2000), citing Barriger v. Barriger, Ky., 514 S.W.2d 114, 115 (1974). The trial court acted within its discretion in apportioning this to Carson's marital share.

The differences in the amounts of the other assets Carson complains of were supported by Betty's testimony and documentation. Carson complains that his figures were not accepted by the trial court. However, the trial court is in the best position to assess credibility of the witnesses, and the court could take into consideration Carson's numerous obfuscations in determining that Betty's testimony was more deserving of belief. Thus, we find no error in the court's assessment that Carson should be awarded \$5000 in tools and \$800 in jewelry that Betty alleged he took. We affirm the assessment

of the guns' value based on Betty's sales price rather than Carson's valuation. On the valuation of the Dodge Club Cab, Carson waived his exception to that at the hearing.

Carson's major point of contention as to the various items given to Betty is that Betty received an additional \$133,000 in certificates of deposit (CDs) not included in her total. At the hearing, Betty testified that she had taken her share of profits from the sale of a marital business and put the money into two CDs. She further testified that she had spent the CDs in 1998, before the petition for dissolution was filed.

Carson mentioned in his amended pretrial disclosure statement of August 24, 2002, that a CD with Community Trust Bank was allegedly "jointly held by Respondent, Betty Gray and [her daughter] Becky Sturgill and which was taken out on January 22, 1999, and paid to Becky Sturgill in the amount of \$58,970.43." Carson attached an exhibit to the statement consisting of a cashier's check for payment to Becky Sturgill. The cashier's check did not include Betty's name. Betty denied any recollection that she had a CD jointly with Becky.

Carson did not subpoena bank records to show that Betty had a CD as a marital asset during the dissolution proceedings. Given the length of these proceedings and fact that he was represented by counsel, we are not persuaded by him that his confinement in jail prevented him from providing proof.

Carson's attorney admitted at the exceptions hearing that Carson had not sought any bank records in the case. The court properly ignored the allegation that Betty had a CD since she denied it and Carson provided no proof of its existence after the separation. We note, moreover, that some of the assets Betty said were purchased from the CD proceeds were included as marital assets, which were divided.

Carson complains of the amount of the valuation of the marital residence. However, Carson did not complain about the valuation of the residence in his exceptions to the report of the domestic relations commissioner, and so is not entitled to raise this issue on appeal. Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997).

Finally, Carson argues about the value of the nonmarital property awarded to Betty. We believe the trial court properly awarded the amount of \$12,008.56 to Betty based on her tracing of her inheritance from her mother to a joint bank account, and from there to checks written on that account to fund the construction of one of the storage buildings for their business. The trial court followed the rule that the requirement of tracing is fulfilled as far as money is concerned when it is shown that nonmarital funds were deposited and commingled with marital funds and that the balance of the account was never reduced below the amount of the nonmarital

funds deposited. Allen v. Allen, Ky. App., 584 S.W.2d 599, 600 (1979). Betty introduced the checks from the distribution from the estate which showed the amount she inherited, bank statements from the joint account, and numerous checks paid from that account toward the construction of the storage building. The court below found that the account balance did not fall below the amount Betty deposited until the parties began constructing the storage buildings.

Carson argues that Betty's testimony at the hearing shows she paid some of that money to relatives and on other expenditures before the storage buildings were constructed, and her nonmarital property should be reduced accordingly. However, we believe the trial court satisfactorily applied the rule of tracing in this instance. The rule should not be subject to "draconian requirements." Chenault v. Chenault, Ky., 799 S.W.2d 575, 579 (1990). The requirement is satisfied if the party can separately trace the nonmarital funds, and the court is satisfied that the party has not resorted to "deception and exaggeration" regarding the nonmarital amounts. Id.

Finally, Carson alleges the trial judge and trial commissioner should have recused themselves for personal bias. No allegation of bias or request for recusal was made in the court below. The burden of seeking disqualification is on the party who claims to have been prejudiced; it is insufficient to

belatedly contend to have been prejudiced. Commonwealth v. Carter, Ky., 701 S.W.2d 409, 410-11 (1985). Carson's claims of long-standing bias and animosity coming as they do on appeal certainly cannot be considered timely. Carson admits that he did not preserve this claim for appeal, but asks that we consider it as a palpable error pursuant to CR 61.02.

The burden of proof required for recusal of a trial judge is an onerous one, requiring a showing that the judge's impartiality was seriously impaired and his judgment was swayed. Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 794 (2001). We do not agree with Carson that the judge's statements and rulings derived from any ill will. Instead, they were a result of Carson's defiance of court orders in the three years of this litigation. The trial commissioner allowed evidence of Carson's temper and bad behavior only to show that he tried to interfere with the valuation and distribution of assets.

Carson was found in contempt because of his repeated failure to abide by the court's orders, not because of a biased attitude of the court. Carson admitted to the court below his failure to provide an accounting and his failure to turn over funds. He admitted to the commissioner that he was selling trailers and not turning over the proceeds to the receiver as ordered. Now, on appeal he complains because the court called him "evasive" and "unrepentant" based on his own actions. A

judge's exasperation at events occurring in the case does not necessarily demonstrate bias or prejudice. Stopher, 57 S.W.2d at 495.

We believe the trial judge's comments about Carson's past dealings with his lawyers in other cases were irrelevant and unfortunate, but did not display feelings of personal bias which should have disqualified him from presiding impartially in this case. We further believe that when Judge Hopper referred to the "years" of problems by Carson, he was referring to the case at bar, which went on for three years, rather than commenting on Carson's past history. We find no palpable error, and we find no merit in Carson's attempt on appeal to use claims of bias to try to undo the harm that he brought on himself in the trial court.

In conclusion, we find that the trial court was within its discretion in awarding Carson those assets which resulted from his sale of trailers and collection of rent in violation of trial court orders. The trial court's valuations of both parties' properties were supported by the evidence. There was also no error in the assignment of nonmarital property to Betty. We conclude that the property division was equitable, and so we affirm the decree of dissolution.

ALL CONCUR.



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