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 NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2005-CA-001043-MR

NANCY M. BLEVINS

APPELLANT

APPEAL FROM BOYD CIRCUIT COURT
v. HONORABLE C. DAVID HAGEMAN, JUDGE
ACTION NO. 99-CI-00596

GENE R. BLEVINS

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; HUDDLESTON, SENIOR JUDGE.¹

COMBS, CHIEF JUDGE: This is an appeal from a series of orders of the Boyd Circuit Court dividing the marital property of Nancy and Gene Blevins in their action for dissolution of their marriage. Nancy contends that the circuit court committed several errors: in characterizing approximately \$50,000.00 of credit card debt as non-marital; in awarding Gene several tracts of real property; in failing to award one-half of Gene's pension

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to her; and in characterizing certificates of deposit worth approximately \$50,000.00 as marital property.

Gene filed a petition for dissolution of the forty-one year marriage on September 15, 1999. He was sixty-nine (69) years of age, and Nancy was sixty-three (63). The Boyd Circuit Court dissolved the marriage on September 29, 2000, reserving for later resolution the characterization and division of the marital property.

The property issues were submitted to a Domestic Relations Commissioner (DRC). After reviewing the depositions, documents, and exhibits submitted by the parties, the DRC filed a Report and Recommendations on March 24, 2005. The DRC recommended that Nancy should be awarded the marital residence, three income-producing rental properties, and certificates of deposit worth \$100,000.00. Gene was to receive a farm and some undeveloped land in Lawrence County and a residence in Ashland. In an order entered on April 6, 2006, the trial court adopted and confirmed the report.

Nancy quickly filed exceptions, which were overruled in an order entered on April 12, 2005. Gene filed one exception to the report, contending that the DRC had committed a clerical oversight resulting in Nancy's receipt of some tracts of land adjoining the marital residence that were Gene's non-marital property. On April 14, 2005, he filed a motion to alter, amend,

or vacate the order of April 12, 2005, asking that his exception be sustained. The trial court agreed and entered an order on April 22, 2005, sustaining Gene's motion and modifying the DRC's report to award to Gene two lots and a portion of a third lot adjoining the marital residence.

On April 22, 2005, Nancy filed a motion to alter, amend, or vacate the order of April 12, 2005, contending that two aspects of the property settlement remained unresolved: the allocation of nearly \$50,000.00 of credit card debt and the characterization of Gene's pension. She argued that Gene should be responsible for one-half of the credit card debt and that she should be awarded half of his pension.

The court entered an order on April 29, 2005, ruling that the credit card debt was a non-marital obligation for which Nancy alone was responsible. The court also awarded to Gene the full amount of his pension benefits. This appeal followed.

I. The Credit Card Debt

Nancy's first argument concerns approximately \$50,000.00 in debt that accrued on ten credit cards. Although all ten cards were listed solely in her name, she contends that the nature of the debt is marital and that it should have been divided equally between the parties instead of having been assigned entirely to her. In arriving at its conclusion, the

court relied primarily on Nancy's own deposition testimony. The relevant portion of the order of April 29, 2005, provided as follows:

In the testimony, it is established that Respondent [Nancy] has opened as many as ten credit cards in her separate name. Petitioner [Gene] did not have knowledge of these cards until after the parties' separation, and Respondent [Nancy] cannot state the amount that was charged on the cards prior to the separation as opposed to subsequent to the separation. In addition, Respondent frankly admits that the charges were for "pageant stuff" for the parties' adult daughter. It appears from the evidence that the parties' adult daughter was involved in various beauty pageants and that large expenditures were made by Respondent after the separation for expenses related thereto. The Commissioner did not make an express finding as to the allocation of these debts thereby by implication allocating same to Respondent. The court now expressly holds that Respondent's credit cards in her separate name are her non-marital obligation and she shall be solely responsible therefor.

Nancy argues that there was insufficient evidence for the trial court to conclude that the debts were incurred solely for "pageant stuff" for couple's daughter or that Gene did not know about the debt until after the separation.

Nancy has correctly cited Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001) as the controlling case in matters of debt allocation. Adopting the reasoning employed by this court in Bodie v. Bodie, 590 S.W.2d 895 (Ky.App. 1979), the Supreme Court

held in Neidlinger that in the absence of a statutory provision, the court should imply no presumption with respect to marital debts. Debts incurred during marriage are to be assigned on the basis of various equitable factors, including: the receipt of benefits, the extent of participation, analysis as to whether the debt was incurred to provide for the maintenance and support of the family, and the economic circumstances of the parties relative to their respective abilities to assume indebtedness. Neidlinger, 52 S.W.3d at 523.

In her deposition, Nancy stated that she did not know whether Gene had learned of the debt before or after the divorce proceedings began. She was unable to say how much of the debt had been incurred after commencement of the action, nor was she able to provide any records (such as credit card statements) or other explanation as to what she had purchased with the credit cards beyond assisting her daughter with "pageant stuff." No evidence was presented to indicate that any of the money was used for marital purposes or that any of the marital assets distributed in the dissolution action had been acquired with the credit cards. In the absence of such information, it was impossible for the court to apply the Neidlinger factors. Therefore, it did not abuse its discretion in determining that the debt was non-marital based on the state of the evidence before it.

II. The Lots Adjoining the Marital Residence

Nancy's next assignment of error concerns several adjoining tracts of real property in the Mount Adams subdivision of Ashland, the location of the marital residence. She contends that the trial court erred in characterizing these lots as Gene's non-marital property.

The marital residence is located at 2751 Adams Avenue.² The property on which the house stands is composed of several adjoining lots, numbered 112, 113, 114, 115, and 116. The house is situated primarily on Lot 113, overlapping slightly onto Lot 112 and Lot 114. Lot 113 and the easterly ten (10) feet of lot 114 were sold to Gene by his father for one dollar on June 20, 1959 (approximately one year after Gene's marriage to Nancy). The remainder of Lot 114 along with Lots 115 and 116 were sold by Gene's father to Gene and Nancy jointly for one dollar in 1964. Gene and Nancy purchased a five-foot portion of Lot 112 from Harry and Mollie Greene in 1964.

For purposes of the property settlement, the entire parcel of real estate was appraised at \$55,000.00. (The appraisal was broken down as follows: the land was valued at \$12,000.00 and the house at \$43,000.00.) The DRC found that Lot

² Gene owns two other lots, numbers 150 and 151, located at 2756 and 2753 Adams Avenue, respectively. There is no dispute that they are his non-marital property.

113 was Gene's non-marital property, noting that Nancy had conceded this point. (Although we are unable to find any evidence of her alleged concession in the record, Nancy does not dispute the issue on appeal). The DRC further determined that since the total value of the land was \$12,000.00, each of the four disputed lots was worth approximately \$3,000.00. Gene was awarded \$3,000.00 for the value of lot 113 as his non-marital property. The house and remaining tracts of land were classified as marital property with an aggregate value of \$52,000.00. In dividing the real property between the parties, the DRC recommended that Nancy be awarded the marital residence. The court adopted the DRC'S Report and Recommendations in their entirety.

In his motion to alter, amend, or vacate the court's order of April 12, 2005, Gene claimed that the DRC had committed a "clerical oversight," which he explained as follows:

[T]he Commissioner recites that the residence is built on multiple lots including lots 113, 114, 115, and 116. **The lots are, as the Commissioner found, Mr. Blevins' non-marital property.** . . . [T]he Commissioner awards the residence at 2751 Adams Avenue to Mrs. Blevins. The finding of fact is mistaken to the extent that it indicates that the residence is built on lots 113, 114, 115, and 116. In fact, the residence is built on and there has been segregated for lot 113 and ten feet of 114. Thereafter, in order to secure the boundary, the parties acquired five feet of lot 112. Thus, to convey the marital residence and

surrounding property to Mrs. Blevins, the Commissioner's report and this court's judgment should provide that she be awarded lot 113 and the easterly ten feet of lot 114 . . . [and] the five foot strip of lot 112[.] The remaining portion of lot 114 and all of lots 115 and 116 are clearly the non-marital property of Mr. Blevins and should be awarded to him expressly. It is clear that the Commissioner intended to award to Mrs. Blevins the residence and the surrounding grounds related to and award to Mr. Blevins his clearcut non-marital property. (Emphasis added.)

Contrary to Gene's assertion, the DRC did not make a finding that the lots (other than Lot 113) were Gene's non-marital property. Nonetheless, the court entered an order granting Gene's motion, reciting that:

[Nancy] is awarded the property at 2715 Adams Avenue, Ashland, Kentucky consisting in the marital residence, lot 113, the easterly ten feet of lot 114 and five feet of lot 112 . . . Petitioner [Gene] is awarded the remaining portion of lot 114 and any and all interest in lots 115 and 116[.]

On appeal, Nancy contends that the court in effect found that a portion of Lot 114 and all of Lots 115 and 116 were Gene's non-marital property. Thus, the order of the court substantially altered the DRC's findings on this issue, amounting to much more than the correction of a "clerical oversight." She claims that there is no evidence in the record to support the contention that Lots 115 and 116 were Gene's non-

marital property; she reiterates that the DRC made no such finding.

Gene has responded that the DRC misperceived the nature of the property as he believed that the house was built on Lots 113, 114, 115, and 116; in fact, it occupies only Lot 113 and minor portions of Lots 112 and 114. He also argues that the court did not necessarily find that the undeveloped lots were Gene's non-marital property but that it was attempting to effectuate the true intent of the DRC to award Nancy the residence and **only** the property upon which it is actually situated.

The DRC found that Lot 113 alone was Gene's non-marital property, setting apart an award of \$3,000 for that lot from the total property assessment. As to the remaining four lots, there is no indication that the DRC committed an oversight, misunderstood the nature of the property, or intended to award lots other than 113 to Gene. "A party claiming that property, or an interest therein, acquired during the marriage is non-marital bears the burden of proof." Sexton v. Sexton, 125 S.W.3d 258, 266 (Ky. 2004); KRS³ 403.190(3). There was no proof presented that the disputed lots were Gene's non-marital property; he did not assert a claim to these lots in any of his prior pleadings and submissions to the court.

³ Kentucky Revised Statutes.

We conclude that the court erred in adopting Gene's version of the DRC's report rather than relying on the plain wording of that report as supported by the evidence presented to the DRC. Therefore, we vacate the court's order of April 22, 2005, and remand it to the court entry of an order reinstating the DRC's finding: namely, reciting that Gene's non-marital interest in the residence is \$3,000 (his compensation for Lot 113) and directing that Nancy be awarded the marital residence, including Lots 113, 114, 115, and 116, and the five-foot portion of Lot 112.

III. Gene's Pension

During the course of the marriage, Gene worked for the City of Ashland and earned a pension of \$866.81 per month. He also has a pipefitters pension of \$55.00 per month and receives Social Security in the amount of \$543.00. Gene takes a salary of \$500.00 per month from his small lawn and garden business -- although the corporation usually operates at a deficit.

Nancy does not have a pension. She did work part-time outside the home, but she was primarily a homemaker during the course of the marriage. In her deposition, she testified that she receives \$419.00 in Social Security and approximately \$80.00 per month in interest from certificates of deposit. She was awarded several income-producing rental properties as part of

the property settlement. The three rental properties (valued at a total of \$126,000.00) assigned to Nancy generate a monthly income of \$1,525.00. She argues that since the income from these properties is uncertain and that she also bears the burden of their maintenance, she should receive one-half of Gene's pension in order to have a guaranteed income.

A vested pension plan is a form of deferred compensation earned during the marriage. Consequently, it is a marital asset and subject to division by the court. Brosick v. Brosick, 974 S.W.2d 498, 504 (Ky.App. 1998).

Assuming that Gene is able to pay himself the \$500.00 salary, his monthly income under the DRC's recommendations will be approximately \$2,000.00 -- which is roughly equivalent to Nancy's monthly income under the settlement. This arrangement is equitable to Nancy and does not warrant reversal simply because there may be some degree of uncertainty connected with her rental income. As the trial court noted, Gene's income is based on the assumption that he can continue to operate his business at his age, "which he does not intend to do and should not be expected to do." The court carefully weighed the circumstances of both parties and did not abuse its discretion in refusing to award Nancy any portion of Gene's pension.

IV. The Lawrence County Property

Nancy's next argument concerns several tracts of real property located in Lawrence County. She contends that the court erred in characterizing the land as Gene's non-marital property when he admitted that it was marital in his answers to her interrogatories.

There are three parcels of real property in Lawrence County. One of them is a farm composed of three tracts that were gifts to Gene from his father. These gifts were all completed before Gene's marriage to Nancy. The DRC properly found, therefore, that the farm is Gene's non-marital property. Since significant improvements had been made to the farm during the course of the marriage, the DRC allotted \$41,500.00 (the value of the land alone) as Gene's non-marital share and \$38,500.00 as the marital share; *i.e.*, the barn, the house, and the garage.

The two other parcels, which Gene characterized as marital in his answers to the interrogatories, are not part of the farm. The record is unclear as to whether they adjoin the farm.

One parcel consists of fifty-five (55) acres conveyed to Gene from Billy Ray Hicks in 1963. The DRC accepted the appraiser's valuation of this property at \$2,750.00. (The rather low amount may be explained by the fact that it is

landlocked.) The DRC found the property to be marital and awarded it to Gene.

The other parcel, acknowledged by Gene to be marital, consists of approximately seventy (70) acres. It is undeveloped land that Nancy and Gene have owned jointly with another couple, Kermit and Margaret Rice. It is involved in a dispute, which we will discuss in the following section of this opinion. The DRC found this parcel to be marital property. He recommended that it be sold and that the proceeds be divided equally between Gene and Nancy.

The DRC's findings regarding the real estate in Lawrence County are all fully supported by deeds in the record. Nancy contends that portions of the farm land are marital property. She bases that contention on Gene's admissions as to the farm regarding the two other -- clearly distinct -- tracts of land. The DRC equitably allowed for her marital contribution to the enhanced value of the farm. We are not persuaded that the DRC erred in any of his findings on any piece of the Lawrence County real estate.

V. The \$7,500.00 Payment

We shall now review the seventy (70) acres in Lawrence County owned jointly with Kermit Rice. It was purchased in July 1966. On February 18, 1998, Gene, Kermit, and Kermit's wife,

Margaret, executed a deed to sell the property to James Limberis for \$15,000.00. Nancy has refused to sign the deed to transfer the property, alleging that the name "Kermit Rice" was fraudulently added as a purchaser to the 1966 deed. She demands that Kermit Rice's name should be removed from the deed and that she and Gene should receive the entire \$15,000.00 in proceeds from the sale.

It is not the task of this court to evaluate the evidence in order to determine whether Kermit Rice's name was fraudulently added to the deed. That issue is separate and distinct from the property division before us. The DRC recommended that the land be sold and that Gene and Nancy's share of the proceeds, \$7,500.00, be equally divided between them. The trial court did not abuse its discretion in adopting the DRC's recommendation.

VI. The Certificates of Deposit

The last asset consists of several certificates of deposit totalling more than \$100,000.00. The CDs were accumulated in Kentucky Farmers Bank during the course of the marriage. Neither party disputes that those certificates were held jointly by Nancy and her mother in accounts with a right of

survivorship. When Nancy's mother died in 1982, the accounts passed to Nancy.

The DRC found that one-half of the certificates were marital property; nonetheless, he awarded the entire amount to Nancy. In dividing the real property between Gene and Nancy, the DRC acknowledged that he created a disparity as to values received. Gene received approximately \$96,250.00 while Nancy received \$178,000.00. Although the DRC stated that he was inclined to award sufficient funds from the CDs to Gene in order to equalize the discrepancy, he noted: "Mr. Blevins has testified that he is content that Mrs. Blevins have the Kentucky Farmers Bank accounts in the event that he is awarded the real property interests which have been recommended to be divided above." Accordingly, the DRC awarded Nancy the full amount of \$100,000.

Nancy believes that she was injured by the DRC's characterization of one-half of the CD's as marital in nature -- despite the fact that she was awarded the full amount. She contends that if the DRC had properly determined the entire amount of the certificates to be her non-marital property, she would have received a more equitable property settlement overall rather than having the alleged marital nature of the CD's detract from her award as to other assets.

In finding that one-half of the amount of the CDs was marital property, the DRC explained as follows:

The burden is on the Respondent [Nancy] to offer evidence of their non-marital component. The Respondent has testified that the accounts were held jointly between the Respondent and her mother during the course of the marriage in accounts with right of survivorship. No evidence has been tendered to indicate the source of the funds contributed to the accounts. The Respondent argues that the funds contributed to the account were entirely her mother's funds and that consequently the passage of these accounts to her by right of survivorship constitute[s] inheritance and/or gift. There is no evidence to support this contention. The Commissioner finds that fifty percent of these funds represent Mrs. Blevins' assets and fifty percent represent her mother's assets. Consequently, fifty percent of all the accounts at Kentucky Farmers Bank in the form of CD's are marital property.

The sole support for Nancy's argument that the CDs are non-marital derives from two admissions by Gene. When he was asked about the CDs in his deposition, he stated, "That's hers. I don't have any CDs." In his answers to her interrogatories, he did not include them as a marital asset. Nancy contends that Gene's failure to list the CDs as a marital asset despite his knowledge of them is an absolute and binding admission that they are non-marital in character. We disagree.

As we have already noted, a party claiming that property acquired during the marriage is non-marital bears the

burden of proof. Sexton, 125 S.W.3d at 266. Nancy provided no documentary evidence to support her contention that the assets in the accounts came entirely from her mother. In light of the uncertainty regarding the full origin of these assets, the court did not abuse its discretion in determining that one-half of the CD asset was devised to Nancy by her mother (and that it was, therefore, non-marital) and that the other one-half was marital as having been acquired by Nancy during the course of the marriage.

Even if the DRC had determined that the entire amount of the CD's to be non-marital, the property settlement as it stands would still be equitable. Nancy has received real property valued at more than \$80,000.00 in excess of the real property awarded to Gene. The court labored diligently and wisely in dividing the property in this case.

The judgment of the Boyd Circuit Court is affirmed in major part and vacated only with respect to the order of April 22, 2005, concerning the lots surrounding the house. We remand that portion of the judgment with directions that the court enter an order incorporating the findings of the DRC on this issue.

ALL CONCUR.

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