

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-002131-MR  
AND  
NO. 2005-CA-002180-MR

EVELYN KAY SELF

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JOSEPH W. O'REILLY, JUDGE  
ACTION NO. 03-CI-501928

DAVID SELF

APPELLEE/CROSS-APPELLANT

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,<sup>1</sup> SENIOR JUDGE.

COMBS, CHIEF JUDGE: This appeal and accompanying cross-appeal are taken from a judgment of dissolution of marriage entered by the Jefferson Circuit Court on November 5, 2004. The judgment divided the marital property of Evelyn Kay ("Kay") Self and David Self. Both parties contest the court's division of the marital assets.

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

The petition for dissolution of the marriage was filed on May 3, 2003. Kay and David had been married for twenty-five years and had raised one child, who is emancipated. Kay has been employed for approximately twenty years as an insurance underwriter for Kentucky Farm Bureau Insurance Company. David worked at Brown-Forman until 1985 when he retired and began running his own business, David Self Lawn Care Company. They each have an annual income of approximately \$40,000.00. The primary assets of the marriage consisted of two tracts of real estate (the marital residence in Jefferson County and two acres in Spencer County where the couple were planning to build a home), retirement accounts, life insurance policies, bank accounts, personal property, and David's lawn care business and equipment.

The action was tried on August 26, 2004. The trial court issued its findings of fact, conclusions of law, and decree of dissolution on November 5, 2004. Kay filed a motion to reconsider to which David responded. The motion was denied on December 14, 2004, and this appeal followed.

In reviewing issues in an action for dissolution of marriage, we must defer to the considerable discretion of the trial court unless it has committed clear error or has abused that discretion. An appellate court "cannot disturb the findings of a trial court in a case involving dissolution of

marriage unless those findings are clearly erroneous." *Cochran v. Cochran*, 746 S.W.2d 568, 569-70 (1988).

Marital property must be distributed in accord with KRS 403.190. Pursuant to this provision, the court must assign each spouse their non-marital property and then divide the couple's marital property in "just proportions," 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. KRS 403.190(1)(a)-(d). The standard of review is whether the trial court abused its discretion.

*Russell v. Russell*, 878 S.W.2d 24, 25 (Ky.App. 1994)(internal citations omitted).

The first issue raised in Kay's direct appeal concerns two redemption checks in the amounts of \$18,388.37 and \$7,345.14 that were withdrawn from the parties' joint mutual fund accounts at Prudential Financial on June 5, 2003, approximately one month after the filing of the Petition for Dissolution. No explanation was provided as to why Kay consented to the withdrawal of these assets or why she allowed David to retain them.

The court found that Kay had agreed to withdraw the money and had signed the necessary documents, but "she has never been in control of the removed funds." This finding accurately

corresponded to Kay's testimony at trial. However, no further mention of these funds was made in the court order.

Kay now argues that the trial court erred in failing to account for these redemption checks in its final division of the marital property. She contends that it was unjust to allow David to retain marital property totalling \$25,733.00 without some offset having been made for it in the court's allocation of the other assets.

David contends that the issue of the redemption checks has not been preserved for our review because Kay failed to list it in her prehearing statement as required under Kentucky Rules of Civil Procedure (CR) 76.03(8). He also argues that the amount of the redemption checks that he retained was offset by the fact that he made all mortgage payments on the marital properties in Jefferson and Spencer counties during the period of the parties' separation. Including taxes and insurance, his payments amounted to \$28,178.00.

Our review of the appellate record confirms David's contention that Kay's prehearing statement made no specific reference to the Prudential Financial redemption checks.

CR 76.03(4)(h) provides that within twenty days of filing a notice of appeal, an appellant must file a prehearing statement setting out a "brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional

challenges[.]” CR 76.03(8) provides in mandatory language as follows:

a party **shall be limited on appeal to issues in the prehearing statement** except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion. (Emphasis added.)

In *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky.App. 2004), this Court recognized the binding nature of that rule by refusing to consider an appellant’s argument regarding the award of maintenance when it had not been cited among the many issues listed in the prehearing statement.

Kay argues that the issue of the redemption checks is properly before this Court as having comprised a part of the distribution of the marital estate designated to be examined on appeal. She contends that we cannot determine whether the trial court made an equitable distribution without considering **all** assets of the estate. Therefore, she asks that we recognize that she has substantially complied with the rules of appellate procedure as set forth in *Ready v. Jamieson*, 705 S.W.2d 479, 481 (Ky. 1986).

We agree that the issue of the redemption checks was sufficiently preserved because they are an essential element of her primary argument that the settlement as a whole was inequitable. It is distinguishable from *Sallee*, in which the maintenance issue raised on appeal was wholly unrelated to the

issues listed in the prehearing statement. In her pre-hearing statement, she properly listed the allegedly inequitable nature of the distribution of which these checks form an integral part.

David has argued that if we review this claim on the merits, we must recognize that he paid considerable sums to cover the mortgages and other expenses of the two marital properties after the separation. We note that the court acknowledged that David paid these expenses, tracing them to and offsetting them against funds that David withdrew from two personal bank accounts at PNC and at BB&T. After weighing the equities on this issue, the court concluded as follows:

While Respondent [David] has been paying the mortgage on both pieces of property, he has also had the enjoyment of both pieces of property. Respondent has been living in the marital home and using the Spencer County property to store equipment from his business. **Further, Respondent has been paying the mortgages out of a bank account that contains the parties' former marital funds that Petitioner no longer has access to.** Therefore, Respondent **shall not receive a credit** for the money expended on mortgages during the parties' separation. (Emphasis added.)

No mention was made of the two checks from the Prudential Financial mutual fund.

We must determine whether the trial court abused its discretion in allowing David to retain the \$25,733.00 in marital assets withdrawn from the Prudential Financial mutual fund

accounts. There is no presumption -- or requirement -- that marital property be equally divided in a dissolution of marriage action. *Russell v. Russell*, 878 S.W.2d 24, 25 (Ky.App. 1994). After considering the statutory factors enumerated in Kentucky Revised Statutes (KRS) 403.190, the trial court properly divided the marital assets in roughly equal proportions between David and Kay. It appears, however, that the court overlooked the Prudential redemption checks in its overall disposition of the marital property. Accordingly, we vacate and remand only that portion of the judgment relating to the omission of these two checks withdrawn on June 5, 2003, from Prudential Financial in order for the court to make an equitable distribution of these assets.

Kay's next argument concerns the two bank accounts held in David's name only that were discussed by the court in connection with his payment of the mortgages. One was an account at BB&T Bank containing \$25,871.17 as of July 31, 2003. The second was at PNC Bank and held \$9,842.09. David testified that he closed the PNC account when Kay filed for divorce so that she would not have any access to the funds. He then opened the BB&T account, which he proceeded to use for business and personal purposes after the date of the separation.

Kay argues that these accounts contained the retained earnings of the business and were a marital asset subject to

division. She contends that the value of the accounts should have been added to the value of \$75,000.00 that the court assigned to the business. In her view, the court simply overlooked these assets when dividing the estate. We disagree. As cited above from the actual judgment, the court carefully and deliberately offset the assets in these accounts against David's payment of the mortgages and the other expenses of the Jefferson and Spencer County properties. We find no abuse of discretion.

Kay next argues that the court failed to recognize the cash value of two whole-life insurance policies owned by David. As of July 31, 2003, the first policy had a cash value of \$14,122.49, and the second a cash value of \$26,832.90. Kay had one policy. The policies were indisputably marital assets. David testified that he had borrowed \$31,732.87 against the policies in order to finance a building that the parties were constructing on the Spencer County land. Because of this loan, the cash value of the policies has been reduced to \$9,222.52.

The court found that David:

did not present any documentation showing the money was taken out of the life insurance or that it was used for the construction of the building [in Spencer County]. The loan payments on both of those policies are currently covered by the cash surrender payments he would be receiving.

The court awarded the parties their respective insurance policies. Kay's insurance policy is now worth \$6,388.00.



Kay has argued that it was unfair to assign each party his/her own life insurance policies because the cash value of hers was only \$6,388.00. As already noted, there is no requirement that marital property be divided in exactly equal proportions. While David has been assigned his two policies with a much higher cash value, they are encumbered with \$30,000.00 in debt. The trial court did not abuse its discretion in its allocation of the insurance policies.

On cross-appeal, David argues that the court committed clear error by failing to accept his testimony about the policies. He contends that he had used the loans against his life insurance policies in order to make improvements to the property in Spencer County. Although the court ordered the property to be sold, it refused to order the re-payment of David's life insurance loans from the proceeds of the sale. He challenges the court's finding that he failed to present any proof that the money was used for the Spencer County property, relying on the documentary evidence of the loans and his own testimony. David argues that the evidence was uncontradicted that he had used the money to improve the Spencer County property and that, therefore, the court clearly erred in not allowing him to re-capture these amounts.

The trial court is not required to accept testimony that it finds unconvincing simply because it is uncontradicted.

Assessing the credibility of witnesses is one of the principal functions and prerogatives of a trial court. "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." CR 52.01. We find no abuse of discretion on this issue.

Kay next complains that the court awarded David business equipment having a net value of \$42,883.00 without reimbursing Kay for her marital interest. Prior to the trial and with the agreement of counsel for both parties, the court appointed an appraiser, Mark Joyce, to assess the personal property of both parties. Joyce assigned a value of \$61,883 to the business property. The property included in his appraisal consisted of two pickup trucks; a dump truck; and smaller items such as lawn mowers, leaf blowers, and office equipment. Kay arrived at her figure of \$42,883.00 by subtracting \$19,000.00 of debt owed on one of the pickup trucks from Joyce's total of \$61,883.00.

By order of the court, a separate appraisal of the business was conducted by Crowe Chizek and Company (Crowe Chizek). However, Crowe Chizek did not perform a formal "business valuation" because the parties refused to pay the \$7,000.00 fee. Instead, Crowe Chizek provided a "range of estimates of the possible fair market value of a 100 percent

interest" in the company. The range of estimates ran from \$60,000.00 to \$90,000.00. The Crowe Chizek report detailed the assets of the company as including "cash, accounts receivable, a small inventory of lawn care supplies, and mowing and transportation equipment."

Finding that the most fair and equitable valuation of the business was the middle of the range provided by Crowe Chizek, the court determined the value of the company to be \$75,000.00. David was ordered to pay Kay a cash amount equal to one-half the value of the company (\$37,500.00) at a rate of \$7,500.00 per year over a period of five years. David was awarded all of the equipment associated with the business -- including the automobiles. He was also ordered to assume all related debt.

Kay argues that the \$42,883.00 assessed by Joyce was an amount to be considered **in addition** to the values provided by Crowe Chizek. She contends that the court erred in not awarding her one-half of that amount as well. We disagree. The Crowe Chizek valuation incorporated in some detail the equipment of the business. The order of the court allowed David to retain the tangible assets of the business while ordering him to pay Kay her share of its value in cash. There was no abuse of discretion.

On cross-appeal, David has also challenged the court's reliance on the Crowe Chizek report on the ground that it merely provided the values of an average business similar to his business. He complains that it failed to assign its true value based on an accurate, actual appraisal. He contends that the court should have ordered a proper business valuation, or, as he requested at the hearing, that the business be sold and the proceeds divided equally.

We may not disturb a court's valuation in a divorce action unless it is clearly contrary to the weight of the evidence. *Underwood v. Underwood*, 836 S.W.2d 439, 444 (Ky.App. 1992), overruled in part on other grounds by *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). David relies on *Robinson v. Robinson*, 569 S.W.2d 178 (Ky.App. 1978), in which the court observed that the testimony of owners concerning the value of their real property was an insufficient basis upon which to render judgment -- absent a showing that owners were properly qualified to testify as to valuation. He argues that the Crowe Chizek report was insufficient evidence upon which the court based its decision -- even though Chizek was not one of the owners as in *Robinson*. He contends that the "court should not have accepted the 'estimate' as evidence merely to penalize the parties for not obtaining an actual business valuation."

We cannot agree that the court was attempting to penalize the parties. Either party was free to provide other evidence of the value of the business. In the ten months between the completion of the report and the beginning of the trial, David raised no objection to the Crowe Chizek report. The court was presented with the Crowe Chizek report along with David's testimony that the business should be sold. Although the report was not a formal valuation, its content provided sufficient evidence for the court to support its determination as to the disposition of the business.

In conclusion, we affirm the findings of fact, conclusions of law, and decree of dissolution of marriage of the Jefferson Circuit Court except as to the disposition of the two redemption checks in the amounts of \$18,388.37 and \$7,345.14 withdrawn by the parties from their Prudential Financial mutual fund accounts on June 5, 2003. We vacate and remand for entry of an order as to that one issue.

ALL CONCUR.

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