

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001766-MR
AND
NO. 2005-CA-001816-MR

MICHAEL TUMEY

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CARL HURST, SPECIAL JUDGE
ACTION NO. 02-CI-503523

JANET TUMEY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING
IN PART AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; HOWARD AND MOORE, JUDGES.

HOWARD, JUDGE: Michael Tumey appeals and Janet Tumey cross-appeals in their divorce action from various rulings of the Jefferson Circuit Court, Family Court Division Four, Honorable Carl Hurst, Special Judge. Having thoroughly reviewed the record, we affirm in most respects, but remand for further findings of fact on one issue.

These parties were married on March 15, 1991, and separated on August 11, 2002. There were no children born of this marriage. Michael Tumey (hereinafter “Michael”) filed a petition for dissolution of the marriage on August 29, 2002. Janet Tumey (hereinafter “Janet”) responded and did not contest the dissolution. There was, however, considerable dispute over the property issues between the parties. After extensive litigation, a Decree of Dissolution of the marriage was entered by the circuit court on March 30, 2005. The same day, the trial court also rendered a “Decision,” attempting to resolve all of the property issues.

On April 12, 2005, Michael filed a motion pursuant to CR 52.02 and CR 59.05 to amend the March 30, Decision. On July 27, 2005, the circuit court entered an “Amended Decision,” granting that motion in part and denying it in part. Both parties now appeal from this Amended Decision.

The specific issues raised on this appeal are as follows. Michael appeals from the holding of the trial court that the marital residence of the parties, consisting of a mobile home and a lot, which the Tumeys purchased pursuant to a contract for deed, can be valued and the equity divided, without the parties having a deed to the property. He further objects to the court's failure to award to him as his non-marital property the entire profit sharing account from his former employment, or if it is to be divided, to the specific division ordered by the trial court. Finally, he asserts that the circuit court erred in accepting an appraisal of various items of personal property which he alleges was incomplete, and in failing to restore to him certain items of personal property which he

claims were his non-marital property. Janet cross-appeals from the trial court's determination that Michael's lump-sum disability back-pay award from Social Security was not subject to division and generally from the court's failure to award her any of that sum.

In 1992, the parties purchased a lot in Cox's Creek, Nelson County by a contract for deed. They paid \$1,000.00 down and agreed to pay an additional \$13,500.00 over 15 years. The contract prohibited their transferring their interest in the property without the seller's consent, but allowed them to pay off the remaining indebtedness at any time, without penalty. They are to obtain a deed when the purchase price is paid in full. Later in 1992, the Tumeys purchased and placed on this lot a Fleetwood mobile home, which they also financed. Neither the lot nor the mobile home have been paid for in full. The trial court found that the total indebtedness on the lot and mobile home was \$29,695.00. The Tumeys have never received a deed to the real estate.

The circuit court received an appraisal, to which neither party objected, valuing the mobile home and lot jointly at \$75,116.00 based on a "cost value" and at \$66,000.00 based on a "sales comparison value." Michael asked that he be awarded the property and allowed to assume the indebtedness. Janet agreed, but asked that she be paid for her share of the equity. The court initially took an average of the two figures, and assigned a value of \$70,588.00, with Michael ordered to pay Janet one-half of the equity. In response to Michael's motion to amend, the court revised its valuation to the \$66,000.00 "sales comparison value." Subtracting from this figure the indebtedness of

\$29,695.00, the court ordered Michael to pay Janet \$18,152.50, representing one-half of the equity of \$36,305.00.

Michael first argues that the trial court erred in assigning any marital value to the residence, as the parties have only a contract for deed and not a fee-simple deed to the property. He points out that the contract prohibits them from conveying the property without the seller's consent, and argues that this restriction, “diminish[es] the value of the property and distinguish[es] it from the other property cited by sales comparison.” He concludes that the Tumeys therefore have no actual equity in the property, but asks that it be awarded to him. This argument seems to us to be without merit. As the trial court pointed out, the Kentucky Supreme Court in *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979) held that under a contract for deed,

... equitable title passes to the buyer when the contract is entered. The seller holds nothing but the bare legal title, as security for the payment of the purchase price. *Sebastian*, 585 S.W.2d at 382.

As pointed out by the Appellee, the Tumeys have the right under the contract to pay off the indebtedness at any time without penalty and would be entitled to a deed at that time. Effectively, the prohibition against conveying the property requires only that the Tumeys receive enough cash up front from their purchasers to pay off the original seller. If we accepted Michael's argument, there would be nothing to keep him from selling the property as soon as it was awarded to him, paying off the seller, and owning the property free and clear, denying Janet her share in the equity gained during the marriage.

Next, with regard to the real estate, Michael argues that the circuit court made a mathematical error in calculating the equity, and that he should have been ordered to pay Janet only \$16,150.81. The discrepancy appears to result from different figures used to represent the total debt against the property. Michael claims that the debt is \$33,697.38, \$11,016.00 on the land and \$22,681.38 on the mobile home. The circuit court found the total indebtedness to be \$29,695.00. Frankly, this Court cannot determine from the record which figure is correct. However, the circuit court made a finding of fact in its March 30, 2005, Decision that the figure was \$29,695.00. This Court will not reverse a finding of fact made by the trial court unless that finding is clearly erroneous. *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998).

Furthermore, the Appellant, in his motion to amend pursuant to CR 52.02 and CR 59.05, did not question this figure or assert that the circuit court had made any error; in fact, he quoted the \$29,695.00 figure twice, apparently with approval. Where the appellant did not raise an alleged factual error such as this by a CR 52.02 or CR 52.04 motion, we will not consider it on appeal. *Crain v. Dean*, 741 S.W.2d 655 (Ky. 1987); *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982). Subtracting the court's figure of \$29,695.00 for the indebtedness from the \$66,000.00 appraised value, the equity is \$36,305.00 and Janet's one-half of that sum is \$18,152.50, as found by the trial court. We find no error in the trial court's rulings as to the mobile home and lot.

The second issue Michael raises involves his profit sharing plan at Phillip Morris Companies. Michael worked for many years for Phillip Morris. He retired in 1998. In 2001, he suffered a stroke and has been disabled since that time. He has both a retirement plan and a profit sharing plan with the company. As to the retirement plan, the circuit court found that the parties were married for 84 months during which contributions were made to this plan, and that Janet was entitled to a Qualified Domestic Relations Order granting her one-half of the value of the plan earned during that time; the rest was found to be Michael's non-marital property. Neither party has appealed from that portion of the court's award.

As to the profit sharing account, at the time of the marriage of these parties, this account had a value of \$33,695.35. At their divorce, its value was \$51,968.92. The account apparently exceeded \$100,000.00 at one point during the marriage, but the parties withdrew some \$82,000.00 during the marriage. However, it was agreed that the account never dropped below its pre-marital value of \$33, 695.35.

Michael first argues that the entire \$51,968.92 should be awarded to him on the theory that the \$82,000.00 the parties withdrew from the account was to pay certain debts of Janet's, incurred for her non-marital purposes. However, he did not even attempt to prove a true dissipation of assets, pursuant to *Robinette v. Robinette*, 736 S.W.2d 357 (Ky. 1987). The circuit court properly rejected this argument.

Next, Michael asserts that the trial court failed to restore to him even the \$33,695.35, which was clearly his non-marital share of this account. He correctly cites *Allen v. Allen*, 584 S.W.2d 599 (Ky. App. 1979) as holding that,

. . . the requirement of tracing should be fulfilled, at least as far as money is concerned, when it is shown that non-marital funds were deposited and co-mingled with marital funds and that the balance of the account was never reduced below the amount of the non-marital funds deposited.
Allen, 584 S.W.2d at 600.

Michael argues that the circuit court failed to award him his non-marital interest in this account, but this is not so. Michael misconstrues what the circuit court did. The trial judge specifically found, “The non-marital value of Petitioner's Phillip Morris profit sharing plan was \$33,695.35,” and that “petitioner deserves credit for his pre-marital fund value.” The court awarded that sum to him. However, the court also found that Michael's share of the remaining personal property, based on the division agreed to by the parties, was \$43,230.00 and the value of Janet's share was \$9,797.00. The difference between these two figures is \$33,433.00. The court found that it was therefore “fair and equitable to consider this difference to represent property acquired by the Petitioner's use of his pre-marital profit sharing funds.” In other words, the court offset Michael's non-marital portion of the profit sharing account against the value of the personal property awarded to him, in excess of that awarded to Janet, so that he was not required to pay her one-half of the \$33,433.00 difference in those awards. He was simply required to pay her one-half of the total value of the existing profit sharing account of \$51,968.92, or \$25,984.46. As the appellee points out, if the court instead had required

Michael to pay Janet one-half of the marital portion of the profit sharing plan of \$18,273.57 (\$9,136.79) and one-half of the \$33,433.00 difference in the personal property awards (\$16,716.50), he would owe her \$25,853.29, only \$131.17 less than under the circuit court's order.

The division of marital property is within the sound discretion of the trial court. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001); *Johnson v. Johnson*, 564 S.W.2d 221 (Ky. App. 1978). We cannot say that the division ordered by the circuit court, as set out above, was an abuse of that discretion.

Michael raises two other claims with regard to the personal property. He argues that Janet failed to cooperate with the court-appointed appraiser and therefore that certain personal property in her possession was not appraised. Secondly, he complains that the circuit court failed to restore to him certain items of personal property that were his non-marital property.

As to the first issue, Janet acknowledges that she did not allow the appraiser into her house to appraise various items of personal property which she had taken from the former marital residence, allowing him to appraise only the vehicles in her possession. She claims that she initially misunderstood the court's order, but that this error was subsequently corrected. She states that the appraiser came back and “did a follow up appraisal at Janet's home appraising all marital property.” However, no supplemental report from the appraiser appears in the record, and the trial court assigned to each party the values for personal property set out in the appraiser's initial report,

\$43,230.00 for personal property in Michael's possession and \$9,797.00 for personal property in Janet's possession.

It appears from the record that this matter was brought to the court's attention by a motion filed by Michael on February 4, 2004. The court entered an order on February 18, 2004, requiring Janet to file with the court a list of all personal property she had removed from the residence, including her assigned values for each item. She complied by filing a list of such items in her possession on December 28, 2004, but without assigning values to any of the items, stating that a supplemental appraiser's report would be provided as soon as it was available. However, as set out above, it does not appear that any such supplemental report was ever placed in the record. It is clear that the court relied only on the initial appraisal report in valuing the personal property assigned to each party. Therefore, those items removed from the marital residence by Janet were not included in the court's valuation of the personal property.

This issue was preserved for appeal. Michael raised this issue on his CR 52.02 motion to amend, but the court's Amended Decision does not mention this matter. Therefore, it is necessary that we remand this case to the circuit court on this limited issue, so that court can make appropriate findings of fact as to the value of the items of personal property in Janet's possession but not included on the initial appraisal report, and so that Janet can be charged with the value of such items and Michael's cash settlement, to be paid to her, can be adjusted accordingly.

Finally, Michael argues that the circuit court failed to restore to him “personal property he identified as his non-marital personal property.” Janet responds that he never identified any such items in the trial court, and the record appears to support her contention in this regard. At the least, Michael did not raise this issue on his motion to amend, nor did he ask the circuit court to make any specific findings of fact on this issue. Again, a failure on the part of a trial judge to make adequate findings of fact is waived if no motion for such findings is made under CR 52.02 or 52.04. *Cherry v. Cherry, supra.*

On Cross-Appeal, Janet argues that the circuit court failed to equitably divide the marital assets when it failed to award her any portion of Michael's lump-sum award from his Social Security disability. Michael received \$17,797.50 in a “lump sum” award, actually paid over 16 months, 13 of which were during the marriage. The trial court, in its original Decision, determined that \$14,460.42 of this sum was marital, and ordered Michael to pay Janet \$7,230.21 for her share. On Michael's motion to amend, the court reversed itself on this issue, pursuant to *Gross v. Gross*, 8 S.W.3d 56 (Ky. App. 1999), stating,

Petitioner argues that Petitioner's lump sum disability payment is not subject to division as marital property. This court is not persuaded the law is that clear in regard to past payments for disability. Certainly the law allows the court to consider disability moneys in determining a fair and equitable division of marital property. Nevertheless, the court has concluded that an amendment to its DECISION is appropriate to eliminate any perceived problem and, further, to serve as an incentive for the parties to conclude their property settlement.

Therefore, the circuit court, in its Amended Decision, ruled that “Petitioner's disability payment is not to be divided with respondent.” However, the court off-set this adjustment in its original division of marital property by requiring, in its Amended Decision, that Michael pay interest on all moneys he was ordered to pay to Janet in division of the marital property. Michael did not appeal from this award of interest.

In *Gross v. Gross, supra*, this court held that while actual social security benefits are not subject to division or set-off, 42 USC §407(a)(1998), federal law does not prohibit a trial court from *considering* non-prospective social security benefits in formulating an equitable division of marital property. We believe that the above quote demonstrates that the trial court in this case correctly understood the law in this respect and did in fact consider the social security benefits in its final division of marital property, specifically in its order that Michael pay interest.

As set out above, the division of marital property is within the sound discretion of the trial court, and we will not reverse that division absent a clear abuse of that discretion. *Neidlinger v. Neidlinger, supra; Johnson v. Johnson, supra*. We cannot say that the circuit court abused its discretion in failing to award Janet a specific share of Michael's social security award.

The Amended Decision of the Jefferson Circuit Court is Affirmed, except as to the one issue concerning the valuation of personal property, as set out above. This

matter is Remanded to the Jefferson Circuit Court for further proceedings on that issue,
consistent with this Opinion.

ALL CONCUR.

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