

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000302-MR

ROSCOE JOBE

APPELLANT

APPEAL FROM GREENUP CIRCUIT COURT,
FAMILY COURT DIVISION
v. HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 06-CI-00046

JENNIFER JOBE AND
JEFFREY D. HENSLEY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: □ FORMTEXT □□LAMBERT AND TAYLOR□, JUDGES;
BUCKINGHAM,□ SENIOR JUDGE.

TAYLOR, JUDGE: Roscoe Jobe brings this appeal from Findings of Fact,
Conclusions of Law, and Decree of Dissolution of Marriage entered in the Greenup
Circuit Court, Family Court Division, on January 10, 2007. We affirm.

Roscoe and Jennifer Jobe were married February 14, 2005, and
separated November 24, 2005. Roscoe filed a petition for dissolution of marriage

on February 1, 2006. The matter was referred to the Domestic Relations Commissioner (Commissioner) for an evidentiary hearing. Kentucky Rules of Civil Procedure (CR) 53.03. Following the hearing, the Commissioner entered his report and recommendations. Roscoe subsequently filed exceptions to the Commissioner's recommendations. The family court overruled Roscoe's exceptions, and on January 10, 2007, the family court entered its Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage. Therein, the family court incorporated the recommendations of the Commissioner. This appeal follows.

We begin our analysis with a statement of the appropriate standard of review. In this case, the evidentiary hearing was conducted by the Commissioner, without a jury. Accordingly, our review of the Commissioner's findings, as adopted by the family court, proceeds pursuant to CR 52.01:

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. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. . . .

CR 52.01. A finding of fact is not clearly erroneous if supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Questions of law are reviewed *de novo* and legal conclusions thereon made by the circuit court will not be disturbed absent an abuse of discretion. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002); *Carroll v. Meredith*, 59 S.W.3d 484 (Ky. 2001).

Roscoe contends that the family court erred by failing to find that Jennifer dissipated funds derived from his nonmarital property.¹ Specifically, Roscoe asserts that just prior to the marriage he obtained a home equity loan in the amount of \$55,000 utilizing his nonmarital property as collateral for the loan. Roscoe claims that the loan proceeds were intended for the purchase of another property. Roscoe asserts he was originally outbid on the property he intended to buy and the funds remained in the home equity account. Roscoe alleges that shortly after their marriage Jennifer began utilizing the funds and eventually expended some \$24,000 without Roscoe's knowledge or consent. Roscoe sought restoration of some \$11,000.

It is well-established that a court may consider dissipation of assets where “property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property.” *Brosick v. Brosick*, 974 S.W.2d 498, 499 (Ky.App. 1998)(citing *Robinette v. Robinette*, 736 S.W.2d 351 (Ky.App. 1987)).

In the case *sub judice*, the evidence fails to support a determination that Jennifer dissipated assets. Although Roscoe presented cancelled checks written on the home equity account, he failed to demonstrate that these checks were written when separation or dissolution was pending or that there was the intent to deprive him of property. In fact, the evidence demonstrated that a portion

¹ We harbor doubt as to whether nonmarital assets can be “dissipated.” However, we do not reach the merits of this issue as it was not raised by the parties.

of the funds were expended three weeks after the parties were married (not when separation or dissolution was pending) and that there was never any intent to deprive Roscoe of the property.

Roscoe further complains that he was prevented from presenting all his proof regarding expenditures from the home equity account. Although Roscoe may not have presented each and every check, the court had previously heard Jennifer's testimony that Roscoe knew about the checks she wrote on the account. The court ultimately chose to accept Jennifer's testimony. As weight and credibility of a witness's testimony are clearly within the sole province of the fact-finder, we cannot say the family court erred by accepting Jennifer's testimony over that of Roscoe. *See Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Thus, we do not believe the family court erred by determining that Jennifer did not dissipate assets.

Roscoe next contends that the family court erred by failing to restore certain nonmarital property to him. Specifically, Roscoe asserts that an antique table and a few pieces from a collection of milk glass were not restored. However, Roscoe failed to provide any evidence to support his bare allegation that these items were his nonmarital property or that Jennifer had possession of these items. Roscoe also failed to include any citation to the record to support his contention that this property was nonmarital. CR 76.12(4)(c)(v). In fact, his entire argument consists of five sentences. Consequently, we view this contention to be without merit.

Roscoe finally contends that the family court abused its discretion by ordering him to pay \$700 of Jennifer's attorney's fees. Kentucky Revised Statutes 403.220 allows the family court to order one party to pay a reasonable amount of the other party's attorney's fees where there is a disparity in the financial resources of the parties. The family court's decision to award attorney's fees is within its sound discretion. In this case, the court considered that Roscoe was receiving pension benefits and Jennifer was unemployed with no income. As such, we cannot say the family court abused its discretion by ordering Roscoe to pay \$700 of Jennifer's attorney's fees.

For the foregoing reasons, the Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage of the Greenup Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mary Hall Sergent
Ashland, Kentucky

BRIEF FOR APPELLEE
JENNIFER JOBE:

Jeffrey D. Hensley
Flatwoods, Kentucky