

RENDERED: OCTOBER 3, 2008; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001556-MR

THERESA GILLIAM

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 06-CI-00157

PAUL D. GILLIAM

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES, SENIOR JUDGE.

NICKELL, JUDGE: In this dissolution of marriage case, Theresa Gilliam (Theresa) alleges the Rowan Circuit Court erred in dividing the marital real estate and overruling her requests for maintenance and attorney's fees in its order entered July 3, 2007. We disagree and affirm.

Theresa's fourteen-year marriage¹ to Paul D. Gilliam (Paul) was dissolved by interlocutory decree on May 25, 2007. Division of property and debts was reserved for later resolution. Items to be divided included household goods, vehicles, heavy equipment and several parcels of land, one of which was the site of the marital home. Some of the parcels were owned in partnership with another couple.

Each party filed a prehearing statement identifying his/her non-marital and marital assets and debts. Both had worked for a telephone company for about three decades and as a result had accrued significant retirement accounts which were substantially equal in value. Paul retired in March of 2002 but quickly returned to work with a telephone company in another capacity. Theresa retired in February of 2006. She, too, returned to work with a telephone company but is earning less than half of her prior hourly wage. Neither could calculate the portion of benefits amassed prior to the marriage and neither sought any portion of the other's retirement account.²

Both parties were deposed and they were the only witnesses to testify at the final hearing on June 6, 2007. Paul evinced a desire to retain all the marital property and accept all outstanding debt associated with the property. Only one of

¹ The couple married in 1992, separated on March 22, 2006, and on May 23, 2006, Theresa petitioned for dissolution of the marriage. No children were born to the couple. Both Paul and Theresa have children from prior marriages.

² Although cited by neither party nor the trial court, KRS 403.190(4) directs that if retirement benefits of one party are not considered in the property settlement, an equal level of retirement benefits of the other spouse will also be excepted from consideration.

the five tracts of land, the marital home, was appraised. The appraisal done at Paul's request valued the marital home, which sits on nearly six and one-half acres and has a detached garage, at \$200,000.00. In contrast, the appraisal of the same tract, done at Theresa's request, valued the home at \$261,000.00. The court split the difference and valued the marital home at \$230,000.00 which was consistent with an appraisal previously performed on Countrywide's³ behalf.

In her prehearing statement and in her testimony at the final hearing, Theresa suggested two other tracts of land be sold and the proceeds divided equally. At the final hearing, Theresa's attorney stated he did not believe the properties could be accurately valued. No appraisals of these parcels were entered into evidence. The first parcel was called the Johnny Wilson tract. Paul testified it was purchased for \$12,500.00 which he considered to be a bit high at the time. The trial court permitted Paul to state his lay opinion that the value of the property was still about \$12,500.00. Theresa did not challenge Paul's statement as to value nor did she offer her own estimate.

Paul testified a second tract of land, which is in the flood plain, was purchased for \$45,000.00 and is probably worth about \$40,000.00 today. Again, Theresa did not challenge Paul's statement of value nor did she offer a contradictory value.

Theresa requested maintenance because she has returned to work but is earning only \$11.00 an hour. She receives \$900.00 a month in retirement

³ Countrywide provided financing for the home at one point.

benefits and pays monthly rent of \$900.00 to her parents. A few months after her retirement she withdrew about \$50,000.00 from her retirement account and gave it to her parents as a gift. Had she not made this withdrawal, her monthly retirement benefits would be \$1,200.00. She withdrew other funds from her retirement account to pay off her son's truck and to pay bills.

As soon as Paul completed his testimony at the final hearing, the court issued its ruling from the bench. In addition to distributing personality, tools and vehicles, about which there appears to be no dispute in this appeal, the court awarded the marital home and other real estate; directed Paul to pay Theresa \$20,834.50; negotiated a payment plan for Paul to make timely payment to Theresa; overruled Theresa's request for maintenance because the trial court did not deem this to be a case justifying a maintenance award; and overruled Theresa's request for attorney's fees because the court normally required each party to pay its own attorney fees. Thereafter, the court offered her notes and asked which attorney wanted to reduce the court's verbal ruling to a written order for the court's signature. Both attorneys said they had been unable to keep up with the court's verbal ruling but ultimately one volunteered to try his hand at drafting the order. At no time did anyone question the trial court's verbal ruling.

On July 3, 2007, an order was entered. Thereafter, no one sought additional findings, moved for a new trial, or moved to alter, amend or vacate the court's order. On August 3, 2007, Theresa filed a notice of appeal attacking the order entered on July 3, 2007. This appeal followed. We now affirm.

PRESERVATION

At the threshold of our analysis, we note a failure to comply with the requirements of CR⁴ 76.12(4)(v) which mandates each appellant's brief contain:

An "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and *which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.*

(Emphasis added.) The mandatory statement of preservation saves "the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal." *Elwell v. Stone*, 799 S.W.2d 46, 47-8 (Ky.App. 1990) (citing 7 Bertelsman and Phillips [sic], Kentucky Practice, CR 76.12(4)(c)(iv) [now (v)], Comment 4 (4th ed. 1989 PP)). When review of an unpreserved issue is desired, counsel may request palpable error review under CR 61.02. When an appellant fails to specify how and where an issue was preserved, this Court may strike the brief or review the case only for manifest injustice. *Id.*

Theresa's brief advances two arguments on appeal, but fails to tell us whether, where or how the allegations were preserved for our review. There is also no request for us to undertake palpable error review. Furthermore, the record shows no objection to any of the trial court's rulings. Due to Theresa's noncompliance with CR 76.12, we would be well within our authority to strike her

⁴ Kentucky Rules of Civil Procedure.

brief. However, for reasons explained elsewhere in this opinion we will not impose such a drastic sanction.

VALUATION OF MARITAL PROPERTY

Theresa's first complaint is that the trial court distributed two unappraised parcels of land without knowing their value. Theresa had suggested the court order the parcels to be sold and the proceeds divided. She now argues the court's order did not fairly and equitably divide the couple's marital property. We disagree.

Theresa did not voice her objection to the property distribution to the trial court in writing or in open court. Additionally, she did not move for a new trial under CR 59.01 or move to alter, amend or vacate the order under CR 59.05. In her prehearing statement, and again in her testimony, she asked that the parcels be sold, but we deem a request during a proceeding to be materially different from an objection to a court order. Here, the allegation was not properly preserved for our review because the trial court was not given the opportunity to correct its alleged error before the complaint was submitted to us for review. *Little v. Whitehouse*, 384 S.W.2d 503, 504 (Ky. 1964); CR 46. Thus, review is denied and the trial court's distribution of the marital real estate is affirmed.

ATTORNEY'S FEES

Theresa's second complaint is that the trial court denied her request for attorney's fees without undertaking the necessary review required by Kentucky Revised Statutes (KRS) 403.220. Awarding attorney's fees is within the trial

court's discretion and will be disturbed only if the trial court has abused its discretion. *Giacolone v. Giacolone*, 876 S.W.2d 616, 620-21 (Ky.App. 1994) (citing *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); and *Wilhoit v. Wilhoit*, 521 S.W.2d 512 (Ky. 1975)). A trial court need not make specific findings on whether a party is entitled to attorney's fees; it need only "consider" the financial resources of the parties" and any award it makes must be reasonable. *Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 148 (Ky.App. 1990).

Based upon the record before us, it does not appear the trial court considered the financial resources of Theresa and Paul before overruling Theresa's request for attorney's fees. However, we cannot say that with certainty because Theresa neither objected to the court's verbal ruling from the bench nor to the court's written order. Nor did she request a specific finding explaining the court's review of the finances of the parties. Therefore, the issue was not preserved and we must deny review. *Little, supra*.

MAINTENANCE

Like the award of attorney's fees, whether to grant maintenance also lies solely within a trial court's sound discretion. Theresa claims she was entitled to maintenance because she submitted a list of expenses that exceeded her income. Maintenance may be awarded if the requesting spouse cannot otherwise provide for his/her reasonable needs and cannot support himself/herself "through appropriate employment." KRS 403.200(1). While Theresa has returned to work earning about one-half of her pre-retirement wage, she testified she did not want to

resume working at the telephone company and besides, a similar position paying \$20.00 an hour, her prior wage, was no longer available with her former employer. As with the other allegations of error, Theresa did not object to the trial court's decision when it was issued from the bench, nor did she file appropriate post-judgment motions to give the trial court an opportunity to correct any errors before appealing to this Court. Again, the issue is not preserved and we must deny review. *Little, supra.*

For the foregoing reasons, the order of the Rowan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Jeffrey Scott
Grayson, Kentucky

BRIEF FOR APPELLEE:

Earl Rogers, III
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