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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002221-MR

ALICE KOONCE

APPELLANT

APPEAL FROM HENDERSON FAMILY COURT
v. HONORABLE SHELIA NUNLEY-FARRIS, JUDGE
ACTION NO. 05-CI-00623

JACKIE KOONCE

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

*** * * * *

BEFORE: CLAYTON, NICKELL AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This action comes before us on an appeal of Findings of Fact, Conclusions of Law, Judgment and Decree of Dissolution entered on September 5, 2006, in the Henderson Family Court. The Appellant, Alice Koonce, contends that the family court erred in the division of property in her divorce from

the Appellee, Jackie Koonce. She also takes issue with the family court's findings regarding dissipation of assets, division of debts and attorney's fees.

FACTUAL SUMMARY

Alice and Jackie were married on June 5, 1971, and had one (1) child together. They physically separated in February of 2004. Prior to that date, Jackie contends that they were leading separate financial lives by agreement. The family court found Jackie's testimony regarding the couple's division of marital assets prior to their physical separation to be credible and based its decision regarding the division of marital property on that date. Alice, however, contends that there was no agreement between her and Jackie regarding a division of finances at that point. As a result, she argues that the family court judge erred when she divided the marital property with this date in mind.

The family court judge found that the parties had the following agreement as to a division of assets:

<u>Alice</u>	<u>Value</u>	<u>Jackie</u>	<u>Value</u>
Lincoln Auto	\$ 7,500	$\frac{1}{2}$ 401K	\$ 52,000
$\frac{1}{2}$ 401 K	52,000	Whirlpool Ret.	36,000
Whirlpool Buyout	10,000	$\frac{1}{2}$ Stock	33,000
$\frac{1}{2}$ stock	33,000	Marital Res.	50,000
Marital Res.	Value Unknown	$\frac{1}{2}$ Money Market	42,500
Edward Jones IRA	28,000		
$\frac{1}{2}$ Money Market	42,500		
Total:	\$173,000		\$213,500

She set forth that there was evidence in Alice's own handwriting that the money market account had not been equally divided. Rather than paying Jackie half of the balance of the account (\$42,500), Alice had transferred the money to a Fifth Third Bank account in her name and paid him \$25,000.

Both Alice and Jackie agreed that the stock was liquidated and that they each received half of the proceeds. This occurred through three (3) separate transactions in September, November and December of 2003. The family court judge found that the "incomplete" parts of the above division of assets were "the division of the 401K, delivery of the \$10,000 to equalize the Edward Jones, and payment by Wife of \$50,000.00 for Husband's interest in the marital residence."

Order entered September 5, 2006, at p. 4.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that "[f]indings 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." A judgment is not "clearly erroneous" if it is "supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id.*, citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). Questions of law, however, are subject to *de novo* review.

Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet, 80 S.W.3d 787, 790 (Ky. 2001).

DISCUSSION

Alice first argues that the family court judge erred when **she** designated August of 2002 as the date of separation of the parties. She contends that, as set forth in the Petition for Dissolution of Marriage (“Petition”), February 7, 2004 is the date when the parties separated. She asserts that this same date is reflected in the pre-trial compliance disclosures and income tax returns. Alice argues that Jackie admitted this when he filed his Answer to her Petition.

The family court found that the parties had separated in 2002 based upon an agreement they entered into whereby they would maintain separate finances. Jackie contends that this came about after he discovered debt in his name that Alice had incurred. Alice, however, contends they did not legally separate at that point, consequently, she argues the date of separation should have been the date they actually separated.

KRS 403.190(3) provides that,

All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section. (Emphasis added).

Subsection (2) provides that:

For the purpose of this chapter, “marital property” means all property acquired by either spouse subsequent to the marriage except:

- (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
- (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (c) Property acquired by a spouse after a decree of legal separation;
- (d) Property excluded by valid agreement of the parties; and
- (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

Alice contends that there was no legal separation and we agree. The family court judge looked to the date of August 2002 because she found that the parties had “legally separated” at that point in their relationship. The judge relied upon testimony by Jackie in making her decision. “Legal separation,” however, requires more than the actions taken by the couple in this instance. “Separation” means a legal one granted by a decree entered pursuant to KRS 403.140(2). The language of the legislature is so definitive it not only does not require, but rather prohibits, us from engrafting any exception based on mere ‘actual’ separation.”

Stallings v. Stallings, 606 S.W.2d 163-64 (Ky. 1980). There was no decree of

legal separation or any of the other enumerated exceptions listed in KRS.403.190(2).

In the present action, the family court incorrectly concluded that the parties had legally separated in the summer of 2002. The correct date to be used under the law was the date of the decree of dissolution of marriage which was September 5, 2006. Thus, in making her property distribution, the trial judge erred.

Next, Alice argues that the family court incorrectly found that she had dissipated assets of the marriage. First, the trial judge found that the assets above existed during the marriage of the parties. She also found that Alice had expended funds in the amount of \$112,000 from 2002 until the dissolution proceeding. This was based on credit card debt, as well as liquidation of assets.

In *Bratcher v. Bratcher*, 26 S.W.3d 797, 799 (Ky. App. 2000), the Court found that “[t]he evidence must only show dissipation occurred during a separation or when dissolution was pending and that there was a clear intent on the part of the dissipator to deprive the spouse of marital assets.” (*citing Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. App. 1998)). The family court judge found that Alice had “dissipated marital assets which were placed in her custody and control after the parties’ division of property which occurred throughout 2002, 2003, and 2004.” Opinion at p. 7. This, too, must be remanded to the Henderson Family Court for findings based upon the actual date of separation.

Alice next argues that the judge erred in her division of the debts of the parties. The family court looked to the factors set forth in *Neidlinger v. Neidlinger*, 52 S.W.3d. 513, 522 (Ky. 2001), in determining how the debts should be divided. As set forth in *Neidlinger*, “[t]here is no statutory authority for assigning debts in an action for dissolution of marriage.” Neither, “is there a statutory presumption as to whether debts incurred during the marriage are marital or nonmarital in nature.” *Id.* The family court judge went on to hold that factors such as receipt of benefits, extent of participation, whether it was for marital property, whether it was for the maintenance and support of the family and the economic circumstances of the parties should be taken into account in dividing debt incurred during the marriage. *Id.*

Using these factors, the judge held Alice responsible for the debt. There is clearly evidence in the record which supports the judge’s decision on this issue. There was testimony of elaborate vacations and shopping sprees as well as the amassing of credit cards of which Jackie was unaware. Thus, we will affirm the family court judge’s decision on the division of debts.

Finally, Alice contends that the judge erred when she awarded Jackie payment of legal fees in the amount of \$1,020. This was based on nine (9) hours of legal services and \$100 per hour plus \$120 in “cost of service.” This amount was based on a contempt motion regarding appraisal of personal property Alice had in a storage locker.

KRS 403.220 provides that:

[A]fter considering the financial resources of both parties [a court] may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees[.]

The judge found that Alice's action caused a delay in the appraisal of the personal property and that Jackie's contempt motion was a direct result of her actions. Thus, we will uphold her award of attorney's fees and affirm her decision on this issue.

In summation, we reverse in part the judgment of the Henderson Family Court and remand this case for a proper distribution of marital property pursuant to KRS 403.190 and a reconsideration of the dissipation of assets issue in accordance with *Bratcher*. The Henderson Family Court's judgment regarding the division of debts and awarding of attorneys' fees is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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