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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-1509-MR
AND
NO. 2007-CA-1510-MR

LARRY DAYTON SKAGGS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM ELLIOTT CIRCUIT COURT
v. HONORABLE KRISTI HOGG GOSSETT, JUDGE
ACTION NO. 05-CI-00002

DEBORAH ANN SKAGGS
(NOW COX)

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: This appeal and cross-appeal are taken from a judgment of the Elliott Circuit Court in a marital dissolution action. At issue is the

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

trial court's characterization and distribution of the marital and nonmarital property.

Deborah Ann Skaggs and Larry Dayton Skaggs were married on December 12, 1998. It was the second marriage for both parties; no children were born of the marriage. The couple separated about six years later, on January 3, 2005, and a decree of dissolution was entered on August 10, 2006. The decree reserved issues of property distribution and assignment of debts for a later determination.

At the time of the dissolution, Larry was fifty-nine years of age. He had been employed at Marathon Oil since 1969, and had retired in July 2004. At that time, he was awarded a lump sum benefit of over \$600,000.00. Larry's income had increased during the course of the marriage; at the time of his retirement his salary was well over \$100,000.00. Before the marriage, Larry's residence was a farm which he owned, where he raised cattle and grew tobacco. At the time of the marriage, Larry also owned a Fidelity brokerage account and Marathon Thrift Plan account. The latter contained approximately \$290,000.00.

Deborah was employed at a nursing home at the time of the parties' marriage. She stopped working outside the home in the summer of 1999 and began receiving disability payments one year later. At the time of the marriage, Deborah also owned her own home and had a savings account.

During the course of the marriage, the couple resided at Larry's house. They made considerable improvements to Deborah's house, including the

installation of new flooring, a new roof and new bathroom fixtures. They also acquired two tracts of real estate, known as “the Sheepskin property” and “the 504 property.”

Following the entry of the decree of dissolution in August 2006, the trial court considered the evidence presented by the parties, which included more than twenty depositions. The trial court entered findings of fact, conclusions of law and judgment on February 5, 2007. The parties were each awarded their respective residences. Additionally, Deborah was awarded the 504 property and a portion of Larry’s retirement account, but no maintenance. Larry was awarded the Sheepskin property. The trial court also assigned or directed to be sold various items of personalty including a tractor, a bulldozer, several horses and some vehicles. Both parties filed motions to alter, amend or vacate the judgment. The trial court ordered the record reopened for a period of forty-five days for presentation of evidence relating to Larry’s retirement accounts, his lump sum distribution, and the existence of some farm machinery. The trial court thereafter entered an amended judgment relating to the calculation of Deborah’s fractional interest in Larry’s lump sum retirement distribution. This appeal by Larry and cross-appeal by Deborah followed.

Under Kentucky Revised Statutes [KRS] 403.190, a trial court utilizes a three-step process to divide the parties' property: (1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties. An item of

property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court.

Sexton v. Sexton, 125 S.W.3d 258, 264-65 (Ky. 2004) (citations and quotation marks omitted).

Furthermore, “[a] party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof.” *Id.* at 266. The classification of an asset as marital or nonmarital property “involves an application of the statutory framework for equitable distribution of property upon divorce and therefore constitutes a question of law subject to this Court's independent determination.” *Holman v. Holman*, 84 S.W.3d 903, 905 (Ky. 2002).

In dividing marital property, including debts, appurtenant to a divorce, the trial court is guided by Kentucky Revised Statute (KRS) 403.190(1), which requires that division be accomplished in “just proportions.” This does not mean, however, that property must be divided equally It means only that the division should be accomplished without regard to marital misconduct and in “just proportions” considering all relevant factors.

Lawson v. Lawson, 228 S.W.3d 18, 21 (Ky. App. 2007) (citations omitted). These relevant factors include the following:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

KRS 403.190 (1).

“Finally, a trial court has wide discretion in dividing marital property; and we may not disturb the trial court's rulings on property-division issues unless the trial court has abused its discretion.” *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

THE 504 PROPERTY

Larry’s first argument concerns the trial court’s disposition of the so-called “504 property.” The trial court’s findings state that the parties purchased the property in April 2004, for the sum of \$40,000.² Relying on the deposition testimony of a professional appraiser, the trial court found the property to have a current value of \$66,000.00. The court then awarded the property to Debbie, stating as follows:

Petitioner [Deborah] has requested that she be awarded this property and both parties acknowledge that it does constitute marital property. The Court finds that Respondent’s [Larry’s] marital wages were deposited into a joint checking account and that these sums were used to acquire the property and that it is indeed marital property. The court finds that this property should be awarded to petitioner.

² Larry’s brief states that the property was purchased in 2003. At any rate, it was purchased during the course of the marriage.

Larry argues that the facts and deposition testimony clearly show that the 504 property was purchased in part with nonmarital funds in the amount of \$20,000.00. He claims that the source of funds for the purchase of the 504 property was \$20,000.00 from his Thrift Plan and \$20,000.00 from his checking account. He states that “there was significant money that Larry had prior to the marriage which was traced to a portion of the purchase price of this 504 property.”

But Larry has provided no citation to the record to support the proposition that he made a nonmarital contribution to the property, nor does he indicate how this contribution was “traced” or where in the record we may find evidence of such tracing. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) requires that an appellant's brief shall contain “**ample supportive references to the record** and citations of authority pertinent to each issue of law.” *See Pierson v. Coffey*, 706 S.W.2d 409, 413 (Ky. App. 1985) (emphasis supplied). The rule “mandates that a party indicate how an issue is properly preserved for review by an appellate court. [Larry’s] briefs do not cite to where in the record this issue is preserved and we will not search the vast record on appeal to make that determination.” *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). The appellee has provided references to the record to this issue, and they support the trial court’s determination that the 504 property was marital property.

THE BULLDOZER

Larry next argues that the trial court erred in awarding Deborah an interest in the bulldozer because it was purchased with nonmarital funds. The trial

court found that Larry had a Fidelity account which at the date of the marriage contained approximately \$29,000.00. Seventeen-thousand dollars was withdrawn from the account to purchase a Buick, which was driven primarily by Deborah. The court found that the Buick was Larry's nonmarital property and it was restored to him. The court further found that Larry deposited \$27,000.00 in marital wages into the account during the marriage. In 2005, after the couple separated, he withdrew \$21,500.00 to purchase a bulldozer. The trial court found as follows:

The Court finds that after withdrawal of the \$17,000.00 to purchase the Buick that approximately \$12,000.00 would have remained in this Fidelity account and that Respondent is rightfully entitled to a \$12,000.00 non-marital interest in the bulldozer. However, the \$27,000.00 deposit made to this Fidelity account came from Respondent's wages earned during the marriage and therefore represented marital funds. The Court has no evidence regarding the fair market value of the bulldozer and finds that same should be sold, that \$12,000.00 should be restored to the Respondent as his non-marital property and that any remaining proceeds should be divided equally among the parties.

The trial court's ruling is fully in accordance with the dictates of KRS 403.190. Furthermore, Larry provides no specific reference to the record to support his argument that the bulldozer was "clearly purchased" with money that he had before the marriage, and that Deborah failed to present evidence to challenge his testimony in this regard. Larry bore the burden of proof to show that the tractor was nonmarital property, and he has failed to demonstrate how he met this burden.

THE TRACTOR

Larry next argues that the trial court failed to consider the debt remaining on a tractor that was awarded to him. The trial court found as follows regarding the tractor:

During the marriage the parties purchased a 2004 tractor for . . . \$46,000.00. This tractor now has a fair market value of \$23,000.00. Respondent withdrew \$12,000.00 from his pre-1997 monies in his Fidelity account to use as a down payment to secure the purchase of this tractor. Respondent made \$800.00 monthly payments on the tractor debt. The Court finds Respondent to have a \$12,000.00 non-marital interest in this tractor that should be restored to him and further finds the existence of an \$11,000.00 marital interest in the tractor. The Court finds that the tractor should be awarded to Respondent.

Larry argues that the trial failed to consider the remaining debt on the tractor when distributing the property, citing his deposition testimony that he was making monthly payments of \$820.97 on the tractor, and had “probably 14 or 15 months” of payments remaining.

In his motion to alter, amend or vacate the trial court’s judgment, Larry also claimed that the trial court erred in assigning a marital value to the tractor. On appeal, it appears that Larry has abandoned his objection to the trial court’s finding that the tractor was partially marital property, and is concerned only with the trial court’s failure to consider the debt remaining on the tractor.

But Larry never requested the court to calculate and make a specific finding as to the amount of debt, nor did he provide the documentary evidence which would have made such a specific calculation possible.

[N]o post-judgment request for additional findings of fact (CR 52.04) or post-judgment motion for amended or additional findings (CR 52.02) was filed. This constitutes a waiver and precludes appellate review. CR 52.04, and *Cherry v. Cherry*, Ky., 634 S.W.2d 423 (1982).

Crain v. Dean, 741 S.W.2d 655, 658 (Ky. 1987).

LARRY'S FARM

Larry's next argument concerns the trial court's finding of a marital share in the farm he owned prior to the marriage. The trial court found that the fair market value of the farm at the time of the marriage was \$163,000.00, and at dissolution was \$257,000.00. The trial court found that the increase in value due to market conditions alone was \$54,000.00. It therefore awarded to Larry \$217,000.00 as his nonmarital interest. The trial court further found that the remaining \$40,000.00 increase in value was due to the addition of two barns to the property. The construction cost of the larger barn was \$37,000.00 and the smaller barn \$8,700.00. The parties received government funds from "the ASC"³ in the amount of \$25,000.00 to apply towards the construction costs of the barns. The court found that marital funds in the amount of \$20,700.00 were additionally expended to complete the construction. The court concluded that the joint efforts of the parties resulted in an increase of \$40,000.00 in the fair market value of the property and that this represented a marital interest. Larry argues that the \$25,000.00 in government funds was nonmarital because he only received these

³ The parties' briefs do not further identify "ASC." The parties were probably referring to the former federal Agricultural Stabilization and Conservation Service, usually abbreviated "ASCS," but for consistency we use the abbreviation used by the trial court.

funds by virtue of his ownership of the farm. On the basis of this Court's holding in *Jones v. Jones*, 245 S.W.3d 815 (Ky. App. 2008), we agree that the payments received from ASC may indeed be nonmarital in nature because they stemmed directly from Larry's nonmarital asset. Therefore, we reverse and remand this claim for further findings of fact regarding the nature of these payments, a recalculation of what portion of the \$40,000.00 increase in value is attributable to the funds received from the ASC if indeed such funds were nonmarital, and if necessary, a reapportionment of the marital property if the court deems such a reapportionment to be just.

THE 50/50 DISTRIBUTION

Finally, Larry argues that Deborah was not entitled to 50 percent of the marital property for the following reasons: 1) she held herself out as a single person throughout the marriage; (2) was away from home for several nights during the marriage; (3) received substantial economic benefits from his money being used to make improvements to her home; and (4) "walks away" with several thousand dollars without contributing to the acquisition of the property. Larry points out that he has been "an extremely hard-working person" as evinced by his high salary from Marathon, whereas Deborah did "absolutely nothing" and "hoarded" her own money.

Under Kentucky's "no fault" marital dissolution policy, Kentucky Revised Statutes (KRS) 403.190(1) expressly directs that the court "shall divide the marital property without regard to marital misconduct in just proportions

considering all relevant factors[.]” Moreover, it is unclear to which portion of the trial court’s order Larry is objecting. The only part of the order which expressly directs an equal division of property is section 6, relating to the bulldozer, horse trailer, several horses, the automobile and some farm equipment. The remainder of the property appears to have been divided in an equitable manner, with each party receiving a residence and various items of personal property. Larry’s argument is so vague as to make the issue raised unreviewable.

CROSS-APPEAL

DEBORAH’S RESIDENCE

On cross-appeal, Deborah argues that the trial court erred in failing to award her the entire nonmarital interest in her home. She argues that the trial court’s findings - that her home had been in a state of disrepair and that Larry and Deborah made significant improvements to the home using marital funds - were not supported by the evidence. The trial court noted that Deborah received over \$13,000.00 in Social Security disability back pay that was used to purchase a substantial portion of the improvements. As the court noted, this payment, which encompassed January 2000 through May 2001, was marital property. Deborah does not dispute this finding. The court also noted that Larry used a drain pipe and I-beams that he had before the marriage to improve Deborah’s property, and that he paid for the new kitchen cabinets, tub and shower set, and the cost of lumber for the deck. The trial court concluded that Deborah had a \$91,007.00 nonmarital interest in the property (the fair market value at the time of the marriage plus an

increase due to general appreciation), and that the parties had a \$48,993.00 marital interest in the property attributable to the various improvements. Deborah has not provided a citation to any evidence in the record that the funds for improving the property came from her nonmarital account, or any other nonmarital source of funds. We decline to search the record for such evidence.

THE SHEEPSKIN PROPERTY

Next, Deborah argues that the trial court erred in determining that the so-called “Sheepskin property” was Larry’s nonmarital property. The trial court found that the property had previously belonged to Larry’s mother, and that he had inherited some portion of it, although a percentage was never provided to the court. The court further found that Larry had made an agreement with his siblings to purchase the property prior to the date of his marriage, but that the sale was not completed until shortly after the marriage. Larry used his 1998 tax refund and cash that he had on hand to purchase the property for \$39,000.00. The court found that the property was nonmarital and restored it entirely to Larry.

Deborah argues that the trial court failed to consider that Deborah and Larry filed a joint income tax return for the year 1998 (they were married in December 1998); and that during that year their salaries were almost equal. She also points to her testimony that she and Larry decided to purchase the property together, and that she wrote the check herself from an account that contained joint funds from both their wages. Deborah has provided no citations to the record to assist us in locating and reviewing this evidence.

On the other hand, Larry has not filed a cross-appellee's reply brief contesting these assertions. Under these circumstances,

CR 76.12(8)(c) provides three alternative avenues of action for an appellate court - all essentially punitive to the appellee:

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

The decision as to how to proceed in imposing such penalties is a matter committed to our discretion.

Roberts v. Bucci, 218 S.W.3d 395, 396 (Ky. App. 2007) (internal citations omitted).

We must therefore balance Larry's failure to file a brief with Deborah's failure to provide any citations to the record to support her argument. We note that even if we accept the appellant's statement of facts and issues as correct pursuant to CR 76.12(8)(c)(i), "[w]here those facts conflict with findings of fact by the trial court, however, we may accept them only where we can say that the trial court's findings are clearly erroneous." *Whicker v. Whicker*, 711 S.W.2d 857, 858-59 (Ky. App. 1986) (citations omitted). We cannot say that the trial court's findings are clearly erroneous in regard, and its judgment as to this issue is therefore affirmed.

THE FIDELITY ACCOUNT

Thirdly, Deborah argues that the trial court erred in its division of Larry's Fidelity account. As we have already noted, the court found that Larry had the account at the time of the marriage, and that it contained a balance of approximately \$29,000.00. During the course of the marriage, the trial court found that he had deposited \$27,000.00 in marital wages into the account. Seventeen-thousand dollars was withdrawn from the account during the marriage to purchase a Buick. The trial court found the vehicle to be Larry's nonmarital property and awarded it to him. It found that \$12,000.00 in nonmarital funds would have remained in the account. The court further found that \$21,500.00 was withdrawn from the account after the separation to purchase a bulldozer. The court ordered the bulldozer sold and \$12,000.00 restored to Larry as the remainder of his nonmarital property. Any remaining proceeds from the sale of the bulldozer were to be divided equally between the parties. The court also found that Larry had expended \$12,000.00 in nonmarital funds from the account for a down payment for a tractor. Therefore, the court found that Larry had nonmarital property stemming from the account that totaled \$41,000.00 (the Buick, the bulldozer and the tractor down payment). But as Deborah has pointed out, this contradicts the trial court's finding that only \$29,000.00 of the account was nonmarital. Therefore, some of the funds for these purchases must have come from the \$27,000.00 in marital funds deposited there in the form of wages during the course of the marriage. Put another way, \$12,000.00 of the funds from the account that were awarded to Larry as his nonmarital property must have come from the \$27,000.00 in marital funds in

the account. We agree with Deborah that the trial court's findings were erroneous, and remand for further findings on this issue. Ultimately, such a finding may not affect the trial court's final disposition of the property, since Larry was presumably also entitled to some share of the marital funds in the account.

THE MARATHON ACCOUNT

Fourthly, Deborah argues that the trial court erred in its distribution of the funds in the Marathon Ashland Petroleum benefit. The trial court found that Larry received a total distribution of \$611,431.60, which it described as a lump sum pension benefit for his thirty-five years of service with the company. The trial court initially found that $7/35$ of that amount constituted marital property. It later reduced that award to $5.5/35$, presumably to reflect the fact that the couple had been married during 5.5 of the 35 years that Larry worked at Marathon. Of that amount, \$96,082.11, the court awarded Deborah \$45,541.06 and Larry \$50,541.05. Deborah argues that there is no support for any of the trial court's findings because Larry submitted no evidence that the lump sum distribution was a retirement benefit. She further contends that the trial court failed to take into account that Larry's salary increased greatly during the years that he was married to Deborah, and that this should have been reflected in the trial court's calculation of the marital portion of the fund. She also argues that the trial court erred in failing to give an explanation for why Larry was awarded a larger share of the marital portion.

We are again confronted with the problem that Deborah has given no references to the record and Larry has not filed a reply brief. It should be noted that in her motion to alter, amend or vacate the trial court's first order, Deborah stated that

the court has misunderstood the payment of \$611,431.60 by Marathon. It was not a retirement benefit. Respondent had been employed by Ashland Oil/Marathon Oil for 35 years and had only \$290,000.00 (as found by the court) in his retirement account. It is inconceivable Marathon would suddenly give Respondent \$611,431.60 when he was a few years from retirement. The payment made by Marathon to Respondent was to pay him for his next five years expected wages. Essentially, his employment was bought out and he was paid not to work.

In its order and amended judgment, the trial court addressed this argument as follows:

Petitioner's counsel further advised the Court that she had no additional evidence to present regarding Respondent's retirement related accounts and lump sum distribution. It was Petitioner who had, in her motion to alter, amend or vacate, argued that the Court had misunderstood the nature of Respondent's lump sum distribution.

Although we are well aware that the burden of proof rests on the party claiming that property is nonmarital, in this situation surely the burden was on Deborah to provide some evidence to the trial court that its characterization of the payment from Marathon was erroneous. Furthermore, she has provided no legal support for the contention that if the payment was indeed a form of future salary buyout that any of it was necessarily marital property. Furthermore, she never raised the issues

of the impact of Larry's salary increase or why Larry was awarded a larger percentage of the marital portion before the trial court. The trial court's ruling on this issue is therefore affirmed.

THE PERSONAL PROPERTY

Finally, Deborah argues that the trial court erred in failing to divide all of the personal property of the parties. She contends that she and Larry "purchased various items of personalty during the marriage, none of which were contained in the Findings of Fact by the trial court judge, or divided in just proportions."

Deborah has failed to give any description of these items of personalty. This lack of specificity means that we are unable to address this argument.

For the foregoing reasons, the judgment of the circuit court is affirmed as to all items except (1) the ASC funds used to finance in part the construction of the barns and (2) the proportion of marital and nonmarital funds in the Fidelity account, specifically as this relates to the purchase of the Buick, the tractor and the bulldozer. These two issues are remanded to the trial court for further findings, and if necessary, a reapportionment of the marital property in light of these findings.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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