

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001752-MR

BOBBY CARROLL TOLER

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 06-CI-00601

TERESA TOLER

APPELLEE

OPINION
AFFIRMING

** ** *

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

VANMETER, JUDGE: Bobby Carroll Toler appeals from a judgment entered by the Laurel Circuit Court, Family Division, in a dissolution proceeding. His sole contention on appeal is that the trial court erred by failing to allocate a portion of

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 Kentucky Revised Statutes (KRS) 21.580.

the value of the marital residence to him as nonmarital property. For the reasons stated hereafter, we affirm.

Bobby and Teresa Toler married in 2003 and separated three years later. During the marriage they purchased a residence for \$120,000. Bobby asserted, but Teresa denied, that he provided the \$65,000 down payment from his nonmarital funds. The trial court summarized the evidence and made findings of fact in pertinent part as follows:

13. [Bobby] claims he used his non-marital funds to make the \$65,000 down payment on the marital home. He claimed in an affidavit filed in support of his motion for possession of the marital residence that the \$65,000 was derived from the sale of property he owned prior to the marriage. In his deposition he claimed that the property he referred to was a six or seven year-old doublewide mobile home that he sold to his mother and brother in 1998 or 1999, some four or five years before the marriage, for \$10,000. He also claimed that the \$65,000 represented his life savings, saved over time from working and from “bartering” guns, and from “loaning” people money to buy cars. However, he testified that he quit working at his job at London Auto Mart/Childer’s Oil in February 2003 shortly before his marriage to [Teresa] and had not had gainful, regular employment since that time. In his testimony at the final hearing in this matter, he admitted that he had gone to Letcher Circuit Court in reference to a child support matter concerning a child from a prior marriage and had testified under oath that he had “been living off [Teresa]” and had no money, at the same time he claims in this matter that he was in possession of \$65,000 of non-marital funds.

The Court also finds that [Bobby] claims \$30,000 of the \$65,000 had previously been in the form of cash held in a safety deposit box at Community Trust Bank. He first claimed he had some record or receipt where he would have taken that money out of the safe deposit box

and deposited in his Community Trust Bank account. A review of those records shows no such deposit, nor do the records show any \$10,000 deposit representing the proceeds from the sale of the mobile home.

[Bobby] has relied upon a deposit slip made out to Laurel National Bank, and a corresponding check written for \$65,000 to Laurel National Bank on a Community Trust Bank account as evidence that he withdrew monies held in his name only at Community Trust and deposited them in Laurel National Bank in another account held in his name only, then making the \$65,000 down payment for the home out of the Laurel National Bank account. The testimony was that the check from Community Trust bank dated January, 2003 was before the parties [sic] married. However, the check was written in January, 2003 according to [Bobby] and the funds were actually withdrawn and re-deposited, in January 2004, after the parties' marriage. It is unlikely that one would write a check to be deposited in an account that was not opened and did not exist, until one year later.

[Bobby] claims that he has been "helping people for years" by assisting them in buying cars, upon which he places liens and the purchasers then make payments to him, and that some of his savings came from that. He claims that [Teresa] made no contribution to revenue from such transactions, and therefore no contribution to the savings that were deposited. However, the testimony of [Teresa] and other witnesses reveal otherwise.

[Teresa] testified that her participation in this car business began before the parties were married and continued during the marriage. According to her, it involved the detailing of cars, the writing of sales contracts, and taking payments from the buyers. [Teresa] testified that the parties both worked in this car business, and that they were saving money from the sale of these cars to buy a home. The payments they received from the cars were to be deposited into an account to be allotted in the future for that purpose. She testified that she did not know that [Bobby] was putting the funds into an account in his name only.

[Teresa's] testimony concerning her participation in the car business was corroborated by Juanita Hurley, who purchased a vehicle from [Bobby] that had been located on the property at 340 Taylor Circle Drive, in London, Kentucky – the non-marital residence of [Teresa]. Wanda Cathers testified that she “bought” several vehicles from [Bobby] over the years, including the period after the parties were married, and that [Teresa] filled out paperwork or sales contracts for those vehicles and took payments for them. [Teresa's] signature appears on several of the receipts attached as exhibits to Ms. Cathers' deposition. Roger Goss testified that he purchased two vehicles from [Bobby]. The last payment he made of \$1,500 for the first vehicle he purchased was made to [Teresa] in 2004. He then he [sic] purchased a second car. At least two receipts attached to Mr. Goss' deposition as exhibits reflect the signature of [Teresa]. Documents introduced during the hearing through the testimony of Lloyd Morris also reflect that [Teresa] was a participant in this business.

The Court finds that both parties worked in this car business and made contributions to the monies accumulated, and then used as the down payment for the marital home. Therefore, the \$65,000 down payment is found to be marital.

The Court finds that [Bobby] has failed to meet his burden that the funds were non-marital under KRS 403.190. Any equity in the home located at 305 East Fifth Street, London, Kentucky is found to be a marital asset.

The Court finds that both parties have made a claim to the marital home and cannot agree on its disposition. If the parties cannot agree that one shall buy out the other's interest, then the parties shall attempt to agree upon a list price and a realtor, and the home should be listed for sale within twenty (20) days from the date of entry of this Decree. If they cannot agree upon a price and realtor, the home should be listed with Ford Brothers and sold at auction. The proceeds should first be applied

to closing, taxes and/or sales costs, the debt to GMAC Mortgage should be paid, and the parties shall split equally any remaining monies.

This appeal followed.

In a dissolution proceeding, KRS 403.190(1) requires a trial court to “assign each spouse’s property to him.” As property acquired after the marriage is presumed to be marital property, a spouse who claims property as nonmarital bears the burden of proving that claim. KRS 403.190(3). The trial court’s findings as to the marital or nonmarital nature of property will not be disturbed on appeal absent clear error. CR² 52.01. *See Sexton v. Sexton*, 125 S.W.3d 258, 269 (Ky. 2004) (citing *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky.App. 1980)).

Here, as described by the trial court and substantiated by our review of the record, Bobby failed to produce compelling evidence to support his claim that the \$65,000 down payment for the marital residence constituted nonmarital property. Although Bobby was unemployed and claimed to be unable to pay support for a child from an earlier marriage, the parties evidently participated together in various profitable activities before and during the marriage. Moreover, the evidence produced to support Bobby’s claims that he transferred nonmarital funds from his savings and a previous mobile home sale to a Laurel National Bank account to provide the down payment was less than persuasive. The trial court therefore did not err by finding that marital funds were used for the down payment

² Kentucky Rules of Civil Procedure.

on the house, and by declaring that any proceeds remaining from the sale of the house, after payment of all costs, should be equally divided between the parties.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry W. Gilliam
London, Kentucky

BRIEF FOR APPELLEE:

Erin M. Butcher
London, Kentucky