

RENDERED: DECEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000085-MR
AND
NO. 2008-CA-001241-MR

SUSAN RAYE LYBROOK

APPELLANT

v.

APPEALS FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 07-CI-00116

DONNA LOWE, AS EXECUTOR
OF THE ESTATE OF BRYANT
HENRY LYBROOK

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; LAMBERT,¹
SENIOR JUDGE.

¹ Senior Judge Joseph E. Lambert 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.

LAMBERT, SENIOR JUDGE: Susan Raye Lybrook appeals from the December 4, 2007, decree dissolving her marriage to Bryant Henry Lybrook.² She claims error in the division of property.

Susan Raye Lybrook and Bryant Henry Lybrook were married in 1997, and Susan filed a petition for dissolution of marriage on February 16, 2007. During the marriage, the Lybrooks and their children resided in the marital residence located in South Shore, Kentucky. During the pendency of the divorce proceeding, the trial court granted temporary possession of the marital residence to Bryant.

On November 13, 2007, an interlocutory decree of dissolution of marriage was entered. Property issues were reserved until a final hearing held on November 20, 2007. On December 4, 2007, the court rendered findings of fact, conclusions of law, and its decree. In the decree, the court awarded the marital residence to Bryant. The court also ordered that retirement accounts or investments owned by the parties be subjected to a QDRO.³ On December 21, 2007, the trial court clarified its decree holding that the funds acquired during the marriage were to be equally divided but that Susan was not entitled to any interest in funds for periods of time that the parties were not married.

² Susan originally appealed from the trial court's orders of December 4, 2007, December 21, 2007, and June 3, 2008, on property issues and child custody and visitation issues. However, on June 10, 2008, Bryant Lybrook died and Donna Lowe was appointed executor of his estate. Susan then moved the Court to substitute the executor as the appellee in this proceeding. Susan also informed the Court that, while all issues of property division remained before the Court, issues pertaining to child custody and timesharing were moot by virtue of Bryant's death. Accordingly, those issues will not be addressed herein.

³ Qualified Domestic Relations Order.

On March 7, 2008, an agreed order for the division of several IRAs was entered. Thereafter, Susan filed a motion to enforce the decree, stating that a Fidelity account, which was in existence at the time of separation but had been liquidated prior to the final decree, should also be divided between the parties. On June 3, 2008, the trial court denied the motion, stating that it had taken the closed Fidelity account into consideration at the time of the decree and that it was not the intention of the court that the Fidelity account be divided as with other investments. This appeal followed.

On appeal, Susan argues that the trial court abused its discretion in failing to award her a portion of the equity in the marital home and by failing to award her a portion of the closed Fidelity account. Specifically, Susan argues that the court erred in allowing Bryant to claim certain funds as non-marital since he had failed to claim any non-marital property during discovery. She also argues that the court erred when it excluded \$20,000.00 from the equity in the marital residence and categorized it as a gift to Bryant from his parents.

Susan maintains that the parental gift was repaid by the liquidated Fidelity account, a marital asset. Finally, Susan argues that she was entitled to a portion of the Fidelity account since it was used to repay the gift which was ultimately labeled as a non-marital contribution to the marital residence.

The division of marital property is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001).

Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision. The exercise of discretion must be legally sound. [Quotation marks and citation omitted.]

Sherfey v. Sherfey, 74 S.W.3d 777, 783 (Ky. App. 2002) (*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)).

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 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).

The pertinent language of the December 4, 2007, order of the trial court is as follows:

[t]he marital residence has both marital and non-marital components to its value. Of its \$216,500.00 value,⁴ at least almost \$40,000.00 is [Bryant’s] non-marital interest. \$20,000.00 of the property value could be traced to a \$20,000.00 gift that was given by [Bryant’s] parents to him to build a garage on the property. Thus almost \$60,000.00 of the \$216,000.00 value of the property is non-marital. The marital interest in the property would thus be \$156,000.00. The current first mortgage is \$135,000.00 leaving a net equity of \$21,000.00. The second mortgage on the residence has to do with the house in Piketon, Ohio. The Court orders that [Susan] finance the house in Piketon, Ohio to pay off the second mortgage [of the marital residence] and that upon doing so [Susan] will be awarded the Piketon, Ohio residence.

⁴ The trial court appears to have subtracted \$19,000.00 from the value, representing the value of the adjacent lot. However, since the lot was awarded to Bryant alongside the marital residence, we have included it in our calculation as part of the marital property value.

[Bryant] had advanced [Susan] \$5,000.00 for the purchase of a residence and [Susan] has taken all of the income tax refund in the amount of \$4,107.00. Based upon these factors and the Court assuming there is some equity in the residence in Ohio, the Court finds it would be an equitable division of the real estate to award the marital residence to [Bryant] and have him responsible for the payment of the first mortgage. [Susan] shall be awarded the house in Ohio and she shall immediately cause the second mortgage on the marital residence to be removed. . . . [Bryant] has various retirement accounts and a 401(K) and the Court finds that any retirement accounts or investments owned by the parties is marital and is subject to division by [QDRO] and so orders.

To determine non-marital contribution to a marital residence, this

Court has held and it has become firmly accepted that:

the interests of the parties [is] “the same percentages as their respective contributions to the total equity in the property.” In other words, there is to be established a relationship between the nonmarital contribution and the total contribution, and between the marital contribution and the total contribution. These relationships, reduced to percentages, shall be multiplied by the equity in the property at the time of distribution to establish the value of the nonmarital and marital properties.

Brandenburg v. Brandenburg, 617 S.W.2d 871, 872 (Ky. App. 1981) (citations omitted).

The parties stipulated that the value of the marital residence, along with an adjoining lot, was \$235,500.00. The home had first and second mortgage liens totaling \$180,985.00. The second mortgage, \$46,000.00 at the time of the hearing, was used to purchase a second home in Ohio which Susan received. In turn, Susan was required to remove the second mortgage from the marital home.

This is not disputed. Accordingly, the remaining first mortgage on the marital home was \$135,000.00, resulting in an equity of \$100,500.00 (\$235,500.00 stipulated value minus \$135,000.00 first mortgage).

When the residence was purchased, the parties contributed a down payment of \$42,385.99, of which \$39,000.00 was Bryant's non-marital contribution from the sale of a home he owned prior to the marriage. Another \$20,000.00 was provided by Bryant's parents, and this was used to build a garage on the property. The original amount of the first mortgage was \$142,000.00, making the mortgage principal reduction \$7,000.00.

Using the figures above, we see no error in the trial court's determination that Bryant's non-marital contribution was "at least[,] almost \$40,000.00." According to *Brandenburg*, the correct amount would be \$59,000.00 (\$39,000.00 non-marital purchase contribution plus \$20,000.00 parental gift). The marital contribution was \$10,386.00 (\$3,386.00 marital purchase contribution plus \$7,000.00 reduction in mortgage principal). Therefore, the total marital and non-marital contribution toward the residence is \$69,386.00. Bryant's non-marital share of this contribution is 85% and the marital share is 15%. The total equity in the property is \$100,500.00.⁵ Applying the *Brandenburg* formula to the equity, Bryant's non-marital share of the equity is \$85,425.00 and the marital share of the equity is \$15,075.00. See *Brandenburg*, 617 S.W.2d at 872.

⁵ This amount is arrived at by subtracting the first mortgage (\$135,000.00) from the stipulated value (\$235,500.00). Because the second mortgage is actually attributable to another home, and that home and corresponding mortgage were assigned to Susan, we did not consider this when calculating the equity on the marital residence.

Although the trial court seems to have utilized a method other than that outlined in *Brandenburg*, this alone does not demonstrate an abuse of discretion. The Court in *Brandenburg* stated:

We do not intend to imply by the adoption of this formula that this Court will not approve other procedures utilized by the lower courts in arriving at an equitable division of property *as long as the relationship between the contributions of the parties is established.*

Id. at 873 (emphasis added). In its order, the trial court clearly established the individual contributions of the parties. Furthermore, in choosing to award the marital residence and all of its equity to Bryant, it is clear that the trial court divided marital property “in just proportions considering all relevant factors,” including Susan’s retention of the parties’ \$4,107.00 tax refund, the \$5,000.00 advance she received from Bryant, and her award of any equity in the parties’ Ohio home.⁶ KRS 403.190(1). The trial court also clearly stated, in its June 3, 2008, order that it had taken the liquidation of the Fidelity account into consideration when dividing the property. This comprehensive, albeit unconventional, analysis by the trial court persuades us that there was no error in the result achieved.

Although Susan has shown that the trial court used an alternative method to calculate its equitable division of the marital property, she has failed to show that this method was an abuse of the trial court’s discretion. Furthermore, her argument that Bryant did not identify any non-marital property in his discovery responses is without merit. The court is the finder of facts and the lack of

⁶ We note also that use of the *Brandenburg* formula yielded a marital equity of \$15,075.00, whereas the trial court’s formula actually yielded a higher marital equity of \$21,000.00.

identified non-marital property does not preclude the court from finding the existence of non-marital property based on the testimony of the parties and the evidence presented, as long as that finding is supported by substantial evidence. *See, e.g., Sherfey*, 74 S.W.3d at 782. Our review of the record indicates that this allocation of non-marital contribution in the marital residence is supported by substantial evidence. Accordingly, the December 4, 2007, order of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Christopher A. Dawson
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BRIEF FOR APPELLEE:

Gordon J. Dill
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