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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001895-MR

MICHAEL SCOTT BROWN APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 07-CI-00005

ANDREA LEE BROWN APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Michael Scott Brown appeals from the findings of fact, conclusions of law, and decree of dissolution of marriage entered on July 11, 2008, and amended on September 12, 2008, by the Casey Circuit Court. He contends that the trial court erred in the division of the parties' assets and debts. Upon

[1] Senior Judge Edwin White 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.

review, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

Michael Scott Brown and Andrea Lee Brown began dating in high school and were together for approximately sixteen years. They were married in 2002 and divorced in 2008. Prior to their marriage, they cohabitated with their children, born in 1997 and 1999, in a mobile home located on property owned by Andrea and her mother.

In 1999, the parties decided that they wanted to build a home. They designated 3.02 acres of the 19.05 acres owned by Andrea and her mother to build the family residence. After considering the evidence presented, the trial court made the following findings regarding this residence:

> A. Miles Roberts and Elsie Roberts and Evelena Harris and Andrea Harris deeded the land on which the residence was built to Scott Brown on July 20, 2001, for the stated consideration of $6,000. [Andrea] and [Scott] testified that the $6,000 was never paid for the land. At the time the land was transferred to [Scott] the parties were not married. The Court finds that the land was obtained by gift. Evelena Harris testified that even though the land was deeded to [Scott], it was a gift to her daughter, Andrea. She stated that she had paid for the land and was gifting it to her daughter as a site for the family residence. Further [Andrea] and Evelena Harris stated that the land was deeded to Scott so that he could use it as collateral to obtain a building loan for the residence. As such, the Court finds that the land on which the residence is built is the non-marital property of [Andrea].
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> B. There has been much testimony regarding the residence. The Court finds that the residence was substantially completed prior to the marriage. Based on

the invoices submitted, the Court finds that the cost to build the residence is $162,865. Both of the parties are listed on the various invoices. The invoices do not show what funds are used to pay for the goods and services. [Scott] alleges he paid for the majority of the construction of the home with nonmarital funds. Prior to the marriage, [Andrea] and [Scott] co-habitated for many years. [Andrea] testified that she knew nothing of the savings. [Scott] is uncertain as to how much money he had actually saved but estimates it around $125,000.

[Andrea] maintains that the home was built from funds from three different sources, Scott's savings, money gifted to her by her mother, and the bank loan. Evelena Harris testified that she gifted her daughter the total sum of $45,000. The evidence contains a carbon copy of three money orders made payable to Andrea Harris from Evelena Harris. The money orders are dated September and October of 1999. The sum of the three is $10,000. Both parties agree that Mrs. Harris gave Andrea a money order in the amount of $15,000. Additionally, Mrs. Harris testified that she gave Andrea cash in the amount of $10,000 on one occasion and Scott $10,000 in cash on another. She stated that it was her intent to make a gift of the cash to [Andrea]. Mrs. Harris also stated that the money was for the new home. The Court is persuaded by the record and finds that [Andrea] used these funds for the improvement of the residence. The Court finds [Andrea] made nonmarital contributions to the residence in the amount of $45,000.

A bank loan resulting in a mortgage was secured against the property on February 12, 2002 for the sum of $49,914.79. This loan was made subsequent to the marriage and paid back during the marriage. [Scott] argues that a portion of said loan was used to purchase a truck and furniture. The parties do not agree on this issue and the Court is not so persuaded. The Court finds that the monies from the bank loan were expended on the residence and therefore a marital contribution in the amount of $49,914.79. The loan has been reduced by approximately $13,000. This reduction of mortgage is a marital asset to be divided.

> The evidence shows that [Scott] did contribute nonmarital funds to the home. The Court finds that [Scott's] nonmarital contribution is $67,950.21.
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> C. The parties have agreed that the fair market value of the property is $200,000. . . .
>
> D. . . . [Andrea's] nonmarital contribution is $51,000. [Scott's] nonmarital contribution is $67,950.21.

The trial court then ruled that the marital residence and the 3.02 acres shall be utilized by Andrea and the minor children until such time as "she decides to remove herself and the children from same, she remarries, cohabitates with a person of the opposite sex, dies or upon attainment of the youngest child of age 18, whichever is earlier." Once such an event occurs, the property "shall be sold and the net proceeds divided equally." It is from these findings and others that Scott now appeals to this Court.

In his first assignment of error, Scott claims the trial court erred in determining that the land on which the parties' residence was built was the non-marital property of Andrea. He argues that the deed in this case is incontrovertible proof that the real property was his non-marital property, not hers. After consideration of these unique facts, we hold that the trial court did not err in its classification of this property.

"On appellate review of a trial court's ruling regarding the classification of marital property, we review *de novo* because the trial court's classification of property as marital or non-marital is based on its application of

KRS 403.190; thus, it is a question of law." *Heskett v. Heskett*, 245 S.W.3d 222, 226 (Ky. App. 2008).

As the land in this case was conveyed to Scott by deed prior to the parties' marriage, there is an automatic presumption that it is Scott's non-marital property. KRS 403.190(2); *see also Rakhman v. Zusstone*, 957 S.W.2d 241, 244 (Ky. 1997) ("it has long been the law in Kentucky that record title or legal title is an indicia sufficient to raise a presumption of true ownership") (internal quotation and citation omitted). However, the presumption of true ownership may be rebutted by "clear and convincing evidence of a specific agreement, either express or implied, that the title is held in trust or clear and convincing evidence that the title was obtained by the grantee by fraud or in violation of a specific agreement or understanding." *Rakhman*, 957 S.W.2d at 244.

In this case, the trial court determined that the specific agreement or understanding of the parties in deeding the land to Scott was not to convey sole ownership of the property to him, but rather it was to allow Scott to obtain a construction loan to build the parties' family residence on the land. Thus, it was understood and agreed by all that this land was to become the home of the parties and their family. Both parties contributed substantial amounts of time, labor, resources, and money to the subsequent erection of a home on this land. Although initially assigning the $6,000 interest in the land to Andrea as non-marital property, the trial court ultimately determined that title to the real property shall be reformed to reflect Scott and Andrea as tenants in common.

Scott concedes that the land was conveyed to him for the purpose of obtaining a loan to build the family home, but argues that the home and the land were intended to be owned solely by him. He claims that any contrary intent found by the trial court cannot overcome the plain language of the deed. We disagree.

While the presumption of gift is high in this case since Scott is most likely a "natural object" of Andrea and her mother's "bounty," *see Rakhman*, 957 S.W.2d at 245, this gift presumption may be overcome. *Id.* Scott maintained a rebuttable presumption of gift until the point that Andrea submitted evidence to rebut this presumption. *Id.* Once rebutted, Scott bore the risk of non-persuasion. *Id.*

In reviewing this evidence and applying the proper standard, we hold that the trial court did not err in finding that Andrea produced clear and convincing evidence to rebut the presumption that the family land was gifted solely to Scott. *See Mayo Arcade Corp. v. Bonded Floors Co.*, 240 Ky. 212, 41 S.W.2d 1104, 1108 (1931) ("It is a well-settled principle of law that courts of equity have authority to reform contracts consistent with the intentions and understanding of the party for fraud or mutual mistake."); *see also Bradshaw v. Kinnaird*, 319 S.W.2d 475, 477 (Ky. 1958); *Price v. Godby*, 263 S.W.3d 598, 602 (Ky. App. 2008). As found by the trial court, the land was one of Andrea's many contributions in a joint effort to create and build a family homestead.

Scott next argues the trial court erred in assigning Andrea $45,000.00 in non-marital contributions to the parties' residence that was allegedly received as

cash gifts from Andrea's mother. He claims that $15,000.00 was received by the parties, but was used to buy himself a "4-wheeler." As for the remaining $30,000.00, he contends that such gifts were never made or utilized to help construct the residence. Rather, Scott alleges that the residence was constructed almost entirely from cash savings that were accumulated and kept by him in a safe at the parties' trailer home.

Kentucky Rule(s) of Civil Procedure (CR) 52.01 directs that a trial court's findings 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." *See also Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986) Findings of fact are clearly erroneous only if they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

In this case, both Andrea and her mother testified as to the $45,000.00 in cash gifts that were utilized to construct the family residence. The first $15,000.00 is acknowledged by Scott; however, he disagrees that the money was spent to help construct the residence. Andrea submitted three carbon copy money orders reflecting another $10,000.00 in payments made to Andrea during the period when the home was being built. Andrea's mother further testified that she gave each party $10,000.00 cash on separate occasions during the construction of the home. Scott produced nothing to support his claim that the home was built entirely from his cash savings.

The trial court also reviewed invoices for various construction materials and other building costs that were in the names of both Andrea and Scott. Ultimately, the trial court determined from the invoices submitted that the total cost of the build was $162,865.00. From this amount, $49,914.79 was found to be funded by the construction loan; $45,000.00 was found to be funded by cash gifts from Andrea's mother; and the remainder, $67,950.21, was found to be funded by cash savings from Scott. Giving due regard to the opportunity of the trial court to judge the credibility of the witnesses and to assess the evidence before it, we hold that the above findings are supported by substantial evidence. Scott's arguments to the contrary are without merit.

Scott next argues that the trial court erred in ordering that Andrea may utilize the marital residence for a period of time before it is sold and divided between the parties. He claims the ruling is unreasonable. We disagree.

A trial court's determination as to the division and assignment of marital assets is reviewed for abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRS 403.190(1)(d) specifically authorizes trial courts to award spouses having custody of children the right to live in the marital home for reasonable periods of time prior to any division of that property. *See Spratling v. Spratling*, 720 S.W.2d 936, 938 (Ky. App. 1986). Scott complains that utilizing

KRS 403.190(1)(d) is unreasonable in this case because he might have to wait as long as ten years from the issuance of the divorce decree to receive proceeds from the sale of the home. He claims inequity is further demonstrated by the fact that the home was the parties' only substantial asset and because it has a "non-marital component."

Andrea counters that the ruling is equitable since she makes substantially less per month than Scott ($1,000 per month versus $2,600 per month) and because it is in the best interest of the children to remain in the home. She maintains that the children have developed a strong bond with the homestead because they were involved with the planning of the home, have lived there since its construction, and are near their grandmother. She further argues that it is unlikely that Scott would have to wait as long as ten years to receive proceeds from the sale of the home due to the other conditions imposed by the trial court.

In making its findings, the trial court found that the children expressed a strong affection for their maternal grandmother, Evelena Harris, who lives on the adjoining property. The trial court further found that Scott is often out of town and thus, the children have spent most of their time with their mother and grandmother at the family residence.

Upon review of the totality of these circumstances, we cannot say that the trial court abused its discretion in utilizing KRS 403.190(1)(d) to permit Andrea to continue to live in the marital home with the children until such time as "she decides to remove herself and the children from same, she remarries,

cohabitates with a person of the opposite sex, dies or upon attainment of the youngest child of age 18, whichever is earlier." We agree with Andrea that these conditions make it unlikely that Scott would have to wait as long as ten years to receive proceeds from the sale of the home. The best interests of these children in addition to the disparity of income between these parties provided sufficient statutory justification to support the trial court's exercise of discretion in this instance.

Scott next contends that the trial court abused its discretion in ruling that the furniture in the home was also to remain "for the use and benefit of the children" until such time as the home is sold. Once the home is sold, the trial court ordered that the parties shall divide the furniture among themselves. In the event the parties cannot come to agreement as to its division, the trial court ordered the furniture to be sold at auction with the proceeds to be divided equally.

In this case, the furniture at issue consisted of three beds, four night stands, two television stands, a couch, a recliner, a love seat, a dresser, an armoire, lamps, and a table and chair set. The trial court determined that living in the home without furniture would not be in the best interests of the children, especially in light of the fact that Scott presented absolutely no showing to the trial court of an immediate need for this furniture. In light of the above discussion, we find no abuse of discretion in the trial court's ruling.

Scott next maintains that the trial court erred, as a matter of law, in not assigning 29% of the proceeds of his father's life insurance policy to him as his

non-marital property. Both parties concede that a life insurance policy was taken on Scott's father in 2000. Premiums were paid on this policy through 2007, at which time Scott's father died. After his death, the parties received $45,000.00 in proceeds. Scott argues that since 29% of the premiums were paid prior to the parties' marriage, 29% of the proceeds should have been classified as Scott's non-marital property. After careful review, we find no error in the trial court's classification of this marital asset.

Term life insurance policies with no cash value are not considered property. *Davis v. Davis*, 775 S.W.2d 942, 944 (Ky. App. 1989). Rather, they become property only upon payout. *Id.* In this case, the insurance policy proceeds were paid to Scott during the party's marriage; and, thus, these proceeds are presumed to be marital property. *Rearden v. Rearden*, 296 S.W.3d 438, 441 (Ky. App. 2009). "To rebut this presumption, KRS 403.190(3) specifies [that] the party claiming the asset acquired during the marriage is non-marital must show the property satisfies an exception described in KRS 403.190(2)(a)-(e) . . . ." *Id.*

Here, Scott failed to make a showing that the life insurance proceeds satisfied any of the exceptions described in KRS 403.190(2)(a)-(e), especially in light of the fact that a majority of the premiums were paid with marital funds. *See Davis*, 775 S.W.2d at 944 (wife had no interest in the proceeds of term life insurance policies obtained with marital funds since the policies did not payout

during the marriage). Accordingly, we discern no error in the trial court's classification of the policy's proceeds as 100% marital.[2]

Scott next argues the trial court erred in classifying two all-terrain vehicles purchased during the marriage as Andrea's non-marital property. Andrea claimed they were gifts to her from her mother. Since this property was acquired during the marriage, Andrea bore the burden of proof on this issue. *Hunter v. Hunter*, 127 S.W.3d 656, 660 (Ky. App. 2003); KRS 403.190(2).

Both Scott and Andrea's mother testified that these vehicles were gifts from her. Scott maintained that they were gifts to him since the vehicles were purchased in his name. Andrea's mother testified that they were actually gifts for Andrea and the children and that Scott simply purchased the vehicles for her. "[T]he intent of the purported donor is considered the primary factor in determining whether a transfer of property is a gift." *Hunter*, 127 S.W.3d at 660. In this case, we agree with the trial court that Andrea met her burden of proving that she acquired the vehicles during the marriage by gift and, thus, they were her non-marital property. Scott's argument to the contrary is without merit.

In his final assignment of error, Scott claims the trial court abused its discretion in the division of the parties' debt. The following sets forth the trial court's standard for making such a determination:

[2] Of course, the trial court may consider the percentage of premiums paid with non-marital funds in its division of such marital property. *See* KRS 403.190(1) (in division of marital property, trial court may consider contributions of each spouse to acquisition of property). Scott only challenged the classification of the life insurance proceeds in his brief. He did not challenge its division.

> 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 trial court identified $26,700.00 in marital debt. It consisted of Andrea's student loan debt of $4,000.00, which was assigned to her. It also included a cattle line of credit in the amount of $6,000.00 used for Scott's business and a $12,000.00 debt incurred to purchase a tractor used for Scott's business. Since Scott was assigned the business and its assets, he was also assigned its debt. We find no abuse of discretion in the above assignments of debt.

The remaining $4,700.00 was credit card debt which was assigned to Scott without explanation. In Scott's July 24, 2008, motion to alter, amend, or vacate, Scott alleged that the trial court erred in assigning this debt to him since Andrea testified that it was incurred by her "solely for her benefit." Andrea does not dispute Scott's allegation in her brief to this Court. In light of Scott's post-trial motion, we agree that it was an abuse of discretion for the trial court to assign this $4,700.00 in credit card debt solely to Scott without any explanation as to whether this assignment was in "just proportions." Accordingly, we must remand this issue to the trial court for additional consideration.

For the reasons set forth herein, the Casey Circuit Court's findings of fact, conclusions of law, and decree of dissolution of marriage entered on July 11, 2008, and amended on September 12, 2008, are affirmed in all respects except for that portion of the orders which assign $4,700.00 in credit card debt incurred during the marriage solely to Scott. This assignment of $4,700.00 in credit card debt is vacated and the matter is remanded to the trial court for an assignment of this $4,700.00 debt between the parties in "just proportions" that is supported by sufficient findings.

ALL CONCUR.

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