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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001227-MR

KEITH PERKINS — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 07-CI-504523

RACHEL FORD A/K/A RACHEL PERKINS — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Keith Perkins appeals from an order of the Jefferson Family Court which found the entire value of an IRA account was marital property and was to be equally divided between the two parties. Keith argues that: (1) the

[1] Senior Judge Sheila R. Isaac 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.

trial court erred by failing to assign to him his nonmarital contribution to the account; and (2) the trial court failed to consider all of the statutory factors in dividing the marital property. We affirm in part, reverse in part, and remand.

Keith Perkins began working for a family business in September 1992. He testified he contributed $30 per week to a 401k plan and that the company matched that amount for a total contribution of $60 per week. Keith and Rachel were then married on December 12, 1998. Floods had destroyed many of the records and Keith was only able to provide documentation showing contributions to the 401k beginning in August 2000, after the marriage. Keith left the family business and rolled over his 401k into an IRA on May 7, 2001, when it had a value of $106,974.30. There was evidence presented that showed the balance of the IRA account as of December 31, 2008, was $134,249.35.

A decree of dissolution was entered on December 23, 2008, with all issues settled by agreed orders except for the status of the IRA account. Keith was the only witness at the hearing. The trial court held that "[w]ithout proof of the value of the 401k account or of Mr. Perkins' contribution to the account prior to the parties' marriage, the Court cannot properly determine the portion of the account that is nonmarital." The family court then found the "entire amount of the IRA account" was marital property and equally divided it between the two parties.

Keith argues that the trial court erred by failing to assign him his nonmarital contribution to the account. We disagree.

In a dissolution proceeding, KRS 403.190(1) requires a trial court to "assign each spouse's property to him." The trial court's findings as to the marital or nonmarital nature of property will not be disturbed on appeal absent clear error. Kentucky Rule of Civil Procedure (CR) 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)). A spouse can offer evidence to rebut the presumption that all property acquired after the marriage is marital in nature by "tracing" property acquired during the marriage to non-marital assets. *See Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990). Tracing is "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present." Black's Law Dictionary 1499 (7th ed.1999). When showing that property is nonmarital in nature, the nonmarital claimant bears the burden of proof on that issue by "clear and convincing" evidence. *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. App. 1998).

In the present case, the trial court found that Keith failed to meet his burden of proving the nonmarital character of the IRA account. It is undisputed that the only documentation of Keith's contributions to the account was dated approximately two years after the parties' marriage. We find that the trial court properly concluded that the Keith did not adequately prove the nonmarital character of the account.

Keith next argues that the trial court failed to consider the statutory factors in dividing the account equally between the parties. We agree.

Once the trial court determined that the entire account was marital property, KRS 403.190(1) requires the division of the asset between the parties in just proportions considering all relevant factors, including:

> (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.

Here, the trial court did not specifically consider these factors and simply concluded in its order that "the entire IRA is marital and must be divided between the parties equally as of the date of the decree." This was done in light of uncontroverted evidence that this asset was derived entirely from Keith's earnings and the interest which accrued thereon and with no evidence having been presented that Rachel made any direct or indirect contribution to this asset. Although Rachel had an opportunity to present contribution evidence, if any she had, she failed to do so.

The Kentucky Supreme Court held in the case of *Gaskill v. Robbins*, 282 S.W.3d 306, 316 (Ky. 2009), "[t]he law is clear that there is no presumption of a 50-50 division without regard to the evidence." (Citation omitted). Moreover,

the manner in which "the trial court ends up splitting the property must be based on record evidence, with an eye toward equity." *Id.*

The only evidence presented at trial on the issue of contribution compelled a decision awarding Keith 100% of the IRA.

Therefore, we affirm the determination that the account was marital property, but reverse the finding of a 50-50 division, and remand this matter with instructions to award Keith 100% of the IRA.

MOORE, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur with the majority but, respectfully, I write separately to clarify my view on two points.

First, I do not believe that application of KRS 403.190(1) to individual assets is *always* called for. In most cases, a division of the marital estate in just proportions is better accomplished by considering marital assets cumulatively. However, certain assets or certain circumstances sometimes make it necessary to apply the KRS 403.190(1) factors to an individual asset. I believe the circumstances of this case required that particularity. Specifically, the parties agreed that all other assets, which many would consider substantial, were divided by agreement of the parties, leaving only this one asset to be addressed. By necessity, the factors of KRS 403.190(1) must be applied to this asset individually.

Second, while it is clear that none of Keith's pre-marital contributions can be attributed to Rachel's efforts, the same cannot be said of the payments Keith made

in the seventeen months after the parties were married and before the pension was rolled into the IRA. During that period of time, Keith used $30 per week of his income to acquire that marital property, for a total of about $3,200. The court must consider Rachel's contribution "to acquisition of the marital property, including [her] contribution . . . as homemaker." KRS 403.190(1)(a). "In this respect, the concept of 'joint or team effort' will apply to the property in issue [*i.e.*, contributions made during the marriage] because it is marital property." *Stallings v. Stallings*, 606 S.W.2d 163, 164 (Ky. 1980) (referring specifically to KRS 403.190(1)(a)). If that $3,200 increased in value proportionately to the remainder of the IRA, its value when the marriage was dissolved would have been only about $4,000. Given the division of the extent of the remainder of the marital property and its division in this case, and the lack of precision in making these estimates, I agree that awarding Keith 100% of the IRA would be consistent with a division of the marital estate in just proportions.

For these reasons, I concur.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Dennis R. Carrithers Louisville, Kentucky	William D. Tingley Louisville, Kentucky