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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001557-MR
AND
NO. 2011-CA-001653-MR

HENRY NELSON SYMONDS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 08-CI-01081

JENA DENNEY SYMONDS

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Henry Symonds and Jena Symonds each appeal the Warren Circuit Court's division of marital assets set forth in the court's Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage. Jena also appeals the

court's order requiring Henry to pay only 50% of her attorney fees and costs.

After careful review of the record, we affirm.

I. FACTUAL BACKGROUND

Henry Symonds and Jena Symonds were married on July 6, 1974, in Monticello, Wayne County, Kentucky. The parties physically separated in May 2008 and have lived apart since that time. Henry and Jena's only son, Daniel, is over eighteen years of age.

Henry earned a Bachelor's Degree in accounting, and during the marriage, worked as a data processor and analyst at a bank and then for the United States Postal Service. He began working for the Postal Service in 1975 and continued until he retired in May 2008.

Jena began her career as a teacher during the marriage. When the parties' only child, Daniel, was born in 1990, Jena took a leave of absence from teaching for approximately five years. She then returned to work and continues to teach at Warren East Middle School.

At the beginning of the marriage, Henry handled all of the finances. Jena gave her paychecks over to Henry, and Henry would give her a small weekly allowance. Henry would use the money to pay bills, make the house payment, and make investments. By 1984, the mortgage on the parties' marital home was paid in full.

When Jena returned to work after the birth of the parties' son, the financial arrangement between the parties changed. Henry and Jena each had

individual bank accounts, and each would contribute a set sum into a joint account, out of which household bills were paid. Henry controlled the joint account, writing all of the checks for the expenses. Jena testified that she was only allowed to write checks for groceries and for Daniel's school lunch; otherwise, she had to ask Henry for permission to write a check from the joint account. Henry frequently asked Jena to contribute more money into the joint account. Jena used the money retained in her own individual account for personal expenses and car repairs. Henry testified that he considered the money he retained to be "his" money; however, he was unable to explain how this money was spent or where this money went.

Starting in 1993, Henry repeatedly told Jena that he intended on leaving her when Daniel turned eighteen and graduated from high school. Henry did, in fact, leave the marital home on the weekend that Daniel graduated from high school in May 2008.

During the trial, Jena testified that she was unaware of how Henry handled their joint income and the income he retained for himself during the marriage. She also presented evidence at trial that Henry dissipated significant marital funds. Specifically, the court found that Henry made withdrawals from a Service One Credit Union savings account and Certificates of Deposit in the amount of \$70,542.67 from April 1991 through September 2002. The family court also found withdrawals from a Farmers National Bank account totaling \$261,700.87 from the period of October 2000 to July 2009. This amount includes

checks written by Henry to himself, checks to “cash,” checks to charity, and checks to various banks. Henry was unable to provide evidence that these funds were spent for marital purposes or where these funds went. Rather, he testified that these funds were “his” money to do with as he pleased.

Additionally, Jena produced evidence that in November 2006, Henry placed \$15,155.48 in Certificates of Deposit in Daniel’s name. This marital money was set aside without the knowledge or agreement of Jena. Henry also testified that he had invested \$29,000 in an account in Daniel’s name, which held stock in high-tech companies, and that all of those funds were now lost. These were marital funds as well and were invested without the knowledge or agreement of Jena. Henry failed to produce any evidence to document or verify this loss.

Henry testified that he had hidden \$30,000 in cash in a box with a false bottom. He discovered the funds after he left the marital home. He testified that he was “always hiding money” when he was at home. He stated that the funds were from investments made between 2002 through 2005. Henry has not been able to provide a full accounting of these funds.

Henry also admitted to depositing \$15,000 in cash for two Certificates of Deposit, which he gave to Daniel, in June 2009 at Citizens National Bank in Somerset, Kentucky. He testified that he did not know the source of this money. The court found this \$15,000 constituted marital funds.

In April 2007, Henry withdrew his entire Thrift Savings Plan account. This account had a balance of \$94,150.68. He claims to have given Daniel

\$40,000 in 2007 and another \$15,000 in 2008. It is uncertain where the remainder of this account went. It appeared to the family court that the money was channeled through several accounts in Daniel's name.

Henry also testified that he had an IRA account worth approximately \$29,000. He withdrew \$9,200 from the account in May 2008; however, Henry is unable to account for the whereabouts of this money. He believes it was put toward the purchase of a car.

During pretrial proceedings of this case, counsel for both parties' found cash in the amount of \$21,714.56 in a safe deposit box opened in Daniel's name at Bank of Edmonson County. Henry is not able to account for or explain the source of these funds. However, based on Henry's testimony, this money was placed in the safe deposit box prior to May 2008, and this money is separate from the \$30,000 hidden in the box with a false bottom, the \$15,000 in the Certificates of Deposit in Somerset, and the \$9,200 withdrawn from Henry's IRA. These marital funds are being held in a joint escrow account by the parties' counsel.

Lastly, Henry testified that upon his retirement from the Postal Service in May 2008, he received \$8,939 in termination pay. There was no evidence that this money was used for marital purposes, and it appeared to the family court that Henry used it for his hair transplants, Lasik eye surgery, vacations, and personal expenses.

To summarize, the family court found that Henry wrongfully dissipated the following marital assets:

Service One Credit Union Account	\$70,542.67
Farmers National Bank Account	261,700.87
Certificates of Deposit (as of 2006)	15,155.48
Investments in Daniel's name	29,000.00
Cash in box with false bottom	30,000.00
Certificates of Deposit (Somerset, KY)	15,000.00
Thrift Savings Plan Account	94,150.68
IRA Withdrawal	9,200.00
Safe Deposit Box in Daniel's name	21,714.56
Termination Pay	8,939.00

After Jena produced evidence of Henry's dissipation of marital assets, Henry failed to satisfactorily provide an accounting as to most of the funds other than to say he lost the money, spent it on personal expenses or gave it away. Henry also asserted at trial that he had lost approximately \$200,000 in the stock market in the year 2000. However, the court heard undisputed evidence from a family friend, Don Bethel, that Henry had disclosed to Don in 2004 that he still had approximately \$300,000 saved for himself and Daniel. Jena also produced as evidence tax returns from the years 2000 and 2001, in which Henry did not document any significant stock market losses. The family court found that Henry wrongfully dissipated marital assets totaling \$555,403.26, and of this total amount, approximately \$110,517.47 has been located.

As for the remaining assets of the parties, Henry did not put forth any evidence claiming he possessed any nonmarital property at trial. Jena had received an inheritance in the year 2000 of approximately \$300,000, before taxes, in addition to a small farm and a small rental house, both located in Wayne County, Kentucky. Jena testified that she has sold the rental house and has started

construction of a new home on the farm. She stated that she has applied \$20,000 in marital funds towards the construction of the new home. Jena testified that she had used some of her inheritance to pay off the balance she owed on her car, and she also purchased a truck. She stated that she used approximately \$5,000 in marital funds to purchase the truck. The court found that the inheritance used to pay off her car likely equaled or exceeded the \$5,000 in marital funds used to purchase the truck. Jena placed the balance of her inheritance in various accounts, some held jointly with Daniel and others in her name only. The court specifically found the funds in those various accounts, the two vehicles, and the farm in Wayne County to be Jena's nonmarital property.

Henry and Jena stipulated at trial the value of the marital home, in which Jena currently resides, to be \$96,120. The marital home has fallen into serious disrepair. Henry repeatedly told Jena that they did not have money to make repairs to the home. The parties further stipulated at trial that Jena should be awarded the marital residence. Additionally, Jena produced evidence of several marital bank accounts in her name and one account in Henry's name, which the court found to be marital property as well as several accounts placed in Daniel's name by Henry.

Jena has three retirement accounts, including a Kentucky Teachers' Retirement System Pension in the amount of \$99,343.25, a Kentucky Public Employees' Deferred Compensation Authority 401(k) in the amount of \$11,119.08, and a Modern Woodmen of America Annuity in the amount of

\$5,024.35. Henry receives a lifetime monthly benefit from the Postal Service in the amount of \$2,683 and has an IRA with Ameritrade in the amount of \$16,833.47.

The family court fashioned an equitable distribution of the marital property in consideration of Kentucky Revised Statutes (KRS) 403.190 and by deeming the wrongfully dissipated marital assets by Henry as being received by him prior to the distribution. The family court also considered the equitable distribution of the parties' retirement funds in light of the wrongful dissipation. The retirement funds were offset pursuant to KRS 403.190(4) with dissipated marital assets as opposed to the limited known existing marital estate. The court awarded Jena property worth \$239,583.25 and awarded Henry property worth \$355,688.54. Nearly all of Henry's award was previously dissipated marital assets. Additionally, the court ordered Henry to pay 50% of the total amount of Jena's attorney fees. Henry appeals the court's division of the marital property, particularly the retirement funds. Jena appeals the court's division of marital property as well, in addition to the court's order requiring Henry to pay only 50% of her attorney fees.

II. STANDARD OF REVIEW

What constitutes an equitable distribution of marital property is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky. App. 2012); *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). Similarly, the amount of an award

of attorney fees by the trial court is reviewed under the abuse of discretion standard. *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). An abuse of discretion is when the trial court's decision is arbitrary, capricious, unreasonable or unfair. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

III. ANALYSIS

The first issue on appeal is whether the family court made an equitable division of marital assets under KRS 403.190(1). Henry argues that the family court abused its discretion in dividing the marital assets by awarding Jena a disproportionately large share of the marital estate, including half of his retirement. Jena argues in her cross-appeal that the family court abused its discretion by failing to equally divide the parties' marital assets. The second issue is whether the family court abused its discretion by requiring Henry to pay only 50% of Jena's attorney fees.

A court is required under KRS 403.190(1) to divide marital property without regard to marital misconduct in just proportions considering all relevant factors including: (a) the contribution of each spouse to the acquisition of the marital property, including the contribution of the spouse as a homemaker; (b) the value of the property set apart to each spouse; (c) the duration of the marriage; and (d) the economic circumstances of each spouse when the division of property is to become effective.

Henry argues that the distribution of marital assets was inequitable because Jena was awarded a disproportionately large share of the marital estate. He claims that he did not dissipate assets that were under his control in an effort to deprive Jena of her share of the marital property. He says he was embarrassed over the money he had lost in the stock market, and that is why he did not discuss it with Jena. He also claims that if he were trying to hide assets and money he had the opportunity to do so when he found the \$30,000 in cash hidden in the box with the false bottom, but he turned it over to the court.

A party may not hide and expend marital funds for nonmarital purposes, be unable to satisfactorily account for those spent funds, and then expect to receive an equal share in the diminished marital estate. *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998). When property is expended (1) during a period where there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property, a court may find wrongful dissipation of marital assets. *Brosick*, 974 S.W.2d at 500 (citing *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987)). “[T]he court will deem the wrongfully dissipated assets to have been received by the offending party prior to the distribution.” *Brosick*, 974 S.W. 2d at 500. The equitable relief fashioned by the court must bear some relation to the evidence presented. *Id.*

We agree with the family court that the record demonstrates Henry's clear intent to leave Jena for many years and deprive her of her share of the marital

assets. Henry failed to produce evidence that the extensive expenditures of marital assets presented at trial by Jena were appropriate and, consequently, the court determined he wrongfully dissipated marital assets in the amount of \$555,403.26. At the time of the trial, only \$110,517.47 had been located. It was undisputed that Henry made his intentions known to leave Jena for many years. He purposefully hid, wasted, and spent significant marital funds throughout the marriage leading up to the time he finally left Jena in May 2008. He constantly told her that they did not have enough money to make repairs to their home, and as a result, the marital residence has fallen into disrepair. As the family court noted, Henry has a Bachelor's Degree in accounting as well as employment experience that clearly shows he knows how to maintain records and financial statements. The relief established by the family court reflects a consideration of the factors in KRS 403.190(1) as well as it appropriately relates to the evidence presented at trial. The family court did not abuse its discretion in awarding Jena the known remaining marital assets and deeming the dissipated marital funds as having been received by Henry prior to the distribution in its division of Henry and Jena's marital estate.

Specifically, Henry argues that the family court abused its discretion in awarding Jena half of his retirement funds. Henry's retirement funds consist of an IRA with Ameritrade in the amount of \$16,833.47 and his monthly pension for life from the Postal Service in the gross amount of \$2,683. Jena's retirement funds include a Kentucky Teachers' Retirement System Pension (KTRS) in the amount of \$99,343.25, a Kentucky Public Employees' Deferred Compensation Authority

401(k) in the amount of \$11,119.08, and a Modern Woodmen of America Annuity in the amount of \$5,024.35.

“Unless specifically exempt by statute, Kentucky treats all retirement benefits accumulated during the marriage as marital property subject to classification and division upon divorce.” *Shown v. Shown*, 233 S.W.3d 718, 720 (Ky. 2007) (citing *Holman v. Holman*, 84 S.W.3d 903, 907 (Ky. 2002)). Jena’s KTRS fund of \$99,343.25 is excepted from classification as marital property according to KRS 161.700(3). However, KRS 403.190(4) states that “if the retirement benefits of one spouse are excepted from classification of marital property ... then the retirement benefits of the other spouse shall also be excepted However, the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exemption provided to the other spouse.” The exemption statute of KRS 161.700 is subject to the limitations provided in KRS 403.190(4). *Shown*, 233 S.W.3d at 721.

The family court found, specifically in regards to the retirement funds, that in light of Henry’s wrongful dissipation of significant marital assets, the setoff provision outlined in KRS 403.190(4) would be applied to a portion of those dissipated assets not otherwise recouped as opposed to the diminished marital estate. The total amount of dissipated marital assets that remain unaccounted for is \$444,885.79. The family court stated that Henry could have set aside previously dissipated marital funds for retirement. The court treated \$99,343.25 of the dissipated marital assets as Henry’s retirement funds to offset with Jena’s KTRS

retirement account. This allowed the known remaining retirement funds to be eligible for distribution. The family court awarded Jena the entire balance of her excepted KTRS account as well as her other retirement accounts. Additionally, Jena was awarded half of Henry’s Ameritrade IRA and half of his monthly, lifetime Postal Service pension, the entirety of which was earned during the thirty-seven-year marriage. The pension award included all Cost of Living Adjustments and Surviving Spouse Benefits permitted under the terms of the pension. The family court made its determination based on the evidence presented at trial and the equitable scheme embedded in KRS 403.190, and it declined to exempt any of Henry’s known retirement funds from distribution. Therefore, the family court did not abuse its discretion in its distribution of Henry’s and Jena’s retirement funds.

In addition to Henry’s appeal, Jena also appeals the family court’s division of marital assets. She argues that the family court abused its discretion by failing to divide the marital estate equally. In the family court’s distribution, Jena was awarded property worth \$239,583.25, and Henry was awarded property worth \$355,688.54. It may appear, based solely on the dollar amount of property awarded, that the family court’s distribution of marital assets was inequitable since Henry, in light of his behavior, received a higher amount. However, in reality, Jena received actual property while nearly all of Henry’s award was previously dissipated assets not otherwise recouped as the following table illustrates:

<u>Marital Property</u>	<u>Value</u>	<u>Jena</u>	<u>Henry</u>	<u>Retirement Offset</u>
Marital Residence	\$96,120.00	\$96,120.00	\$0.00	-

Cash in Escrow	\$21,727.97	\$21,727.97	\$0.00	-
Jena's Accounts	\$3,372.97	\$3,372.97	\$0.00	-
Henry's Account	\$1,729.27	\$0.00	\$1,729.27	-
Marital Funds in Daniel's name	\$58,647.43	\$58,647.43	\$0.00	-
Farmhouse	\$20,000	\$20,000	\$0.00	-
Certificate of Deposit	\$15,155.48	\$15,155.48	\$0.00	-
<u>Retirement</u>				
KTRS Pension	\$99,343.25	\$99,343.25	\$0.00	-
KPEDCA 401(k)	\$11,119.08	\$11,119.08	\$0.00	-
Woodmen Annuity	\$5,024.35	\$5,024.35	\$0.00	-
IRA with Ameritrade	\$16,833.47	\$8,416.73	\$8,416.73	-
TOTAL		\$239,583.25	\$10,146.00	
<u>Dissipated Assets</u>				
Farmers National Bank Account	\$261,700.87	-	\$245,999.87	\$15,701.00
Service One Credit Union Acct.	\$70,542.67	-	\$70,542.67	-
Cash in false bottom box	\$30,000.00	-	\$0.00	\$30,000.00
IRA Withdrawal	\$9,200.00	-	\$0.00	\$9,200.00
USPS Termination Pay	\$8,939	-	\$0.00	\$8,939
Investments in Daniel's name	\$29,000.00	-	\$29,000.00	-
Thrift Savings Plan Account	\$35,503.25	-	\$0.00	\$35,503.25
TOTAL DISSIPATED ASSETS	\$444,885.79	-	\$345,542.54	\$99,343.25
OVERALL TOTAL				
DIVISION BY FAMILY COURT		\$239,583.25	\$355,688.54	

Jena requests that each party be awarded \$297,635.89 worth of marital property, representing equal shares of the estate, and that her nonmarital property

have no effect on the equal division. Jena acknowledges KRS 403.190 as the court's authorization to determine a just division of marital property as well as consideration of the dissipation of marital assets relevant to this particular case. She also asks that this Court consider the likelihood that there are more hidden marital assets which were not found in the course of this litigation.

The division of marital property pursuant to KRS 403.190(1) requires a court to make such a division in "just proportions" considering the listed relevant factors. There is no statutory requirement or presumption that the division of marital property be equal. *Stipp v. St. Charles*, 291 S.W.3d 720, 726 (Ky. App. 2009). The family court has broad discretion in determining an equitable distribution of marital assets based on the evidence presented and within the scheme of KRS 403.190. The family court made its division in this case based on KRS 403.190(1), principles of equity, and the evidence presented before it. Additionally, this Court will not disturb the decision of the family court absent an abuse of discretion or clearly erroneous factual findings not supported by substantial evidence. The possibility or speculation about the likelihood of more hidden marital assets for which there is no evidence is inappropriate for this Court to consider. Accordingly, we cannot hold that the family court abused its discretion in distributing the marital assets as it did.

The remaining issue on this appeal is Jena's argument that the family court abused its discretion in failing to require Henry to pay 95% of her attorney fees and costs. The family court ordered Henry to pay 50% of Jena's attorney fees. Henry

created additional legal work by failing to disclose significant marital funds he transferred and hid leading up to the time he left Jena in May 2008 and he refused to cooperate throughout the litigation.

Pursuant to KRS 403.220, a court may, after considering the financial resources of each of the parties, order a party to pay a reasonable amount for the cost to the other party of maintaining or defending a dissolution proceeding. The amount of an award of attorney fees is within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). “[T]here is no abuse of discretion nor any inequity in requiring the party whose conduct caused the unnecessary expense to pay it.” *Id.*

The family court was familiar with the financial circumstances of both Henry and Jena based on the evidence and testimony presented at trial. Jena was awarded the known but diminished balances of the remaining marital funds. Henry receives income in the form of his monthly pension from the postal service, and Jena receives income from her work as a teacher. It appears that a substantial amount of Jena’s attorney fees could have been avoided by Henry’s cooperation throughout the litigation. However, the family court did consider the parties’ financial resources as well as the affidavit of attorney fees filed by Jena and the obstructionist behaviors of Henry requiring additional work throughout the dissolution proceeding. Based on those considerations, the court concluded Henry should be ordered to pay 50% of Jena’s attorney fees. “Th[e trial] court is in the best position to observe conduct and tactics which waste the court’s and attorneys’

time and must be given wide latitude to sanction or discourage such conduct.” *Id.*

Accordingly, we find no abuse of discretion in the family court’s award of attorney fees.

IV. CONCLUSION

For these reasons, the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage of the Warren Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Phillip L. Kimbel
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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

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