

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001409-MR
AND
NO. 2012-CA-001452-MR

JACKIE DARRELL KEITH

APPELLANT/CROSS-APPELLEE

APPEAL FROM WAYNE CIRCUIT COURT
v. HONORABLE JENNIFER UPCHURCH EDWARDS, JUDGE
ACTION NO. 08-CI-00223

CONNIE DALE KEITH

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Jackie Darrell Keith, Appellant/Cross-Appellee, and
Connie Dale Keith, Appellee/Cross-Appellant, appeal from the Wayne Circuit
Family Court's division of marital property and debt following the dissolution of
marriage. Finding no reversible error, we affirm.

The parties were married from August 18, 1994, until the decree of dissolution of marriage was entered by the Wayne Circuit Family Court on December 3, 2008, reserving the issues of property division and allocation of debt. The court heard testimony on the matter on July 29, 2010, and then on June 15, 2011, after settlement negotiations failed. Thereafter, the court entered its findings of fact, conclusions of law, and judgment concerning the parties' property division and allocation of debt on February 27, 2012.

In the February 27, 2012, order, the court noted that there were no debts to be divided by the court and that the parties' real property had been sold at public auction and the proceeds from the sale, approximately \$303,916.97, were being held in escrow to be divided by the court. Relevant to the matters on appeal, the court set forth Jackie's incurred marital expenses¹ for which he would be credited one-half:

| | |
|---|-------------|
| a. sale of the parties' cattle | \$15,255.02 |
| b. preparation for sale of farm equipment | \$900.00 |
| c. 2009 John Deere Credit payment | \$4,718.96 |
| d. 2009 Monticello Bank hay roller loan payment | \$632.98 |
| e. 2009 property taxes | \$422.30 |
| f. 2008 proceeds of sale of 45 bales of hay at \$30/bale | \$1,350.00 |
| g. 2009 proceeds of sale of 200 bales of hay at \$15/roll | \$4,500.00 |

The court ordered that Connie reimburse Jackie one-half of these expenses, totaling \$13,889.63.

¹ We note that the court also set forth expenses which were made with marital funds for payment of marital obligations and did not order either party to reimburse the other for the 2008 John Deere tractor loan payment, the 2008 Monticello Bank hay roller loan interest payment, and the 2008 property tax bill.

The court also divided the parties' annual tobacco buyout of 2008, 2009, 2010, and 2011, in addition to the tax refunds from 2007 and 2008 and ordered Jackie to pay Connie \$12,676.60.

Concerning the parties' nonmarital property claims, the court found that Connie had received a nonmarital personal injury settlement and used those funds for the following purchases:

a. \$15,075.00 toward the purchase of the Armstrong property, which constituted a 75% interest in the property. Said property was sold for \$48,975.16 and 75% of the value being \$36,731.37;

b. \$2,500 toward the purchase of a gooseneck trailer, which constituted 100% of the value of said property; trailer sold for \$1,400.00;

c. \$7,000.00 toward the purchase of the hay roller, which constituted 82% of the value; said property having sold for \$3,500.00, 82% being \$2,870.00;

d. \$2,950.00 toward the purchase of a manure spreader and cattle scales, which constituted 100% interest in the property; said properties having sold for \$2,075.00.

The court also found that Connie had received a nonmarital gift from her mother in the amount of \$12,500.00, which constituted one-half the purchase price of the Landini tractor, a plow and disc; said property sold for \$10,050.00, one-half of the value being \$5,025.00

The court then found that Jackie received as an inheritance to him a one-sixth interest in the parties' property and timber received by them in Deed Book 289, Page 257. Thus, Jackie was awarded \$21,416.67 as nonmarital property.

The property of record in Deed Book 10, Page 320 was purchased by the parties during their marriage with the assistance of a loan from Jackie's parents. Said property was sold during the marriage, prior to the separation,² making the property and proceeds of the sale marital property in which neither party has a nonmarital interest.

The court ordered that the parties' nonmarital property be restored to them, that each party reimburse the other as set forth in the order, and then the court ordered that the parties split the remaining available funds in escrow. It is from this order that the parties now appeal.

On appeal, Jackie argues: (1) the court erred in its division of proceeds from real estate designated as nonmarital; and (2) the court failed to properly reimburse the petitioner for expenditures in liquidating assets. Connie argues that any award made to her by the trial court of property was not in error. Additionally, Connie argues: (1) that the trial court erred in finding that Jackie had any nonmarital property; (2) that the court erred in requiring her to pay Jackie any expenses associated with liquidating marital property as the funds came from a joint account; (3) the court erred in awarding Jackie money for hay reimbursement for hay that he admittedly left behind; and (4) the court erred in failing to divide the future year tobacco payments between the parties. With these arguments in mind we turn to our applicable standard of review.

² The parties argue over the date of separation. We affirm the trial court's finding as to the date of separation.

In dividing marital property a trial court has wide latitude, and absent an abuse of discretion we shall not disturb the trial court's ruling. *See Smith v. Smith*, 235 S.W.3d 1 (Ky. App. 2006), and *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Abuse of discretion is that which is arbitrary or capricious, or at least an unreasonable and unfair decision. *See Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). However, the trial court's conclusions of law are reviewed *de novo*. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky. App. 2009). We now turn to the issues raised by the parties.

First, the parties argue that the court erred in dividing the marital property in regard to claimed nonmarital interests by the parties. Jackie claims that the trial court erred by not awarding him a larger amount of nonmarital property and Connie argues that the court improperly awarded Jackie any nonmarital property at all. The division of marital property is controlled by Kentucky Revised Statutes (KRS) 403.190 which states:

In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct 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.

Our courts have interpreted KRS 403.190 to require a three-step process. As stated in *Hunter v. Hunter*, 127 S.W.3d 656, 659-660 (Ky. App. 2003), “The trial court's division of property involves a three-step process: (1) characterizing each item of property as marital or nonmarital; (2) assigning each party's nonmarital property to that party; and (3) equitably dividing the marital property between the parties.” (Internal citations omitted). The equitable division of property is not necessarily equal. *See Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky. App. 2007) (KRS 403.190 requires a court to divide the marital property in “just proportions” which is not necessarily equally.).

The party claiming that the property acquired during the marriage is nonmarital has the burden of proof and must establish this by clear and convincing evidence. *Sexton* at 266-267, n.31. “Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (Ky. 1934). This is accomplished with the concept of tracing.

Tracing allows the party claiming a nonmarital interest in property to prove its nonmarital character. The “source of funds rule” is often used to achieve

tracing when the property before the court includes both marital and nonmarital components. *See Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001). “The source of funds rule simply means that the character of the property, i.e., whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire property.” *Travis* at 909, n.10 (internal citations omitted). Moreover, “[i]n the context of tracing nonmarital property, when the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset.” *Sexton* at 266.³

The concept of tracing does not require mathematical certainty. *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990). Instead, the party claiming such an interest may persuade the family court through testimony how the property owned at the time of the dissolution had been acquired. *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002). This often requires showing that the nonmarital asset was spent in a traceable manner during the marriage. *Kleet v. Kleet*, 264 S.W.3d 610 (Ky. App. 2007).⁴

Sub judice, the trial court was presented evidence concerning three parcels of real property: (1) the Obie Keith property in which the court found Jackie had a one-sixth nonmarital interest due to his inheritance; (2) the Armstrong

³ *Sexton* explains that tracing “arises from KRS 403.190(3)'s presumption that all property acquired after the marriage is marital property unless shown to come within one of KRS 403.190(2)'s exceptions.” *Id.* at 266.

⁴ While not specifically argued by the parties, we believe that both parties refer to the doctrine of commingling of assets to support their arguments. Commingling of assets presents two related issues for the party claiming a nonmarital interest in the property to overcome. First, did the nonmarital property lose its exempt status; and second, has the commingling of assets rendered tracing ineffective? *See Bischoff v. Bischoff*, 987 S.W.2d 798 (Ky. App. 1998), and *Travis* at 910.

property in which the court found that Connie had a nonmarital interest due to her using personal injury settlement funds towards the purchase of the land; and (3) the Campanile property where the court found that said property was bought using a loan from Jackie's parents and which was sold prior to the parties' separation. Additionally, the court was presented evidence regarding the purchase of farm equipment which Connie asserted came from either a gift from her mother or from her personal injury settlement funds. Both parties assert that the other party failed to sustain their burden of proof of the asserted claim of nonmarital property.

Jackie argues that: (1) he should have had a larger nonmarital portion of the Obie Keith property as inheritance; (2) that Connie should not have been awarded a nonmarital claim in the Armstrong property as she did not adequately trace the personal injury settlement funds to the property;⁵ and (3) that the Campanile property was a gift, not a loan, and the value should have been awarded to him as nonmarital property. Additionally, Jackie argues that Connie did not adequately trace the personal injury settlement funds to the farm equipment purchases and that her mother's "gift" check was written months prior to the purchase of the tractor and thus the court should not have found that this was a gift.

Connie argues: (1) that Jackie should not have been awarded any nonmarital property as inheritance as the parties bought this property at auction and Jackie did not adequately trace any inherited money from the sale of this land;⁶

⁵ Jackie asserts that the settlement funds at the Monticello Bank had remained intact.

⁶ It appears to this Court that the property was sold at auction and the proceeds given to Jackie and his five siblings, hence the trial court's finding that Jackie was entitled to a one-sixth interest in the property as his inheritance.

(2) Connie properly traced the expenditure of her personal injury settlement funds to the purchase of the Armstrong property and, thus, the court correctly determined that she had a nonmarital interest; and (3) the trial court correctly concluded that the Campanile property did not result in either party having a nonmarital interest as Jackie's parents loaned the parties money to buy the Campanile property, evidenced by the repayment of the loan to his parents and the parents' estate. Additionally, Connie argues that she properly established and traced the purchase of the farm equipment from her personal injury settlement funds and the gift check from her mother, through the introduction of canceled checks and bank records documenting these transactions.

Each party asserts that the conflicting evidence presented to the trial court mandated a result favorable to them when the court ruled in favor of the other party. We disagree. The question before this Court is not whether we would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *See B.C. v. B.T.*, 182 S.W.3d 213, 219–20 (Ky. App. 2005). *See also Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). The family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous. *Bailey v. Bailey*, 231 S.W.3d 793,

796 (Ky. App. 2007). After our review, we must conclude that the trial court's findings were not clearly erroneous given the conflicting testimony and the evidence before it. Thus, we decline to reverse on this ground.

Next, we turn to the parties' arguments over the court ordering Connie to reimburse Jackie for one-half of the expenses of liquidating marital property. Jackie argues that the court should have ordered Connie to pay more and Connie argues that the court erred in requiring her to pay Jackie any expenses associated with liquidating marital property because the funds came from a joint account, which she claims meant she had to pay the expenditures twice.

Throughout the marriage, the parties maintained a joint checking account from which Jackie primarily wrote checks, and a separate checking account solely in Connie's name. This arrangement was due to Jackie's working out of town for much of the marriage and he kept the joint check book with him. It appears that both accounts were marital property. It is undisputed that the trial court found the contested expenditures to be for marital property. The confusion appears to be that the trial court treated the joint account sometime in 2008 or 2009 to be solely Jackie's property; however, we have not found in the record where such a finding was made by the trial court.

Neither party has argued to this Court that the trial court erred in dividing the checking accounts nor has either party cited to the record to support their respective arguments where the trial court divided the checking accounts. It is incumbent upon the Appellant to present the appellate court with a complete

record. *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008), citing *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). When the record is incomplete, we must assume that the omitted record supports the trial court. *Id.* “We will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record.” *Id.*

Accordingly, we must affirm the trial court and assume that the trial court correctly divided the accounts and properly ordered Connie to reimburse Jackie one-half of the expenses for liquidating marital property.

Last, we address Connie’s arguments regarding reimbursement to Jackie for hay and the court’s award of future tobacco buyouts to Jackie. Connie asserts that Jackie had abandoned his share of the bailed hay and the court erred in awarding him half of \$1,350.00 for the 2008 hay and that it was also error for the court to assess the 2009 hay value at \$4,500.00 when said hay sold for \$1,000.00 right before the auction of the parties’ lands. Jackie had testified that the hay was worth \$4,500.00; however, no evidence was presented to contradict Connie’s position that the hay had to be sold or otherwise it would have been a part of the land sale.

Connie also argues that the court erred in failing to divide the future year tobacco payments between the parties. The court’s order divided the tobacco buyouts for 2008, 2009, 2010, and 2011 between the parties as marital property and then ordered the 2012 tobacco buyout and each year thereafter until such payments ceased to Jackie. We remind the parties that the equitable division of

property is not necessarily equal. *See Lawson v. Lawson*, 228 S.W.3d at 21. (KRS 403.190 requires a court to divide the marital property in “just proportions” which is not necessarily equally.) We cannot say that the trial court’s apportionment of the marital property with the hay and the tobacco buyouts was an abuse of discretion given the overall distribution of marital property. Accordingly, we decline to reverse on this ground.

Finding no reversible error, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

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