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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001008-MR
AND
NO. 2011-CA-001313-MR
AND
NO. 2011-CA-002053-MR

CAROLINE MOSES — APPELLANT

v.

APPEALS FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 10-CI-01838

DANIEL LEGASPI — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: In this dissolution action, Caroline Moses appeals several orders of the Hardin Family Court addressing the classification and

division of real and personal property. Having reviewed the record and the arguments of the parties, we affirm in part, reverse in part, and remand for additional proceedings.

I. Facts and Procedure

Caroline and Daniel Legaspi married on September 11, 2004. No children were born of the marriage. They separated in 2010 and, on August 19, 2010, Daniel filed a petition for dissolution of marriage.

The classification of certain real property as marital or non-marital, the equitable division thereof, and the equitable division of certain personal items dominated the dissolution proceedings. Specifically, the real property at issue included real estate located at: (1) 5580 Flaherty Road, Vine Grove, Kentucky; (2) 1468 Vine Street, Radcliff, Kentucky; (3) 304 North Mulberry Street, Elizabethtown, Kentucky; (4) 76 Mayapple Lane, Elizabethtown, Kentucky; and (5) U.S. 31W and Highway 434, Radcliff, Kentucky. The personal property included: (1) a 2004 Ford F-150; (2) a 2003 BMW; (3) a 2007 Mitsubishi Outlander; (4) a 2009 Csn-Am Spyder motorcycle; (5) a 2003 Harley-Davidson motorcycle; (6) a camper; (7) a boat; (8) two four-wheelers; and (9) several miscellaneous items including two Italian crystal vases, a gas grill, and a television.

A trial was held on these issues on February 3, 2011. At its conclusion, the family court requested each party submit proposed findings of fact, conclusions of law, and a recommended judgment; the parties complied. The family court entered

its findings of fact, conclusions of law, and judgment on March 16, 2011 (Original Judgment). The family court acknowledged that the Flaherty Road property had been sold, and ordered the parties to equally divide the proceeds. The family court further found the equity in the remaining properties to be as follows: (1) Vine Street: $21,000.00; (2) N. Mulberry Street: $132,000.00 ($24,000.00 of which the family court designated Caroline's non-marital property); (3) Mayapple Lane: $27,000.00; and (4) 31W/434: $168,000.00. The family court classified all the equity, except as previously noted, as marital property.

The family court awarded Daniel the Mulberry and Vine Street properties (and their equity), and awarded Caroline the 31W/434 property (and its equity); the order awarded both parties, apparently inadvertently so, the property at Mayapple Lane. To equalize the division of the marital real property assets, the family court ordered Caroline to pay Daniel an equalization payment in the amount of $175,697.50.

The family court also: awarded Daniel the Ford F-150, the Csn-Am Spyder motorcycle, the Harley-Davidson motorcycle, and the miscellaneous items of personal property; awarded Caroline the Mitsubishi Outlander and the BMW; awarded each party one four-wheeler; and ordered the parties to sell the boat and camper, and to equally split the proceeds received from the sale. Finally, the family court awarded Daniel his premarital company, Snazzy, Inc., and awarded Caroline her premarital company, Alexco, Inc.

Caroline believed the family court's order to be lacking in several respects. Caroline faulted the family court: (1) for purportedly adopting, *in toto*, Daniel's proposed factual findings and legal conclusions; (2) for failing to issue factual findings and legal conclusions supported by the evidence; and (3) for failing to address various contested issues, including the effect of deeds and releases signed by the parties relinquishing their respective marital interests in some of the real property owned by the parties. Caroline also took issue with several of the family court's marital classifications. Consequently, Caroline filed a motion seeking additional factual findings pursuant to Kentucky Rules of Civil Procedure (CR) 52; she also requested a new trial under CR 59.01(d)(f).

A hearing was held on Caroline's post-judgment motions on April 12, 2011, during which the trial judge stated "that she took for granted that [Daniel's] tendered findings of fact had correct addresses in them." The family court entered amended findings of fact, conclusions of law, and judgment on May 9, 2011 (First Amended Judgment). Therein, the family court corrected factual errors and inconsistencies – most notably awarding Caroline the Mayapple Lane property – and rejected Caroline's argument concerning the effect of deeds and releases signed by the parties. The family court also amended its prior order to reflect the equity in the Mayapple Lane property to be $132,000.00, $24,000.00 of which the family court classified as Caroline's non-marital property, and the North Mulberry Street property as being "upside-down" with negative equity of -$1,000.00; the

equity in the Vine Street and the 31W/434 properties remained unchanged. Likewise, the $175,697.50 equalization payment remained unchanged.

Caroline filed a second motion pursuant to CR 52, requesting more specific findings of fact in support of the equity values attributed to each parcel of real property and the equalization payment; she also filed a motion pursuant to CR 59.05 and to alter, amend, or vacate the First Amended Judgment. Despite Caroline's pending motions, on June 8, 2011, Caroline filed a notice of appeal from the First Amended Judgment.

Before the family court ruled on Caroline's motion, Daniel sought to enforce the First Amended Judgment. Caroline, by motion, asked the family court to set a supersedeas bond to stay execution during the pendency of the appeal. The family court denied Caroline's motion. From that order, Caroline filed a timely notice of appeal. Caroline also filed for Chapter 13 bankruptcy protection in the Western District of Kentucky, and an automatic stay issued.

Thereafter, by order entered July 27, 2011 (Second Amended Judgment) the family court denied Caroline's pending CR 52 and CR 59 motions except to increase Caroline's non-marital interest in the Mayapple Lane property from $24,000.00 to $60,000.00. The family court also found that Caroline "failed to meet her burden of proof to show that any increase in the value of the . . . equity in the house on Mayapple Lane was through non-marital efforts or even through general market increases alone." Based on this, the family court classified the

remaining equity in the Mayapple Lane property as marital property and declined to apply the *Brandenburg*[1] test.

Daniel moved to alter, amend, or vacate the Second Amended Judgment. By order entered August 31, 2011 (Third Amended Judgment), the family court denied Daniel's motion, except to order the sale of the Mayapple Lane property.

Caroline filed a timely CR 59.05 motion to alter, amend, or vacate the Third Amended Judgment. The family court entered a Fourth Amended Judgment on October 14, 2011, sustaining Caroline's motion, vacating the order of sale, and reducing the equalization payment owed by Caroline to Daniel from $175,697.50 to $139,697.50.[2] From this order, Caroline filed a third notice of appeal.

In the interest of judicial economy, we have consolidated these appeals. Additional facts are set forth below as necessary.

II. Standard of Review

"Whether an item is marital or non-marital is reviewed under a two-tiered scrutiny." *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). The family court's factual findings are reviewed for clear error. *Id.*; CR 52.01; *Sexton v. Sexton*, 125 S.W.3d 258, 268 (Ky. 2004). A finding of fact not supported by substantial evidence, *i.e.*, evidence "sufficient to induce conviction in the mind of a reasonable person," is deemed clearly erroneous. *Rearden v. Rearden*, 296 S.W.3d

[1] *Brandenburg v. Brandenburg*, 617 S.W.2d 871, 873 (Ky. App. 1981).

[2] The reduction reflected the family court's prior determination that Caroline held a $60,000.00, as opposed to a $24,000.00, nonmarital interest in the Mayapple Lane property.

438, 441 (Ky. App. 2009). We afford those factual findings suitable deference because the family court is in the preeminent position to judge the credibility of the witnesses and to weigh evidence. CR 52.01. We review *de novo* the family court's legal conclusions, including its ultimate legal conclusions denominating items as marital or non-marital. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky. App. 2009); *Smith*, 235 S.W.3d at 6.

The family court is necessarily afforded wide latitude and discretion in equitably dividing marital property and debt; we decline to disturb the family court's decisions pertaining thereto absent an abuse of that discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513,523 (Ky. 2001); *Smith*, 235 S.W.3d at 6. "An abuse of discretion generally 'implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" *Rice v. Rice*, 372 S.W.3d 449, 452 (Ky. App. 2012) (citation omitted).

Finally, the interpretation of a deed is a question of law we review *de novo*. *Smith v. Vest*, 265 S.W.3d 246, 249 (Ky. App. 2007).

III. Disposition

Caroline asserts the family court committed numerous errors, each of which we address below.

A. Abdication of Family Court's Responsibilities

Caroline first argues the family court erred as a matter of law by failing to draft and enter its own findings of fact and conclusions of law. Instead, the family court undisputedly adopted verbatim Daniel's proposed findings and

legal conclusions. Caroline declares that by doing so the family court abdicated its decision-making responsibilities, thereby tainting all subsequently entered judgments. We disagree.

Nothing prohibits the family court from delegating the clerical task of drafting proposed factual findings and legal conclusions to the parties. *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982). It is certainly "not error for the trial court to adopt findings of fact which were merely drafted by someone else." *Prater v. Cabinet for Human Res.*, 954 S.W.2d 954, 956 (Ky. 1997). In doing so, however, the family court must proceed cautiously to ensure it "does not abdicate its fact-finding and decision-making responsibility under CR 52.01."[3] *Bingham*, 628 S.W.2d at 629. The judgment must ultimately demonstrate that "the decision-making process was . . . under the control of the trial judge [and] that findings and conclusions were . . . the product of the deliberations of the trial judge's mind." *Id.* at 629-30.

Here, as referenced, both parties submitted proposed findings of fact and legal conclusions at the family court's request. The family court, in issuing the Original Judgment, adopted Daniel's proposed findings and conclusions without modification or change.

However, the issue of whether the family court abdicated its responsibilities is moot in light of the fact that the Original Judgment was

[3] CR 52.01 requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]"

superseded by first, second, third, and fourth amended findings and legal conclusions. These orders reflect the family court's conscious thought, clear deliberation, and independent judgment. Accordingly, Caroline has not demonstrated that the family court improperly delegated its decision-making responsibility, or that its ultimate "findings and conclusions were not the product of the deliberations of the trial judge's mind." *Bingham*, 628 S.W.2d at 629-30. On this issue, we find no error.

B. Real Property Classifications

Next, Caroline maintains the family court erroneously classified and divided the various parcels of real property and the equity contained therein. Her argument focuses on how the court divided the equity in those properties.

When the division of property is at issue, the classification of that property as marital or non-marital is a threshold task. *See Sexton*, 125 S.W.3d at 264-65 (explaining the first step "to divide the parties' property" is to classify the property as either marital or non-marital). Kentucky Revised Statutes (KRS) 403.190(1) instructs the family court to first characterize each item of property as marital or non-marital, and then assign each spouse the non-marital property belonging to him or her. *Snodgrass v. Snodgrass*, 297 S.W.3d 878, 887 (Ky. App. 2009). After that assignment, the family court must divide between the parties the marital property "in just proportions" taking into consideration the:

> (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.

KRS 403.190(1); *Snodgrass*, 297 S.W.3d at 887.

All property acquired during the marriage is presumed to be marital property unless shown "to come within one of KRS 403.190(2)'s exceptions." *Sexton*, 125 S.W.3d at 266. KRS 403.190(2) identifies certain non-marital property as:

> (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
>
> (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (c) Property acquired by a spouse after a decree of legal separation;
>
> (d) Property excluded by valid agreement of the parties; and
>
> (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

Of course, "an item of property will often consist of both non-marital and marital components, and when this occurs, a trial court must determine the parties' separate non-marital and marital shares or interests in the property on the basis of the evidence before the court." *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001). The spouse claiming that property acquired during the marriage is non-marital bears a substantial burden of proof. *Sexton*, 125 S.W.3d at 266. With these standards in mind, we address Caroline's specific claims of error with respect to each parcel of real property.

(1) *5580 Flaherty Road*

Shortly before the parties' marriage, Caroline purchased from Daniel and his siblings real property located at 5580 Flaherty Road. A restaurant called the Schnitzel Barn was located on the land. After the purchase, Caroline assumed control of and operated the Schnitzel Barn.

The evidence at trial revealed the property was valued at $84,500.00 when purchased; Caroline mortgaged it for $78,747.00. In 2010, the state condemned all but a small portion of the property; Caroline received $171,000.00 as compensation. At the time of the condemnation, the property had an outstanding mortgage of $69,851.20.

At trial, Daniel testified the profit realized from the sale of the property was $101,148.80, and admitted Caroline had a premarital interest in the amount of $5,753.00. Daniel also testified the remaining, non-condemned segment was valued at $5,000.00. In contrast, Caroline testified that, after payment of the

mortgage and costs, $99,000.00 remained from the sale of the property. Caroline argued this was not marital property, but her non-marital interest. Likewise, Michael Richardson, a commercial lender with the Fort Knox Federal Credit Union (the Credit Union) confirmed Caroline's testimony that $99,000.00 remained from the sale of the Flaherty Road property.

Based on this evidence, the family court concluded: "That the profit realized by the parties from the sale of the real estate located at 5580 Flaherty Road, Vine Grove, Kentucky, in the amount of $101,498.00 is marital and shall be equitably divided between the parties." The family court also ordered the parties to sell the remaining portion and to equally divide the proceeds.

Before this Court, Caroline asserts: (1) the family court's determination that profits from the sale were $101,498.00 is not supported by the evidence; (2) the family court erroneously classified the sales profits as marital property; and (3) the family court erred when it refused to apply the *Brandenburg* formula to ascertain Caroline's non-marital share.

We agree with the first part of Caroline's argument. Daniel testified the sale profits were $101,148.00, and Caroline testified the sales profit were $99,000.00. There is no evidence in the record supporting the family court's factual finding that the sale profits were $101,498.00.

Turning to the second part, Caroline contends that the profits realized from the sale of the Flaherty Road property are non-marital because she acquired the property prior to the parties' marriage, and the increase in its value cannot be

attributed to the joint efforts of the parties. Caroline further proffers that the family court wholly failed to account for Caroline's non-marital interest in this property.

Again, "[p]roperty acquired during the marriage and before a decree of legal separation is presumed to be marital property[.]" *Kleet v. Kleet*, 264 S.W.3d 610, 614 (Ky. App. 2007); KRS 403.190(2). Property acquired *before* the marriage, however, is non-marital property. *See Kleet*, 264 S.W.3d at 614.

Here, Caroline purchased the Flaherty Road property prior to the parties' marriage. It is, without question, Caroline's non-marital property. Accordingly, the family court erroneously categorized the non-condemned property as marital property. We conclude that the property is Caroline's non-marital property and must be restored to her.

With respect to the profits realized from the sale of the property, it has long been the rule in this Commonwealth that "[a]n increase in value of non-marital property may be marital or non-marital depending on *why* the increase in value occurred." *Goderwis v. Goderwis*, 780 S.W.2d 39, 40 (Ky. 1989) (emphasis in original). "If the increase is attributable to general economic conditions, it is non-marital[.]" *Kleet*, 264 S.W.3d at 614; KRS 403.190(2) (instructing that "the increase in the value of property acquired before the marriage" remains non-marital property "to the extent that such increase did not result from the efforts of the parties during marriage"). However, "where the parties' joint efforts cause the increase, it is marital property." *Kleet*, 264 S.W.3d at 614; *Croft v. Croft*, 240 S.W.3d 651, 654 (Ky. App. 2007) ("[A]n increase in value of property that

[resulted] from the efforts of the parties during marriage should be considered marital property."). In the case before us, the family court failed to make the requisite "why" determination.

Caroline and Daniel presented conflicting evidence as to why the Flaherty Road property increased in value. Daniel testified that after the marriage he served as a cook, bartender, and dishwasher for the restaurant, completed numerous improvement projects such as replacing the floor, designing new menus, and helping with the design of the restaurant, and participated in the negotiations with the Commonwealth of Kentucky. Caroline claimed Daniel spent approximately six hours at the restaurant after she purchased it in 2004; Caroline testified the restaurant was her sole responsibility. Daniel further testified Caroline paid her personal bills from the Schnitzel Barn bank account, and co-mingled the restaurant's funds with marital funds. Caroline testified she did not put any marital monies into the Schnitzel Barn, and tendered its profit and loss statements to substantiate her claim that the restaurant was self-sustaining. The parties introduced ample, *albeit* conflicting, evidence from which the family court could determine why the Flaherty Road property increased in value. Despite this evidence, and despite Caroline's specific post-judgment request, the family court failed to make this determination or even address Caroline's non-marital interest.[4] At a minimum, the family court must assign Caroline the non-marital property

[4] Daniel conceded before the family court, and before this Court, that $5,753.00 of the sales proceeds is non-marital property belonging to Caroline. Daniel reached this figure by subtracting the value of the property at the time of its purchase by Caroline ($84,500.00) from the mortgage amount ($78,747.00).

belonging to her. *Snodgrass*, 297 S.W.3d at 887. The failure to have done so constitutes reversible error.

Finally, Caroline maintains the family court should divide the sale profits into marital and non-marital shares using the formula articulated in *Brandenburg v. Brandenburg*, 617 S.W.2d 871, 873 (Ky. App. 1981). Caroline made this request in her second CR 52 motion, but the family court summarily denied her request with respect to the Flaherty Road property.

> In *Brandenburg*, this Court set out a formula to apportion equity where the property was acquired with both marital and non-marital contributions. In essence, the formula requires the trial court to calculate the respective percentages of marital and non-marital contributions in relation to the total contribution to the property. Each percentage is then multiplied by the equity in the property to apportion the property between the parties.

Atkisson v. Atkisson, 298 S.W.3d 858, 862 (Ky. App. 2009). We do not think it appropriate to apply the *Brandenburg* formula to this particular piece of real estate. It is without dispute that the Flaherty Road property was purchased by Caroline prior to the marriage with non-marital funds. As such, it was not "acquired with both marital and non-marital contributions." *Atkisson*, 298 S.W.3d at 862.

In sum, on remand the family court must assign Caroline her non-marital share of the Flaherty Road property – including the non-condemned segment and the conceded $5,753.00 equity interest – and determine whether the increase in the property's value was marital or non-marital. If non-marital, the family court shall assign Caroline the profits realized from the sale. If marital, the family court shall

equitably divide the profits between the parties. Caroline, as the party claiming the profits to be non-marital, bears the burden of proof. *Sexton*, 125 S.W.3d at 266.

(2) *75 Mayapple Street and 304 N. Mulberry Street*

Caroline maintains the family court erroneously deemed the 75 Mayapple Street and 304 N. Mulberry Street properties marital property. Caroline asserts the Mayapple parcel is her non-marital property, and the Mulberry parcel is Daniel's non-marital property. In support, Caroline points to a plethora of deeds and documents in which Caroline and Daniel each purportedly relinquished his or her interest in the other's property. Caroline asserts the family court's failure to give any credence to these deeds constitutes reversible error. We agree.

On November 15, 2002, Caroline purchased the 75 Mayapple Street property. The property was, and continues to be, Caroline's primary residence. Five months after the parties' marriage, on February 24, 2005, Caroline conveyed Daniel an interest in the property. Less than three months later, on May 1, 2005, Daniel conveyed his interest back to Caroline, citing as consideration "love and affection." Then, on February 8, 2008, Daniel executed a document denominated a "Release of Dower/Curtesy Deed," which contained the following language:

> By this document Husband does hereby release and quitclaim unto Wife **all of Husband's marital rights**, including dower, in and to [the 75 Mayapple Street property][.]
>
> . . . .
>
> Husband does hereby render, release and forever quitclaim unto Wife **all right, title and interest that**

> **Husband may now have or hereafter acquire, as a result of his marriage to wife,** in the [75 Mayapple Street property] including **specifically** dower/curtesy and **all other marital rights**.

(Emphasis added).

The acquisition of the Mulberry Street property followed a similar path. The parties purchased the Mulberry Street land on January 13, 2005. On May 1, 2005, Caroline conveyed her interest to Daniel, citing as consideration "love and affection." On July 10, 2008, Caroline executed a document titled "Dower Deed" containing language substantially identical to that in the "Release of Dower/Curtesy Deed" signed by Daniel the previous February.

The validity of the 2008 release deeds is not at issue.

Armed with these deeds, Caroline argued before the family court that she and Daniel waived any right to assert a marital interest in the Mulberry and Mayapple properties, respectively. The family court rejected Caroline's position and afforded the deeds no weight. In so doing, the family court found that the mere signing of a release or quitclaim deed was insufficient to relinquish a marital property right. Instead, the family court reasoned it was obligated to test the sufficiency of the release deeds by applying a three-part test[5] first adopted in *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). In the family court's view, the release deeds failed to satisfy that test. We need not engage in a protracted

[5] That test includes three elements: (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable? *Gentry*, 798 S.W.2d at 936.

analysis of the *Gentry* test, and the family court's application thereof, because we find that test applies only to premarital agreements; it has no bearing on post-marital agreements, such as the deeds of release here. The family court's reliance on *Gentry* and its progeny was misplaced.

Again, any property acquired by either spouse during the marriage is routinely considered marital property, subject to certain exceptions. KRS 403.190(2). "Property excluded by valid agreement of the parties" is non-marital. KRS 403.190(2)(d).

Our object in construing a deed is to ascertain and "effectuate the intention of the parties to the instrument[.]" *Ferrill v. Cleveland*, 6 Ky.L.Rptr. 513, 13 Ky.Op. 198, 198 (1885). "The construction of a deed is a matter of law, and the intention of the parties is to be gathered from the four corners of the instrument." *Phelps v. Sledd*, 479 S.W.2d 894, 896 (Ky. 1972). It is further to be assumed "that the parties to a deed intended each of its provisions to have some effect from the very fact that the words were used." *Villas at Woodson Bend Condominium Ass'n, Inc. v. South Fork Development, Inc.*, 387 S.W.3d 352, 357 (Ky. App. 2012) (citation omitted). In construing a deed, our conclusion can never be that the parties intended nothing by their actions. *See id.*

In the matter before us, we garner from the four corners of the deeds of release the parties' unequivocal intent to release and relinquish their respective marital interests in the Mayapple Lane and Mulberry Street properties. The language of the 2008 release deeds is clear and unambiguous. Indeed, the

language used is so fervent that any other interpretation would be suspect. The deeds do not merely refer to the parties' respective dower and curtesy interests, but specifically reference, on two occasions, their intent to also waive, release, and relinquish their respective marital rights in the properties. The deeds are legally binding agreements supported by consideration. Accordingly, we find the 2008 deeds of release constitute valid agreements by the parties to exclude from the marital estate, and to waive any marital interest Daniel and Caroline may hold in, the Mayapple and Mulberry properties, respectively. KRS 403.190(2)(d). The family court erred when it declined to afford the 2008 releases any weight and, in turn, when it deemed the Mayapple and Mulberry land, in their entirety, marital property.

Because the parties clearly intended to exclude the Mayapple and Mulberry properties from the marital estate, it logically follows that they also intended to exclude the equity, if any, in those properties from the marital estate. Of course, neither the Mayapple nor the Mulberry property was non-marital during the entire pendency of the marriage; both properties contain "non-marital and marital components[.]"[6] *Travis*, 59 S.W.3d at 909. On remand, we direct the family court to award Mayapple Lane, and the non-marital equity accrued therein, to Caroline, and to award Mulberry Street, and the non-marital equity accrued therein, if any, to Daniel. The family court, in the exercise of its discretion, shall equitably and justly divide the equity, if any, that accrued during the period

[6] For example, the family court already determined that Caroline is entitled to $60,000.00 of non-marital equity, which accrued prior to the marriage, in the Mayapple Lane property.

between the respective purchases of the properties and the related deeds of release during which period each parcel was marital property.

(3) ***31W/434 Property***

On May 28, 2010, Caroline, by and through Alexco, Inc., purchased real property located at U.S. 31 West and Highway 434 in Hardin County, Kentucky, for $237,000.00. Caroline mortgaged the property for the purchase price. Simultaneously, Daniel signed a "release of dower or curtsey [sic] interest" (the 2010 release) stating:

> I, Daniel G. Legaspi, hereby release any and all dower/interest I have or may have in the property located at the corner of 31 W and 434 Radcliff, Ky 40160. I forever transfer said interest to my spouse, Caroline Moses-Legaspi. I hereby subordinate any interest I have or may have had unto the mortgage company(ies) for my spouse.

Thereafter, on September 13, 2010, Caroline entered into a new mortgage with the Credit Union in the amount of $1,232,700.00. Caroline used the excess funds to build a restaurant on the property. At trial, Richardson, a Credit Union employee, testified the initial mortgage of $237,000.00 was an interest only, 100% loan to secure the lot. Richardson confirmed the subsequent mortgage was a Small Business Association loan in the amount for $1,232,700.00.

Also at trial, J. Scott Wise, a certified appraiser, testified he appraised the property on October 16, 2010, for $405,000.00. Using Wise's appraisal amount and the first mortgage of $237,000.00, the family court concluded

$168,000.00 in equity existed in the property. The family court classified the equity as marital property.

On appeal, Caroline argues: (1) Daniel released his interest in this property and, therefore, the family court erroneously deemed the property and its equity, if any, marital property; and (2) the family court's $168,000.00 equity valuation is not supported by the evidence and, therefore, is clearly erroneous.

We reject Caroline's position that Daniel relinquished his marital interest in the 31W/434 Property. "The construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court." *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). Again, in construing a written instrument, the goal "is to effectuate the intentions of the parties." *See Cantrell Supply Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002).

Unlike the 2008 release deeds discussed above, the 2010 release pertaining to this property makes no mention of Daniel's marital interest or rights. Instead, it only releases Daniel's curtesy interest in the property. As pointed out by the family court, while both curtesy and marital property rights are inchoate rights and similar in nature, they are not synonyms, each being distinct property rights provided by statute. *Compare* KRS 392.020 (defining curtesy and assigning husband curtesy interest in property of deceased wife) *and* KRS 403.190 (defining and assigning marital property interests). While Daniel, by virtue of the 2010 release, undoubtedly released his curtesy interest in the 31W/434 property, he did

not relinquish his marital interests. Accordingly, the family court did not err when it declined to interpret the 2010 release as a waiver of Daniel's marital interest in the 31W/434 property.

We agree, however, that the family court's equity valuation is not supported by the evidence. Caroline submitted documentation that the Credit Union holds a mortgage on the 31W/434 property in the amount of $1,232,700.00; Richardson's testimony corroborated the mortgage records. Daniel did not contradict or otherwise dispute this evidence. Accordingly, in light of the family court's finding that the property is valued at $405,000.00, no equity currently exists in the property. In fact, there is a negative equity balance of $995,700.00. Accordingly, we reverse the family court's $168,000.00 equity valuation.

(4) ***1468 W. Vine Street***

On April 10, 2009, Daniel purchased at auction real property located at 1468 W. Vine Street for $152,000.00. Daniel and Caroline received a mortgage on the property for $254,033.00. As of trial, $243,000.00 remained on the mortgage.

There is no dispute this property is marital property. Instead, Caroline takes issue with the family court's valuation of the property and, in turn, its equity calculation. Caroline also faults the family court for failing to address her claim that Daniel dissipated marital assets in connection with this property.

At trial, Caroline submitted an appraisal conducted on March 27, 2009, by Don Pierce, a certified general appraiser, who declared the market value

of the property to be $390,000.00. In response, J. Scott Wise testified that on January 27, 2011, he appraised the subject property at $264,000.00. Wise admitted he was not familiar with Pierce's appraisal but, in Wise's view, the property was not worth $390,000.00.

Before this Court, Caroline takes exception to the family court's finding that $21,000.00 in equity existed in the Vine Street Property. Caroline asserts the family court should have disregarded Wise's $264,000.00 appraisal in favor of Pierce's $390,000.00 appraisal, resulting in an equity amount of $143,000.00. We are not persuaded.

On the basis of Daniel's evidence, the family court was justified in finding the property had a fair market value of $264,000.00. Although Caroline presented evidence to the contrary, it is insufficient to warrant reversal. "[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). As such, it was in the family court's discretion to believe Daniel's evidence to the exclusion of Caroline's. We decline, despite Caroline's urging, to re-weigh the evidence. Furthermore, using the $264,000.00 value and $243,000.00 mortgage, the family court correctly determined the equity in the property to be $21,000.00.

Caroline also asserts Daniel dissipated marital assets. As referenced, the parties mortgaged the property for $102,000.00 more than was needed to purchase it. The excess amount was given to Daniel at the closing of the loan in 2009. Daniel admitted he deposited the excess funds into a Snazzy Corporation

account, and used it to pay marital bills. In response, Caroline asserts Daniel used the money to pay his separate credit cards and debts, thereby dissipating marital assets. Caroline reiterated that, during their marriage, the parties had separate bills, separate credit cards, and separate debts.

Dissipation relates to "spending funds for a non-marital purpose[.]" *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987). It is only appropriate for the family court to consider dissipation "when marital property is expended (1) during a period when 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." *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998) (citing *Robinette*, 736 S.W.2d at 354). Here, there is no evidence the alleged dissipation occurred during a period of separation or at a time when dissolution was being contemplated. Instead, the evidence indicates it occurred on or about April 2009, well over one year before Daniel petitioned for dissolution of the marriage. Accordingly, the family court did not err when it declined to address Caroline's dissipation claim.

C. Vehicle Distribution and Loan Refinance

Caroline argues the family court abused its discretion in its distribution of the marital motor vehicles, resulting in a grossly disproportionate award of equity to Daniel. We agree.

The family court awarded Caroline the 2003 BMW and the 2007 Mitsubishi Outlander. The former was valued at $12,500.00 and encumbered by a

$7,000.00 debt, and the latter was valued at $14,875.00 and encumbered by a $17,000.00 debt. The equity in both vehicles awarded to Caroline totaled $3,375.00. In contrast, the family court awarded Daniel the 2004 Ford F-150, valued at $15,475.00; the 2009 Csn-Am Spyder motorcycle, valued at $16,367.00; and the 2003 Harley-Davidson motorcycle, valued at $8,030.00. The F-150 and Spyder were encumbered by a single $12,500.00 debt, and the motorcycle was encumbered by a $3,231.00 debt. The equity in the vehicles awarded to Daniel totaled $24,141.00. There is no dispute that all of the vehicles are marital property.

No presumption exists that "marital property be equally divided in a marriage dissolution proceeding." *Heskett v. Heskett*, 245 S.W.3d 222, 228 (Ky. App. 2008). Instead, KRS 403.190 directs the family court to divide marital property "in just proportions." KRS 403.190(1). Here, the family court clearly endeavored to equally divide motor vehicles between Caroline and Daniel: Caroline received two automobiles, and Daniel received one automobile and two motorcycles. There is no dispute, however, that a substantial disparity exists in the vehicle equity awarded Caroline and the vehicle equity awarded Daniel. Insofar as this grossly disparate division is not explained by the family court as being in "just proportions" as required by KRS 403.190(1), we agree with Caroline. Requiring Caroline to "equalize" the division of the *real property* marital assets, but not requiring Daniel to do the same with regard to the *personal property* marital assets is, facially at least, unreasonable and unfair – thus an abuse of the family court's discretion. On this issue, we reverse and remand for additional proceedings in

accordance with this opinion. The court may consider a different distribution, may impose an "equalization" payment, may articulate why the facially inequitable division is, nevertheless, a division in "just proportions," or some combination of these or other possibilities.

As a corollary to the above, Caroline argues the family court's failure to order Daniel to refinance a joint loan, which the family court assigned as Daniel's responsibility, constitutes error. As noted, the Ford F-150 pickup truck and the Csn-Am Spyder motorcycle, both awarded to Daniel, are secured by a debt owed by the parties to Magnolia Bank. Caroline moved the family court to require Daniel to refinance the loan or otherwise remove Caroline's name from the Magnolia Bank note. The family court denied Caroline's motion.

In light of our decision concerning the division of vehicles, we need not fully address this argument. We simply note that a principal "goal of the dissolution process . . . is to sever all ties as much as possible as soon as possible." *Daunhauer v. Daunhauer*, 295 S.W.3d 154, 156 (Ky. App. 2009). On remand, the family court shall ensure that each party takes the necessary and appropriate steps to remove the other from any debt assigned.

D. Supersedeas Bond

Finally, Caroline argues the family court erred when it denied her request to post a supersedeas bond to stay execution of the judgment during the pendency of the appeal. We find this issue to be moot.

CR 73.04, states in pertinent part: "[w]henever an appellant entitled thereto desires a stay on appeal, as provided in Rule 62.03,[7] he may present to the clerk or the court for approval an executed supersedeas bond with good and sufficient surety[.]" The amount of the bond varies depending on the judgment to be secured. If the judgment is for the recovery of money, the bond amount shall be sufficient to "cover the whole judgment remaining unsatisfied" plus "costs on appeal, interest, and damages for delay[.]" CR 73.04(2). "When the judgment determines the disposition of" property, the amount of the bond shall be sufficient to "secure the amount recovered for the use and detention of the property," plus costs, interest, and delay damages. CR 73.04(3).

In this case, Daniel sought to execute upon the First Amended Judgment shortly after its entry. As previously noted, that judgment called for the sale of certain properties, the transfer of property titles, the distribution of personal assets, and the disbursement of an equalization payment. Caroline, having filed a notice of appeal, sought to stay enforcement of the First Amended Judgment by giving a supersedeas bond. Caroline represents that she contacted the circuit clerk, who was unable to ascertain an appropriate bond amount. Not knowing the actual amount which would be effective, Caroline, out of an abundance of caution, filed a motion pursuant to CR 62.03 requesting the family court set a supersedeas bond

[7] CR 62.03 states: "[w]hen an appeal is taken the appellant may stay enforcement of the judgment by giving a supersedeas bond as provided in Rule 73.04. . . . The stay is effective when the supersedeas bond is approved by the court or the clerk."

amount. On June 22, 2011, the family court entered an order denying Caroline's motion to set a supersedeas bond amount.

Caroline represents that she then attempted to file a supersedeas bond with the circuit clerk for an amount she deemed appropriate. However, the circuit clerk, according to Caroline, declined Caroline's tender, declaring the family court's June 22, 2011 order would not allow for a posting of any amount of money for a bond. To prevent execution of the First Amended Judgment, Caroline sought the protections of the Bankruptcy Act. Caroline apprised the family court and Daniel of the automatic stay issued by the bankruptcy court.

On appeal, Caroline argues the family court's June 22, 2011 order violated CR 73.04 by making it impossible for her to post a supersedeas bond and, therefore, constitutes reversible error. Because the family court has given effect to the bankruptcy court's automatic stay, and the parties have abided by that decision, this issue appears to be moot. We readily admit, however, that we know of no authority permitting a trial court to prohibit *carte blanche* a party from filing a supersedeas bond. An appellant who desires to stay enforcement of a judgment on appeal has a right to file a supersedeas bond, provided the bond otherwise complies with our civil rules. CR 73.04; CR 62.03. Neither the trial court nor the person responsible for acting upon the trial court's orders may suspend or otherwise impede that right.

With that said, we agree that if the family court's order had prohibited Caroline from filing an otherwise proper and valid supersedeas bond, that would

have been error. But that is not what the family court's order said. Instead, the order merely refused to set the supersedeas bond *amount*. The circuit clerk, to Caroline's detriment, erroneously interpreted that order as prohibiting the filing of any supersedeas bond. Despite the harm afforded Caroline, the family court has given effect to the bankruptcy court's automatic stay, thereby preventing Daniel from executing upon any judgment issued by the family court. Accordingly, this issue is moot, and no further discussion is warranted.

IV. Conclusion

For the foregoing reasons, in cases No. 2011-CA-001008 and No. 2011-CA-002053, we affirm in part, reverse in part, and remand for additional proceedings consistent with this opinion. We dismiss Caroline's appeal of the June 22, 2011 order in case No. 2011-CA-001313 as moot.

TAYLOR, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

VANMETER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I concur in most of the majority opinion, I respectfully dissent from the portion of the opinion that discusses the disposition of the parties' property at 75 Mayapple Street and 304 N. Mulberry Street. The majority opinion glosses over whether the parties had a valid postnuptial agreement to divide their properties. The trial court discussed in great detail whether the property was non-marital, whether by valid agreement of the parties or

by gift. Under KRS 403.190(2), non-marital property includes property acquired by gift, and property excluded by **valid** agreement of the parties (emphasis added). While the deeds contained gifting language, the fact that the conveyances and releases were so close in time certainly makes it appear as if the spouses had some sort of agreement. Case law supports the idea that agreements between spouses as to property division must be reviewed under equitable principles. In a recent, unpublished case, another panel of this court extended the equitable principles applied to evaluate prenuptial agreement to postnuptial agreements as well:

> Any uncertainty over whether an otherwise valid postnuptial agreement is enforceable in the context of a marriage terminated by dissolution was resolved by the Kentucky Supreme Court's opinions rendered in *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990), and *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990). The court expressly overruled its prior opinions which had declined to enforce antenuptial or postnuptial agreements but preserved the traditional defenses against enforcement of such agreements. In *Gentry*, quoting *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662, 666 (1982), the court outlined the criteria for a trial court to employ in determining enforceability of an agreement:
>
> > [T]he trial judge should employ basically three criteria in determining whether to enforce such an agreement in a particular case: (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable?
>
> *Gentry*, 798 S.W.2d at 936.

> Similarly, in *Edwardson*, the court stressed that enforcement of agreements made in contemplation of divorce remains "subject to appropriate limitations," the first of which is "full disclosure" and the second of which is "unconscionability." *Edwardson*, 798 S.W.2d at 945.

Aubrey v. Aubrey, 2009-CA-001598-MR, 2010 WL 4669144 (Ky. App., Nov. 19, 2010). While the *Aubrey* court apparently misread *Gentry* and *Edwardson* as holding that equitable principles apply to postnuptial agreements (the *Gentry* and *Edwardson* courts only discussed prenuptial agreements), I suggest that the same criteria for determining the enforceability of a prenuptial agreement should apply to postnuptial agreements as well.

Also, the Mayapple and Mulberry transactions may involve elements of gifts, thereby bringing the transactions under the analysis of *Gertler v. Gertler*, 303 S.W.3d 131 (Ky. App. 2010), and *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. App. 1980). The language from *O'Neill* looks at four factors involving gifts among spouses:

> In determining this issue, the court's decision would necessarily have to be based on the pertinent facts of each case. In each case, consideration should be given to [i] the source of the money with which the "gift" was purchased, [ii] the intent of the donor at that time as to intended use of the property, [iii] status of the marriage relationship at the time of the transfer, and [iv] whether there was any valid agreement that the transferred property was to be excluded from the marital property.

O'Neill, 600 S.W.2d at 495.

In my view, the majority opinion elevates the form of the releases over their substance without any consideration of equitable principles and underlying

circumstances which has long governed evaluation of transactions between married couples. I would affirm the trial court on this point.

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