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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000832-MR

LARRY DAYTON SKAGGS

APPELLANT

v. APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, SPECIAL JUDGE
ACTION NO. 05-CI-00002

DEBORAH ANN SKAGGS (NOW COX)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: Larry Dayton Skaggs has appealed from the Elliott Family Court's March 13, 2012, order and judgment following a remand from this Court and the denial of his subsequent motion to alter, amend or vacate. Following a careful review, we affirm.

This appeal represents the latest chapter in a lengthy divorce action between Larry and Deborah Ann Skaggs (now Cox). The pair were married for

approximately six years and the litigation has now spanned over eight years. Following entry of a final judgment resolving issues related to valuation and distribution of marital and nonmarital property, an appeal and cross-appeal were prosecuted in this Court.¹ In a lengthy Opinion, a panel of this Court affirmed in part, reversed in part, and remanded the matter to the Elliott Family Court for further findings. That Opinion succinctly set forth the historical factual and procedural background as follows:

Deborah Ann Skaggs and Larry Dayton Skaggs were married on December 12, 1998. It was the second marriage for both parties; no children were born of the marriage. The couple separated about six years later, on January 3, 2005, and a decree of dissolution was entered on August 10, 2006. The decree reserved issues of property distribution and assignment of debts for a later determination.

At the time of the dissolution, Larry was fifty-nine years of age. He had been employed at Marathon Oil since 1969, and had retired in July 2004. At that time, he was awarded a lump sum benefit of over \$600,000.00. Larry's income had increased during the course of the marriage; at the time of his retirement his salary was well over \$100,000.00. Before the marriage, Larry's residence was a farm which he owned, where he raised cattle and grew tobacco. At the time of the marriage, Larry also owned a Fidelity brokerage account and Marathon Thrift Plan account. The latter contained approximately \$290,000.00.

Deborah was employed at a nursing home at the time of the parties' marriage. She stopped working outside the home in the summer of 1999 and began receiving disability payments one year later. At the time of the

¹ *Skaggs v. Skaggs (now Cox)*, 2007-CA-1509-MR and 2007-CA-1510-MR, 2008 WL 4683021 (rendered October 24, 2008; unpublished).

marriage, Deborah also owned her own home and had a savings account.

During the course of the marriage, the couple resided at Larry's house. They made considerable improvements to Deborah's house, including the installation of new flooring, a new roof and new bathroom fixtures. They also acquired two tracts of real estate, known as "the Sheepskin property" and "the 504 property."

Following the entry of the decree of dissolution in August 2006, the trial court considered the evidence presented by the parties, which included more than twenty depositions. The trial court entered findings of fact, conclusions of law and judgment on February 5, 2007. The parties were each awarded their respective residences. Additionally, Deborah was awarded the 504 property and a portion of Larry's retirement account, but no maintenance. Larry was awarded the Sheepskin property. The trial court also assigned or directed to be sold various items of personalty including a tractor, a bulldozer, several horses and some vehicles. Both parties filed motions to alter, amend or vacate the judgment. The trial court ordered the record reopened for a period of forty-five days for presentation of evidence relating to Larry's retirement accounts, his lump sum distribution, and the existence of some farm machinery. The trial court thereafter entered an amended judgment relating to the calculation of Deborah's fractional interest in Larry's lump sum retirement distribution. This appeal by Larry and cross-appeal by Deborah followed.

Skaggs, at *1.

The panel then analyzed the various arguments advanced by Larry and Deborah, rejecting nearly all of them. However, the panel found two of the trial court's holdings to be erroneous and necessitating remand for further proceedings. As to the matters to be resolved on remand, this Court stated as follows:

Larry's next argument concerns the trial court's finding of a marital share in the farm he owned prior to the marriage. The trial court found that the fair market value of the farm at the time of the marriage was \$163,000.00, and at dissolution was \$257,000.00. The trial court found that the increase in value due to market conditions alone was \$54,000.00. It therefore awarded to Larry \$217,000.00 as his nonmarital interest. The trial court further found that the remaining \$40,000.00 increase in value was due to the addition of two barns to the property. The construction cost of the larger barn was \$37,000.00 and the smaller barn \$8,700.00. The parties received government funds from "the ASC"[²] in the amount of \$25,000.00 to apply towards the construction costs of the barns. The court found that marital funds in the amount of \$20,700.00 were additionally expended to complete the construction. The court concluded that the joint efforts of the parties resulted in an increase of \$40,000.00 in the fair market value of the property and that this represented a marital interest. Larry argues that the \$25,000.00 in government funds was nonmarital because he only received these funds by virtue of his ownership of the farm. On the basis of this Court's holding in *Jones v. Jones*, 245 S.W.3d 815 (Ky. App. 2008), we agree that the payments received from ASC may indeed be nonmarital in nature because they stemmed directly from Larry's nonmarital asset. Therefore, we reverse and remand this claim for further findings of fact regarding the nature of these payments, a recalculation of what portion of the \$40,000.00 increase in value is attributable to the funds received from the ASC if indeed such funds were nonmarital, and if necessary, a reapportionment of the marital property if the court deems such a reapportionment to be just.

* * * *

Thirdly, Deborah argues that the trial court erred in its division of Larry's Fidelity account. As we have already

² The parties' briefs do not further identify "ASC." The parties were probably referring to the former federal Agricultural Stabilization and Conservation Service, usually abbreviated "ASCS," but for consistency we use the abbreviation used by the trial court.

noted, the court found that Larry had the account at the time of the marriage, and that it contained a balance of approximately \$29,000.00. During the course of the marriage, the trial court found that he had deposited \$27,000.00 in marital wages into the account. Seventeen-thousand dollars was withdrawn from the account during the marriage to purchase a Buick. The trial court found the vehicle to be Larry's nonmarital property and awarded it to him. It found that \$12,000.00 in nonmarital funds would have remained in the account. The court further found that \$21,500.00 was withdrawn from the account after the separation to purchase a bulldozer. The court ordered the bulldozer sold and \$12,000.00 restored to Larry as the remainder of his nonmarital property. Any remaining proceeds from the sale of the bulldozer were to be divided equally between the parties. The court also found that Larry had expended \$12,000.00 in nonmarital funds from the account for a down payment for a tractor. Therefore, the court found that Larry had nonmarital property stemming from the account that totaled \$41,000.00 (the Buick, the bulldozer and the tractor down payment). But as Deborah has pointed out, this contradicts the trial court's finding that only \$29,000.00 of the account was nonmarital. Therefore, some of the funds for these purchases must have come from the \$27,000.00 in marital funds deposited there in the form of wages during the course of the marriage. Put another way, \$12,000.00 of the funds from the account that were awarded to Larry as his nonmarital property must have come from the \$27,000.00 in marital funds in the account. We agree with Deborah that the trial court's findings were erroneous, and remand for further findings on this issue. Ultimately, such a finding may not affect the trial court's final disposition of the property, since Larry was presumably also entitled to some share of the marital funds in the account.

* * * *

For the foregoing reasons, the judgment of the circuit court is affirmed as to all items except (1) the ASC funds used to finance in part the construction of the barns and

(2) the proportion of marital and nonmarital funds in the Fidelity account, specifically as this relates to the purchase of the Buick, the tractor and the bulldozer. These two issues are remanded to the trial court for further findings, and if necessary, a reapportionment of the marital property in light of these findings.

Skaggs, at *4, *6, and *8 (footnote in original). A subsequent petition for rehearing was denied as was a motion for discretionary review filed in the Supreme Court of Kentucky.

On remand, following a series of reassignments to different judges because of retirements, appointments, and conflicts, the trial court convened a hearing in May of 2010 to permit the parties to argue their respective positions. The trial court took the matter under submission, received additional written arguments, and ultimately entered its order on April 27, 2011. Therein, the trial court determined the ASC monies were nonmarital and thus, any increase in the value of Larry's farm attributable to those funds was likewise nonmarital. Further, the trial court revised its calculation of the marital and nonmarital values of the Fidelity account, determined the Buick and bulldozer were Larry's nonmarital property, and directed the tractor be sold and the proceeds divided after giving Larry a \$12,000.00 credit for his nonmarital contribution to the purchase price.³ Because it had reclassified a portion of the assets as nonmarital, the trial court determined it was necessary to reallocate the distribution of other assets to ensure a just division of the marital property. To effectuate this goal, the court granted the

³ The trial court stated that based on the values assigned on the record, Larry could retain the tractor if he paid the sum of \$5,500.00 to Deborah for her marital interest in the tractor.

KY 7/KY 504 property to Larry and ordered him to pay Deborah \$16,500.00 for her interest therein.

Dissatisfied with the decision, and believing it to be contrary to the remand by this Court, Deborah timely moved the trial court to alter, amend or vacate the April 27, 2011, order. The trial court convened a hearing on the motion on June 7, 2011. Approximately nine months later, on March 13, 2012, the trial court entered an order drastically different from the April 27, 2011, order. In the new order, the trial court reversed course and determined the ASC monies were marital after distinguishing the facts from those presented in *Jones*, and held the entire increase in value of Larry's farm attributable to the barns constituted a marital asset subject to division. Based on this decision, the trial court concluded a reallocation of marital property would be unnecessary. Further, the trial court determined it had miscalculated the marital value of the Fidelity fund leaving \$17,500.00 unaccounted for and undistributed; and directed that amount be divided equally between the parties. All prior, consistent orders were to remain in effect. Larry's subsequent motion to alter, amend or vacate the March 13, 2012, order was denied. This appeal followed.

As an initial matter, we note Larry's failure to comply with CR⁴ 76.12(4)(c)(v) which requires "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

⁴ Kentucky Rules of Civil Procedure.

CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (1987)). Failing to comply with this rule is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. See *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the brief or dismiss the appeal for Larry's failure to comply with the rules. *Elwell*. While we have chosen not to impose such a harsh sanction, we caution counsel that such latitude may not be extended in the future.

Larry contends the trial court failed to follow the dictates of this Court on remand by determining *Jones* was inapplicable to the facts at bar and subsequently concluding the ASC funds were marital.⁵ He further alleges the trial court erred in concluding the Fidelity account had any marital component

⁵ Curiously, in responding to Deborah's motion to alter, amend or vacate which preceded the order he now appeals, Larry contended her assertion that our prior Opinion had a *res judicata* effect "is simply wrong." But, before this Court, he now contends our previous Opinion *did* have a *res judicata* effect and essentially took all discretion away from the trial court in relation to the ASC funds.

whatsoever. Having reviewed the entirety of the voluminous record, we discern no error.

Our analysis necessarily begins with KRS⁶ 403.190, the statute governing property division in dissolution actions, which states in pertinent part:

(1) 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.

(2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there

⁶ Kentucky Revised Statutes.

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.

(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

Under KRS 403.190, trial courts are generally directed to use a three-step process in dividing the marital estate:

(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties. An item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or

interests in the property on the basis of the evidence before the court. Neither title nor the form in which property is held determines the parties' interests in the property; rather, Kentucky courts have typically applied the "source of funds" rule to characterize property or to determine parties' nonmarital and marital interests in such property. 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 the property.

Gripshover v. Gripshover, 246 S.W.3d 460, 465 (Ky. 2008) (citations omitted).

Additionally, on remand the trial court was to be further guided by our decision in *Jones*. In that case, a dispute arose regarding classification and division of future payments to be received from the Tobacco Transition Payment Program (TTPP) in relation to a farm inherited by the husband prior to the parties' marriage. The parties executed a prenuptial agreement whereby they established the farm and any income produced thereby would remain the husband's nonmarital property. To effectuate a just division of the marital estate, the trial court concluded the TTPP payments were marital and used those amounts in devising its allocation of marital assets. On appeal, this Court undertook an extensive examination of the history and purpose of the TTPP payments for tobacco quota owners and tobacco growers—the husband in *Jones* was both a quota owner and grower—and found the payments to be government "compensation" for the taking of a quota owner's property interest and an income supplement or replacement stream for a grower. Based on the facts presented, this Court concluded the husband in *Jones* received the TTPP payments solely because of his nonmarital interest in the farm and the

income it produced. The trial court was, therefore, reversed and the matter remanded for entry of new orders designating the TTPP payments as nonmarital and excluding them from the marital estate. With these standards in mind, we turn to Larry's first allegation of error.

Larry contends the trial court erred in ruling Deborah was entitled to a marital share of the ASC funds after erroneously concluding *Jones* was factually distinguishable. He contends the trial court's decision is infirm as

the Court of Appeals has already determined, as did Judge Gossett in her initial Decree, that the ASC funds were, in fact, non-marital. This was found by Judge Gossett and reaffirmed by the Court of Appeals, and as such, cannot be retried. That is the law of the case, and the Trial Court upon remand was without authority to change that holding.

However, Larry misconstrues the holding in our previous Opinion as well as the law of the case doctrine.

Nowhere in our previous Opinion does this Court determine the ASC funds were marital or nonmarital. Contrary to Larry's assertion, we did not "reaffirm" Judge Gossett's holding that the ASC funds were nonmarital. In fact, the actual language of our Opinion states the funds "*may* indeed be nonmarital in nature because they stemmed directly from Larry's nonmarital asset." *Skaggs*, at *4 (emphasis added). The matter was remanded to the trial court for additional findings regarding the nature of the payments in light of *Jones*, and a recalculation of the increase in value to Larry's farm attributable to the ASC funds "*if indeed such funds were nonmarital.*" *Id.* Clearly, a determination of the marital or

nonmarital classification of these government funds was left to the sound discretion of the trial court upon reviewing and analyzing the evidence on remand. Consequently, our holding necessarily renders the law of the case doctrine inapplicable to this issue.

The law of the case doctrine is “an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.” *Union Light, Heat & Power Co. v. Blackwell’s Adm’r*, 291 S.W.2d 539, 542 (Ky. 1956). The doctrine is predicated upon the principle of finality.

The law of the case rule is a salutary rule, grounded on convenience, experience and reason. It has been often said that it would be intolerable if matters once litigated and determined finally could be relitigated between the same parties, for otherwise litigation would be interminable and a judgment supposed to finally settle the rights of the parties would be only a starting point for new litigation.

Id. The law of the case doctrine is similar to but distinct from the doctrine of *res judicata*. “There is a difference between such adherence (the law of the case doctrine) and *res adjudicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission.” *Southern Ry. Co. v. Clift*, 260 U.S. 316, 43 S.Ct. 126, 67 L.Ed. 283, 284 (1922).

Brooks v. Lexington-Fayette Urban County Housing Authority, 244 S.W.3d 747, 751 (Ky. App. 2007). There having been no adjudication by an appellate panel as

to the proper classification of the ASC funds, there can be no law of the case on the issue. Larry's unsupported contention to the contrary is without merit.

As previously stated, pursuant to KRS 403.190(3), all property acquired during a marriage is presumed to be marital in nature. The burden falls on the proponent to show a presumed marital asset is, in fact, nonmarital. KRS 403.190(2). (*See also Crawford v. Crawford*, 358 S.W.3d 16, 20 (Ky. App. 2011); *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. App. 1998)). Larry has simply not met this burden. He has likewise failed to show the trial court erred in concluding *Jones* was distinguishable and inapplicable.

Our review of the record reveals very little information was given to the trial court regarding the purpose of the ASC payments. Although Larry testified at one of his depositions the monies were "based on your tobacco quota," absolutely no evidence was presented by either party indicating these funds were intended to replace an existing income stream or as compensation of the loss of any property interest. The testimony tended to indicate the ASC funds were reimbursement for construction of barns; a later disbursement was received following the purchase of a horse trailer. Although the government funds *may* have been received solely because of Larry's ownership of the farm, no evidence was presented establishing that fact. Further, the name and/or nature of the federal program from which these funds were secured were not revealed to the trial court, nor did the trial court receive information regarding any potential qualifying events

or requirements for receiving the ASC funds.⁷ The record contains copies of determinations by the United States Department of Agriculture that Larry and Deborah were entitled to equal shares of TTPP payments related to “farms 575 and 2219” in Elliott County, Kentucky. There is no indication regarding the amount of these TTPP payments, when they were received, the purposes for which they were used, or whether they were the same funds referred to below as the ASC funds.

Based on the evidence before it, the trial court reviewed the provisions of KRS 403.190(2) and the holding in *Jones* before determining the ASC funds did not fall within any recognized exception under the statute and *Jones* was factually distinguishable and inapplicable. Supported by these determinations, the trial court concluded the ASC monies were marital as was any increase in value related to the building of the barns using such funds. The trial court clearly completed the task assigned to it on remand on this issue. The testimony adduced and the arguments advanced by the parties compelled the trial court’s ruling and we cannot say its decision was erroneous. Larry simply failed in his burden to overcome the presumption of the marital nature of the ASC funds and failed to show the trial court’s non-reliance on *Jones* was in error.

Next, Larry contends the trial court erred in concluding the Fidelity accounts had any marital component whatsoever. His argument is convoluted and unclear but appears to be centered on his assertions that the purchases were made

⁷ Regarding the horse trailer, Deborah testified she purchased it for \$9,500.00. Following the purchase, she went to the ASC office where she applied for and received a reimbursement of \$2,500.00. She indicated she “signed up” for the money and they gave it to her.

from funds withdrawn from another account and our prior Opinion mandated a finding that the purchase of the Buick, the tractor and the bulldozer were completed with nonmarital funds. We again believe Larry has misconstrued the scope of our prior Opinion and has further ignored the uncontroverted evidence of marital contributions to the Fidelity account.

A plain reading of our previous Opinion reveals we concluded the trial court had made incorrect mathematical calculations in relation to the Fidelity account. We remanded the matter to correct the distribution utilizing the correct figures, which the trial court clearly did. We did not in any way indicate the trial court should conclude the purchases were made using nonmarital funds from the Fidelity account or any other source. Although Larry presented evidence he had withdrawn nonmarital funds from another account, none of those funds were traced to the purchases at issue. The source of funds for the purchases of the Buick, tractor and bulldozer was definitively shown to be the Fidelity account at issue. Further, Larry continues to ignore the uncontroverted finding that \$27,000.00 in marital wages was deposited into the Fidelity account, a portion of which must necessarily have been used to purchase the Buick, tractor and bulldozer, as outlined in our earlier Opinion. We discern no error in the trial court's amended calculations and reject Larry's contention to the contrary.

Finally, we have considered Larry's assertion that the trial court "was terribly confused" when it considered the issues before it and prepared the March

13, 2012, order, and find it unnecessarily inflammatory and wholly without merit.

The allegation warrants no further attention.

For the foregoing reasons, the judgment of the Elliott Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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