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OPINION OF MAY 16, 2014, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001158-MR

JANICE A. IVEY HENTON — APPELLANT

v. — APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 09-CI-02049

HAMPTON HARRIS HENTON, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: Janice "Ivey" Henton appeals from the Franklin Family Court's order dissolving her marriage to Hampton "Hoppy" Henton, Jr., which classified certain property as Hoppy's non-marital property, awarded her maintenance in the amount of $750 per month for three years, and held the parties

equally responsible for debt incurred to fund a business during the marriage. We affirm.

I. Background

In 1983, Hoppy and six of his family members created Henton Farms, Inc. (HFI), a Subchapter S entity incorporated in Delaware. 26 U.S.C.A. §1362 (2007). Ten thousand shares of stock were initially issued, divided among each of the shareholders in proportion to the value of land and farm equipment he or she had contributed to HFI. Hoppy initially received 1,576 shares, and he has acted as general manager and president of HFI since its formation.

Hoppy later received a total of 2,846 shares as gifts. The parties agree that the shares Hoppy acquired upon the formation of the business and as gifts are his non-marital property. KRS 403.190.

HFI's real property initially consisted of four tracts of land, known to the shareholders as the Hilltop tract, the Milner tract, the O'Rear tract, and the Midway tract. Between HFI's formation in 1983 and 1997, there were several real estate transactions which changed the landscape of the real estate holdings. HFI sold the Midway tract in 1993, traded away the Hilltop and O'Rear tracts in 1997 for cash and a new property, the Waverly tract, and sold the Milner tract in 1999.

The shareholders changed over time, as well. Hoppy's father made gifts of shares to his three children, eventually giving all his remaining shares to Hoppy. Hoppy purchased his siblings' shares in 1993. In 1995, Hoppy's aunt and cousins

(the Maddoxes) sold their shares back to HFI, and they became unissued stock, *i.e.*, treasury stock.

These transactions and other matters will be described in greater detail where necessary to the discussion.

Ivey and Hoppy married in December of 1990. During the marriage, Hoppy gave Ivey 338 shares of HFI. The parties agree that these are her non-marital property.

From 1999 to 2003, Ivey owned and operated a retail clothing business called Hemp Universe. It amassed considerable debt, much of which was secured by HFI's real estate and $234,000 of which remained outstanding as of September 2011.

Hoppy filed a petition for dissolution of the marriage in 2009. The parties disagreed about a number of property matters, including the extent to which Hoppy's interest in HFI is marital or non-marital property, the amount of maintenance to which Ivey was entitled, and division of the marital debt incurred for Hemp Universe.

Following trial, the family court concluded Hoppy's entire interest in HFI was non-marital, awarded Ivey $750 monthly maintenance for three years, and ordered the parties to equally share the Hemp Universe debt.

Ivey appealed. She claims the family court erred in five respects: (1) classifying as non-marital the 1,222 shares Hoppy bought from his siblings; (2) not classifying as marital property the 4,050 shares of treasury stock traded in by the

Maddoxes; (3) failing to conclude the appreciation of Hoppy's interest in HFI was due to the efforts of the parties and was therefore marital property; (4) awarding her too little maintenance; and (5) splitting the marital debt equally.[1]

II. Classification of property as marital or non-marital

The first three of Ivey's arguments concern the classification of property as marital or non-marital.

> "[M]arital 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 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.

KRS 403.190(2).

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[1] Strictly speaking, Ivey has identified six reasons she believes the family court's order should be reversed. We will not be addressing one of these, the first argument presented in her appellant's brief, because it was not presented in a way that allows us to meaningfully address it. It bears minimal citation to legal authority, no explanation of the rationale which would justify reversal, and, as Hoppy notes, no statement of preservation. Under these circumstances, we are permitted to disregard the argument, and we elect to do so. *See* CR 76.12.

The standards governing the family court's classification of property have been succinctly explained:

> [A] trial court utilizes a three-step process to divide the parties' property: (1) the trial court first characterizes each item of property as marital or non[-]marital; (2) the trial court then assigns each party's non[-]marital 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 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. … The 'source of funds rule' simply means that the character of the property, *i.e.,* whether it is marital, non[-]marital, or both, is determined by the source of the funds used to acquire the property.

Sexton v. Sexton, 125 S.W.3d 258, 265 (Ky. 2004) (quotations and footnotes omitted).

Property acquired during the marriage is presumptively marital property. KRS 403.190(3). When a party to dissolution asserts that he acquired property during the marriage by exchanging non-marital property, he bears the burden of proof; he may meet this burden by "tracing" the source of the funds to non-marital property:

> "Tracing" is defined as [t]he process of tracking property's ownership or characteristics from the time of its origin to the present. In the context of tracing non[-]marital property, [w]hen the original property claimed to be non[-]marital is no longer owned, the non[-]marital claimant must trace the previously owned property into a presently owned specific asset.

Sexton, 125 S.W.3d at 266 (Ky. 2004) (footnotes and quotations omitted). Likewise, when the value of a party's non-marital property has increased during the marriage, it is the burden of that party to prove that the appreciation is non-marital. *Travis v. Travis,* 59 S.W.3d 904, 910 (Ky. 2001).

"On appellate review of a trial court's ruling regarding the classification of marital property, we review *de novo* because the trial court's classification of property as marital or non-marital is based on its application of KRS 403.190; thus, it is a question of law." *Heskett v. Heskett*, 245 S.W.3d 222, 226 (Ky. App. 2008). Findings of fact are reviewed for clear error. *Hempel v. Hempel,* 380 S.W.3d 549, 551 (Ky. App. 2012).

a. The 1,222 shares Hoppy bought from his brother and sister

The family court concluded the 1,222 shares Hoppy acquired from his siblings were his non-marital property. It found, more specifically, that in 1993, HFI had sold the Midway tract to a neighboring farm for roughly $1.2 million. The shareholders had received disbursements of that $1.2 million in proportion to their interest in HFI. Hoppy's ownership of 1,576 shares in HFI entitled him to a disbursement of $183,700 following the sale. The family court found that later in 1993 Hoppy used that money to purchase his siblings' shares. The family court was persuaded that Hoppy had adequately traced his ownership of the 1,222 shares to a non-marital source and had met his burden of proving that the 1,222 shares were his non-marital property.

Income earned from property acquired before the marriage or as a gift is non-marital unless the income is the result of either party's efforts during the marriage. KRS 403.190(2)(a). "Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift" is also non-marital. KRS 403.190(2)(b).

Ivey argues the family court improperly classified the 1,222 shares. Her rationale is not clearly stated, but it appears she believes the payment of $183,700 was marital income. On that basis, she maintains that his purchase of his siblings' 1,222 shares was made with marital property; therefore, she argues, the shares are marital property. We are not persuaded because the family court's order reflects factual findings supported by substantial evidence and correct application of the law to those facts.

Hoppy testified that the $1.2 million dollars HFI received for the Midway tract was divided among the shareholders in proportion to their respective interests in HFI. Hoppy's interest at the time, his 1,576 shares acquired upon the 1983 formation of HFI, was entirely non-marital, and Ivey concedes as much. The payment of $183,700 was non-marital income because it derived solely from Hoppy's premarital ownership interest, and not from the efforts of either party. KRS 403.190(2)(a).

It may be Ivey's position that the $187,300 payment was earned by way of Hoppy's efforts as general manager and president of HFI, and was therefore marital income. This would be incorrect. The other six shareholders who received

disbursements following the sale of the Midway tract played no role in the day-to-day operations of HFI. Their disbursements were based solely on their ownership interests, as was Hoppy's. He did not receive any additional payment due to the management positions he held within the company. The payment was due purely to his non-marital ownership interest in HFI.

Ivey presented some evidence that Hoppy had actually purchased the 1,222 shares using a loan purportedly taken out by the couple rather than from his non-marital income. The family court simply found Hoppy's evidence more convincing on the question of tracing. Because the evidence upon which the family court relied constitutes substantial evidence, the finding must be affirmed despite the existence of contrary evidence in the record. *Allen v. Kentucky Horse Racing Authority*, 136 S.W.3d 54, 59 (Ky. App. 2004) (citation omitted).

b. The 4,050 shares HFI bought from the Maddoxes

Hoppy presented evidence of the following matters to the family court in the form of testimony and documentation: In 1995, the Maddoxes agreed to sell their 4,050 shares in the company back to HFI at a rate of $88.50 per share. The 4,050 shares became treasury stock. HFI financed the trade through a combination of promissory notes and mortgages.

Ivey maintained below that the Maddox stock was actually purchased with the loan she claims to have taken out with Hoppy.

The family court was persuaded by Hoppy's evidence that HFI had purchased the Maddox shares. In other words, the shares were not Hoppy's

property at all, marital or non-marital; they were the property of the corporation. The evidence was sufficient to support the relevant factual findings, and Ivey has raised no argument on appeal which mandates reversal; she simply believes her evidence was more compelling.

The family court was likewise correct in its legal conclusion that the treasury stock was not marital property. Treasury stock "is corporate stock that … has been reacquired by the corporation by purchase, donation, forfeiture, or other means." 18A Am. Jur. 2d Corporations §367 (2013). It "becomes personal property of the company and part of its assets . . . [.]" *Id.* It does not belong to any shareholder.

We affirm on this matter.

c. Increase in value of HFI

The parties also debated the change in valuation of Hoppy's interest in HFI. Ivey claimed the value of HFI had grown approximately $7 million over the course of the marriage. Hoppy claimed any appreciation in the value of the farm operation arose from changes in the market rather than his efforts as general manager and president. *See* KRS 403.190(2)(e).

"No evidence was produced at trial relating to increase in value of HFI or Mr. Henton's interest in HFI from 1990 to 1997." (Ivey's Response to Hoppy's Petition for Rehearing, p. 2).[2] Where there is no evidence of an increase in the

[2] The original opinion in this case was rendered on May 16, 2014. Both Ivey and Hoppy filed petitions for rehearing; the former was denied but the latter granted on the basis of this point of agreement, quoted here from Ivey's response to Hoppy's petition.

value of non-marital property, there can be no issue whether its character is marital or non-marital.

Notwithstanding that it contradicts the view held by the National Conference of Commissioners on Uniform State Laws,[3] *Travis v. Travis, supra,* places the burden of proving the non-marital character of the increase in value on non-marital property on the owner of that property. Therefore, *if* there had been proof of such an increase before 1997, it would have been Hoppy's burden to prove its character. However, we believe it remains the burden of the party claiming an interest in a particular property to prove it exists in the first place. Because Ivey failed to prove the existence of an asset in the form of a pre-1997 increase in the value of Hoppy's non-marital asset, we begin the analysis with evidence of the increase attributable to events after 1997.

Expert testimony was adduced that any changes in value of Hoppy's interest in HFI after 1997 were due entirely to market forces and were not attributable to the joint efforts of the parties. Specifically, Hoppy's expert testified that between 2000 and roughly 2008, there had been yearly increases in the value of farm property in Woodford County of approximately seven percent. In the expert's

[3] Justice Cooper's dissent in *Travis* explains, convincingly, why we should follow the Commissioner's view that "once it is established that a property interest acquired during the marriage is but an increase in value of a nonmarital asset or interest, the burden shifts to the proponent of the marital interest to show that any portion of the increase was due to a marital contribution." *Travis*, 59 S.W.3d at 915 (Cooper, J., dissenting). However, this Court lacks authority to deviate from precedent established by the Kentucky Supreme Court. Supreme Court Rule (SCR) 1.030(8)(a).

opinion, HFI's farm property had enjoyed the same increase and none of it was attributable to Hoppy's or Ivey's efforts.

Ivey's expert witness substantially confirmed this testimony. He stated that farm values rose steadily until around 2007 or 2008 when they stagnated. The witness opined, however, that the increase in the value of HFI was due to more than just market forces: he knew Hoppy to be an excellent businessman and believed his management contributed to the increase in value. However, Ivey's expert conceded that he was unaware of any specific factor attributable to Hoppy which would have caused an increase in value since 1997.

The family court concluded that Hoppy's non-marital property had increased in value during the marriage, but found the increase was due entirely to market changes, rendering the appreciation non-marital property.

The family court did not enter a finding as to the value of the property on the dates of the marriage and the dissolution. Ivey argues this, too, was error and relies, principally, on *Jones v. Jones*, 245 S.W.3d 815 (Ky. App. 2008) for support. We are not persuaded.

Jones does not require a finding as to the increase in value of non-marital property during the marriage; rather, it stands for the proposition that, *upon determination* that non-marital property has increased in value due to "marital improvements," *i.e.*, improvements attributable to the joint efforts of the parties, *then*

> [t]o properly calculate the increase in value attributed to marital improvements upon property acquired before marriage, the court must subtract the fair market value of the property at the time of dissolution without marital improvements from the fair market value of the property at the time of dissolution with marital improvements.

Id. at 819. This calculation would have been necessary in the case now before us *if* the family court had found an increase in value attributable to "marital improvements," but the court found otherwise. The experts discussed values and their changes as they related to the prefatory issue of the character of the increase in value. Finding no increase in value based on the joint efforts of the parties, the family court did not err by excluding from the findings of fact the specific dollar figures upon which the experts based their opinions.

Because the family court's order does not lack necessary findings as to value and, further, because the issue of the character of the increase in value of Hoppy's non-marital property is supported by substantial evidence, we affirm on this issue.

III. Maintenance

The parties agree that Ivey is entitled to some maintenance, but disagree as to the appropriate amount. Ivey contends $750.00 per month is insufficient to meet her needs, but Hoppy maintains the family court's award was proper.

In calculating the amount and duration of a maintenance award, the family court must consider the following factors:

> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a

> child living with the party includes a sum for that party as custodian;
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (c) The standard of living established during the marriage;
>
> (d) The duration of the marriage;
>
> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
>
> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

KRS 403.200(2).

The family court found the duration of the marriage to be long, and the standard of living relatively high. It also recognized that Ivey's notable absence from the workplace would likely hinder, at least initially, her ability to obtain gainful employment. The family court balanced those factors against Ivey's prior career as an advertising executive in Chicago, her reasonably good health, her entitlement to 338 shares of HFI stock, her marital portions of Hoppy's life insurance policies ($21,500.00) and retirement account ($31,650.00). In light of these factors and the parties' financial positions, the family court found a three-year maintenance award of $750.00 per month adequate. Ivey has identified nothing which causes us to doubt the family court's decision.[4] Maintenance is not

[4] Ivey claims, without citation, that Hoppy was awarded assets valued at no less than eight million dollars. The family court made no such finding and we find Ivey's calculations suspect.

designed to last indefinitely or to require one party to wholly support the other. 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). While Ivey may have limited employment opportunities at this moment, they are not non-existent. She is not precluded from re-assessing her employment situation and obtaining employment which would allow her greater financial independence from Hoppy. We are not convinced that the family court's maintenance award amounts to an abuse of discretion.

IV. Division of marital debt

Finally, Ivey contends the family court abused its discretion when it divided the Hemp Universe debt equally between the parties. Ivey claims that in so doing the family court failed to consider her financial ability to pay the debt and failed to consider the economic circumstances of both parties.

Several factors govern the division of debt incurred during marriage. They include "such factors as receipt of benefits and extent of participation, whether the debt was incurred to purchase assets designated as marital property, and whether the debt was necessary to provide for the maintenance and support of the family[.]" *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001) (citations omitted). Another important factor is the "economic circumstances of the parties bearing on their respective abilities to assume the indebtedness." *Id.*

The family court was undoubtedly aware of each party's financial health, and there is nothing to suggest that it failed to take that factor into consideration

when allocating the Hemp Universe debt. Hemp Universe was a marital venture risked by both parties; they obtained the debt together, jointly owned the Hemp Universe stock, and were both named officers in Hemp Universe. We cannot say the family court abused its discretion when it concluded that, since the purpose of Hemp Universe was marital, the debt must be equally shared between the parties.

Ivey also seeks to hold HFI responsible for the Hemp Universe debt because, at some point, HFI secured the Hemp Universe debt and HFI made some of the loan payments on Hemp Universe's behalf. The generosity of HFI does not alter the character of the Hemp Universe debt or render it HFI's responsibility. It is a marital debt belonging to the parties, not HFI.

V. Conclusion

Ivey has raised insufficient reasons to reverse the family court's April 19, 2012 order. We affirm.

ALL CONCUR.

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