

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001894-MR

SARAH JOHNSON

APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 12-CI-00143

JAMES DENNIS JOHNSON

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Sarah Elizabeth Johnson (Sarah) appeals an order from the Letcher Circuit Court entered on September 20, 2013, with respect to the division of marital property and arrears for maintenance. For the following reasons, we affirm in part, reverse in part and remand for further proceedings.

Sarah and James Dennis Johnson (James) were married on May 20, 2006 and a divorce decree was entered on September 5, 2012. Following this decree, both parties came before the trial court disputing the distribution of marital property and the payment of debts. During the marriage, the parties established a trucking transport business, Johnson Trucking, which accounted for a large portion of the marital estate. The business assets were divided between the two parties, including trucks, tools, and other parts. No amount or value of the income from the business or the valuation of the business itself was presented. Also during the marriage, Sarah was injured in a November 2011 traffic accident, for which she was awarded a confidential personal injury settlement. The accident left Sarah unable to work, and at the time of the last hearing, she was on medical leave from her bank teller position at People's Bank and Trust and earning no income.

After extensive motions and hearings, both before the Letcher Circuit Court and the Domestic Relations Commissioner ("DRC"), all disputes over the division of marital property and any obligations to pay marital bills were consolidated before the Letcher Circuit Court. The Letcher Circuit Court issued an order on September 25, 2012 ("2012 Order"), which enumerated the marital bills James was obligated to pay. The court then issued a final order on September 20, 2013 ("2013 Final Order"), which adopted the enumeration of James' obligation from the 2012 Order, and also assigned value to some business and personal assets to be divided between the parties. Additionally, this 2013 Final Order ordered James to pay Sarah \$7,500 for marital bills, an amount the court reached by offsetting the

total arrearages due with Sarah's personal injury settlement award. From the 2013 Final Order, Sarah appeals.

Sarah makes two arguments on appeal. First, she argues that the trial court erred by failing to make specific findings of value for the marital business necessary to divide the marital estate as required by *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009). She contends that the trial court abused its discretion by only valuing business assets and not evaluating the income or worth of the business itself before assessing an equitable division as part of the marital estate pursuant to *Herrick v. Herrick*, No. 2011-CA-001086-MR, 2012 WL 4839544 (Ky. App. Oct. 12, 2012). Second, she argues that the trial court erred in offsetting the arrearage owed to her for marital bills with her personal injury settlement. She alleges that James owes her approximately \$20,133.69 plus interest for the unpaid marital bills he was ordered to pay, rather than the \$7,500 mandated in the 2013 Final Order after the offset of her personal injury settlement.

CR¹ 59.05 states: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." In general, a trial court has unlimited power to alter, amend, or vacate its judgments. *Gullion v. Gullion*, 163 S.W.3d 888, 891-92 (Ky. 2005). The Supreme Court of Kentucky has limited the grounds for relief under CR 59.05 to those established by its federal counterpart, Federal Rule of Civil Procedure 59(e). *Id.* at 893.

¹ Kentucky Rules of Civil Procedure.

There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Id. (internal footnote omitted). A trial court's ruling on a CR 59.05 motion is reviewed under an abuse of discretion standard. *Bowling v. Kentucky Dep't of Corr.*, 301 S.W.3d 478, 483 (Ky. 2009).

The first issue on appeal is whether the court erred by failing to make specific findings of value for the marital business in the division of the marital estate. The standard of review for the division of marital property is whether the trial court's decision is clearly erroneous. *Quiggins v. Quiggins*, 637 S.W.2d 666, 669 (Ky. App. 1982). KRS² 403.190(1) governs the division of marital property: "the court shall assign each spouse's property to him. It also shall divide the marital property... in just proportions considering all relevant factors." Marital property is defined as "all property acquired by either spouse subsequent to the marriage" and "[a]ll 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

² Kentucky Revised Statutes.

such as joint tenancy, tenancy in common, tenancy by the entirety, and community property.” KRS 403.190(2), (3).

The trial court's division of property involves a three-step process: (1) characterizing each item of property as marital or nonmarital; (2) assigning each party's nonmarital property to that party; and (3) equitably dividing the marital property between the parties. (Internal citations omitted).

Hunter v. Hunter, 127 S.W.3d 656, 659–60 (Ky. App. 2003). “The trial court must fix a value, and there should be an evidence-based articulation for why that is the value used.” *Gaskill v. Robbins*, 282 S.W.3d 306, 315 (Ky. 2009). “[KRS 403.190] requires only that property be divided in ‘just proportions;’ it does not require that the division be equal.” *McGowan v. McGowan*, 663 S.W.2d 219, 223 (Ky. App. 1983) (quoting *Quiggins v. Quiggins*, Ky. App., 637 S.W.2d 666 (1982)).

In this case, that Johnson Trucking was started during the marriage is a stipulated fact. Following the three-step process set forth in *Hunter*, the trial court properly characterized this business as marital property in the 2013 Final Order, to be divided according to KRS 403.190. *Hunter v. Hunter*, 127 S.W.3d 659–60. Second, the court then assigned a value to the two trucks and two trailers associated with the business, and to the other “junk” vehicles used for parts. Third, the trial court divided these assets between the parties in just proportions, with one truck and one trailer going to each party. The court also awarded “all of the items which remain in the shop area of the property to Sarah Johnson who may use these

to sell for scrap or whatever she can get out of them to pay bills which are due and owing.”

Sarah raises the issue that the trial court “neglected proper analysis of various and pertinent aspects needed to make such a determination [about the value of the business as a whole].” However, she makes no argument as to how or the amount at which the business should be valued.

Furthermore, neither party’s argument contained “a statement with reference to the record showing whether the issue was properly preserved for review, and if so, in what manner” in regards to the valuation of the marital business. CR 76.12(4)(c)(v).

Compliance with this rule permits a meaningful and efficient review by directing the reviewing court to ... where in the record the preceding court had an opportunity to correct its own error before the reviewing court considers the error itself.” *Hallis v. Hallis*, 328 S.W.3d 694, 696–97 (Ky. App. 2010). “Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]” *Id.* at 696.

Briggs v. Kreuztrager, 433 S.W.3d 355, 361 (Ky. App. 2014). Therefore, the issue of the value of the business was not properly preserved pursuant to CR 76.12(4)(c)(v), and is not properly raised on appeal. The division of property between the parties was not clearly erroneous, and we affirm the division of property set forth by the trial court.

Next, Sarah argues that the court erred in offsetting the arrears owed to her for maintenance with the personal injury settlement she received. The 2012 Order mandated that James be responsible for all payments during the pendency of this action, including but not limited to: Sarah's health insurance premium; loan payments for the Jeep and the truck awarded to Sarah in the disposition of marital property; automobile insurance for both the Jeep and truck; cable, television, and phone service from Inter Mountain Cable; cell phone service from Verizon; life insurance for Sarah; utilities from Fleming Neon Water; payment to the creditor for the building that was repossessed; residential and pool/shed utilities from American Electric Power; pool heater from Dohenys; and home owners' insurance from Kentucky Farm Bureau. James was further ordered to return the homeowners' insurance coverage to the level that existed at the time of dissolution. The 2013 Final Order adopted this enumeration and ordered that James pay these obligations until the date the 2013 Final Order was entered.³

James argues that the 2013 Final Order to pay marital bills does not constitute temporary maintenance, but rather a temporary order to satisfy marital debts. Therefore, James contends that unlike with maintenance, the arrearages could be offset with Sarah's personal injury settlement. Sarah argues that regardless of the characterization of the payment of the marital bills, the court

³ A discrepancy exists as to the date until which James must pay the marital bills. The 2012 Order states that he must pay the bills until "July 2013," at which time, "Sarah shall be responsible for any utilities and her personal bills," whereas the 2013 Final Order states that James must pay these marital bills until "this order is entered by the Clerk of the Court." Regardless of this discrepancy, James was required to pay enumerated marital bills that were not paid.

erroneously stated the amount of arrears, and that the actual amount James owes to Sarah would likely far exceed the amount of the personal injury settlement proceeds to which James would be entitled.

When offsetting the arrearage, the 2013 Final Order stated that “the entire proceeds of the settlement or judgment [Sarah] receive[d] as a result of the motor vehicle accident . . . shall be awarded solely to [her]. [James] shall not benefit in any way from the proceeds of any settlement or judgment.” Since there has been no order for maintenance, as required by KRS 403.200, and in light of the language of the 2013 Final Order,⁴ we do not characterize James’ payment of marital bills as maintenance, but rather the settlement constitutes property to be divided as both marital and nonmarital under KRS 430.190.

With regard to personal injury awards, the Supreme Court of Kentucky has said the following:

To the extent that a personal injury award for loss of earnings and permanent impairment of ability to earn money is applicable to the years while the marriage existed, it is marital property. To the extent that the award can be prorated to the remaining years of life expectancy following the dissolution of the marriage, it is nonmarital.

However, any portion of the recovery which constitutes damages for pain and suffering must stand on a different footing because it is in no sense the replacement of earnings that otherwise would have accrued during the marriage.

⁴ In the 2013 Final Order, the court states “[Sarah] has or will have sufficient funds to meet her own needs after she receives her personal injury settlement and therefore, no maintenance is awarded to [her].”

As a matter of fairness it does not seem right that upon the dissolution of the marriage one of the parties should be rewarded because the other party had the misfortune to suffer painful injuries as a result of an accident.

. . . We consider K.R.S. 403.190(2) applicable, and hold that as to pain and suffering resulting from an injury sustained during the marriage, the injured party has simply exchanged property acquired before the marriage, i.e., good health, free from pain, for the money received as compensation for the loss.

Weakley v. Weakley, 731 S.W.2d 243, 244-45 (Ky. 1987). The court in *Weakley* explicitly declined to “attempt to decide here the proper procedure for the allocation between marital and nonmarital property of a personal injury award for an injury sustained during the marriage where the settlement or judgment does not indicate what portion of the award applies to earning capacity and what portion is allocated to pain and suffering.” *Id.* at 245.

In this case, the trial court should have reviewed the confidential settlement *in camera*.⁵ If the settlement indicates the portion of the award which accounts for lost wages, only that portion of the settlement is to be divided as marital property. Furthermore, on remand, the court should evaluate the total of arrearage owed to Sarah for unpaid marital bills. Sarah argues that the amount of arrearage awarded to her, \$7,500, was an interim total, not the final total of bills owed. She argues that \$20,133.69 is the final correct total for unpaid marital bills.

⁵ In a hearing before the Letcher Circuit Court on June 13, 2013, the confidential settlement had been finalized, and the court planned to review the settlement *in camera* in order to determine the amount and characterization of the monies awarded. However, the court did not indicate in the 2013 Final Order the amount portion of the settlement to be awarded to James.

We agree that the trial court abused its discretion in offsetting the arrearage with Sarah's personal injury settlement without determining the portion, if any, of the settlement that would be divisible as marital property. We remand for the trial court to determine which, if any, portion of the settlement is lost wages, and the proper division/percentage, half of which James should be entitled to as marital property. The court must then determine the arrearage owed to Sarah in light of the evaluation of the personal injury settlement.

For the foregoing reasons, the opinion of the Letcher Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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