

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000524-MR

DENVER G. LYKINS

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 12-CI-00258

CAROLYN S. LYKINS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: D. LAMBERT, THOMPSON AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: This is an appeal from a judgment of the Carter Circuit Court as to the division of marital property in a dissolution action. After review, we vacate the circuit court's judgment and remand for further proceedings.

Appellant, Denver Lykins ("Denver"), and Appellee, Carolyn Lykins ("Carolyn"), married on September 8, 1979. They divorced on November 28,

2012, at a time when Carolyn was incarcerated. Following her release, the circuit court conducted a hearing to divide the parties' marital property.

During the hearing, Denver asserted that Carolyn dissipated marital assets. Specifically, Denver alleged that Carolyn misappropriated \$100,000.00 from his individual retirement account (IRA) and another \$65,000.00 from his employer-based retirement account at a time the parties faced financial hardship.¹ In its final judgment dated December 12, 2013, the circuit court found that Carolyn redeemed a mortgage on the parties' real estate with roughly \$70,000.00 of the \$100,000.00 withdrawal from the IRA and only \$30,000.00 "was not accounted for." The circuit court also found that Denver knew Carolyn removed \$65,000.00 from the employer-based retirement account, even though Carolyn "offered no credible evidence accounting for the disposition of those funds." Based on these findings, the circuit court concluded that it "must divide the marital property without regard to marital misconduct" and allocated the Lykins' marital property without determining whether Carolyn dissipated the funds from the retirement accounts.

Denver later filed a timely motion to alter, amend or vacate the final judgment. In this motion, he argued the circuit court failed to consider Carolyn's misconduct and the associated tax consequences when dividing the marital property. The circuit court overruled his motion on March 19, 2014, and Denver now presents similar arguments on appeal.

¹ Both parties have acknowledged that these two accounts were marital property.

KRS 403.190 governs property division during dissolution of marriage proceedings. Under that statute, the court generally may not consider marital misconduct of the parties when dividing marital property. *See* KRS 403.190(1). However, a court may consider when a party dissipates marital assets, that is, uses them for non-marital purposes (1) when there is a separation or dissolution impending and (2) where there is a clear showing of intent to deprive one's spouse of his or her proportionate share of the marital property. *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998) (citing *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987)).

Procedurally, once the spouse alleging dissipation presents sufficient evidence dissipation occurred, the spouse charged with dissipation bears the burden to account for the assets and demonstrate that he or she did not dissipate. *Brosick*, 974 S.W.2d at 502. The trial court then must make a finding concerning the amount of the dissipation proven by the preponderance of the evidence. *Id.* Furthermore, an appellate court reviews a trial court's factual findings for clear error; that is, substantial evidence must support such findings. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

Here, the circuit court found that Carolyn removed \$165,000.00 from two separate accounts: \$100,000.00 from the IRA and \$65,000.00 from the employer-based account. Of this \$165,000.00, Carolyn could account for \$70,761.03. Carolyn produced a copy of a cashier's check for \$70,761.03 and a copy of a mortgage release dated April 25, 2011. Based on these copies, the court

found Carolyn redeemed their mortgage with that check. Because these copies were sufficient to induce conviction in the mind of a reasonable person that \$70,761.03 from the IRA served a marital purpose and was not dissipated, the circuit court made a proper finding as to this amount.

As for the balance of the \$165,000.00 in withdrawals, the circuit court did not make the appropriate findings under Kentucky law. Although Carolyn argues she did not dissipate these assets because she was still living with Denver when she removed these funds and because Denver knew she removed \$65,000.00 from his employer-based account, neither of these arguments terminates the circuit court's duty to make a finding as to what happened to the funds. Dissipation can still take place even though the parties are married and living together. *See Brosick, supra*. Furthermore, dissipation can take place in anticipation of the other party filing for divorce. *Kleet v. Kleet*, 264 S.W.3d 610, 618 (Ky. App. 2007).

Denver presented evidence during the hearing and argued in its post-judgment motion that Carolyn removed these funds at a time when she was engaged in fraudulent criminal activity and usurped them for her own benefit. The circuit court then found that the balance of Carolyn's \$100,000.00 IRA withdrawal "was not accounted for" and that Carolyn "offered no credible evidence" accounting for the disposition of her \$65,000.00 withdrawal from Denver's employer-based account. Accordingly, unless Carolyn can show Denver gifted roughly \$95,000.00 to her within 18 months of their divorce, she must account for and the court must make a finding addressing the assignment of these assets.

Additionally, the Court failed to make findings to allocate the tax liability associated with the withdrawal of the IRA and pension funds.² The circuit court's failure to make these finding before dividing the marital assets was error. Therefore, we VACATE the judgment of the Carter Circuit Court and REMAND with instructions to make a specific finding on the issue of dissipation and assignment of tax liabilities.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gordon J. Dill
Ashland, Kentucky

BRIEF FOR APPELLEE:

Malenda S. Haynes
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² Carolyn asserts in her brief that this is a moot issue as the United States Tax Court has adjudicated the issues and determined that Denver has no liability concerning taxes owed for the withdrawal of his pension funds. However, no documentation supporting this position has been filed in this Court. Should it remain unresolved, the Court must make findings as to the tax debt.