

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001379-MR

CODY LEE FIELDS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 13-CI-00219

CAROL LOUISE BOGGS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Cody Lee Fields appeals the final decree in a dissolution of marriage action, arguing the circuit court erred in awarding certain funds to Carol Louise Boggs as nonmarital.

Cody and Carol were married on September 5, 2009, and separated on February 15, 2013. They did not have children. On May 22, 2013, Carol filed a petition for dissolution.

On September 2, 2013, the circuit court entered a partial decree dissolving their marriage. The circuit court reserved ruling on issues regarding division of their property and debts.

A final hearing was held on February 19, 2014. On February 27, 2014, the domestic relations commissioner filed recommendations for the final decree of dissolution. The domestic relations commissioner recommended finding: (1) \$5,067.59 of the down payment for the marital residence came from Carol's nonmarital funds which should be returned and restored to her; and (2) a savings account was comprised of nonmarital funds originating from money belonging to Carol prior to the marriage and repayment by Carol's father of a loan she made to him prior to her marriage.

Cody filed exceptions to the tendered final decree as follows:

[Cody] hereby excepts to the finding that [Carol] is entitled to \$1758.92 as nonmarital property and the finding of \$5067.59 as nonmarital interest in the property. Those sums were not sufficiently traced, therefore [Carol] is not entitled to the same.

On July 30, 2014, the circuit court overruled Cody's exceptions:

(A) [Carol] testified and filed documents evidencing that \$5,067.59 (Five Thousand, Sixty-Seven Dollars and Fifty-Nine Cents) of the down payment for the purchase of the parties' marital residence was paid out of a nonmarital CD owned by [Carol]. As such, \$5,067.59 are nonmarital funds which should be returned and restored to [Carol] by [Cody]. Therefore, [Cody's] exceptions be and the same are hereby OVERRULED.

The Court also notes that [Cody] was awarded the marital residence and all equity therein without payment

to [Carol], but for the restoration of the nonmarital down payment.

(B) [Carol] testified and produced documents demonstrating that \$1,758.92 (One Thousand, Seven Hundred Fifty-Eight Dollars and Ninety-Two Cents) represented funds from her bank account which she held prior to the marriage. Accordingly, these funds are nonmarital property to [Carol] and are to be returned and restored to her. Therefore, [Cody's] exceptions be and the same are hereby OVERRULED.

(C) The Findings of Fact, Conclusions of Law, and Final Decree of Dissolution of Marriage recommended by the Commissioner and filed herein on February 27, 2014, are ADOPTED.

Cody argues Carol failed to overcome the presumption that these assets, \$5,067.59 and \$1,758.92, are marital because “[t]he record is void of any of these assets being nonmarital in nature and as the case law requires that the person who claims nonmarital property must be able to specifically trace those items back to nonmarital funds.” Cody also argues the circuit court failed to make any findings as to how Carol traced these funds.

On appeal, Carol requested this Court permit the Letcher Circuit Court Clerk to supplement the record to include an affidavit that no video recording was made of the final hearing to explain why no references were made to specific portions of the hearing in her brief. Cody did not respond to this motion.

Our Court granted the motion, noting “[i]f the parties wish to cite to testimony given at the hearing conducted on February 19, 2014, they should refer to the process for preparing a narrative statement set forth in [Kentucky Rules of

Civil Procedure] CR 75.13.” The record was then duly supplemented to include the affidavit of a deputy clerk of the Letcher Circuit Court which stated that no video recording was made of the testimony taken during the hearing due to an unknown error.

CR 75.13(1) states in relevant part:

In the event no stenographic or electronic record of the evidence or proceedings at a hearing or trial was made or, if so, cannot be transcribed or are not clearly understandable from the tape or recording, the appellant may prepare a narrative statement thereof from the best available means, including his/her recollection, for use instead of a transcript or for use as a supplement to or in lieu of an insufficient electronic recording. This statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service upon him/her. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the trial court for settlement and approval, and as settled and approved shall be included in the record on appeal.

Although Cody properly received notice that he could prepare a narrative statement, he failed to prepare one.

When the record on appeal is incomplete, the reviewing court presumes the omitted portions of the record support the circuit court’s order.

Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985); *Commonwealth, Dep't of Highways v. Richardson*, 424 S.W.2d 601, 604 (Ky. 1967).

As our Kentucky Supreme Court clearly held in *National Dairy Products Corp. v. Rittle*, 487 S.W.2d 894, 896 (Ky. 1972), a litigant must follow the procedure of supplying a narrative statement, in the event of a deficiency, in order for a reviewing court to determine

whether he has been prejudiced. *Id.* If a party does not avail himself of that remedy, the result is that “he arrives in this court without a record of what he claims to have been the evidence.” *Id.* at 896–97.

Harper v. Commonwealth, 371 S.W.3d 763, 768 (Ky.App. 2011). Therefore, if no attempt is made by an appellant to comply with CR 75.13, we must assume the omitted portions of the record support the decision of the circuit court. *Harper*, 371 S.W.3d at 769.

The documents provided in Carol’s financial disclosure statement showed she had \$2,500.79 in her saving account before her marriage. It also supports the circuit court’s findings that Carol deposited into the account: (1) repayment of premarital loan, \$3,000; and (2) the proceeds from a premarital CD, \$5,067.59, deposited into the account three days before the down payment of \$5,700.63, was paid toward the down payment. We must assume the missing video would provide support for the circuit court’s determination that \$1,758.92 from the savings account and \$5,067.59 of the down payment on the marital residence was properly traced from premarital funds.

Accordingly, we affirm the Letcher Circuit Court’s final decree ordering the distribution of assets in this dissolution action.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Gene Smallwood, Jr.
Whitesburg, Kentucky

