

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001768-MR

NORTON DOUGLAS MUSGRAVE

APPELLANT

APPEAL FROM ELLIOTT CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 13-CI-00054

MELINDA MAE MUSGRAVE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Norton Douglas Musgrave brings this appeal from Findings of Fact, Conclusions of Laws, Decree of Dissolution of Marriage entered in the Elliott Circuit Court, Family Court Division, on October 24, 2016, allocating and dividing the parties' property. We affirm.

Norton and Melinda Mae Musgrave were married on March 20, 1999.

No children were born of the parties' marriage. Norton and Melinda separated in 2007 when Norton was arrested.¹ Although the parties physically separated in 2007, neither party sought a dissolution of the marriage until Norton filed a petition for a decree of dissolution in June of 2013. A special judge was assigned to preside over the case on August 29, 2013.

The family court conducted an evidentiary hearing on October 12, 2016, to determine the allocation and division of the parties' property.² There were only two parcels of real property owned by the parties; one parcel located in Elliot County and one parcel located in Carter County. Norton claimed that real property located at 2527 Bear Ridge in Elliot County was his non-marital property; Melinda agreed. Melinda asserted that real property located at 30 Foxhunter Road in Carter County was her non-marital property. Norton disagreed, arguing the property was marital. Norton also argued that Melinda dissipated marital property. Specifically, Norton sought recovery or compensation for several items of personal property

¹ Norton Douglas Musgrave was arrested and charged with rape in 2007. The charges leading to Norton's arrest emanated from allegations made by Melinda Mae Musgrave's daughter. Norton was incarcerated for 387 days awaiting a jury trial. Following the jury trial, Norton was acquitted and released from custody in 2008.

² Presumably, the only witnesses who testified at this hearing were the parties, although Melinda states in her brief that her aunt also testified. The record on appeal is meager at best, consisting of 37 substantive pages. The record does not contain a video record or transcript of the evidentiary hearing for review. It is Norton's duty under Kentucky Rules of Civil Procedure (CR) 75.01 and CR 98 to insure the record on appeal is sufficient for appellate review. Norton does not cite to the video hearing record in his brief, yet Melinda makes numerous cites to the "hearing tape." Accordingly, we must assume that the omitted record supports the judgment of the family court below. *Smith v. Smith*, 450 S.W.3d 729, 732 (Ky. App. 2014).

(horses, horse trailers, horse tack, dogs, guns, and some amount of cash) that he believed Melinda disposed of during his incarceration in 2007 and 2008.

The family court's Findings of Fact, Conclusions of Laws, Decree of Dissolution of Marriage were entered on October 24, 2016. As concerns the parties' real property, Norton was awarded 2527 Bear Ridge as his nonmarital property, and Melinda was awarded 30 Foxhunter Road as her nonmarital property. Thus, the only marital property to be divided was personal property. Regarding the personalty, the family court concluded the property had already been divided by agreement or otherwise no longer existed. The family court awarded each party the personal property in their possession in 2016 upon entry of the decree.³ This appeal follows.

On appeal, Norton contends the family court erred in its allocation and division of the parties' nonmarital and marital property, including certain personal property that he alleged Melinda dissipated. Norton initially asserts in his brief that the family court erroneously concluded that the Foxhunter Road property was Melinda's nonmarital property.

In Kentucky, the allocation and division of property in a dissolution of marriage proceeding is governed by Kentucky Revised Statutes (KRS) 403.190. Pursuant to KRS 403.190(3), "[a]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property

³ The family court's decree that awarded the personalty was entered almost three and one-half years after the divorce petition was filed and at least nine years after the parties separated in 2007. The purported dissipation of marital property occurred at least five to six years before the divorce petition was filed.

...” However, the presumption of marital property may be overcome by a showing that the property was acquired by a method listed in subsection (2) of KRS 403.190. Relevant herein, KRS 403.190(2)(a) provides that any property acquired during the marriage by gift to one spouse is that spouse’s nonmarital property. *Hunter v. Hunter*, 127 S.W.3d 656, 660 (Ky. App. 2003).

We note that family courts have wide discretion in resolving property division issues in divorce proceedings. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). Whether an item of property is marital or nonmarital is reviewed by this Court under a two-tiered scrutiny. *Id.* First, we review the family court’s factual findings for clear error. *Id.*; Kentucky Rules of Civil Procedure (CR) 52.01. And, a finding of fact not supported by substantial evidence is deemed clearly erroneous. *Rearden v. Rearden*, 296 S.W.3d 438, 441 (Ky. App. 2009); *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Second, we review *de novo* the family court’s legal conclusion on whether the property is determined to be marital or nonmarital. *Smith*, 235 S.W.3d at 6.

In the case *sub judice*, Melinda asserts that the Foxhunter Road property was a gift to her and, thus, her nonmarital property. Norton, as noted, argues the property is marital. It is undisputed that the property was conveyed solely to Melinda during the marriage. By deed dated June 17, 2005, Franklin and Elizabeth Haywood (Grantors) conveyed the property solely to Melinda. The deed provided that the only consideration for the conveyance of the Foxhunter Road property was the “personal support and health care” Melinda had provided to

Grantors. Norton asserts he also provided support and care to Grantors but presented no evidence to support his claim. Although the Foxhunter Road property was conveyed during the marriage, the property was conveyed solely to Melinda. And, the only consideration recited in the deed was the personal support and health care Melinda had provided to Grantors. From these facts, we cannot say the family court erred or otherwise abused its discretion by determining that the property at 30 Foxhunter Road was gifted solely to Melinda and, thus, constitutes her nonmarital property. KRS 403.190(2)(a).

Norton next argues that the family court erred by not requiring Melinda to account for certain items of personal property he believes Melinda dissipated during his incarceration (between 2007 and 2008) some nine years before the decree of dissolution of marriage was entered in 2016.

Dissipation of marital property occurs where one party to the marriage expends assets “(1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one’s spouse of 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)). And, marital property is to be divided as of the date of entry of the decree of dissolution of marriage. *Stallings v. Stallings*, 606 S.W.2d 163, 164 (Ky. 1980); *Jones v. Jones*, 245 S.W.3d 815, 819 (Ky. App. 2008).

Melinda testified at the hearing that while Norton was incarcerated between 2007 and 2008, Norton’s uncle lived on the Elliot County farm where

most of the contested personal property was located. Norton's uncle was responsible for caring for the horses and for all things attendant to the farm during Norton's incarceration. Melinda testified that at the time of Norton's arrest in 2007, she and Norton were living in Carter County and that most of the personal property at issue was located on the Elliot County farm. Melinda acknowledged that she and Norton's uncle did give away three horses when Norton was initially incarcerated because she could not afford to feed them. The record establishes that the parties have lived apart since Norton's arrest in 2007 and continued to do so after his subsequent release from incarceration in 2008. Also, we note that Norton waited until 2013 to file a petition for dissolution of marriage.

In its October 24, 2016, Findings of Fact, Conclusions of Laws, Decree of Dissolution of Marriage, the family court stated the following regarding the items of personal property:

[Norton] was incarcerated for 387 days, because of allegations made against him by [Melinda] and her daughter. He was acquitted by a Jury of the charges against him. However, he waited almost five or six years after he got out of jail and after the parties separated in order to file the divorce in 2013. He wants this Court to award him horses that have long since disappeared, dogs that have disappeared and/or died, and money and other papers that were in a lock box. He also makes claims for saddles, bridles, furniture, hay, etc. [Norton] also claims that two horse trailers have disappeared.

The evidence is quite clear that [Norton's] uncle lived on the property and took care of the property while [Norton] was incarcerated. [Melinda] denies selling the horses, but stated she gave three away, so that they could be taken care of. She received nothing for them. She

states the lock box was stolen out of the house. [Norton] states that there was \$3,000.00 in the lock box. However, his pretrial disclosure states that there was \$10,000.00 in the lock box.

. . . .

3. The COURT HEREBY FINDS that any and all other property belonging to the parties before has been divided and/or no longer exists and therefore, ORDERS that the parties shall be owners of the property currently in his or her possession and that neither party shall be responsible to the other party for any other division of property nor sums of money.

Findings of Fact, Conclusions of Laws, Decree of Dissolution of Marriage at 2-3.

Simply put, the family court determined, clearly based on lack of supporting evidence, that Melinda did not dissipate any items of personal property and, thus, awarded each party the personal property in their possession in 2016, which would have been the same personalty at the time the divorce action was filed in 2013. Under these circumstances, we cannot say the family court erred by refusing to restore or allocate property to Norton that had been disposed of almost a decade earlier.

We view any remaining contentions of error as moot or without merit.

For the foregoing reasons, the Findings of Fact, Conclusions of Laws, Decree of Dissolution of Marriage of the Elliott Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael J. Curtis
Ashland, Kentucky

BRIEF FOR APPELLEE:

Robert W. Miller
Grayson, Kentucky