

RENDERED: SEPTEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001372-ME
AND
NO. 2017-CA-001385-ME

TERESA JO MOSLEY

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM LAWRENCE FAMILY COURT
v. HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 16-CI-00043

RANDY ALLEN MOSLEY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

COMBS, JUDGE: Teresa Jo Mosley and Randy Allen Mosley appeal and cross-appeal, respectively, from the Lawrence Family Court's order and judgment dividing the parties' property and setting maintenance in their dissolution of marriage. After our review, we affirm in part, vacate in part, and remand.

Teresa and Randy were married in July 1991 and separated on

January 6, 2016. At some point later, they attempted a reconciliation but separated for a final time on July 29, 2016. During their marriage, the parties acquired four tracts of real estate: the marital home, which was purchased in 1996 for \$16,000; a rental property located on Canes Creek Road in Blaine, Kentucky, purchased in 2013 for \$10,500; a rental property in Martha, Kentucky, purchased in 2014 for \$4,000; and a rental property in Flatwoods, Kentucky, purchased in 2013 for \$14,000. The parties also owned various household items and a gun collection. The rest of the marital estate consisted of goods not relevant to this appeal.

On March 6, 2017, the family court held a final hearing to resolve issues regarding property and maintenance. Neither party introduced expert testimony concerning the value of their real estate. However, Teresa introduced the deeds to the properties and records from the Lawrence County Property Value Administrator's (PVA) Office. The PVA records showed the most recent assessed tax value of the marital home was \$35,000. Teresa testified she believed that the marital home was worth an amount between \$120,000 to \$150,000; but the only basis for her opinion was her knowledge of a nearby home which had been listed for sale at \$200,000. Teresa believed that the Canes Creek and Martha properties were worth at least their purchase price, but she did not provide any basis for that opinion. She also testified that the parties invested \$15,000 in improvements to the Flatwoods property, leading her to speculate that it was worth "at least" \$50,000.

Teresa requested that the family court order the parties' real property to be sold and the proceeds to be divided equally.

Randy testified that he could sell the marital residence for \$80,000 if he "had to sell it quick"; that the Canes Creek property was "probably" worth \$8,000; and that did he not believe that the Flatwoods property could be sold for more than \$20,000. Randy did not explain his basis for these opinions. Nor did he give an opinion concerning the value of the Martha property. Nonetheless, he requested that the family court equitably divide the real estate between the parties.

When asked about the gun collection, Randy estimated there were eleven to twelve guns in the collection but that he had "no idea" of its total value. However, he testified that the firearms were stored in a gun safe purchased for \$800 and that the most expensive gun he owned was purchased for \$600. When asked to give a "ball park value," Randy estimated that the gun collection was worth approximately \$1,500 to \$1,600.

The family court also heard testimony regarding Teresa's romantic relationship, which Randy claimed was an extramarital affair. Randy testified that he believed Teresa's relationship with her current boyfriend had begun before the parties' initial separation, but he conceded that he did not have any direct evidence to support his suspicion. Teresa admitted that she met her current boyfriend prior to the parties' separation on January 6, 2016, but she claimed that the relationship

did not develop into a romance until late February or early March of 2016. Teresa also denied that the relationship was romantic during the brief tenure of reconciliation with Randy. On cross-examination, she admitted that the home address she provided to her current employer in Floyd Knobbs, Indiana, was actually the location of her boyfriend's home in Louisville, Kentucky. However, she denied ever cohabitating with her boyfriend. She asserted that she lived in Georgetown, Kentucky, during her separation from Randy. She testified that she used a Louisville address for work because she feared she would not have been hired if her employer had known the distance between her home and place of employment.

The family court took the matter under submission and subsequently entered a written order and judgment. Its written findings of fact largely recapitulated the testimony set forth above. The family court stated that Teresa valued the Martha property at \$6,000 while Randy valued it at \$4,000. However, in light of Teresa's testimony that she believed the Martha property was worth its purchase price (\$4,000) and Randy's lack of testimony on the matter, the basis for this finding is unclear. The family court also found that the parties owned a second rental property on Canes Creek valued at \$9,000; however, there was no evidence to support this finding.

Based on this interpretation of the testimony, the family court

concluded that the combined value of the marital residence plus the three rentals was \$136,000. The family court did not separately value each piece of real estate or explain which evidence upon which it was relying to reach or to support this finding. The family court ultimately awarded the marital home plus the rentals to Randy and ordered him to pay Teresa \$68,000 in consideration for her equitable interest in the properties. The gun collection and safe were also awarded to Randy, but Teresa received all of the household items she requested. After considering the factors set forth in KRS¹ 403.200(2), the family court found that Teresa should receive \$500 per month in maintenance for four years. However, it concluded that she was cohabitating with her boyfriend; thus, it reduced her maintenance to \$250 per month for four years.

Both parties subsequently moved to alter, amend, or vacate the family court's order and judgment. The family court granted Randy's motion to the extent that it requested the court to delete the reference to the second Canes Creek rental, acknowledging as erroneous its finding that the parties owned two rental properties on Canes Creek. It then reduced the value of the marital home plus the three rental properties to \$125,000 and Teresa's equitable interest to \$62,500. Because the value assigned to the "second" Canes Creek rental was \$9,000, it is unclear why the family court reduced the total value by \$11,000. The family court

¹ Kentucky Revised Statutes.

rejected Teresa's contention that its valuation of the marital property was legally insufficient, stating it had taken the parties' testimony into consideration when determining value. The trial also denied both parties' challenge to its maintenance award. These appeals followed.

On appeal, Teresa asserts four grounds as error for our consideration. First, she contends that the family court inappropriately valued the marital estate plus the three rental properties when neither party was qualified to testify or to offer an opinion regarding the value of real property. Second, she argues that the court erred in awarding Randy the gun collection and the gun safe without receiving any competent evidence regarding its value. Third, she claims that the family court improperly delegated its fact-finding authority to Randy by signing his proposed order without review. Fourth, she argues that the family court's finding that she cohabitated with her boyfriend lacked any evidentiary support. Teresa asks us to remand this case to the family court so that it can either order the property be sold or that an expert be retained to value the real property and the gun collection. She also requests that we reverse the court's reduction in her maintenance. In his cross-appeal, Randy argues that the family court should not have awarded Teresa **any** maintenance after finding that she had cohabitated with her boyfriend.

In a dissolution proceeding, the trial court must divide the parties'

marital property in just proportions after considering all the relevant factors. KRS 403.190(1). “[A] trial court has wide discretion in dividing marital property; and we may not disturb the trial court’s rulings on property-division issues unless the trial court has abused its discretion.” *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). The test for abuse of discretion is whether the trial court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). A trial court’s finding with respect to the value of a marital asset may not be disturbed unless clearly erroneous. *Purdom v. Purdom*, 498 S.W.2d 131, 133 (Ky. 1973).

Clear error cannot be found when the trial court’s valuation of marital property is within the range of estimates provided by competent testimony. *Roberts v. Roberts*, 587 S.W.2d 281, 283 (Ky. App. 1979). A party to a dissolution proceeding can provide competent testimony regarding the value of the parties’ real property as long as he or she provides “some qualification for giving an opinion[.]” *Id.* If the parties present their proof with “grossly insufficient” evidence concerning the value of the property involved, “the trial court should either order this proof to be obtained, appoint his own experts to furnish this value, at the cost of the parties, or direct that the property be sold.” *Jones v. Jones*, 245 S.W.3d 815, 820 (Ky. App. 2008) (quoting *Robinson v. Robinson*, 569 S.W.2d 178, 180 (Ky. App. 1978), *overruled on other grounds by Brandenburg v.*

Brandenburg, 617 S.W.2d 871 (Ky. App. 1981)).

After carefully reviewing the record, we are compelled to hold that the family court erred in valuing the marital residence and rental properties at \$125,000. Although this figure was within the range of the parties' testimony, neither Teresa nor Randy testified to having any qualification to give an opinion on the value of the marital residence and three rental properties. Moreover, the family court's representation of Teresa's and Randy's valuation of the Martha property did not wholly reflect their actual testimony. The parties' testimony is the only evidence the family court explicitly stated that it took into consideration when dividing these properties. The marital residence and three rental properties were the primary marital assets, which were required to be divided in just proportions. The equitable interest allotted to Teresa was based on testimony that was not competent as to valuation of the marital residence and three rental properties. Under these circumstances, it was an abuse of discretion to award all of these properties to Randy in exchange for the \$62,500 given to Teresa.

Therefore, that portion of the family court's order and judgment dividing the marital residence plus the three rental properties must be vacated and remanded. If the trial court concludes on remand that the record contains grossly insufficient proof regarding the value of the parties' real property, it must order that this proof be obtained, appoint its own experts at the cost of the parties, or

order the property sold. *Jones*, 245 S.W.3d at 820.

However, we cannot agree that the court abused its discretion by awarding Randy the gun collection and gun safe. The family court attempted to divide the value of the parties' personal property equitably. It awarded Teresa all the household items she requested. Although Teresa complains that there was not any competent evidence to value the gun collection, Randy provided **at least some** qualification for his opinion that it was worth approximately \$1,500 to \$1,600. He testified that the gun safe was purchased for \$800 and that the most expensive firearm he owned cost \$600. Teresa made no attempt to value the gun collection. "[A] party should not complain when she offers no proof of value, and when there is some basis for the competency of the proof offered by the joint owner of the property." *Roberts v. Roberts*, 587 S.W.2d 281, 283 (Ky. App. 1979). Again, the family court was not required to divide the marital property equally – but rather equitably. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). Under the circumstances, the family court did not abuse its discretion in dividing the marital personal property in just proportions by awarding Randy the gun collection and gun safe.

We also hold that the record does not support Teresa's accusation that the family court simply signed the proposed findings of fact provided by Randy's counsel. A trial court may permit an attorney to draft findings of fact and

conclusions of law as long as it does not “abdicate its fact-finding and decision-making responsibility under CR 52.01.” *Bingham v. Bingham*, 628 S.W.2d 628, 629-30 (Ky. 1982). Indeed, the family court’s award of maintenance to Teresa over Randy’s objection refutes any accusation that it delegated to either party its duty to find facts and to draw conclusions of law independently.

Finally, we agree with Teresa that the trial court abused its discretion with respect to its maintenance order. The amount and duration of a maintenance award are within the sound discretion of the trial court, and an appellate court may reverse only if the trial court’s factual findings were clearly erroneous or if it abused its discretion. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). A trial court may award maintenance if it finds that the spouse seeking maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment. KRS 403.200(1)(a)-(b). A maintenance award must be for an amount and for a length of time that the trial court deems just after considering all the relevant factors. KRS 403.200(2). Although fault cannot be considered in determining whether a party is entitled to maintenance, it can be considered when determining the *amount* of maintenance to be awarded. *Chapman v. Chapman*, 498 S.W.2d 134, 138 (Ky. 1973).

As noted earlier, the family court initially awarded maintenance of \$500 per month for four years to Teresa. It then summarily slashed that amount to

\$250 per month because it believed that she had been cohabitating with her boyfriend and accordingly penalized her for this “fault.” We hold that it erred in doing so.

There was no evidence other than Randy’s bare allegation that Teresa had been romantically involved with another man at the time the marriage unraveled. On the contrary, she openly admitted to the relationship following her separation from Randy. Thus, fault cannot be imputed or assumed. *Chapman, supra*.

There is no evidence that Teresa has been financially enriched or sustained by her new boyfriend so as to make an award of maintenance unnecessary or to cause it to be deemed a windfall to her. *Combs v. Combs*, 787 S.W.2d 260 (Ky. 1990).

In his cross-appeal, Randy urges us to deny all maintenance. We disagree. Despite Randy’s accusations and demand that Teresa receive no maintenance, we are persuaded that the court **erred in reducing** its original maintenance award in the absence of evidence to support a finding of fault in mitigation of its previous determination of entitlement. On remand, we direct that the family court reinstate its maintenance award of \$500 per month for a period of four years.

To recapitulate, we hold that the family court acted within its

discretion except as to the division of the parties' real property and its reduction of its maintenance order. Therefore, we affirm in part, vacate in part, and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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