RENDERED: OCTOBER 18, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001357-MR
AND
NO. 2016-CA-001590-MR

STEPHEN K. BAILEY — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM GREENUP CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE DAVID D. FLATT, SPECIAL JUDGE
ACTION NO. 13-CI-00471

REBECCA BAILEY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Stephen K. Bailey appeals from Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage entered August 8, 2016, by the Greenup Circuit Court, Family Court Division, regarding the

characterization and division of property. Rebecca Bailey cross-appeals, arguing her maintenance award is insufficient. We affirm as to both appeals.

BACKGROUND

Stephen and Rebecca were married in December 1980. On August 4, 2014, an interlocutory decree dissolving the marriage was entered, with the court reserving property division issues for future orders. The family court conducted an evidentiary hearing on December 2, 2015, and the parties submitted post-hearing memoranda afterwards. On August 8, 2016, the family court issued its Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage. Stephen soon thereafter filed his appeal and Rebecca later timely filed her cross-appeal. We shall resolve both appeals in this opinion.

On appeal, Stephen argues the court erred in the following four ways: 1) classifying a 155-acre tract of real estate as Rebecca's nonmarital property; 2) alternatively, failing to find the appreciation of the 155-acre tract during the marriage to be a marital asset; 3) improperly valuing a roofing and remodeling business Stephen and Rebecca jointly owned; and 4) concluding the parties' business would have made $320,000 income during the pendency of the dissolution proceedings, and awarding Rebecca half thereof. Rebecca's cross-appeal is limited to the sole argument that her $250 per month maintenance award is insufficient.

STANDARDS OF REVIEW

In Kentucky, the allocation and division of property in a divorce proceeding is governed by Kentucky Revised Statutes (KRS) 403.190. Pursuant to KRS 403.190, the family court must engage in a three-step process when addressing property issues in a divorce. *Sexton v. Sexton*, 125 S.W.3d 258, 264-65 (Ky. 2004). First, the family court shall characterize each item of property as either marital or nonmarital; second, the court shall assign each party their nonmarital property; and third, the court must equitably divide the marital property. *Id.* There exists a presumption that property acquired by either party during the marriage is marital property; conversely, property acquired before the marriage is generally nonmarital property. KRS 403.190(3). As with nearly every rule there are exceptions and relevant herein is the exception which provides that property acquired during the marriage by gift to one spouse is nonmarital property. KRS 403.190(2)(a); *Hunter v. Hunter*, 127 S.W.3d 656 (Ky. App. 2003). And, a gift of nonmarital property to a spouse may be made either by a third party or by the other spouse. *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. App. 1980).

Upon dividing the property in accordance with KRS 403.190, we then review whether the family court's findings of fact are clearly erroneous pursuant to Kentucky Rules of Civil Procedure (CR) 52.01. 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). We further review *de novo* the family court's legal conclusions on whether the property is determined to be marital or nonmarital. *Smith v. Smith*, 235 S.W.3d 1 (Ky. App. 2006).

ANALYSIS

As noted, Stephen raises four issues on appeal. We will address each as follows:

(i) Nonmarital Real Estate

The real property at issue in this case is a 155-acre tract of land upon which the marital residence is located. The property was acquired by Rebecca by deed during the marriage in December 2003. However, the family court concluded that this real estate was Rebecca's nonmarital property based upon a finding that Stephen had gifted his interest in the property to Rebecca during the marriage. The record does contain a signed, notarized document styled "Assignment" dated November 24, 2003, by which Stephen assigned his interest in a Land Sale Contract for the property to Rebecca (Defendant's Exh. 3).[1] Further, the record contains a deed dated December 4, 2003, whereby the property was conveyed to

[1] Apparently, the property had been purchased by Stephen K. Bailey and Rebecca Bailey pursuant to a Land Sale Contract entered into in 1993 and the final transfer by deed to Rebecca only was consummated in December 2003. Stephen transferred his interest in the property to Rebecca by way of the assignment.

Rebecca, individually (Defendant's Exh. 4). Both of these documents were duly recorded in the Greenup County Clerk's Office. The documents, along with other evidence such as Rebecca's testimony that Stephen gifted his interest in the land to her, provided substantial evidence for the family court to conclude that the land was Rebecca's nonmarital property. Finding no error, we affirm.

(ii) Increase in Value of Nonmarital Real Estate During Marriage

In the alternative, Stephen contends that the increase in the 155-acre tract's value during the marriage should be deemed a marital asset, even if the land itself is found to be Rebecca's nonmarital property. Stephen argues that at least some of the property's increase in value is attributable to his having allegedly "cleared the land and built a home and garages" on it and "continued to improve the land increasing [its] value," and so the increased value should be deemed a marital asset. Stephen's Brief at 3.

However, Stephen's argument contains no citation to the record to support his position. We will not sift through a record, including viewing the entirety of a lengthy evidentiary hearing, to look for potential evidence which may support a party's arguments. Instead, the parties to the appeal have the burden and duty under CR 76.12(4)(c)(v) to support their arguments with sufficient citations to

the record.[2] *Smith*, 235 S.W.3d at 5. More importantly, Stephen fails to cite to any evidence in the record below establishing the fair market value of the land and how much any increase in value during the marriage was due to actual improvements made by Stephen as opposed to mere appreciation in value over time due to economic conditions.[3] *See, e.g.*, *Maclean v. Middleton*, 419 S.W.3d 755 (Ky. App. 2014); KRS 403.190(2)(a) (providing that property acquired after the marriage via gift is nonmarital and so is the income or increased value thereof "unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom"). Thus, we find no error in the family court's conclusion that any increase in value of the nonmarital property during the marriage is also nonmarital.

[2] The entirety of Stephen's argument in his appellant's brief fails to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Each argument presented is conclusory and underdeveloped--indeed, two arguments contain no citations to the record and the other two each contain only minimal, passing references to the record. While this Court could strike Steven's brief under CR 76.12(8), we have declined to do so and nonetheless considered the appeal on the merits.

[3] In an earlier section of his brief, Stephen cites to his testimony at the final hearing to show that the land was improved. But that citation provides no material assistance to Stephen as it only addresses the uncontested fact that improvements were made to the land after the parties acquired it. The cited testimony does not detail what specific role Stephen played in making the improvements or the increase in value of the land attributable to Stephen's labors. And, Stephen's testimony contained repeated references to improvements "we" (presumably he and Rebecca) made. Trial video 12/2/2015 at 9:20:00 *et seq.*

(iii) Business Valuation

Stephen's next argument is that the family court's valuation of the business must be reversed because it is arbitrary and not supported by the evidence presented. We disagree.

Stephen's expert valued the business at $14,425, using only the tax returns provided by Stephen as a foundation for his conclusions. The court found that valuation "totally lacking in credibility" because Stephen had provided the expert no documents beyond tax returns, a problem rendered more acute by the uncontested fact that Stephen operated the business primarily on a cash basis. The court concluded Stephen's expert's valuation was "entirely too low" because it did not reflect the parties' previous "lifestyle and purchases." Record at 254. The family court was equally unpersuaded by Rebecca's expert's $198,785 valuation, concluding it was too high, being based solely upon information provided by Rebecca as opposed to authenticated business records. Seemingly frustrated by the parties' lack of documentary evidence and competent testimony to establish the value of the business, the family court concluded that both parties' expert valuations were without evidentiary support or merit.

Thus, the family court held as follows:

> This places the Court in the uncomfortable position of having no credible evidence as to what Tri-State Roofing and Remodeling's actual fair market value is. Based upon the Parties['] expenditures and lifestyle and

> apparent lack of significant debt, the Court finds the business to be valued at $90,000.00.

Record at 254. Stephen argues the $90,000 figure cannot stand as it was computed without any evidentiary basis. We agree, to the limited extent that there was no evidence presented which exactly valued the business at $90,000. However, we disagree that the family court's valuation was improper.

As the Kentucky Supreme Court has noted, valuing a business is a complex, subjective task. *Gaskill v. Robbins*, 282 S.W.3d 306, 311 (Ky. 2009). Due to the inherent difficulty of that job, we look only to see if a lower court "reasonably approximated" a business's value, *Clark v. Clark*, 782 S.W.2d 56, 59 (Ky. App. 1990), using the clearly erroneous standard. *See, e.g., Gomez v. Gomez*, 168 S.W.3d 51, 56 (Ky. App. 2005).

In this case, neither party presented substantial expert proof that the family court could reasonably rely upon. Based upon the evidence presented, the family court chose a value within the range of the parties' experts' opinions (in fact, the valuation was less than the average for the two opinions). For nearly forty years this Court has affirmed business valuations so long as they fell within the range of competent evidence, even if the trial court's valuation did not precisely align with any evidence of record. *See, e.g., Underwood v. Underwood*, 836

S.W.2d 439, 444 (Ky. App. 1992);[4] *Roberts v. Roberts*, 587 S.W.2d 281, 283 (Ky. App. 1979). Accepting Stephen's argument would require us to hold that a family court could not weigh the evidence to fashion its own valuation, but rather must accept an exact valuation offered by either of the parties. We decline to so restrictively bind a family court's inherent discretion in valuing a business based upon the facts and circumstances of this case.

Before leaving this topic, we must determine whether *Gaskill*, relied upon by Stephen in his brief, requires a different result. *Gaskill* involved how to properly measure the goodwill of a professional medical practice in a case where the wife was the sole physician.[5] One expert in *Gaskill*, 282 S.W.3d at 315, based his valuation on the average of four different valuation methods. The Court found the trial court could not rely on that expert's valuation because using an average is "nothing more than making up a number, for there is no evidentiary basis to support that *specific* number." *Id.*

However, there is a difference between a family court weighing conflicting evidence as in this case and arriving at a valuation within the range of

[4] *Underwood v. Underwood*, 836 S.W.2d 439, 444 (Ky. App. 1992) was overruled in part on unrelated grounds by *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001); *Neidlinger* was overruled in part on another unrelated ground by *Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018).

[5] The family court here did not explicitly include any value for the business's goodwill in our case. The parties do not request relief based upon that omission, or the fact that the family court did not explain how much of its valuation was due to any specific factors, such as tangible assets, accounts receivable, etc.

the evidence presented versus adopting an expert's opinion that is based entirely upon his/her valuation on an average of different valuation models. The Supreme Court in *Gaskill* did not address precedent, such as *Roberts* and *Underwood*, which explicitly permit a trial court to use its discretion to reach a valuation within the range of values offered by the evidence. We are confident that if the Supreme Court intended to bind trial courts in the manner posited by Stephen it would have directly addressed, and likely overruled, *Underwood* and *Roberts*. Thus, we distinguish the application of *Gaskill* to this case as it looks more to the proposition that the opinion of an expert must be based upon specific, accepted accounting and valuation methods, not merely averaging various methods.

In other words, *Gaskill* does not entitle Stephen to relief. The family court in this case was limited by the lack of substantial evidence to support either party's valuation argument. Accordingly, the family court permissibly chose a valuation within the range of the evidence presented and explained its reasons for doing so. Again, we find no error and affirm.

(iv) Business Income During the Divorce Proceeding

Stephen's final argument challenges the award of $160,000 in business income to Rebecca during the three-year tenure of the divorce proceeding. Stephen argues that the family court erred in determining the business earned $320,000 during the pendency of the divorce action.

We begin our analysis by noting that the family court's conclusions seem to contain a mathematical or typographical error. The court concluded the business earned $120,000 per year during the divorce. The court then held:

> [H]ad the husband properly carried out business activity, not attempted to shut the business down, and complied with the Order of the Court to keep business funds in a special account that the wife would be entitled to receive the sum of One Hundred Sixty Thousand Dollars ($160,000.00) from said account as her share of the business proceeds earned during the pendency of this action, (being Sixty Thousand Dollars ($60,000.00) per year for the Wife's share.).

Record at 255. The petition for dissolution was filed in July 2013, and the Findings of Fact, Conclusions of Law and Decree of Dissolution were filed just over three years later, in August 2016. Thus, if the business earned (or should have earned) $120,000 per year for those three years, then it would have earned a total of $360,000. Thereupon, Rebecca and Stephen's shares would be $180,000 each, not $160,000 as awarded to Rebecca. Remarkably, neither party on appeal has raised this issue.[6] Thus to the extent the family court did err in its computation, the error has been waived and we decline to address further the matter *sua sponte* and will base our review on the $160,000 award. *See, e.g., Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

[6] Neither party cites to the record in this section of their respective briefs.

The evidence presented established that the business provided the sole means of support for the parties during the marriage. The family court then concluded that Stephen dissipated marital funds during the pendency of the divorce by: keeping minimal business records, operating the business on a cash basis, failing to comply with the court's order requiring him to place business funds into a segregated account, and not providing any money from the business to Rebecca. Those conclusions are supported by the record. During the divorce, Stephen was found in contempt and incarcerated for failing to comply with the court's order regarding the placement of business funds in a separate bank account. Stephen admitted during his testimony at the final hearing that he had operated the business on primarily a cash basis during the pendency of the divorce. And, Rebecca did not receive any of the money generated by the business during the divorce. Trial video, 12/2/15 at 11:30:09 *et seq.* Stephen also admitted at the hearing to having slowed down the operations of the business during the divorce. Trial video, 12/2/15 at 10:09:29 *et seq.* In fact, Rebecca's son-in-law, who formerly worked for Stephen's and Rebecca's business, testified that he left the company because Stephen said he was going to shut it down until after the divorce. Trial video, 12/2/15 at 6:57:40.

The intentional slowdown in business operations coupled with the almost complete lack of proper business and banking records and Stephen's

flagrant disregard of the court's order mandating using a separate account for the business made it impossible for the family court to determine accurately how much money the business made, or should have made, during the divorce. Therefore, the family court was forced to approximate the business's income. Accordingly, the family court made a thorough review of the parties' tax returns that were placed into evidence. Those returns showed the business listed gross receipts of $131,730 on its 2010 income tax return, $159,040 in its 2011 return and $134,690 in its 2012 return. The family court also considered the expenses of the business during the period of the divorce as well as the personal nature of some of the deductions that were being claimed on the returns, including commissions paid to the parties as income and automobile related expenses for their personal autos. The family court's conclusion that Rebecca would be entitled to $160,000 of business earnings during the pendency of the divorce, had Stephen properly carried out the business activity and complied with court orders to separate business funds in a special account, is supported by substantial evidence, for which we find no error.

Cross-Appeal

In her cross-appeal, Rebecca argues the family court's award of $250 per month maintenance for her life, or until she remarries, is inadequate. We disagree.[7]

Like Stephen, we begin by noting the failure of Rebecca to comply with CR 76.12(4)(c)(v) as concerns her argument on this issue in her brief. The argument consists of three paragraphs with no supporting reference to the record nor citation of legal authority relied upon. As a general rule in this Court, fleeting, unsupported and underdeveloped arguments on appeal are normally not sufficient to merit relief. *Jones v. Livesay*, 551 S.W.3d 47, 51-52 (Ky. App. 2018).[8]

Notwithstanding, the family court below stated that it considered:

> [T]he financial resources of the Wife, including the marital property apportioned to her, and her ability to meet her needs independently, the time necessary to acquire sufficient education or training to enable the Wife to find appropriate employment, the standard of living established during the marriage, the duration of the marriage, the age and the physical and emotional condition of the Wife, and the ability of the Husband to meet his needs while meeting those of the spouse seeking maintenance.

[7] Again, there is a typographical error in the pertinent ruling as at one point the court orders Stephen to pay Rebecca "Two Hundred Fifty Dollars ($2,50.00) per month." Record at 256. Later, however, the court stated clearly that Stephen owed Rebecca "Two Hundred Fifty Dollars ($250.00) per month." Record at 258. We are convinced the reference to $2,50.00 reflects a stray comma.

[8] Stephen did not file a response brief to Rebecca's cross-appeal brief.

Record at 256. Those are the basic factors listed in KRS 403.200 for determining if maintenance is proper and, if so, in what amount and duration. A trial court has wide discretion in determining the amount of maintenance to award. *See, e.g.*, *Age v. Age*, 340 S.W.3d 88, 95 (Ky. App. 2011).

Rebecca's remarkably short argument addresses none of the statutory factors in sufficient detail, nor does it cite to relevant evidence of record showing how the family court abused its discretion in making this award. Accordingly, given the extremely conclusory nature of Rebecca's argument and the family court's statement that it considered the statutory proper factors (*sub silentio*), in accordance with KRS 403.200, we find no abuse of discretion and affirm the family court's ruling on this issue.

CONCLUSION

For the foregoing reasons, the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage of Greenup Circuit Court, Family Court Division, is affirmed as to Appeal No. 2016-CA-001357-MR and Cross-Appeal No. 2016-CA-001590-MR.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:	BRIEF FOR APPELLEE/CROSS-APPELLANT:
Matthew J. Warnock Greenup, Kentucky	Robert W. Miller Grayson, Kentucky