RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001164-MR

DONALD EUGENE COX — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 15-CI-00319

CONNIE MARIE GAITHER COX — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: Donald Eugene Cox appeals from the Marion Circuit Court's order dissolving his marriage to Connie Marie Gaither Cox, awarding marital and non-marital property to the parties, and dividing the marital debt. After reviewing the record in conjunction with applicable legal authority, we affirm in part, reverse in part, and remand.

BACKGROUND

Donald and Connie married on April 27, 2002, and Donald filed a petition for dissolution of marriage on December 29, 2015 (the "Petition"). The parties apparently reconciled for a brief time before permanently separating on November 18, 2016. Connie thereafter filed a response to the Petition on December 27, 2016. After holding an evidentiary hearing on June 18, 2018, the circuit court entered findings of fact, conclusions of law and decree of dissolution on July 2, 2018 (the "Original Decree") and amended findings of fact, conclusions of law and decree of dissolution on July 5, 2018, correcting a typographical error contained in the Original Decree (the "Decree").

Donald filed a motion to alter, amend or vacate on July 13, 2018, and a notice of appeal on August 1, 2018. Thereafter, the circuit court entered a calendar order noting that it had lost jurisdiction of the case once Donald filed his notice of appeal and therefore the circuit court would not rule on Donald's motion to alter, amend or vacate. *See Wright v. Ecolab, Inc.*, 461 S.W.3d 753, 755 (Ky. 2015) (the filing of a notice of appeal divests the circuit court of jurisdiction over a case and transfers that jurisdiction to the Court of Appeals).

a. The Forest Property

The real property at issue in this appeal involves a rental property located at 213 South Forest Street, Lebanon, Kentucky (the "Forest Property").

Donald owned the Forest Property free and clear of any encumbrances prior to the parties' marriage. Donald and Connie mortgaged the Forest Property in 2013 for $31,600.00.

The circuit court noted that neither party introduced expert testimony at the hearing concerning the fair market value of the Forest Property. The only evidence Donald produced was an exhibit from the Marion County Property Value Administrator's Office (the "PVA") dated January 11, 2017, and purporting to list the assessed value of the Forest Property at $48,000.00. Additionally, Donald's tax returns showed improvements to the Forest Property in July of 2008 valued at $2,600.00, in July of 2009 valued at $24,820.00, in July of 2010 valued at $7,179.00, in July of 2011 valued at $2,650.00, in July of 2012 valued at $7,000.00, and in July of 2013 valued at $3,645.00, for a total of $47,894.00 spent in improvements to the Forest Property.

After taking the matter under submission, the circuit court found that neither party provided sufficient evidence of the fair market value of the Forest Property, and therefore the circuit court was unable to apply the formula described in *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. App. 1981). Ultimately, the circuit court found that the parties financed the Forest Property specifically to pay for the improvements to the Forest Property as reflected on the income tax returns. As a result, the circuit court determined that the only way to value the

parties' equity in the Forest Property for marital property division purposes was to subtract the mortgage amount owed on the Forest Property at the time of the Decree ($29,463.00) from the total cost of the improvements to the Forest Property as depicted for depreciation purposes on Donald's income tax return ($47,894.00), resulting in divisible marital equity of $18,431.00. The circuit court awarded the Forest Property to Donald in the property division and ordered that Donald assume the remaining indebtedness owed on the Forest Property.

b. Farmers National Bank Account

In the Decree, the circuit court discussed a bank account at Farmers National Bank ("FNB") (the "Farmers Account") opened by Donald with a value of $40,000.00. In August of 2006, Donald was involved in a motor vehicle accident and, as a result of such accident, Donald received a lump sum settlement of $800,000.00 and other structured settlements. In his brief, Donald claims that he cashed in one of his structured settlements in December of 2016, and argues that the settlement money was deposited into the Farmers Account. Consequently, Donald maintains that all the funds in the Farmers Account were proceeds from his pain and suffering settlement, which are non-marital assets under Kentucky law. In the decree, the circuit court found the Farmers Account to be a marital asset subject to equitable division but made no other findings attempting to trace the funds back to Donald's structured settlement.

c. Division of Marital Debt

The parties constructed a home during their marriage located at 24 Mount Airy Drive, Lebanon, Kentucky (the "Mount Airy Property"). The parties opened a line of credit with FNB and used the Mount Airy Property as collateral. The circuit court found no marital equity in the Mount Airy Property, as it determined that funds from the settlement were used to pay the original loan on the lot and to build the home. The circuit court found that Donald should therefore receive the Mount Airy Property and be responsible for the entire line of credit debt owed to FNB, which was approximately $78,208.01 at the time of the Decree.

ISSUES

In his appeal, Donald claims that (1) the circuit court incorrectly found the existence of marital equity in the Forest Property and, in the alternative, incorrectly calculated the amount of each parties' marital equity in the Forest Property, (2) the circuit court erred when it found that the Farmers Account was a marital asset, and (3) the circuit court erred when it assigned to Donald the remaining mortgage debt on the Forest Property and the remaining line of credit debt on the Mount Airy Property rather than dividing such debts between the parties.

ANALYSIS

As a preliminary matter, in contravention of Kentucky Rule of Civil Procedure ("CR") 76.12(4)(c)(iv), Donald's "Statement of the Case" in his brief failed to include "ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings . . . supporting each of the statements narrated in the summary." Further, as required by CR 76.12(4)(c)(v), nowhere can this Court discern in the "Argument" section of Donald's brief any specific citations to the record on appeal supporting each of his arguments or references to the record showing whether the issue was properly preserved for review.

In *Hallis v. Hallis*, a panel of this Court explained:

> It is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated.

328 S.W.3d 694, 696 (Ky. App. 2010) (internal quotation marks and citation omitted). The Court in *Hallis* further stated that, in situations such as these, an appellate court has the following options: "(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Id.* (citing *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990)).

In this case, the shortcomings in Donald's brief do not warrant striking his brief or reviewing the appeal solely for manifest injustice. Although we have elected not to impose the more severe options permitted under *Hallis* and CR 76.12, we advise counsel our decision may not be so lenient upon the occurrence of subsequent violations of this Court's procedural rules.

a. Determination of Marital and Non-Marital Property

When the division of property is at issue, the classification of that property by the circuit court as marital or non-marital is a required threshold task. *Sexton v. Sexton*, 125 S.W.3d 258, 264-65 (Ky. 2004). Kentucky Revised Statute ("KRS") 403.190(1) instructs the circuit court to first classify each item of property as marital or non-marital, and to then assign each spouse the non-marital property belonging to such spouse. *Snodgrass v. Snodgrass*, 297 S.W.3d 878, 887 (Ky. App. 2009). Further, KRS 403.190(1) requires a circuit court to divide the marital property in "'just proportions;' it does not require that the division be equal." *McGowan v. McGowan*, 663 S.W.2d 219, 223 (Ky. App. 1983) (citing *Quiggins v. Quiggins*, 637 S.W.2d 666 (Ky. App. 1982)).

All property acquired during the marriage is presumed to be marital property unless shown to fall under one of the exceptions contained in KRS 403.190(2). *Sexton*, 125 S.W.3d at 266. KRS 403.190(2) states that "marital

property" is "all property acquired by either spouse subsequent to the marriage," but excludes:

> (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
>
> (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (c) Property acquired by a spouse after a decree of legal separation;
>
> (d) Property excluded by valid agreement of the parties; and
>
> (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

Of course, "[a]n item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court." *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001). "A party claiming that property acquired during the marriage is other than marital property, bears the burden of proof." *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002) (citations omitted). As a result, "a party asserting that he or she should receive appreciation upon a nonmarital contribution as his or her

nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution." *Travis*, 59 S.W.3d at 910 (citation omitted).

A circuit 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) (citation omitted). Alternatively, a circuit court's determination of whether a particular item of property is non-marital or marital is subject, on appeal, to "a two-tiered scrutiny." *Id.* A circuit court's factual findings are reviewed for clear error. *Id.*; *see also* CR 52.01. A finding of fact not supported by substantial evidence, or evidence "sufficient to induce conviction in the mind of a reasonable person[,]" is deemed clearly erroneous. *Rearden v. Rearden*, 296 S.W.3d 438, 441 (Ky. App. 2009) (citation omitted). We grant a circuit court's factual findings appropriate deference, as the trial judge is in the best position to judge the credibility of the witnesses and to weigh evidence. CR 52.01. We review the circuit court's ultimate legal conclusions classifying items as marital or non-marital *de novo*. *Smith*, 235 S.W.3d at 6 (citation omitted).

i. <u>The Forest Property</u>

With the foregoing standards in mind, we first address Donald's claims of error regarding the Forest Property. Donald argues that the Forest

Property contained no marital equity for the following reasons: (1) he owned the Forest Property free and clear of all encumbrances prior to his marriage to Connie, (2) after the parties mortgaged the Forest Property in 2013, all of the mortgage payments, homeowners' insurance premiums, and property taxes were paid only with the rental income from the Forest Property, and (3) the amounts reported on the income tax returns were expended for general repairs and not for any improvements that increased the value of the Forest Property. Finally, Donald argues that, even if marital equity existed in the Forest Property, the method by which the circuit court arrived at its valuation of the amount of Connie's marital interest was not appropriate, as simply adding up the amounts listed on the parties' 2016 tax return and assuming the amount spent increased the value of the home dollar-for-dollar was not an accurate way to determine each parties' interest in the Forest Property.

In this case, the property interest at issue is the equity in the Forest Property, a non-marital asset that Donald received without encumbrances prior to the parties' marriage. As explained in a panel of this Court's decision, "[a]s used in KRS 403.190 in referring to restoration of the property of each spouse, the word 'property' means equity." *Robinson v. Robinson*, 569 S.W.2d 178, 181 (Ky. App. 1978), *overruled on other grounds by Brandenburg*, 617 S.W.2d at 873. Here, while Donald introduced the exhibit from the PVA with the Forest Property's

assessed value, Kentucky cases have noted that "[i]n determining the value of land … assessed value, though not conclusive, can be considered *in connection with other evidence of value of property*." *Id.* at 180 (emphasis added) (quoting *Commonwealth, Dep't of Highways v. Rankin*, 346 S.W.2d 714, 717 (Ky. 1960)). Therefore, we agree with the circuit court that neither party produced sufficient evidence as to the fair market value of the Forest Property.

However, rather than requiring the parties to produce proof of the Forest Property's fair market value, the circuit court essentially equated the actual cost of the parties' improvements to the Forest Property with the Forest Property's fair market value. We view this as clear error. As stated by a panel of this Court in *Jones v. Jones*, "the actual cost of improvements may be considered as evidence bearing upon fair market value but should not be the sole factor." 245 S.W.3d 815, 820 (Ky. App. 2008). Rather, Kentucky courts have held that if there is "grossly insufficient" evidence concerning the value of the property involved, "the trial court should either order this proof to be obtained, appoint [its] own experts to furnish this value, at the cost of the parties, or direct that the property be sold." *Id*. (quoting *Robinson*, 569 S.W.2d at 180).

Here, the circuit court was required to determine the Forest Property's fair market value based on substantial evidence in order to determine the parties' equity in the Forest Property, which equity was the very property interest needing

categorization as marital or non-marital; ultimately, there was simply no way in which the circuit court could accurately fix the value of the property which was the subject of the action due to the lack of evidence.

However, we do agree with the circuit court's assessment that any equity in the Forest Property is marital. As defined in *Brandenburg*, a party's "nonmarital contribution" is "the equity in the property at the time of marriage, plus any amount expended after marriage . . . from traceable nonmarital funds in the reduction of mortgage principal, and/or the value of improvements made to the property from such nonmarital funds." *Brandenburg*, 617 S.W.2d at 872. In this case, Donald provided no evidence of the fair market value upon his acquisition of the Forest Property, nor did he provide evidence of the Forest Property's fair market value on the date of the parties' marriage. Moreover, he provided no evidence of, nor was he specifically able to trace, any payments he made on the Forest Property or any improvements he made to the Forest Property prior to the parties' marriage.

Alternatively, the *Brandenburg* Court defines "marital contribution" as "the amount expended after marriage from other than nonmarital funds in the reduction of mortgage principal, plus the value of all improvements made to the property after marriage from other than nonmarital funds." *Id*. Here, Donald testified that all payments on the Forest Property's mortgage and other expenses

were made from the rent received. Income received during a marriage from an individual's non-marital property constitutes marital property. *Brunson v. Brunson*, 569 S.W.2d 173, 178 (Ky. App. 1978). Further, Donald was unable to trace any of the funds used for the improvements to the Forest Property to non-marital funds.

Finally, as previously discussed, under both *Terwilliger* and *Travis*, Donald bore the burden of proving that any portion of the equity or appreciation in value of the Forest Property was non-marital property. In *Travis*, the Supreme Court of Kentucky found that KRS 403.190(3) "placed the burden on [a]ppellant to show an increase in value as a result of general economic circumstances" and because he had not done so, he had failed to rebut the assumption that the property was marital in nature. *Travis*, 59 S.W.3d at 912-13. Likewise, Donald failed to meet this burden. Therefore, the circuit court correctly found that the total amount of equity in the Forest Property was divisible marital property.

Therefore, we reverse that portion of the Decree valuing the Forest Property. Upon remand, the circuit court should use one of the methods described in *Jones* to determine the Forest Property's fair market value. Any amount of equity calculated by using such fair market value is divisible as marital equity.

As a side note, Donald's arguments appear to confuse the Forest Property with another property involved in the Decree, 307 Hancock Street (the

"Hancock Street Property"). We assume that this was a typographical error, as the circuit court awarded the Hancock Street Property to Donald as a non-marital asset free and clear of any claim or interest by Connie and found no marital property or interest in the Hancock Street Property.

ii. <u>The Farmers Account</u>

Donald next argues that the Farmers Account was not marital property, as he claims that the entire amount in the Farmers Account could be traced back to the settlement money from his personal injury claim. Under Kentucky law, any portion of a recovery which constitutes damages for pain and suffering is non-marital. *Weakley v. Weakley*, 731 S.W.2d 243, 245 (Ky. 1987).

As previously discussed, KRS 403.190(2)(b) defines marital property, in part, as "all property acquired by either spouse subsequent to the marriage except: . . . (b) Property acquired in exchange for property acquired before the marriage[.]" Numerous Kentucky decisions have construed this statutory provision and from these decisions there has emerged the concept of "tracing." *Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990). "Tracing" is defined as "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present." *Sexton*, 125 S.W.3d at 266 (citation omitted). In the context of tracing non-marital property, "[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the

previously owned property into a presently owned specific asset." *Id*. (citations omitted). Moreover, non-marital funds which have been commingled with marital funds may be traced by showing that the balance of the commingled account "was never reduced below the amount of the nonmarital funds[.]" *Allen v. Allen*, 584 S.W.2d 599, 600 (Ky. App. 1979).

In this case, this Court can discern no evidence to sufficiently trace the amounts from Donald's pain and suffering settlement to the $40,000.00 balance in the Farmers Bank Account. He provided no bank records or other information in the record sufficient enough to permit a meaningful review. Moreover, while Donald argues in his brief that he deposited $135,616.08 of his settlement funds into the Farmers Account, the balance in the Farmers Account as of the date of the Decree was $40,000.00, a reduction below the amount of the non-marital funds that Donald claims he deposited into the Farmers Account. As stated in *Travis*, the burden of production was Donald's to prove that he could trace the $40,000.00, or any portion of the $40,000.00, to his original non-marital contribution, and he did not meet this burden. Therefore, the circuit court's determination was not clearly erroneous, and we affirm the circuit court's characterization of the funds in the Farmers Account as marital.

b. Division of Debt

Donald's final argument is that the circuit court erred in assigning him the remaining mortgage debt on the Forest Property and the remaining line of credit debt on the Mount Airy Property, as the circuit court's assignment of those debts was not a division "in just proportions" pursuant to KRS 403.190(1). Issues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001), *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018).

Unlike marital property, the Supreme Court has noted that "[t]here is no statutory authority for assigning debts" in a dissolution action, "[n]or is there a statutory presumption as to whether debts incurred during the marriage are marital or nonmarital in nature." *Id*. at 522. Further, there is no presumption that debts must be divided equally or in the same proportion as the marital property. *Id*. at 523. Rather, debts acquired during the marriage "are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation, whether the debt was incurred to purchase assets designated as marital property, and whether the debt was necessary to provide for the maintenance and support of the family." *Id*. (citations omitted).

The record in this case is sparse concerning the *Neidlinger* factors, and Donald fails to cite this Court to any specific evidence concerning the receipt of the benefits of either of the debts nor whether the debts were necessary to provide for the maintenance and support of the family. In his brief, Donald argues that he testified at the hearing that the funds from the mortgage obtained on the Forest Property were used for living expenses, payment of debts, and to make the Forest Property rentable. We cannot review this testimony, as a video of the June 18, 2018 hearing was not included in the record. Therefore, we are again left with scant evidence, and certainly not enough to say that the circuit court's decision was arbitrary or an abuse of discretion due to the lack of documentation or evidence concerning Connie's participation in or receipt of benefits from the loan. *See Smith*, 235 S.W.3d at 15. Therefore, we affirm the circuit court's decision regarding the division of marital debt.

CONCLUSION

In conclusion, we reverse and remand the portion of the circuit court's decree valuing the Forest Property and remand for further proceedings consistent with this Opinion. We affirm the circuit court's conclusions that any equity in the Forest Property and the Farmers Account are marital property subject to equitable division, as well as the circuit court's division of the marital debt.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elmer J. George
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Dawn L. McCauley
Lebanon, Kentucky