

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001379-MR

JOHN NORRIS

APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT,
FAMILY DIVISION
v. HONORABLE PAMELA K. ADDINGTON, JUDGE
ACTION NO. 17-CI-00631

TAMMY NORRIS

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: GOODWINE, TAYLOR, AND K. THOMPSON, JUDGES.

GOODWINE, JUDGE: John Norris (“John”) appeals from the findings of fact, conclusions of law, and decree of dissolution of marriage entered by the Hardin Circuit Court, Family Division on September 11, 2018. John argues the family court abused its discretion by failing to characterize his and Tammy Norris’s (“Tammy”) retirement accounts as marital or nonmarital, failing to divide their

retirement accounts in just proportions, and arbitrarily characterizing personal property as marital or nonmarital. After careful review, we affirm in part, reverse in part, and remand.

BACKGROUND

John and Tammy were married on August 26, 2000 in Hardin County. They separated around December 2016. On September 11, 2018, the family court entered findings of fact, conclusions of law, and a decree of dissolution of the marriage. Pertinent to this appeal, the family court awarded John and Tammy their respective retirement accounts and characterized and divided the parties' personal property. To divide the parties' marital personal property, the family court ordered Tammy to draft two lists of their personal property and allowed John to choose his preferred list. Following the entry of the decree, the parties entered an agreed order indicating which list each party received. This appeal followed.

On appeal, John argues: the family court erred in (1) failing to characterize the parties' retirement accounts as marital or nonmarital prior to awarding each party their respective retirement accounts and failing to divide them in just proportion and (2) arbitrarily characterizing property as marital or nonmarital and ordering each party to choose a list of personal property drafted by Tammy.

Before we reach the merits of John’s arguments on appeal, we must address the deficiencies in his brief. “There are rules and guidelines for filing appellate briefs. Appellants must follow these rules and guidelines, or risk their brief being stricken, and appeal dismissed, by the appellate court.” *Koester v. Koester*, 569 S.W.3d 412, 413 (Ky. App. 2019) (citing CR¹ 76.12). John’s brief fails to “reference to the record showing whether the issue was properly preserved for review and, if so, in what manner” as required by CR 76.12(4)(c)(v). “It is not the function or responsibility of this court to scour the record on appeal to ensure that an issue has been preserved.” *Koester*, 569 S.W.3d at 415 (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003)). Our procedural rules “are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination.” *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007) (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)). Therefore, an appellant’s compliance with this rule allows us to undergo “meaningful and efficient review by directing the reviewing court to the most important aspects of the appeal[,] [such as] what facts are important and where they can be found in the record[.]” *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010).

¹ Kentucky Rules of Civil Procedure.

John's failure to comply with CR 76.12 hinders our ability to review his arguments. *See Hallis*, 328 S.W.3d at 695-97. "Our options when an appellate advocate fails to abide by the rules are: (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[.]" *Hallis*, 328 S.W.3d at 696 (citation omitted). The fatal flaw in John's brief is his failure to include a preservation statement for the issues raised. Based on John's error, we review for manifest injustice only. *See Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). "[T]he required showing is probability of a different result or error so fundamental as to threaten a [party's] entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

First, John argues the family court erred in dividing the parties' retirement accounts without following the three-step process required by KRS² 403.190. Tammy argues the family court lacked sufficient evidence to determine the source of the funds and characterize the retirement accounts, and the family court made a good faith effort to conform with KRS 403.190(1). In dividing a couple's property, family courts are required to: (1) characterize "each item of property as marital or nonmarital;" (2) assign "each party's nonmarital property to that party;" and (3) "equitably divide[] the marital property between the parties."

² Kentucky Revised Statutes.

Sexton v. Sexton, 125 S.W.3d 258, 265 (Ky. 2004) (quoting *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001)). In characterizing property, Kentucky courts apply the “‘source of funds’ rule . . . to determine parties’ nonmarital and marital interests in such property.” *Travis*, 59 S.W.3d at 909. “The ‘source of funds rule’ simply means that the character of the property, *i.e.*, whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire property.” *Id.* at 909 n.10.

Although John fails to indicate how this error was preserved, the family court’s judgment merely provides: “[Tammy] and [John] shall be awarded their respective retirement accounts.” R. at 147. The family court clearly failed to follow the three-step process in dividing the parties’ retirement accounts and failed to apply the source of funds rule as required under Kentucky law. As such, we hold the trial court erred in failing to characterize the parties’ retirement accounts before assigning them their respective nonmarital portions and dividing the marital portions of their retirement accounts.

John also argues the family court erred in characterizing the parties’ personal property as marital or nonmarital and ordering each party to choose a list of marital personal property drafted by Tammy. As to the lists of marital property drafted by Tammy, the record indicates John did not object to this method of division at any time before the family court. It is well-established that

“a party may not raise an issue for the first time on appeal.” *Sunrise Children’s Services, Inc. v. Kentucky Unemployment Insurance Commission*, 515 S.W.3d 186, 192 (Ky. App. 2016) (citation omitted). John did not request review for palpable error, so we decline to address this argument.

It is unclear whether John’s argument regarding the parties’ nonmarital property was preserved below. It appears John contested the characterization of some items of personal property but agreed that many of the items were nonmarital property. Even if John properly preserved this issue, his argument on appeal lacks specificity. Although John “is obviously dissatisfied with the trial court’s decision, threadbare recitals of the elements of a legal theory, supported by mere conclusory statements, form an insufficient basis upon which this Court can grant relief.” *Jones v. Livesay*, 551 S.W.3d 47, 52 (Ky. App. 2018). Apart from reciting applicable law regarding setting aside a family court’s decision to equitably divide marital property, John advances nothing of substance in support of his contention. We will not scour the record to construct John’s argument for him.

Based on the foregoing analysis, we affirm in part and reverse in part the judgment of the Hardin Circuit Court, Family Division. This case is remanded with instructions to follow *Sexton* and KRS 403.190 in dividing the parties’ retirement accounts.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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