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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0657-MR

RANDOLPH ALLEN

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
FAMILY DIVISION
HONORABLE DWIGHT S. MARSHALL, JUDGE
ACTION NO. 18-CI-00625

ANITA HALE ALLEN

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: ACREE, EASTON, AND GOODWINE, JUDGES.

GOODWINE, JUDGE: Randolph Allen (“Randy”) appeals the Floyd Circuit Court, Family Division’s March 23, 2023 findings of fact, conclusions of law, and final order. We affirm, in part; reverse, in part; and remand.¹

¹ By agreement of the parties, the family court entered a bifurcated decree dissolving the marriage but reserving all other issues on December 28, 2022.

BACKGROUND

Randy petitioned for the dissolution of his marriage to Anita Hale Allen (“Anita”) on September 25, 2018. The parties were married for over eighteen years before their separation in 2017. One child, now an adult, was born of the marriage.

The family court was required to dispose of several assets in the dissolution. During a two-day trial, the court heard extensive arguments regarding the marital and nonmarital nature of the property and how each party wished for the marital estate to be divided. Thereafter, the court entered a twenty-four-page order with extensive findings of fact and conclusions of law regarding the assignment of nonmarital property and division of the marital estate.

In the relevant part, the court found the land at Ed Hale Branch (“Ed Hale land”) on which the parties built their marital home is Anita’s nonmarital property. The court found any claim that the land is marital property is barred by *res judicata* because of a prior partition suit, Floyd Circuit Court action No. 02-CI-00920. Record (“R.”) at 540.

During his testimony, Randy introduced deeds to fourteen parcels of real property purchased during the marriage (“Allen Resources properties”). *Id.* at Petitioner’s Exhibits 3, 8-15, 18-20. The court found:

Randy also entered deeds showing that Anita had conveyed her interest in these properties to Randy and

that Randy had executed deeds placing these properties in the name of Allen Resources, LLC. (Petitioner's Exhibits 16, 17, 22, 23, 24, 25, and 26.) Randy asserted during his testimony that Anita had conveyed the properties to him because she didn't want to be liable should there be any lawsuits involving said properties. Anita testified that she remembers that there was a lawsuit involving one of the properties and that she didn't want any liability for the property involved in that suit, but that she neither knew nor understood that she was signing away her rights to claim the properties as marital in the event of a dissolution of the marriage between the parties.

Id. at 487-88. The court denied Randy's nonmarital claim to the properties. The court was convinced by Anita's testimony and found she did not knowingly waive her marital interest because "she did not understand that she was signing away all future claims to these properties in the event of a divorce[.]" *Id.* at 502. The court allowed Randy to retain ownership of the properties but included their \$139,000.00 value in the marital estate.

The family court considered the value of Anita's dental practice and the land and buildings that comprise the practice as separate assets. The parties stipulated the value of the practice, including equipment, as \$166,393.00. *Id.* at 496. The court found this to be marital property. *Id.* Randy presented evidence of a mortgage Anita took out before the marriage using the dental practice land as collateral. He alleged the mortgage was paid off during the marriage. The family court made no findings regarding the mortgage but found Anita owned the land

and buildings before the marriage, making them her nonmarital property. R. at 488.

Finally, the family court found Anita opened and funded a Morgan Stanley account during the marriage. The balance as of July 31, 2022, was \$178,985.86. *Id.* at 492. The parties both testified that Anita solely contributed to the account. Anita claimed she used the fund to pay for their adult child's college expenses and planned to gift the child the remaining balance upon graduation. The court awarded the account to Anita and ordered: "the balance of the account shall be held for the benefit of the child." *Id.* at 500.

Rather than separately dividing the value of each marital asset, the family court considered the total value of the marital estate. The court ordered Anita to pay Randy \$178,578.58 as an equalization payment. *Id.* at 503.

The family court denied Randy's subsequent motion under CR² 59.05. This appeal followed. Additional facts will be developed as necessary in the discussion below.

STANDARD OF REVIEW

When a case is tried without a jury, "the court shall find the facts specifically and state separately its conclusions of law thereon and render an

² Kentucky Rules of Civil Procedure.

appropriate judgment[.]” CR 52.01. We will not set aside a family court’s findings of fact unless they are clearly erroneous. *Id.* Where a family court’s findings are supported by substantial evidence, they are not clearly erroneous. *Barber v. Bradley*, 505 S.W.3d 749, 754 (Ky. 2016) (citation omitted). “[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court.” *Id.* (citation omitted). Where findings are not clearly erroneous, we will only consider whether they support the family court’s conclusions of law. *Id.* We review a court’s legal conclusions, including the determination of whether the property is marital or nonmarital, *de novo*. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006) (footnote omitted). We review the division of the marital estate for abuse of discretion. *Wilder v. Wilder*, 294 S.W.3d 449, 452 (Ky. App. 2009) (citation omitted).

ANALYSIS

On appeal, Randy argues: (1) *res judicata* does not prohibit the family court from considering whether the Ed Hale land is marital property; (2) the Allen Resources properties are Randy’s nonmarital property under KRS³ 403.190(2)(d); (3) the family court erroneously awarded Anita the entire value of the dental practice land and buildings even though the parties paid off a mortgage

³ Kentucky Revised Statutes.

on the property during the marriage; and (4) the family court improperly awarded the entire Morgan Stanley account to Anita.

Disposition of property in dissolution actions is controlled by KRS 403.190. Under the statute, the family court must engage in a three-step process to divide property. *Sexton v. Sexton*, 125 S.W.3d 258, 264-65 (Ky. 2004) (footnote omitted). First, the family court determines whether the property is marital or nonmarital in nature. *Id.* Property acquired during the marriage is presumed marital. KRS 403.190(3). A party may rebut the presumption by proving the applicability of one of the exceptions listed in KRS 403.190(2). Second, the court must assign each party his or her nonmarital property. *Sexton*, 125 S.W.3d at 264-65 (footnote omitted). Finally, the family court must equitably divide the marital estate. *Id.*

First, Randy argues the family court was not barred by *res judicata* from considering whether the Ed Hale land was marital property. The family court based its decision on a prior partition action in which the parties were involved. In the prior action, Randy and Anita filed suit against her two sisters and their spouses. They petitioned for partition of land Anita's parents, Edgar and Bobby Jean Hale, deeded to their daughters, and requested Anita's one-third share of the land. In the 2005 final judgment in that action, the trial court found Anita's parents deeded all their property to their daughters in 1988. The court found each daughter

had a one-third interest in the land. Based on the stipulation of the sisters, the court divided the land according to a map attached to its order. The court further held Randy had no present interest in the land and any “interest was only an expectancy of an interest or future interest contingent upon him surviving his wife.” R. at Respondent’s Exhibit 7. According to the order, the master commissioner executed deeds to the sisters.

Randy introduced two deeds executed in 2007. The first is a corrected master commissioner’s deed conveying Anita’s share to “Anita Hall Allen and Randy Allen, married[.]” Petitioner’s Exhibit 6. The second is a deed conveying a parcel of land from Anita’s sister, Gwendolyn, and her husband to both Anita and Randy. Petitioner’s Exhibit 7.⁴ It appears from the record that these parcels, together, make up the Ed Hale land which is now at issue.

Res judicata operates to prevent repetitious lawsuits on the same claims. *Price v. Yellow Cab Co. of Louisville*, 365 S.W.3d 588, 591 (Ky. App. 2012) (citation omitted). “[A] judgment on the merits in a prior suit involving the same parties or their privies bars a subsequent suit based upon the same cause of action.” *Id.* (citation omitted).

⁴ It is not immediately apparent from the evidence whether the land conveyed by Gwendolyn and her husband is the entirety of her one-third share or some portion of it. It is also unclear why Gwendolyn conveyed her land to the parties after the trial court’s decision in the partition suit and execution of the master commissioner’s deeds.

The general rule for determining the question of *res judicata* as between parties in actions embraces several conditions. First, there must be identity of the parties. Second, there must be identity of the two causes of action. Third, the action must be decided on its merits. In short, the rule of *res judicata* does not act as a bar if there are different issues or the questions of law presented are different.

Id. at 591-92 (citation omitted). Identity of parties requires the parties be the same or privies of the parties to the prior case. *See BTC Leasing, Inc. v. Martin*, 685 S.W.2d 191, 197 (Ky. App. 1984) (citation omitted). “Identity of causes of action means an identity of the facts creating the right of action and of the evidence necessary to sustain each action.” *Hashemian v. Louisville Regional Airport Authority*, 493 S.W.3d 843, 846 (Ky. App. 2016) (internal quotation marks and citations omitted).

Here, *res judicata* does not apply because the two actions present entirely different issues and questions of law. The first was an action for partition of real property whereas the second was a claim for division of property in a dissolution action. Discrete evidence is required to prove each of these claims. In the partition action, the trial court considered only the deed executed by Anita’s parents in 1988 to determine each daughter’s interest in the property. According to that deed, Randy had no interest in the land. While the 1988 deed may have been determinative of the partition action, neither it nor any other deed is controlling in a family court’s decision of whether the property is marital or nonmarital in nature.

See Hunter v. Hunter, 127 S.W.3d 656, 660 (Ky. App. 2003) (citing KRS 403.190(3)); *see also Sexton*, 125 S.W.3d at 264 (footnotes omitted) (“The disposition of parties’ property in a dissolution-of-marriage action is governed by KRS 403.190, and neither record title nor the form in which it is held . . . is controlling or determinative.”).

Instead, in a dissolution, the family court must use the “source of funds rule” to determine the marital or nonmarital nature of property. *Id.* at 265 (footnote omitted). This means whether property is “marital, nonmarital, or both, is determined by the source of the funds used to acquire the property.” *Id.* (footnote omitted). Furthermore, a party may claim a nonmarital interest in property acquired during the marriage under KRS 403.190(2). The evidence necessary to decide such claims is distinct from that considered by the trial court in the partition action. Therefore, *res judicata* does not bar the family court from determining the marital or nonmarital nature of the Ed Hale land under KRS 403.190.

As an appellate court, we are not in the position to make this determination. Although the decision of whether property is marital or nonmarital is a question of law, the family court must find facts which support such a conclusion. *Smith*, 235 S.W.3d at 6 (footnote omitted). While the partition suit does not bar this claim, it may be considered as evidence of the nature of the land

under KRS 403.190. It appears Anita may be able to prove the land was a gift from her parents under KRS 403.190(2)(a). The deeds executed during the marriage may support Randy's claim that he now has more than an expectancy interest in at least some portion of the land.⁵ The family court is in the best position to weigh evidence. *Smith*, 235 S.W.3d at 6 (footnote omitted). For this reason, we remand this matter for a determination of the marital or nonmarital nature of the Ed Hale land.

Next, Randy claims the Allen Resources properties are his nonmarital properties under KRS 403.190(2)(d). In the deeds conveying Anita's interests in the properties to Randy, she agreed "[a]s a further consideration the Grantor relinquishes any and all claims that she may be able to assert in the future in the event of a dissolution of the marriage of the parties hereto that the foregoing tract would be or may become marital property." R. at Petitioner's Exhibit 24.⁶ Both parties signed the deeds in the presence of a notary.

The events which led to the execution of the deeds on the Allen Resources properties are not in dispute. A tenant of one of the properties filed a lawsuit against Randy. Anita did not want to be involved in the litigation and was

⁵ It is especially unclear whether there is a marital interest in the land conveyed to both parties from Gwendolyn.

⁶ The same or similar language was used by the parties in all of the deeds to the Allen Resources properties.

concerned that her dental practice could be put at risk by this or any future lawsuit. On this basis, the parties executed the deeds and Randy deeded the properties to Allen Resources, LLC. During her testimony, Anita acknowledged that she signed the deeds of her own volition. She did not claim fraud, coercion, or duress. She argues she signed the deeds without reading them but assumed she was signing documents for the creation of Allen Resources, LLC.

Property acquired during the marriage can be excluded from the marital estate “by valid agreement of the parties[.]” KRS 403.190(2)(d). Agreements between married parties are enforceable like any other contracts. *See Nelson v. Mahurin*, 994 S.W.2d 10, 15 (Ky. App. 1998) (citing *Gentry v. Gentry*, 798 S.W.2d 928, 934 (Ky. 1990)). Deeds are interpreted under the same general rules as courts use for contract interpretation. *Williams v. City of Kuttawa*, 466 S.W.3d 505, 510 (Ky. App. 2015) (citation omitted). Like a contract, where there is no ambiguity in the terms, we confine our analysis to the four corners of the deed and give words their ordinary meaning to determine the intention of the parties. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 600 (Ky. App. 2006) (footnotes omitted). “A court may not substitute what grantor may have intended to say for what was said.” *Phelps v. Sledd*, 479 S.W.2d 894, 896 (Ky. 1972) (citation omitted). We will assume the parties to a deed “intended each of its provisions to have some effect from the very fact that the words were used.” *Id.*

Furthermore, it is well-settled that if a party has the opportunity to read a contract, does not do so, but signs it, he “is bound to the contract terms unless there was some fraud in the process of obtaining his signature.” *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764, 766 (Ky. App. 1985). If we allow a party to evade enforcement of a contract simply by claiming he did not read what he signed, “contracts would not be worth the paper on which they are written.” *J.I. Case Threshing Mach. Co. v. Mattingly*, 134 S.W. 1131, 1133 (Ky. 1911) (citation omitted).

The terms of the deeds to the Allen Resources properties unambiguously state Anita relinquished any claim to the property in the event of a divorce between the parties. Anita did not claim fraud. Her claim that she should not be bound by the terms of their agreement because she chose not to read them has no basis in law. The family court cannot disregard the unambiguous terms to which Anita agreed in favor of what she claimed to intend. We must give effect to the provision as it is written. On this basis, the Allen Resources properties are Randy’s nonmarital property under KRS 403.190(2)(d).

Next, Randy argues some portion of the buildings and land on which Anita’s dental practice sits is marital in nature. *Brandenburg v. Brandenburg*, 617 S.W.2d 871, 872 (Ky. App. 1981), sets out a formula for apportioning the marital

and nonmarital shares of a single asset.⁷ However, the formula can be applied only where the parties have presented the court with sufficient proof. *See Atkisson v. Atkisson*, 298 S.W.3d 858, 862-63 (Ky. App. 2009). Randy claims he should be awarded some part of the marital portion of the value of Anita’s dental practice’s buildings and land. “Marital contribution” is defined within the *Brandenburg* formula 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.” *Brandenburg*, 617 S.W.2d at 872.

Randy presented the court with a document listing the terms for a mortgage on the dental practice property, which was executed on November 5, 1995. R. at Petitioner’s Exhibit 48. Therein, Anita promised to make “59 payments of \$1,217.12 due monthly beginning 12/07/95. 1 final payment of \$97,298.62 due 11/07/00[.]” *Id.* The parties were married on December 31, 1998. Randy reasons that he is entitled to a calculation of marital interest based on a

⁷ Anita argues this issue is not properly preserved under Kentucky Rules of Appellate Procedure 32(A)(4). Randy states “[t]his issue was preserved by Randy’s Motion to Alter, Amend, and Vacate at TR 507, Appendix 2.” He uses the same statement of preservation for each of his arguments. We caution counsel that “a party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of judgment.” *D.W. Wilburn, Inc. v. H&H Painting, LLC*, 648 S.W.3d 687, 693 (Ky. App. 2022). Our review of the record shows that, while Randy did not specifically argue for application of *Brandenburg* before the family court, he presented evidence of the mortgage. This is sufficient for our review.

marital contribution of \$97,298.62. He claims this amount represents the “minimal principle [sic] reduction of the loan during [the] marriage.” Appellant’s Brief at 17.

However, Randy also entered into evidence a payment book associated with the loan which lists some, but not all, of the payments made on the loan. Petitioner’s Exhibit 47. The payment book purports to show payments made during the marriage, as well as payments made by Anita prior to the marriage. Some of those payments were for amounts well above the \$1,217.12 agreed to in the mortgage documents, likely meaning that the final payment would have been reduced. The payment book ends in June 2000, meaning there is no proof that a payment of \$97,298.62 was ever made by the parties. Without such proof, we are unconvinced by Randy’s argument.

Furthermore, Randy’s claim of marital interest in the dental practice land and buildings fails on other grounds. Evidence in the record makes clear the mortgage was not used to purchase the land and/or buildings. Anita testified she purchased the land and buildings with cash prior to the marriage. She further testified the mortgage was used to purchase equipment for her dental practice with the land as collateral. Randy does not contest these facts. The parties stipulated to the value of the practice, which included the equipment, but excluded the land and buildings. The family court properly determined the value of the practice to be

marital in nature. Based on these facts, neither the existence of the mortgage nor the timing of payments makes any portion of land and/or buildings marital in nature.

Finally, Randy claims the family court erred by awarding Anita the entire Morgan Stanley account. The court found:

Anita has an investment account at Morgan Stanley. As of July 31, 2022, the value of the account was \$178,985.86 (Respondent's Exhibit 12). Anita testified that she opened this account to serve as a college fund for the parties' child and that she uses funds from this account to pay the child's college expenses. Randy testified that he has made no contributions to this account and that his only contribution towards college expenses has been spending money for the child. Anita further testified that she intends to give the balance of this account to the child when he finishes college and requested that the [c]ourt set this account aside for the benefit of the child.

R. at 492. The court then concluded:

Anita's investment account at Morgan Stanley was established as and is being used as a college fund for the parties' child. Randy has made no contributions to this account. Anita shall retain this account and the balance of the account shall be held for the benefit of the child.

R. at 500.

When dividing marital property, the court must consider factors including the contribution each spouse made in acquiring the property; the value of the property each spouse is receiving; the duration of the marriage; and the

economic circumstances of each spouse once the property is divided. KRS 403.190(1)(a)-(d). The statute does not mandate the weight a court should give each factor. *Cobane v. Cobane*, 544 S.W.3d 672, 684 (Ky. App. 2018). An award of a single asset in its entirety to one party is not necessarily an abuse of discretion, especially where that party was the only contributor to it. *See* KRS 403.190(1)(a); *see also Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky. App. 2012) (citation omitted) (holding “[w]hat constitutes a just division lies within the sound discretion of the family court and will not be disturbed absent an abuse of discretion”).

Although the court did not explicitly state whether the Morgan Stanley account was marital or nonmarital, it is clear from the facts that it was established and funded during the marriage, making it marital property under KRS 403.190(3). The family court treated it as such. Randy concedes he made no contribution to the account and cites to no other factor in KRS 403.190(1) which would entitle him to a greater portion of the marital estate. His argument also ignores the court’s award of a substantial equalization payment in his favor. In its thorough findings of fact, the court clearly considered the factors in KRS 403.190(1) in dividing the entire marital estate, including the Morgan Stanley account. There was no abuse of discretion.

Where our decision alters the contents of the marital estate, the family court's calculation of the equalization payment is also impacted. *See Cobane*, 544 S.W.3d at 684. Under KRS 403.190(1), the "just" division of marital assets does not necessitate an equal division. *Id.* (citation omitted). The family court has broad discretion in dividing the marital estate, including any award of equalization payments. *Id.* Here, our decision removes the Allen Resources properties from the marital estate and leaves open the possibility that some portion of the value of the Ed Hale land is marital property. The family court is in the best position to determine if this impacts its prior division of marital assets. Therefore, if necessary, after deciding the nature of the Ed Hale land, the family court may reconsider the division of marital assets under KRS 403.190(1), including recalculation of the equalization payment if applicable.

CONCLUSION

Based on the foregoing, we affirm the March 23, 2023 findings of fact, conclusions of law, and final order of the Floyd Circuit Court, Family Division on its decisions as to the dental practice land and buildings and the Morgan Stanley account. We reverse the court's decisions on the Allen Resources properties and the Ed Hale land. We remand this matter to the family court for a hearing on the marital or nonmarital nature of the Ed Hale land. The court shall make specific findings of fact and conclusions of law under KRS 403.190. If

necessary, the court may at that time reconsider the equitable division of the marital estate.

ALL CONCUR.

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