

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001434-MR

DONNA K. GRASSMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT, FAMILY DIVISION
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 04-CI-502943

THOMAS W. GRASSMAN

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: In this dissolution action, Donna Grassman has appealed from the Jefferson Family Court's June 16, 2006, Findings of Fact, Conclusions of Law, and Order, in which the family court determined whether disputed property was marital or nonmarital, and divided the assets and debts between Donna and her former husband, Thomas Grassman. We affirm in part, reverse in part and remand.

Donna and Thomas were married in Jefferson County, Kentucky, on September 23, 1988, and separated in April 2003. No children were born of the marriage. Donna sought and obtained a Domestic Violence Order against Thomas on July 26, 2004, which prohibited him from having any contact with her for three years. Thomas filed a Petition for Dissolution of Marriage on August 4, 2004. At that time, he was fifty-six years old, while Donna was forty-six years old. Prior to and throughout the marriage, Donna worked for the United States Postal Service (USPS) and participated in its Thrift Savings Plan retirement account. Donna stopped working for the USPS in July 2004 due to an injury, and she began receiving \$2,167 per month in workers' compensation benefits in November 2005. She also applied for disability retirement benefits. Thomas, who had been disabled since 1998, was receiving \$903 per month in Social Security disability benefits. Upon his mother's death in 1996, Thomas received a sizable inheritance. At the time the petition was filed, Thomas and Donna owned three pieces of real estate (two homes in Louisville and a trailer and lot in Florida) that were purchased during the marriage, as well as several vehicles. The main issues before the family court were Thomas's claims regarding his nonmarital inheritance and the ownership derived therefrom, as well as the distribution of property and debts.

Both Thomas and Donna testified at the hearing on December 2, 2005, as to how the real estate was purchased, what they each claimed was marital or nonmarital property, and how they thought the property should be divided. On June 6, 2006, the family court entered a Decree of Dissolution of Marriage, followed on June 16, 2006, by

an Amended Decree incorporating its Findings of Fact, Conclusions of Law, and Order dividing the property. The family court awarded Thomas all of the real property and the vehicles in his possession (several Volvos, a Jeep, a truck, and a motorcycle), along with the \$50,000 second mortgage on one of the properties and several other debts. Thomas also received the nonmarital assets he inherited, including Hilliard Lyons investments valued at \$47,226.57, funds in a Stockyard Bank and Trust Company account valued at \$48,209.90, five distributions from Fifth Third Bank of Kentucky totaling \$33,681.47, and the proceeds from a Commonwealth Land Title Insurance Policy equaling \$25,000. Donna was awarded her Thrift Savings Plan (balance of \$49,756.65) and the debt against it (\$20,283.90). The family court also ordered Thomas to pay Donna the sum of \$27,500 to more fairly effect the division of property. It is from this order that Donna has appealed.

On appeal, Donna asserts that Thomas failed to meet his burden of proof to overcome the presumption that property acquired after a marriage is marital, as he failed to adequately document his nonmarital claims and as the family court ignored that Donna was the primary wage-earner in the family during the marriage. Thomas, on the other hand, argues that the family court did not commit any error in classifying the property or abuse its discretion in equitably distributing the property.

Our standard of review is succinctly set forth in *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003):

Under CR 52.01, in an action tried without a jury, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court.” *See also Greater Cincinnati Marine Service, Inc. v. City of Ludlow, Ky.*, 602 S.W.2d 427 (1980). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly, Ky.*, 976 S.W.2d 409, 414 (1998); *Uninsured Employers' Fund v. Garland, Ky.*, 805 S.W.2d 116, 117 (1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. *Golightly*, 976 S.W.2d at 414; *Sherfey v. Sherfey, Ky.App.*, 74 S.W.3d 777, 782 (2002). An appellate court, however, reviews legal issues *de novo*. *See, e.g., Carroll v. Meredith, Ky.App.*, 59 S.W.3d 484, 489 (2001). (Footnote omitted).

With this standard in mind, we shall review the present action.

The sole issue we must address in this appeal concerns the classification and division of property. The Supreme Court of Kentucky extensively addressed this issue in *Sexton v. Sexton*, 125 S.W.3d 258, 264-65 (Ky. 2004):

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, *e.g.*, partnership, corporation, or sole proprietorship, is controlling or determinative. Under KRS 403.190, a trial court utilizes a three-step process to divide the parties' property: “(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties.” “An 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.” Neither title nor the form in which property is held determines the parties' interests in the property; rather, “Kentucky courts have typically applied the ‘source of funds’ rule to characterize property or to determine parties' nonmarital and marital interests in such property.” “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 the property.” (Footnotes omitted).

The *Sexton* Court went on to explain the concept of tracing, as it applies to determining whether property, or some portion of it, is marital or nonmarital:

“Tracing” is defined as “[t]he process of tracking property's ownership or characteristics from the time of its origin to the present.” In the context of tracing nonmarital 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.” The concept of tracing is judicially created and arises from KRS 403.190(3)'s presumption that all property acquired after the marriage is marital property unless shown to come within one of KRS 403.190(2)'s exceptions. A party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof. (Footnotes omitted).

Id. at 266. Furthermore, an admission made by the opposing party that property is the nonmarital property of the other relieves that party from his burden of tracing the proceeds. *Davis v. Davis*, 775 S.W.2d 942 (Ky.App. 1989). Our review of the family court's classification of property as marital or nonmarital is done using the two-prong approach addressed in *Hunter* while the family court's division and award of marital

property is reviewed for abuse of discretion. *Johnson v. Johnson*, 564 S.W.2d 221 (Ky.App. 1978).

1. Camden Avenue Property

Prior to her marriage to Thomas, Donna purchased real property on Camden Avenue, which was sold on April 1, 2003. The proceeds were apparently used to pay off a loan and the remainder went to Thomas. Donna now asserts that the family court failed to address the proceeds from the sale, including how much of the proceeds were used to pay off the loan, whether the loan was obtained for a marital purpose, and whether the repayment to Thomas was for marital or nonmarital funds. She requests that the matter be remanded for the family court to make additional findings.

In its order, the family court, after noting that the testimony concerning this issue was both vague and confusing, concluded:

The proceeds from the sale of the Camden Avenue property, which Ms. Grassman owned prior to the marriage, were used, in part, to pay off a loan taken for undisclosed reasons. Ms. Grassman did not recall how much money she received from the sale of this residence and provided no documents to show distribution of the funds. Approximately \$4,000.00-5,000.00 was paid to Mr. Grassman to replace funds withdrawn from his Hilliard Lyons account, but as there was no explanation of the reason for the withdrawal the Court cannot characterize the use of the funds as marital or non-marital.

We agree with the family court that there was not enough evidence introduced to allow it to properly characterize the use of the proceeds from the sale of the property, or to even calculate what those proceeds totaled or were used for. However, we disagree with

Donna's assertion that the matter should be remanded on this issue. Donna did not raise this issue in her trial memorandum and did not provide any documentation to establish the amount of proceeds she received as a result of the sale or how those proceeds were used. We decline her request for what amounts to additional discovery and fact-finding. Therefore, we affirm this portion of the family court's order.

2. 732 Gagel Avenue Property

Because of the complicated nature of the transactions regarding this particular piece of real property, we shall go into more extensive detail on the factual underpinning of this issue. On December 10, 1991, Christine Gruebbel, Thomas's mother, purchased real property at 732 Gagel Avenue in Jefferson County. The deed effecting the transfer listed the fair market value of the property as \$52,000. Ten days later, she executed a Contract for Deed whereby Thomas and Donna would purchase the property for the sum of \$55,000, at an interest rate of 8%, payable in 180 monthly installments of \$525.61, with the last installment totaling \$525.14. The installments were to apply first to interest and then to principal. The Contract for Deed was never recorded. According to the testimony, the parties made a number of payments of \$500 pursuant to the Contract for Deed, but there is no definite information as to how much money was paid on the interest or principal. On June 14, 1994, two and one-half years after entering into the Contract for Deed, Mrs. Gruebbel executed her Last Will and Testament, leaving Thomas “the deed to the real estate located at 732 Gagel Ave., Louisville, KY and cancellation of the mortgage thereon[.]” Mrs. Gruebbel passed away on March 8, 1996,

and her Last Will and Testament was probated. Pursuant to the will, a deed conveying the real property on Gagel Avenue to Thomas was recorded on September 29, 1997. The fair market value of the property was again listed as \$52,000. By deed dated December 10, 1999, and recorded January 6, 2000, Thomas transferred the real property to himself and Donna as husband and wife. At that time, the fair market value was still listed as \$52,000. On August 23, 2000, Thomas and Donna obtained a \$60,000 loan from the Louisville Federal Credit Union in exchange for a second mortgage on this property. The majority of this loan amount was paid to Bank One. The record does not indicate why the Bank One debt had been incurred.

For purposes of the dissolution action, Donna claimed that the Gagel Avenue property was marital, subject to equal division, while Thomas claimed that the majority of the equity in the property was nonmarital due to his mother's bequest. The family court found that the property was marital and would be equitably divided. The family court then determined that the mortgage held by Mrs. Gruebbel was a marital debt, but could not determine the amount of the marital contribution to the property. Finally, the family court held that Mrs. Gruebbel's bequest to Thomas forgiving the mortgage debt was his nonmarital property, although it was unable to determine what the amount of his nonmarital interest was. We note that Thomas was awarded the property, which had an estimated market value of \$140,000 as of January 21, 2006. He was also assigned the second mortgage debt against the property, which had an approximate balance due of \$50,000.

While we hold that the family court's factual findings are supported by substantial evidence and that it correctly found that the Gagel Avenue property and the mortgage held on it were marital, we must hold that the family court nevertheless erred as a matter of law when it ruled that the debt forgiveness in Mrs. Gruebbel's will constituted Thomas's nonmarital property. Because the property itself and the mortgage held on it were properly deemed to be marital, logic dictates that the cancellation of the mortgage was also marital. The cancellation of the mortgage benefited both Thomas and Donna, not just Thomas, as neither was required to make any additional payments pursuant to the Contract for Deed. Therefore, we hold that the family court erred when it deemed the debt forgiveness in Mrs. Gruebbel's will to be Thomas's nonmarital property.¹ Accordingly, we must reverse this ruling and remand this matter to the family court for reconsideration of the equitable division of marital property and debts.

3. 2311 DeMel Avenue Property

Thomas and Donna purchased the DeMel Avenue property on February 23, 2000, for \$75,000. The family court found, and Donna no longer disputes, that Thomas paid \$70,000 of the purchase price from funds he inherited from his mother, and that Donna contributed \$5,000 in marital funds through a signature loan she obtained from the Louisville Federal Credit Union. At the time the judgment was entered, the property had a fair market value of \$135,000. Based upon this increase in value, the family court

¹ Although we cannot determine Mrs. Gruebbel's intent in only naming Thomas in her will regarding the debt forgiveness, the legal effect of her action clearly benefitted both Thomas and Donna.

valued Thomas's nonmarital interest in the property at \$126,000 and the marital investment at \$9,000. The family court then awarded the property to Thomas and stated that the marital share would be equitably divided, but assigned the \$5,000 signature loan to Donna.

Donna contends that the family court should have required Thomas to repay the signature loan, as he was awarded this property. Furthermore, she asserts that her share of the marital contribution was worth less than the encumbrance that she was assigned. We note that the division of marital property and debts is within the sound discretion of the trial court. *Johnson v. Johnson*, 564 S.W.2d 221 (Ky.App. 1978). In light of our decision that this matter must be remanded for reconsideration of the division of marital property, the family court is free to revisit its award of this property and the assignment of the debt upon it. However, we hold that the family court's determination as to the nonmarital and marital interests in the property is correct and shall be binding upon the parties on remand.

4. Florida Property

On February 4, 1998, Donna and Thomas purchased a lot and mobile home in Putnam County, Florida from Donna's grandparents for \$10,000, which was \$2,000 less than the asking price. The parties have agreed that the fair market value of this property is \$12,000. Although Thomas claimed that he paid for the property with inherited funds, he did not provide any documentary support for this claim. Therefore,

the family court determined that the property was entirely marital and awarded the property to Thomas, subject to the allocation of their equitable interests.

In her brief, Donna contends that she should have been awarded \$6,000, representing one-half of the current market value of the property. As with the previous analysis, the family court is free to reexamine the division of this item of marital property upon remand. However, the determination that the entire property is marital is binding upon the parties and shall not be revisited.

5. Vehicles

At the time of the separation, Thomas and Donna had obtained several automobiles, including five Volvos, a Jeep, and a motorcycle. Thomas was still driving the 1998 Dodge Ram truck that he had transferred to his ex-wife.² The family court determined that Thomas inherited the 1995 Volvo from his mother's estate, and thus it was his nonmarital property. The family court noted that this vehicle had been totaled in an accident that took place while Donna was driving. Accordingly, the \$6,100 obtained in insurance proceeds following the wreck was deemed to be Thomas's nonmarital property. Although Thomas claimed that the truck and motorcycle were paid off with his inherited funds, the family court found that Thomas failed to support those claims with documentary evidence and deemed those vehicles to be marital. The remaining vehicles (four Volvos and the Jeep) were acknowledged by both parties to be marital property. The family court then determined that the total of the vehicles deemed as marital property

² We infer from the record that this ex-wife is not Donna.

was \$18,720 and awarded them all to Thomas. We presume that the family court took this into consideration in equitably dividing the estate.

In her brief, Donna spends considerable time arguing that Thomas dissipated at least one marital asset; namely, the truck, when he transferred it to his ex-wife. However, it is apparent from the family court's order that the truck was included in its calculation of the total value of the vehicles in Thomas's possession and was deemed to be marital property.

Finally, Donna argues that she should have been awarded one-half of the appraised value of all of the vehicles. Upon remand, the family court shall consider the value and allocation of the vehicles deemed to be marital property when it equitably divides the property and debts. However, the decision that the 1995 Volvo and insurance proceeds are Thomas's nonmarital property and that the remainder of the vehicles are marital property, as well as the value of those vehicles, shall be binding on the parties.

For the foregoing reasons, the order of the Jefferson Family Court is affirmed as to its findings regarding the Camden Avenue property. However, the Jefferson Family Court's order is reversed as to the finding that the debt forgiveness on the Gagel Avenue property was part of Thomas's nonmarital inheritance. This matter is therefore remanded to the family court solely for reconsideration of the equitable division of the marital estate.

MOORE, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CLAYTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully dissent only from so much of the majority opinion as holds the trial court erred as a matter of law when it ruled that the debt forgiveness in Mrs. Gruebbel's Will for the property at 732 Gagel Avenue constituted Thomas's nonmarital property. I agree with the trial court's characterization of the debt forgiveness as a bequest, thus, rendering the value ascribed to this portion of the property's equity to be nonmarital.

Pursuant to KRS 403.190(1), the trial court assigns each spouse his or her nonmarital property and subsequently divides the marital property, without regard to marital misconduct, in just proportions considering all relevant factors.

Initially, the trial court categorizes property as either marital or nonmarital prior to any property division. To determine the marital/nonmarital status of the property, the trial court is guided by KRS 403.190(2), which provides that:

“marital property” [is] all property acquired by either spouse subsequent to the marriage, except:

- a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived 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 the marriage.

Notably, property acquired by bequest, is considered to be nonmarital. KRS 403.190(2)(a).

Furthermore, as provided in the seminal case, *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky.App. 1981), nonmarital contribution is the equity in the property at the time of the marriage, plus any amount expended after marriage by either spouse from traceable nonmarital funds in the reduction of mortgage principal. Obviously, using this delineation of nonmarital property and KRS 403.190(2)(a), it is clear the loan forgiveness of the mortgage debt provided solely to Thomas in Mrs. Gruebbel's Will, allows for this portion of the equity to be characterized as Thomas's nonmarital interest.

Therefore, I agree with the trial court that, while the property itself is marital, the loan forgiveness in Mrs. Gruebbel's Will, relieving Thomas of the remaining debt on the property at 732 Gagel Avenue, renders that portion of the property's equity to be the nonmarital property of Thomas.

The burden of proving that property is nonmarital falls upon the party claiming the property as such. *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990); *Hunter v. Hunter*, 127 S.W.3d. 656 (Ky.App. 2003). Thomas demonstrated the nonmarital character of the equity created by the loan forgiveness through his mother's Will. In order to reconcile the equities involved in determining the nature of the property,

although the trial court awarded 732 Gagel Avenue to Thomas, it took into account the equities involved in the property division in distributing the remainder of the parties' marital estate.

In conclusion, my opinion is that the marital portion of 732 Gagel Avenue flows from the contract for deed executed between the Grassmans and Thomas's mother, Mrs. Gruebbel. The regular monthly payments made on this property, roughly 51 monthly payments according to the trial court's Findings of Fact and Conclusions of Law, create the marital equity in the home. The nonmarital portion is represented by the loan forgiveness of the mortgage given to Thomas in Mrs. Gruebbel's Will.

BRIEFS FOR APPELLANT:

Sandra G. Ragland
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jacqueline M. Caldwell
Louisville, Kentucky