RENDERED: FEBRUARY 24, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001434-MR

SHIRLEY PUCKETT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE DEBARRY BROWN, JUDGE
ACTION NO. 11-CI-501636

FRED PUCKETT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT, AND MAZE, JUDGES.

LAMBERT, J., JUDGE: Shirley Puckett appeals from the Jefferson Circuit Court decree of dissolution of her marriage to Fred Puckett. Shirley challenges the trial court's allocation of property and assets as well as its denial of her motion for a new trial. We affirm.

Shirley and Fred Puckett were married on October 22, 1994. It was not a first marriage for either of them, and both were retired and had considerable assets (namely, real estate, retirement accounts, investments, and Fred's business). An ante nuptial agreement was executed one week prior to the marriage. In that document the parties agreed to keep separate their nonmarital property. However, during the marriage, the Pucketts built a new home – on property owned by Fred – in 2005. The mortgages (there were two) were held in both names, although Fred made the payments. Also, many of the furnishings in the new home were purchased by Shirley.

Shirley moved out of the parties' home to Louisville in May 2010 (first to an independent living apartment, later to an assisted living facility), taking with her the personal possessions she considered hers, and filed for dissolution of marriage on May 11, 2011. Various motions and hearings were held over the next several years. In 2012 the trial court denied Shirley's motion for temporary maintenance, but it awarded her a $2,000.00 advance from Fred to pay for her attorney fees. Mediation was attempted in 2013 but was unsuccessful, in part because Shirley was physically unable to participate. Shirley's health continued to decline (she suffered from dementia and was prone to falling, resulting in several fractures, hospital stays, and rehabilitation), and her son (Scott Brogan) exercised the power of attorney that Shirley had executed. Scott became totally responsible for his mother's care and finances.

The trial in this matter was held on May 7, 2015. Although Shirley attended the trial, she did not testify other than through her power of attorney.

The record indicates that for the first year of their separation Fred contributed $200.00 per month toward Shirley's living expenses; he ceased payments the month following Shirley's filed petition for dissolution. Scott Brogan testified at trial that, other than the occasional trip to town with dinner out, Fred did not support Shirley financially once she left home. According to Scott, Fred's visits ceased in 2010. Scott testified extensively about his mother's health issues and the expenses related thereto. He was Shirley's sole witness.

Fred testified on his own behalf. He offered evidence of the expenses related to the construction of the home as well as his and Shirley's individual contributions toward same. Fred also testified about his various premarital holdings as well as the status of his independently owned business and the parties' checking accounts. Fred's only other witness was Paul Gaines, a realtor that had appraised the Pucketts' home for a value of $325,000.00, exclusive of the property it sat on.

The trial court entered its findings of fact, conclusions of law, judgment and decree on August 3, 2015. The trial court found that the marital home was Fred's sole property since he had provided the land on which it was built, had made all the payments, had assumed total responsibility for the two mortgages, and had paid all the taxes and insurance associated with the property. Although the home had increased in value, none of the increase could be traced to

Shirley's contributions. The trial court ordered that Fred be solely responsible for the outstanding mortgages (totaling $78,808.11). The trial court awarded Shirley maintenance of $1,000.00 per month for one year. Each party was held responsible for his or her attorney fees.

On August 13, 2015, Shirley filed a motion for a new trial, pursuant to Kentucky Rules of Civil Procedure (CR) 59.01. The trial court overruled Shirley's motion on September 1, 2015. Shirley filed notice of appeal to this Court on September 18, 2015.

Shirley does not contest the validity of the ante-nuptial agreement when it was executed just prior to the marriage. *See Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). However, she insists that its application had become unconscionable at the time of the parties' dissolution. *Lane v. Lane*, 202 S.W.3d 577 (Ky. 2006); *Blue v. Blue*, 60 S.W.3d 585 (Ky. 2001). She seeks, not so much to set aside the ante-nuptial agreement, but to be reimbursed for the monies she expended from not being able to return to the marital home.

Each ante-nuptial agreement should be reviewed on a case-by-case basis. *Edwardson v. Edwardson,* 798 S.W.2d 941, 946 (Ky. 1990).

> [T]he mere increase in the value of [the husband]'s nonmarital property, by whatever percentage, does not render the prenuptial agreement unconscionable as to [the wife]. . . . To set aside the agreement, [the wife] must show more than that [the husband]'s position has improved. She must also show that her position has suffered in a manner which was beyond the contemplation of the parties when they signed the agreement. In the alternative, [the wife] must establish

> that the agreement is oppressive or manifestly unfair to her at the time of dissolution. Despite the limited scope of the trial court's consideration of the issue of unconscionability, [the wife] did not present any evidence to support such findings. Consequently, we find that the trial court was correct in holding that the prenuptial agreement is not unconscionable and may be enforced.

Blue, 60 S.W.3d at 591. We hold similarly. Shirley's proof fell short of demonstrating that the agreement was unconscionable. Shirley's move from the marital home was of her own choosing. According to both Scott and Fred, Shirley was prompted by the recent dementia diagnosis and indicated her desire to move back to her "home" of Louisville. The only time Shirley expressed a desire to visit the farm in Gallatin County was for an anniversary weekend shortly after she had moved to Louisville. It was Scott's testimony that Shirley required assistance in her daily living; her first apartment provided a certain level of assisted care. She later moved to an assisted living facility because her needs required it, not because Fred refused to let her return home.

Shirley did not meet her burden of proving that the parties' joint efforts resulted in the increase of Fred's nonmarital property. As her attorney stated during an objection in the trial, "this case is all about tracing." *See Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. 1981), cited by Shirley. Fred was able to trace his contributions, Shirley was not, nor did she rebut Fred's testimony. Kentucky Revised Statute (KRS) 403.190; *Maclean v. Middleton*, 419

S.W.3d 755 (Ky. App. 2014). The trial court did not err in awarding the residence to Fred.

We also agree with Fred that Shirley did not preserve for appellate review the argument of unconscionability.

A reviewing court will not consider any argument on appeal that has not been preserved in the trial court. *Am. Founders Bank, Inc. v. Moden Invs., LLC,* 432 S.W.3d 715, 721 (Ky. App. 2014). CR 76.12(4)(c)(v) provides: "[t]he organization and contents of the appellant's brief shall [include]: ... at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Appellant's brief lacks such a statement. Furthermore, we have combed the voluminous record, including the videotaped proceedings, and cannot find where this issue has been preserved for appeal. We likewise find the issue lacking in the prehearing statement or by timely motion submitted to this Court. CR 76.03(8). And Shirley's reply brief exceeds the five-page limit set by CR 76.12(4)(b)(i). We decline to consider any arguments made on pages six through eight. CR 76.12(8)(a).

Shirley further contends that, had Fred allowed her to return home, her expenses would have been minimized, and she would not have been forced to dip into her retirement savings in order to afford the cost of assisted living. Shirley believes that she would have been able to return home had Fred not allowed, in Shirley's absence, another woman to move into the marital home. Again we

cannot find the lower court's ruling to be clearly erroneous. CR 52.01. Shirley's son's testimony emphasized that she was in need of more care than she could have received at the parties' residence. This was affirmed by her further decline and increased needs over the years succeeding her departure from the marriage.

Additionally the disparity in the parties' incomes was addressed in the trial court's award of maintenance (albeit for only one year) to Shirley. We see no error or abuse of discretion in this regard.

Shirley lastly argues that the trial court incorrectly denied the CR 59.01 motion for a new trial. We agree with Shirley that the trial court erred in holding that Shirley's motion was untimely (it was clearly within the ten-day rule enunciated in CR 59.05). However, the trial court did not clearly err or abuse its discretion in its other grounds for denial. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001).

The judgment and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Thomas V. Haile Louisville, Kentucky	Dean H. Sutton Louisville, Kentucky