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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000132-MR

JAMES HOUSTON BARR, III — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 13-CI-500764

CINDY ANN JEFFRIES BARR — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James Houston Barr, III (Jim) appeals from an order of the Jefferson Family Court entered in this dissolution of marriage action. Jim presents the following issues: (1) whether the family court erred in its calculation of his nonmarital interest in the marital residence; (2) whether the family court erred in awarding Cindy Barr $224,025.50 as her marital portion of a Thrift Saving

Plan; (3) whether the family court erroneously found that Jim failed to adequately trace his nonmarital interest in the parties' Vanguard accounts; (4) whether the family court erred in awarding Cindy full benefits to Jim's federal civil service employee annuity benefit; (5) whether the family court should have granted Jim's request that he be permitted to supervise the parties' teenage children during the summer months while Cindy works; (5) whether the family court properly granted supervision of the children's education savings account to Cindy; and (6) whether Jim was entitled to credit for taxes paid on amounts paid to Cindy from his retirement account.

Jim and Cindy were married on May 31, 1997, and had two children, W.B. born in May 1999, and A.B. born in August 2001. The parties separated in October 2012 and, on March 11, 2013, Cindy filed a petition for dissolution of marriage. At the time of the dissolution hearing, Cindy was fifty-four years old and worked as an office manager earning $42,000 per year. Jim was seventy-four years old and had been an attorney for forty-nine years. He had also served in the Army Reserve from which he retired in 1991. At the time of the marriage, he was an assistant United States Attorney and retired from that position in November 2013.

On May 28, 2015 and June 12, 2015, the family court heard evidence on the issues of property distribution, the award of survivor pension benefits,

parenting time, the supervision of education funds and the allowance of a credit for the payment of taxes on retirement benefits.

Jim presents various issues relating to the valuation and division of property. We apply the same general law to each issue.

In a dissolution proceeding involving contested property distribution issues, the family court is required to follow three steps. It must "categorize each piece of contested property as either marital or nonmarital. Next, the court must assign each party's nonmarital property to that party. Finally, the court must equitably divide the parties' marital property in just proportions." *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky.App. 2006) (footnotes omitted). In a dissolution of marriage action, this court cannot disturb the findings of a trial court unless those findings are clearly erroneous. *Hunter v. Hunter,* 127 S.W.3d 656, 659 (Ky.App. 2003). "A factual finding is not clearly erroneous if it is supported by substantial evidence. 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." *Id*. (citations omitted). Legal issues are reviewed *de novo*. *Id*.

The initial issue presented by Jim concerns the family court's valuation of his nonmarital interest in the parties' marital residence located at 100 Westwind Road in Jefferson County, which Jim built in 1988 prior to the parties'

marriage. The family court valued the home at $795,000 at the time of the dissolution. Jim does not contest that finding. Jim argues the family court clearly erred in determining the value of the home *prior* to the marriage and, therefore, he was entitled to a greater amount than awarded as his nonmarital interest.

From 1994 through January 1, 1997, the home was assessed at $473,580 and had not been reassessed during that three-year period. Seven months after the parties' marriage, the home was reassessed at $705,910 as of January 1, 1998. Jim appealed the $705,910 assessment and it was reduced to $650,910. Jim appealed again, and the assessment was reduced to $595,000. Jim argues the $595,000 assessment more accurately reflects the value of the home at the time of the marriage than does the $473,580 assessment and, therefore, he should be restored that amount as his nonmarital property.

The proper standard to be applied to the family court's valuation of Jim's nonmarital interest in the home presents a question of fact. *Purdom v. Purdom*, 498 S.W.2d 131, 133 (Ky. 1973). Therefore, it may not be disturbed unless it is clearly erroneous. *Hunter*, 127 S.W.3d at 659.

Neither party presented evidence from a qualified appraiser as to the value of the home on the date of the marriage and, therefore, the only evidence of its value was the two PVA assessments, one five months prior to the parties' marriage and the other seven months after the parties' marriage. In finding that

$473,580 was the value on the date of the parties' marriage, the family court relied on the appraisal closest to the date of the marriage.

Under our standard of review, great deference is given to the family court in valuing marital and nonmarital interests. However, the discretion afforded the family court is limited by the rule that factual findings must be based on substantial evidence or, in other words, evidence upon which a reasonable person could rely. *Id*.

The home had not been reassessed for a three-year period prior to the marriage and, therefore, the PVA assessments from 1994-1997 did not reflect any increase in value during the period. When reassessed in 1998, the home's value had increased $121,420. The only reasonable explanation for the difference in the two assessments is that the 1997 assessment was not a reassessment but was based on prior assessments dating back to 1994. When a new assessment was made in 1998, the actual value of the home was determined to be $595,000. There is no evidence that the higher assessment in 1998 was attributable to any other than the lack a reassessment from 1994-1997. A reasonable person could not rely on the 1997 assessment as an accurate value of the home at the time of the parties' marriage. Therefore, the family court clearly erred when it found that the value of the home was $473,580 at the time of the marriage.

There is no dispute that Jim's interest in the home prior to the marriage was nonmarital. However, there is also no dispute that the remaining mortgage at the time of the marriage was paid with marital funds, improvements were made to the home and the home increased in value during the marriage. KRS 403.190 provides, in relevant part, as follows:

> (2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> ....
>
> (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.
>
> (3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

Where the increase in the value contains both marital and nonmarital components, the family court is required to determine from the evidence why the increase occurred. *Goderwis v. Goderwis*, 780 S.W.2d 39, 40 (Ky. 1989). As pointed out in *Marcum v. Marcum*, 779 S.W.2d 209, 210–11 (Ky. 1989), "[t]here is a distinction between an increase in value of property which occurs without

effort on the part of the owners and the increase in the value of property that occurs as a result of the efforts of the parties." If the increase in the value of nonmarital property is due to general economic conditions, the increase is nonmarital. *Travis v. Travis*, 59 S.W.3d 904, 910 (Ky. 2001).

When the value of property increases from both general economic circumstances and the joint efforts of the parties, it is said to have both marital and nonmarital components. In that event, the property is not exclusively marital or nonmarital but requires application of the formula set forth in *Brandenburg v. Brandenburg*, 617 S.W.2d 871, 872 (Ky.App. 1981). "In essence, the formula requires the trial court to calculate the respective percentages of marital and non-marital contributions in relation to the total contribution to the property. Each percentage is then multiplied by the equity in the property to apportion the property between the parties." *Atkisson v. Atkisson*, 298 S.W.3d 858, 862 (Ky.App. 2009).

During the marriage, Jim and Cindy paid off the $67,698 debt on the home outstanding on the date of the marriage with marital funds. There were also improvements made including; $5,287 (kitchen island); $1,378 (plumber fee for connection to sewer); $7,585 (gas line and gas boiler); $5,600 (air conditioner parts). Using marital funds, the parties also replaced asphalt shingles with metal shingles, which Cindy testified cost $27,352. While Jim argues some of these

items were maintenance rather than improvements, some marital funds were used to improve the home.

In 2013, Linda English appraised the home. She testified that from the year of the parties' marriage to the date of the hearing, other than the amount paid to improve the home, the increase in value was due to inflation or an influx in market conditions. While the family court was within its discretion to disregard English's 2013 appraisal value because of its staleness, it offered no explanation why it also disregarded her testimony regarding the reasons for the home's increased value. Without application of the *Brandenburg* formula, the family court simply subtracted $473,580 as the value of the home on the date of the marriage from its current value, $795,000, and divided it in half awarding $160,710 to Cindy.

The family court's refusal to apply the *Brandenburg* formula was premised on three erroneous legal assumptions. The first was that the increase in value must be solely attributable to economic circumstances for any part of that increase to be considered nonmarital. That is incorrect. The *Brandenburg* formula exists for the very reason that a property can have nonmarital and marital components.

The second erroneous premise is that the *Brandenbur*g formula does not apply because Cindy made substantial marital contributions as a homemaker.

While she did make valuable contributions as a homemaker, that does not convert nonmarital property into marital property where its value increased because of economic circumstances. Unlike a business where an increase in value during the marriage may render part of or the entire increase in value as marital based on a spouses' contribution as a homemaker, *Goderwis*, 780 S.W.2d at 40, a residence may increase, and generally does, without any significant activity by either spouse.

Finally, the family court found Jim had not proven that any of the increase in value was nonmarital by "clear and convincing evidence." In *Travis*, 59 S.W.3d at 910, the Court held that the *Brandenbur*g formula was inapplicable where a party claiming an increase in property is nonmarital fails to present clear and convincing evidence to support that claim. The husband contributed $7,500 of nonmarital funds toward the purchase of a home and the parties obtained a $39,368.90 loan to purchase the home and made substantial improvements, including adding a second story. While the parties were separated, the home burned, and the insurance company paid $63,000 for the structure. After payment of the loan balance which remained unchanged at $39,368.90, and restoration of the husband's $7,500 nonmarital interest, the question was how to divide the increase in value of the home during the parties' marriage.

The Court held the *Brandenburg* formula was inapplicable and the lower court should have "simply awarded [the husband] $7,500 as his nonmarital

contribution and the remainder divided as marital property in just proportions." *Id.* at 908. Its decision was based on the presumption created by KRS 403.190(3) that all property acquired during the marriage is presumed to be marital. *Id*. at 912. However, the Court added that the presumption could be rebutted with "evidence which, in the mind of the reasonable fact finder, would cause a reasonable person to justifiably disregard the presumption that the property in question is marital property." *Id*. at 912-13 (quoting *Underwood v. Underwood*, 836 S.W.2d 439, 441 n.1 (Ky.App. 1992)).

Applying the same reasoning as in *Travis*, this Court rendered *Croft v. Croft*, 240 S.W.3d 651 (Ky.App. 2007), where we held that an increase in value from $18,000 to between $28,000 and $29,000 was marital property. This Court held there was no clear and convincing evidence that the improvements to the property from marital funds were not the reason for the increased value. *Id*. at 654. Those improvements included the addition of a new structural outdoor deck space.

The family court erred when it did not recognize the significant distinctions between the facts here and those in *Travis* and *Croft*. The home is now valued at $795,000, meaning it increased $200,000 over an eighteen-year period.

This is far more of an increase than in *Travis* and *Croft* and is grossly disproportionate to the cost of the modest improvements made to the home over the same time. Moreover, there was expert testimony that the increase in value of

the home beyond the cost of those improvements was due to economic circumstances alone. Jim met the required burden to demonstrate that at least part of the increase in the value of the home was due solely to economic circumstances. For the reasons stated, the family court erred in not applying the *Brandenburg* formula. We remand for application of that formula by the family court.

Jim also argues that the family court did not apply KRS 403.190(2)(e) when it awarded Cindy $224,026.50 as her marital interest in a Federal Thrift Savings Plan. We agree.

At the time of the parties' marriage in 1997, Jim had $94,262 in a Federal Thrift Savings Plan and contributions continued to be made after parties' marriage with marital funds. Certified Public Accountant Helen Cohen testified that the balance of the plan on May 5, 2015 was $542,314. Cohen testified that Jim's nonmarital equity had grown in value during the parties' eighteen-year marriage from $94,262 to $214,092 by December 31, 2013. Cindy's Certified Public Accountant, Missy DeArk, did not disagree with the figures relied upon by Cohen but testified that those calculations needed to be updated to reflect activity after 2013, including a $45,000 loan against the plan in 2014.

Despite evidence that Jim's nonmarital share in the Thrift Savings Plan had increased in value over the eighteen-year marriage because of economic circumstances, the family court restored him only $94,262 as his nonmarital

interest. Although the family court properly found that amounts paid into the plan with marital contributions and the increase in value on that amount is marital property under KRS 403.190(2)(e), Jim is entitled to any increase in the value of his nonmarital share of $94,262 over the course of the marriage. We remand for appropriate findings regarding the nonmarital and marital interest in the Thrift Savings Plan.

Jim also contends that the family court erred when it did not award him $139,662 as his nonmarital interest in a Vanguard account and subaccounts that he argues were partially funded using nonmarital funds from a now nonexistent Fidelity IRA he owned prior to the marriage. He also argues that he should be entitled to the majority of the Vanguard IRA because Cindy frivolously spent marital funds put into an IRA created for her in 1998 and those amounts should be offset.

The family court found that Jim failed to trace the previously owned nonmarital Fidelity account funds into the existing Vanguard account and subaccounts owned at the time of dissolution. It concluded Jim failed to prove that any increase was not due to the joint efforts of the parties and that contributions to those accounts after 1997 were from nonmarital funds.

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." *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004) (quoting 15 L. GRAHAM & J. KELLER, KENTUCKY PRACTICE DOMESTIC RELATIONS LAW § 15.10). As stated in *Maclean v. Middleton*, 419 S.W.3d 755, 767 (Ky.App. 2014):

> If the claimant does so, then the trial court assigns the specific property, or an interest in the specific property, to the claimant as his or her non-marital property. On the other hand, a claimant cannot meet the tracing requirement simply by showing that he or she brought non-marital property into the marriage without also showing that he or she has spent his or her non-marital assets in a traceable manner during the marriage.

The Court observed that "[w]here the party claiming the non-marital interest is a skilled business person with extensive record keeping experience, the courts may be justified in requiring documentation to trace non-marital assets into marital property." *Id*.

As noted by the family court, while there was evidence of the value of the Fidelity account on the date of the marriage and the value of the Vanguard account and subaccounts at the time of dissolution, there was no evidence tracing the Fidelity funds into the Vanguard accounts. We conclude the family court did not err by finding Jim failed to adequately trace the amount in the Vanguard accounts as nonmarital.

Additionally, we are not persuaded that Cindy's interest should be off-set by the funds she expended from the IRA established in her name. While it is

true that "a party may not spend marital assets or funds for non-marital purposes, and then expect to receive an equal share from the diminished marital estate[,]" *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky.App. 1998), there is no evidence that Cindy spent those funds in anticipation of a dissolution of the marriage to deprive Jim of his marital interest. *Id*. There is evidence that Cindy spent those amounts to pay marital expenses.

The family court awarded Cindy full survivor benefits from Jim's civil service retirement plan (CSRS). Jim argues Cindy should have been awarded only a *pro rata* share of those benefits, or 42% based on the marital/nonmarital contribution to his pension.

5 United States Code (U.S.C.) § 8341(h)(1) and 5 Code of Federal Regulations (C.F.R.) § 838.101(a)(1) permits a court to order an employee to affect a survivor annuity benefit, naming the employer's former spouse as beneficiary. A qualified spouse is "a living person who was married for at least 9 months to an employee or retiree who performed at least 18 months of civilian service covered by CSRS . . . and whose marriage to the employee or retiree was terminated prior to the death of the employee or retiree." 5 C.F.R. § 838.103. "[T]he purpose of a survivor annuity benefit is to protect the named beneficiary financially in the event of the death of the employee." *Caldwell v. Caldwell*, 103 Md.App. 452, 456, 653 A.2d 994, 996 (1995).

Despite its purpose, Jim argues we should treat the survivor benefit the same as marital/nonmarital property and award Cindy only that portion that reflects the marital contribution. His objection to the award is based on the hypothetical that he may someday remarry, and his possible widow should receive part of those benefits.

Given that the purpose of the survivor benefit is to provide support, we agree with the Court in *Caldwell* that the benefit "should be considered not as a division of marital property, but as part of the spousal support obligation." *Id*. at 462, 653 A.2d at 999. Although a family court "may not out-of-hand order a survivor annuity benefit to be maintained, it may determine a fair and equitable amount." *Id*. at 463, 653 A.2d at 999.

The proper standard of review is the abuse of discretion standard. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). Under the facts, the family court did not abuse its discretion.

Jim requested "supervision time" with his children, ages 15 and 17 during the summer months while Cindy worked. After interviewing the children in-chambers the family court denied his request. We conclude the family court did

not abuse its "broad discretion in child custody and visitation matters." *Nein v. Columbia*, 517 S.W.3d 492, 496 (Ky.App. 2017).

The remaining issues presented by Jim also fall within the abuse of discretion standard of review. We conclude that the family court did not abuse its discretion in awarding supervision of the children's education savings to Cindy. Although Jim argues he is more educated than Cindy and, therefore, more suited to control the accounts, the family court acted well within its discretion.

We also conclude that the family court did not err in denying Jim a tax credit for amounts he paid to Cindy from his CSRS retirement for 2014, 2015, and part of 2016. Jim chose to pay Cindy from those funds and no payments were made by the federal government directly to Cindy until after she was awarded a portion of his federal pension. We conclude the family court did not abuse its discretion.

For the reasons stated, we reverse and remand to the family court for an award of $595,000 to Jim as his nonmarital interest in the home and application of the *Brandenburg* formula to determine the parties' marital and nonmarital interests in the family residence. We also reverse and remand for appropriate findings regarding the nonmarital and marital interest in the Thrift Savings Plan. In all other respects, we affirm.

DIXON, JUDGE, CONCURS.

CLAYTON, CHIEF JUDGE, CONCURS AND FILES SEPARATE OPINION.

CLAYTON, CHIEF JUDGE, CONCURRING: I agree with the majority that the family court did not properly account for the non-marital contribution. However, I write separately because I believe that neither *Brandenburg* nor its progeny require the court to use that specific formula, but instead the court must consider both the marital and non-marital contributions and also the existing mortgage at the time of the marriage. Therefore, I would reverse and remand with directions to the family court to either apply the *Brandenburg* formula or any other formula that considers the non-marital and marital contributions of the parties.

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