

RENDERED: AUGUST 2, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000778-MR

CAROLYN LYKINS

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 12-CI-00258

DENVER LYKINS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

ACREE, JUDGE: Appellant, Carolyn Lykins appeals the April 6, 2017, Carter Circuit Court order finding she dissipated \$65,000.00 in marital assets prior to the dissolution of her marriage with Appellee, Denver Lykins. We affirm.

FACTS AND PROCEDURE

This matter was previously before this court in *Lykins v. Lykins*, No. 2014-CA-000524-MR, 2015 WL 3643442 (Ky. App. June 12, 2015). In that

appeal, Denver argued he had established a *prima facie* claim that Carolyn dissipated assets but that the circuit court failed to rule on the issue. His argument persuaded this Court which found the circuit court erred by failing to rule on the dissipation question before dividing the marital assets. The case was remanded to allow the circuit court, holding that Denver's *prima facie* showing of dissipation shifted the burden to Carolyn to present evidence, if she could, how the assets were used for a marital purpose and therefore not dissipated. The remand specifically gave "instructions to make a specific finding on the issue of dissipation and assignment of tax liabilities" associated with the withdrawal of IRA and pension funds, the assets allegedly dissipated.

On remand, the circuit court considered the evidence and found as follows:

1. There are two accounts. With respect to the first account, [Carolyn] removed \$100,000.00 from an IRA that belonged to [Denver]. . . . After withholding for tax and penalty, the actual amount received was \$80,000.00. [Carolyn] presented evidence that she paid off the mortgage on the parties' residence in the amount of \$70,761.03 from that \$80,000.00. The record reflects that she withdrew the remainder of that amount. Her testimony was that she "paid bills" with that money but she provided no documentation of its disposition nor did she provide any evidence of any specific bills which she did pay. [Denver] should receive a credit against the obligations owed by him in the Court's Judgment for one-half of that amount.

2. The second account involves \$65,000.00 from an employment[-]based account. [Carolyn] admits that she withdrew the funds and they came into her possession. She offers no explanation whatsoever as to where the funds went. The Court notes that there is substantial evidence of extensive gambling by Mrs. Lykins at a casino in southern Indiana. [Carolyn] again asserts that although she was fired from her job at Frito Lay, she continued to work as an independent contractor for Frito Lay. She cannot remember the full names or exactly what she was paid for her services, but it is evident that any earnings that [Carolyn] may have received from such independent contracting cannot account for the extensive gambling activities in which she engaged. The Court therefore finds that the \$65,000.00 removed by [Carolyn] was dissipated by her. [Denver] is entitled to a credit against the amounts due and owing [Carolyn] for one-half thereof.

(Order, April 6, 2017.)

Carolyn filed a motion to alter, amend or vacate the April 6, 2017, order, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

Our standard of review is governed by CR¹ 52.01, which provides that, “[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; . . . Findings of fact shall not be set aside unless clearly

¹ Kentucky Rules of Civil Procedure.

erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *See also Largent v. Largent*, 643 S.W.2d 261, 263 (Ky. 1982). The foundation of CR 52.01 is the trial court’s findings of fact, as they give this Court a clear understanding of the grounds and bases of its judgment. As such, an appellate court will not overturn the findings of the lower court if supported by substantial evidence and thus not clearly erroneous. Findings of fact are clearly erroneous if they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence of a probative value that a reasonable person would accept as adequate to support a conclusion. *Id.*

ANALYSIS

A reviewing court’s analysis necessarily considers the briefs and the record. Carolyn’s failure to follow the rule governing appellate briefs, CR 76.12, makes our review challenging. She fails to cite to the certified record in violation of CR 76.12(4)(c)(iv) and (v). There is citation to the videotape transcript of the October 10, 2013 hearing that occurred prior to the parties’ first appearance in this Court, but that videotape is not part of the record on this appeal. There is no argument heading or statement concerning whether and how the point of error argued before this Court was preserved in the circuit court. CR 76.12(4)(c)(iii), (v). Such deviations from our rules justify review of the issues raised in the brief

for manifest injustice only. *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990); *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010).

However, we need not adjust the standard of review in this case because Carolyn's argument is without merit. She fails to recognize that this Court previously held that Denver made a *prima facie* showing of dissipation, and that the burden was upon her to present evidence to contradict that showing. What evidence had Denver presented?

Denver introduced an IRS report concerning Carolyn's gambling earnings for 2011. The report, prepared on September 6, 2011, stated that an individual named Carolyn Lykins attempted to open a \$1,000.00 line of credit at the Hollywood Casino in Lawrenceburg, Indiana, using a social security number associated with the Social Security Administration's issuance of death benefits on May 15, 1970. (R. at 14.)

The report reviewed Carolyn's player account, which began January 27, 2011. For the entirety of 2011, the report showed thirty-one slot jackpots of sizeable amounts. Carolyn said the report was erroneous. She has since provided no evidence to substantiate her statement this report was made in error.

In substance, Carolyn's argument is that substantial evidence does not support the circuit court's finding of dissipation because she "makes a clear denial that she did not visit the casinos as often as alleged in the [IRS] document"

(Carolyn’s brief, p. 4.) Given the opportunity to overcome Denver’s *prima facie* case for dissipation, she had nothing to offer other than her denial. That is not enough.

Rather than telling this Court how she countered Denver’s proof, Carolyn contends the circuit court assigned fault to her in violation of the intent of KRS² 403.190. She argues “it is clear the court decides there is fault involved as someone has an extensive gambling problem. . . . Herein the court . . . is assessing fault against an individual, and totally violates the clear intent of the statute not to do so and therefore has abused it’s [sic] discretion.” We disagree. Not only is abuse of discretion not the standard of review here, there is nothing to which this Court has been directed that even hints that the circuit court’s decision was based on fault-finding. Finding that a spouse dissipated assets is a question of proof and mathematical calculation, no matter how the dissipated assets are spent. As this Court has stated:

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. The “fault” considered is not blame for the dissolution of the marriage. Rather, the court will deem the wrongfully dissipated assets to have been received by the offending party prior to the distribution.

Brosick v. Brosick, 974 S.W.2d 498, 500 (Ky. App. 1998).

² Kentucky Revised Statutes.

Carolyn failed to satisfy her burden to account for the assets and demonstrate that she did not direct them to her own use. The circuit court's finding is supported by substantial evidence.

CONCLUSION

For the foregoing reasons, we affirm the Carter Circuit Court's April 6, 2017 order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard A. Hughes
Ashland, Kentucky

BRIEF FOR APPELLEE:

Gordon J. Dill
Ashland, Kentucky