

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000326-MR

ROBERT H. RODGERS

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE SUSAN WESLEY MCCLURE, JUDGE
ACTION NO. 15-CI-00692

LANA RENEE RODGERS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON,
JUDGES.

COMBS, JUDGE: Robert Rodgers appeals from the decree of the Hopkins Circuit

Court entered on January 26, 2018 that dissolved his marriage to Lana Rodgers.

The family court divided the marital property between the parties and allocated a

portion of the debt to Robert. Following our review, we vacate and remand.

Robert owns and operates Rodgers Logging Company and had done so for the twenty or so years prior to his marriage to Lana in August 2013. On November 3, 2015, Robert withdrew more than \$31,000 from the parties' joint bank account and deposited it into his individual account. On November 9, Robert withdrew an additional \$15,000 from the parties' joint bank account and deposited it into his individual account. Three days later, on November 12, 2015, he filed his petition for dissolution of the marriage and a motion *pendente lite*. He also asked the court for a *status quo* order, which was entered on November 13, 2015. Lana was properly served with the petition and the motion. A hearing on Robert's motion *pendente lite* was scheduled for December 16, 2015.

In his petition, Robert indicated that the parties had been separated since September 2015. Lana testified later that despite the petition for dissolution, the parties had continued to live together and to operate their household in the same manner as they had before the petition was filed. She indicated that the couple had maintained marital relations and that Robert had advised her that the divorce proceedings had been "put [] on the shelf" while the couple explored the prospects for reconciliation. Lana did not answer the petition. On December 15, 2015, she was served with a motion and notice to reschedule the *pendente lite* hearing to January 13, 2016.

On December 29, 2015, Robert moved the family court to enter a default judgment. He did not mention this motion to Lana. Instead, he tendered to the court a decree of dissolution that included a division of the marital property (not including the cash withdrawn from the couple's joint bank accounts) and debt. The tendered decree was entered on January 5, 2016.

Lana retained counsel, and on January 13, 2016, she filed a motion requesting that the default judgment be set aside except that portion which dissolved the parties' marriage. Concluding that the division of property and allocation of debt included in the final decree tendered by Robert were neither complete nor equitable, the family court granted Lana's motion.

On September 22, 2017, the parties agreed to certain written stipulations related to the marital property and debts and to additional written stipulations related to the procedural history of the case. On September 28, 2017, the family court conducted an evidentiary hearing pertaining to an equitable distribution of the parties' property and an allocation of debt. Following the hearing, the trial court's judgment was entered on January 26, 2018. An amended judgment was entered on the same date to correct certain typographical errors.

The family court awarded Robert marital property with a purported value of \$242,439.70. He was allocated marital debt totaling \$165,956.04. Lana was awarded marital property valued at \$122,616.24. No marital debt was

allocated to her. The decree provided that the court had been guided in its distribution of the marital estate by the statutory factors included in Kentucky Revised Statutes (KRS) 403.190. It concluded that its division of marital property was in just proportions and that its allocation of debt was fair and equitable.

The court found that Lana had already received property valued at \$31,167.00 and the benefit of sums totaling \$18,364.51. It also found that Lana owed Robert \$7,051.81 for the damage that she had caused to his property.¹ The court deducted \$56,583.32 from the value of marital property awarded to her and concluded that Robert owed to her the sum of \$66,032.92. Robert appealed.

On appeal, Robert contends that the family court made numerous errors in its findings of fact and that it abused its discretion by failing to distribute the marital property in just proportions. We address these arguments in the order in which they were presented.

Our standard of review is governed by the provisions of Kentucky Rules of Civil Procedure (CR) 52.01, which require that:

In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard

¹ Lana damaged Robert's shop with her vehicle and she also damaged other vehicles before entry of the decree of dissolution. No mention is made of any compensation for medical expenses (if any) related to Lana's use of a baseball bat on him after he admitted to a marital indiscretion in Tennessee.

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). We may not overturn the findings of a trial court if they are supported by substantial evidence. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002), *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). If the findings of fact are not supported by the evidence, they are deemed to be clearly erroneous and must be set aside. *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. App. 1999). Substantial evidence is that evidence which -- when taken alone or in the light of all the evidence -- has sufficient probative value to induce conviction in the minds of reasonable people. *Id.* (citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298 (Ky. 1972)).

Robert argues first that the family court clearly erred by finding that he had violated the *status quo* order. He observes that he had established his individual account at Independence Bank using funds taken from the parties' joint accounts **days before he filed the petition for dissolution** and his motion for a *status quo* order. We agree that the family court clearly erred in its finding since he technically had moved the money prior to entry of the *status quo* order. However, in light of our later discussion, that error was harmless.

Next, Robert takes issue with the finding of the family court that it had held that Lana was "entitled to a new trial" and that it "granted the new trial

which was held September 28, 2017.” Roberts contends that “[t]hese assertions are incorrect as the trial court never ruled on the motion to alter, amend, or vacate that was *alleged* to have been filed of record on or around January 12, 2016.”

(Emphasis added.)

A motion to set aside the default judgment was filed with the court by Lana on January 13, 2016. It appears of record. Counsel for Robert filed a written response to the motion. Additionally, at numerical paragraph 9, the parties’ procedural stipulations provide as follows:

On January 12, 2016, a Motion was filed on behalf of Lana Rodgers requesting that the Default Judgment Decree of Dissolution of Marriage be vacated and set aside except that portion thereof which dissolved the marriage of the parties.

This stipulation was signed by counsel for Robert, who also appears in this appeal on his behalf. Thus, the decision of the family court to set aside the default judgment clearly was not erroneous.

Next, Robert argues that the family court clearly erred by assigning to him both the “Knuckle boom and CTR ground saw” (stipulated by the parties at numerical paragraph 24 of their stipulations to have a marital value of \$8,525) **and** the “Prentice 280 Knuckleboom Loader with CTR Model 421P Ground Saw” (stipulated by the parties at numerical paragraph 27 to be property subject to division and having a value of the average of their two appraisals which amounts

to \$27,500). Robert contends that he owns only “one Knuckleboom Loader and CTR Ground Saw and no evidence was presented to the contrary.” He concludes that this error was simply a duplication by the family court and acknowledges that \$27,500 should be deducted from the total value of assets assigned to him.

Similarly, Robert argues that the family court erred by assigning to him both the “650-G John Deere bulldozer” (with a stipulated marital value of \$12,675) **and** the “John Deere 650G LGP Bulldozer #828852” (valued by the parties at \$19,500). Robert was also awarded a “John Deere bulldozer, 700H LGP, #939752” (with a stipulated value of \$43,000) and a “John Deere 700H LGP Bulldozer #903449” (valued by the parties at \$39,250). Again, Robert contends that he owns only “one John Deere 650G LGP Bulldozer and no evidence was presented to the contrary.” He concludes that this, too, was a “duplication error” and that a further \$6,825 (the difference between the values of the two disputed bulldozers) should be deducted from the total value of the assets assigned to him. Robert contends that the two alleged duplication errors result “in an irrefutable error in the amount of \$34,325 in the assets awarded” to him.

Having reviewed the record, including the provisions of Lana’s disclosure statement and the professional appraisals provided to the family court, we are persuaded that the family court’s findings of fact with respect to these assets were clearly erroneous. It appears that the duplications are exactly as Robert

represents. Because the family court had as its proper goal an equitable distribution of the marital estate rather than an equal division, we are unable to determine how these calculation errors might affect the family court's final computations. Consequently, we must reverse the judgment and remand for further proceedings to permit the family court to correct these computational errors.

Next, Robert raises the issue of a \$600.00 check (numbered 17867) drawn, post-decree, on the parties' U.S. Bank account by Lana. He argues that the family court erred by failing to include that check in its calculation of the value of assets that Lana had already received from the marital estate. Our review of the exhibit submitted by Robert and relied upon by the family court appears to support Robert's contention. The court included the value of three other checks (each also for \$600) in its calculations, but it failed to account for the remaining check (numbered 17867). On remand, the family court must address this asset.

Robert also contends that the family court erred by failing to include in its calculation of debts allocated to him marital business debts he paid in the total amount of \$15,818.17. It appears from our review that the individual sums that Robert seeks to have included represent debts that were incurred and paid prior to the date of the dissolution decree. The family court did not err by choosing not to include these sums in its allocation of debt.

Robert next argues that the family court erred by failing to credit him with having paid to Lana \$8,860.67 -- the sum that she stipulated that she expended from the parties' joint account at Independence Bank during the post-dissolution period January 5, 2016, through March 23, 2016, and an additional amount of \$4,012.82 -- the total charges that Lana made to the U.S. Bank credit card account during February, March, and April 2016 (post-dissolution). We agree that the parties' stipulations and testimony reflect that these amounts were subtracted from the marital estate after the date of the dissolution decree yet were omitted from the total assets received by Lana. On remand, the family court must account for these sums.

Finally, Robert argues that the family court abused its discretion by failing to conclude that Lana dissipated a portion of the marital estate and by failing to award him a greater proportion of the marital property.

“[A] party is free to dispose of his marital assets as he sees fit so long as such disposition is not fraudulent or intended to impair the other spouse's interest[.]” *Duffy v. Duffy*, 540 S.W.3d 821, 828 (Ky. App. 2018) (citing *Ensor v. Ensor*, 431 S.W.3d 462, 472 (Ky. App. 2013)). In making a just distribution of the marital estate, it is proper for the family court to decide whether a party dissipated or wasted marital assets where the property was expended “(1) during a period when there is a separation or dissolution impending, and (2) where there is a clear

showing of intent to deprive one's spouse of his or her proportionate share of the marital property." *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987); *see also Brosick v. Brosick*, 974 S.W.2d 498 (Ky. App. 1998).

Dissipation is demonstrated by a preponderance of the evidence, and the family court's findings of fact are upheld if supported by substantial evidence. *Kleet v. Kleet*, 264 S.W.3d 610 (Ky. App. 2007). If dissipation is found to have occurred, "the court will deem the wrongfully dissipated assets to have been received by the offending party prior to the distribution." *Brosick*, 974 S.W.2d at 500.

The family court concluded that Lana would bear the costs associated with the repair of the shop that she damaged with her vehicle and the costs of repair to the vehicles that she damaged before entry of the decree; that she would be credited with receipt from the marital estate for the value of four checks drawn on the parties' Independence Bank account made payable to her before the date of the dissolution decree; and that the certain charges to a U.S. Bank credit card incurred by Lana before the date of dissolution would be credited to her share of the marital estate. The family court also considered the value of two checks drawn on the parties' U.S. Bank account prior to the entry of the decree, but it determined that there was no evidence from which it could conclude that they were written in

order to dissipate the marital estate. We are not persuaded that the family court erred in its conclusion that Lana did not dissipate the marital estate.

Robert contends that the family court abused its discretion by assigning to Lana such a large proportion of the marital estate since she failed to contribute meaningfully to its acquisition. He also argues: that the value of property set apart to her was substantial; that the marriage was short-lived; and that she is back in “the same place she came from[] and living under the exact conditions as before marrying [him.]

The equitable distribution of marital property is governed by the provisions of KRS 403.190, which direct the trial court to divide marital property in “just proportions” and without regard to marital misconduct. In deciding upon the proper distribution of property, the trial court is to “consider all relevant factors[,]” including: the contribution of each spouse to the acquisition of the property; the value of the property assigned to each spouse; the duration of the marriage; and the economic circumstances of each spouse at the time the property is divided. *Id.* Moreover, “a trial court has wide discretion in dividing marital property; and we may not disturb the trial court’s rulings on property-division issues unless the trial court has abused its discretion.” *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

In light of our directions, the court will necessarily need to re-visit its division of the marital property. Having reviewed the record, we are persuaded that the family court is well aware of its duty to divide the marital assets equitably and that it is familiar with the factors relevant to its determination. Because of computational errors as discussed above, we vacate and remand. However, we have found no abuse of discretion.

For the foregoing reasons, the findings of fact, conclusions of law, and final order and decree of dissolution of the Hopkins Circuit Court are vacated and remanded with instructions to address the assets at issue and, as a consequence, to re-visit its division of the marital assets as may appear necessary and appropriate after correction of the mathematical errors.

ALL CONCUR.

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