

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000270-MR

GARY W. THOMPSON

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT B. OVERSTREET, JUDGE
ACTION NO. 97-CI-00138

LYDIA KATHLEEN THOMPSON

APPELLEE

OPINION

AFFIRMING IN PART, REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: COMBS, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Gary W. Thompson (Gary) appeals from the court's order confirming portions of the domestic relations commissioner's report which divided the parties' property and debts as a result of their divorce and awarded attorney fees to Lydia Kathleen (Kathleen) Thompson's attorney. Gary argues that the court erred in assigning to Gary as a marital asset the value of improvements that the couple made to the family farm. Moreover, Gary contends that Kathleen's interest in his 401(K)

should be offset against one half of his student loan balance. Finally, Gary does not believe that he should have to pay Kathleen's attorney fees. After considering the arguments made by the parties and the record, we reverse and remand in part and affirm in part.

Gary and Kathleen were married on November 2, 1991, in Fayette County, Kentucky. The couple had one child, Jared, who was five years old at the time Gary filed the petition for dissolution on July 9, 1997.

During the marriage, Gary completed his education, taking out student loans to assist with expenses. At the time of the divorce, Gary worked as a test engineer at Lexmark earning in excess of \$43,000 per year. Kathleen worked as a teacher's assistant for which the court attributed her a minimum yearly income of \$10,920. She worked 20-25 hours per week so she could care for Jared when his school day was over.

Gary had a 401(k) through his employment at Lexmark. The court concluded that Gary's 401(k) was to be divided equally as Gary's plan existed as of June 25, 1998, the date of entry of the Decree of Dissolution of the marriage.

During the marriage, Gary and Kathleen rented the farm belonging to Gary's father. They paid a monthly rent of \$350 for a medium-sized house on a one acre lot. Gary and Kathleen made improvements to the property including a large metal

building and a new garage door valued at \$5,274. At some point after Gary filed for divorce, Kathleen moved out, and Gary continued to reside on the farm. In disposing of the marital property, the court ultimately found that the value of the improvements to the property (\$5,274) was a marital asset that remained in Gary's possession. Accordingly, the court assigned this value to Gary.

Following is a breakdown of the court's assignment of marital property and debts to Gary and Kathleen:

Petitioner, Gary Thompson

Personalty	\$10,510.00
Farm Improvements	5,274.00
Debt - Tractor	(3,719.00)
Debt - Truck	(3,690.00)
Debt - Credit Card	(1181.00)
Debt - Garage Doors	(865.00)
 TOTAL	 \$6,329.00

Respondent, Lydia Kathleen Thompson

Personalty	\$3,385.00
Debt - Credit Card	(576.00)
Debt - Vehicle	(4,096.00)
 TOTAL	 (\$1,287.00)

Based on the above, the court concluded that Gary shall pay Kathleen the sum of \$3,808 to equalize the division of marital assets between the parties.

Just prior to Gary's filing for divorce, Kathleen won a hot tub. Later, Kathleen sold the hot tub for \$3,000, and

used the proceeds to pay her attorney a \$1,500 retainer in the underlying divorce proceedings. She used the remaining \$1,500 for living expenses. Based upon the respective incomes of the parties, Gary's income constituting 80 percent of the total, the court concluded that Gary should pay 80 percent of the "\$1500 initial payment made by respondent [Kathleen] for attorney's fees, or a total of \$1200. Said amount shall be payable directly by petitioner to counsel for respondent."

Gary filed written objections to the commissioner's report. The trial court overruled all the objections with the exception of the visitation schedule in the joint custody agreement. On all other issues, the trial court confirmed the commissioner's report. Gary appeals the court's order.

Gary raises three arguments on appeal. First, Gary contends that the trial court and the commissioner abused their discretion by allocating the value of the metal building and garage door to Gary as marital assets. Second, Gary argues that the trial court and the commissioner erred in assigning Gary the total responsibility for repayment of the student loan debt, while only giving him one half of his 401(k), when his education allowed him to earn the 401(k). Finally, Gary asserts that Kathleen's attorney had already been paid by Kathleen with marital funds, therefore, he should not have to pay Kathleen's attorney \$1,200.

The first issue Gary raises involves an application of the statutory framework for equitable distribution of property on divorce and therefore constitutes a question of law. Thus, our review is *de novo*. See Holman v. Holman, Ky., 84 S.W.3d 903, 905 (2002).

In disposing of the marital property pursuant to Kentucky Revised Statutes (KRS) 403.190, the court assigned the value of the metal building and garage door to Gary as marital assets remaining with Gary because Gary remained in the house. “[M]arital property’ means all property acquired by either spouse subsequent to the marriage . . .” KRS 403.190(2). Moreover, improvements made on land owned by another and paid for with marital funds are not marital property. See Mullins v. Mullins, Ky. App., 797 S.W.2d 491, 492 (1990).

In finding that the improvements to the family farm were marital assets in this case, the court based his determination on the fact that Gary remained in possession of the metal barn and new garage door after the couple divorced. However, we believe the court’s conclusion was contrary to the holding of Mullins, 797 S.W.2d at 492. In that case, Paula and Robert Mullins lived in a home built by Robert’s father, Jesse, on Jesse’s land. Jesse built the home, and Robert and Paula finished the interior. Thereafter, Paula and Robert lived in the house rent-free. Eventually, the couple divorced. In

dividing the couple's property, the court determined that although the couple used marital funds to make improvements to the home, neither party would receive a set-off for those costs since Jesse held title to the property. See id. Although the facts do not indicate that Robert remained in the house after the couple divorced, we do not believe that that fact would change the outcome of the case, because the court focused on the parties' knowledge, and Paula's knowledge in particular, that the title rested in Jesse. See id. at 493.

In this case, we do not believe the farm improvements are marital assets. Gary's father owned the farm to which the couple made improvements. Whether or not Gary remained on the farm after the divorce and continued to use and enjoy the metal barn and the garage door is not a factor to consider in determining if the improvements were marital property. Since improvements made on land owned by another and paid for with marital funds are not marital property, we reverse the trial court's assignment of marital property and remand for redetermination of the marital assets.

The second issue that Gary raises on appeal is whether the trial court erred in assigning Gary the total responsibility for repayment of the student loan debt, while only giving him one half of his 401(k), when his education allowed him to earn the 401(k). We review issues pertaining to the assignment of

debts incurred during the marriage under an abuse of discretion standard. See Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 523 (2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000).

"Loans obtained to get an educational degree are considered non-marital debts." Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675, 679 (1993) (citing Van Bussum v. Van Bussum, Ky. App., 728 S.W.2d 538 (1987)). In other words, because Gary will reap the benefit of the education, he should bear the responsibility for repaying the debt incurred in obtaining that education. See Van Bussum, 728 S.W.2d at 539. Accordingly, the trial court did not abuse its discretion in assigning the entire student loan to Gary.

Gary asks this court to consider the factors set out in Neidlinger, Supra, in reviewing the trial court's assignment of the student loan. In particular, Gary asserts that two factors a court should weigh are (1) whether Gary incurred the debt to facilitate acquisition of marital property; and (2) whether incurring the debt was necessary for support and maintenance of the family. However, Neidlinger goes on to say that "[a]nother factor, of course, is the economic circumstances of the parties bearing on their respective abilities to assume

the indebtedness." Id. at 523. Based on the respective incomes of Gary and Kathleen, Gary was in the better position to assume the debt. Thus, the Neidlinger factors further support the trial court's conclusion to assign Gary the student loan debt.

The final argument Gary raises is that Kathleen's attorney had already been paid by Kathleen with marital funds, therefore, he should not have to pay Kathleen's attorney \$1,200. On this issue, the court found as follows:

The Commissioner further finds and concludes that petitioner [Gary] shall pay a portion of respondent's attorney's fees, given the inequality of resources between the parties. Based upon petitioner's wages in excess of \$43,000 in 1997 and the minimum wage attributed to respondent of \$10,920, the petitioner's earnings are 80% of the total earnings of the parties. Based on that percentage, the Commissioner concludes that the petitioner should pay 80% of the \$1500 initial payment made by respondent for attorney's fees, or a total of \$1200. Said amount shall be payable directly by petitioner to counsel for respondent.

Because the court ordered that the \$1,200 shall be paid directly by Gary to Kathleen's attorney, Kathleen's attorney is a necessary party to this appeal. See KRS 403.220; Neidlinger, 52 S.W.3d at 518-19. Kathleen's attorney is not a named party to this appeal, therefore, we can not consider Gary's arguments on this issue.

For the foregoing reasons, the trial court's order overruling Gary's objections to the commissioner's report is

affirmed in part, and reversed and remanded for an order consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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