

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000421-MR

MARK DOUGLAS FOX

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 99-CI-00864

WILMA JEAN FOX

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: HUDDLESTON, PAISLEY AND TACKETT, JUDGES.

PAISLEY, JUDGE. This is an appeal from a decree of dissolution entered by the Pulaski Circuit Court. For the reasons stated hereafter, we affirm.

The parties married in 1977, separated in 1999, and divorced some two years later. Both of their children are now adults. The parties engaged in dairy and other farming activities throughout the marriage, and at various times they also had outside employment. The court divided the parties' assets and debts as more particularly described below, and this appeal followed.

First, appellant contends that when dividing the parties' marital property, the trial court erred by failing to consider appellant's substantial contributions to the accumulation of such property. We disagree.

The record shows that the parties adduced substantial evidence regarding the work which they each performed, both on and off the farm, during the marriage. Appellant contends that he performed more of the farm-related work over the years, and that the court erred by failing to award him a greater share of the farm property in light of KRS 403.190(1)(a), which requires a court to consider the "[c]ontribution of each spouse to acquisition of the marital property." However, even if one assumes for the sake of this argument that appellant indeed performed more of the actual farm-related work over the years, his argument must fail since KRS 403.190(1)(a) provides in its entirety that the trial court's division of marital property must include a consideration of the "[c]ontribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker." (Emphasis added.) Our review of the record shows that substantial evidence was adduced to show that appellee's efforts, including the generation of additional income through outside employment, also contributed greatly to the parties' acquisition and maintenance of the farms and other marital property. Having carefully reviewed the

evidence, we cannot say that the trial court failed to consider appellant's contribution to the acquisition of marital property, or that it abused its discretion when dividing the residences or other property between the parties.

Next, appellant contends that the trial court erred when making its findings regarding his nonmarital interests. More specifically, he asserts in part that the court failed to restore to him the value of certain farm equipment which he allegedly owned prior to the marriage. However, given the conflicting evidence which was adduced regarding the equipment's purchase date, we cannot say that the court abused its discretion by determining that the purchase occurred after the marriage and that appellant lacked any nonmarital interest therein.

Moreover, although appellant asserted that he was entitled to be reimbursed for an ownership interest in certain cattle, it is clear from the record that the individual cattle were no longer alive at the time of the dissolution, and that appellant could not specifically trace the nonmarital animals, or the proceeds from the sale of such animals, into other specific animals or property which the parties had in their possession at the time of dissolution. We therefore cannot say that the court erred by failing to find that appellant fulfilled his tracing obligations. Further, although it is undisputed

that appellant sold his interest in a family dairy business to his father and brother in 1994, no evidence was adduced to show what, if any, portion of that value was attributable to appellant's interest in the business during the two years between the start of the family business venture and the date of the parties' marriage. The court therefore did not err by failing to assign to appellant any portion of the price which was paid for the sale of the interest in the dairy business in 1994.

Next, appellant contends that the trial court erred by relying on conflicting property appraisal reports which established widely divergent values for particular items of marital property. He relies on Robinson v. Robinson, Ky. App., 569 S.W.2d 178, 180 (1978), overruled on other grounds by Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981), in asserting that the trial court should have either ordered that additional evidence be obtained, appointed its own experts to determine value, or directed the sale of the property. However, unlike Robinson, supra, at 180, here there was not a "total lack of evidence" regarding valuation. To the contrary, the record simply shows that the parties adduced substantial conflicting evidence as to valuation. We cannot say that the court abused its considerable discretion by picking and choosing among the evidence to determine the value of the property.

Appellant's next stated issue and argument consist only of the following statements:

THE COURT ERRED IN DETERMINING THE DEBT ON THE FARM AS THE DEBT FIGURE SUBTRACTED WAS THE PAYOFF, DID NOT INCLUDE INTEREST, OR ALLOW CREDIT FOR THE \$32,075.00 USED TO MAKE THE MONTHLY FARM PAYMENT AND DID NOT ALLOW MARK CREDIT FOR THE \$98,600.00 MARK PAID WHILE THE LITIGATION CONTINUED.

In addition, the indebtedness on the property is so obviously wrong as to require a reversal. The figure used to determine the debt by the court was the "payoff" and it is obvious on its very face that this is wrong as the debt is subject to interest of 7.25% per cent [sic] per annum. This mistake obviously greatly penalizes Mark Fox. Mark also was not allowed credit for the \$98,600.00 he paid in on the debt as this divorce drug on and on nor his work in paying that debt.

This argument does not show whether or how these matters were preserved for appellate review, see CR 76.12(4)(c)(v), and our review of the record, including appellant's motion and supplemental motion to vacate the judgment, fails to show that they were raised before the trial court. Hence, this issue will not be addressed on appeal.

Next, appellant contends that the trial court erred by valuing the farm equipment in accordance with appraisal values rather than in accordance with depreciated values used for tax purposes. As appellant has cited and we have found no legal authority to support this proposition, we cannot say that the court erred in this regard. Moreover, we conclude that the

court did not abuse its discretion by directing that the equipment be awarded to appellant rather than sold at auction, especially in light of the fact that the farms themselves were awarded to appellant.

Next, appellant contends that the court erred in regard to the valuation of certain dairy cattle. As noted by the trial court, during the proceedings appellant obtained a restraining order against appellee based on his stated desire to continue the dairy farm's normal operations. Then, without appellee's knowledge or the court's consent, appellant sold the herd of cattle for what the court described as "an unknown price." Given that appellant failed during the proceedings below to account for either the sale of the herd or the disposition of the sale proceeds, we cannot say that the court erred by valuing the herd in accordance with appellee's appraisal evidence, and by then including that valuation figure when calculating the total value of the marital property.

Next, appellant contends that the court erred by relying on certain valuation evidence adduced by appellee regarding grain held in storage, rather than relying on appellant's testimony regarding the grain. We cannot agree, given the fact that appellant evidently failed to cooperate in providing the court with specific evidence regarding either the

grain's use or storage, or the disposition of proceeds from the sale of the grain.

Next, appellant contends that the court erred by determining that certain checks, issued by the Department of Agriculture in 1996 but then misplaced, were marital assets which were subject to division between the parties. Although appellant states on appeal that the funds from the reissued checks were deposited into the farm account and were used to pay marital bills, the record contains no evidence to specifically support this assertion. Absent such evidence, we cannot say that the court erred by dividing the value of the proceeds between the parties.

Next, appellant contends that the trial court erred by determining that the farm account was a marital asset. His sole statement in support of this argument is that the account "was used to pay bills for the farm and was not truly an asset as it was used to protect the land as an asset." Simply put, we find no merit in this contention.

Next, appellant contends that the court erred by finding that appellee was entitled to receive one-half of certain insurance proceeds. As the court amended its finding to provide that the entire amount should be awarded to appellant upon compliance with certain other terms of the dissolution decree, this issue need not be further addressed on appeal.

Next, appellant contends that the trial court erred by adopting, without alteration, appellee's proposed findings of fact. However, a line-by-line comparison of the proposed findings and the court's judgment shows that there are numerous significant differences between the two documents. We conclude, therefore, that there is no merit to this argument on appeal.

Finally, appellant contends that the trial court abused its discretion by ordering him to pay \$6,000 of appellee's attorney's fees. However, as the award was ordered to be paid directly to the attorney rather than to appellee, that attorney was a necessary and indispensable party to any appeal. Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 519 (2001). Because appellee's attorney was not so named, the issue of attorney's fees is not properly before us on appeal. In any event, we could not say that the court abused its considerable discretion in making the award.

The court's decree is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phyllis L. Robinson
Manchester, Kentucky

David Austin Tapp
Somerset, Kentucky

BRIEF FOR APPELLEE:

Robert E. Gillum
Somerset, Kentucky