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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001109-MR
AND
CROSS-APPEAL NO. 2002-CA-001221-MR

ROBIN CULVER

APPELLANT/CROSS-APPELLEE

v. APPEALS FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 00-CI-00090

FRANCIS WAYNE CULVER

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
** ** * * * * *

BEFORE: KNOPF, TACKETT, AND VANMETER, JUDGES.

KNOPF, JUDGE: Robin and Francis Culver each appeal from a judgment of the Nelson Circuit Court dividing property between them following dissolution of their marriage. Robin argues that the trial court erred in finding that she had failed to trace her non-marital interest in real property, while Francis contends that the trial court abused its discretion by awarding Robin a larger share of the marital property. Finding no reversible error, we affirm.

Robin and Francis were married for the first time on July 8, 1988. That marriage was dissolved by a decree entered on February 22, 1993. On March 31, 1993, the parties executed a property settlement agreement, but that agreement was never formally adopted by the trial court in the first dissolution action. In fact, the parties resumed their co-habitation shortly after entry of the 1993 decree, and they re-married on January 27, 1996.

Robin filed a petition for dissolution of their second marriage on February 18, 2000. The trial court entered the decree of dissolution on April 7, 2000, reserving for later adjudication the issues of division of property and debt, and child custody and support. Following a hearing, the domestic relations commissioner issued recommended findings of fact. Both parties filed objections to the proposed findings, which the trial court sustained in part. Thereafter, on March 27, 2002, the trial court entered findings of fact and conclusions of law resolving the disputed issues. This appeal and cross-appeal followed.

Robin does not object to the trial court's rulings regarding child custody, time-sharing, and support. Rather, she objects to the trial court's designation of certain property as marital and to its division of other marital property. In addition, Robin contends that the trial court failed to divide a

savings and a checking account which were in Francis's name. In his cross-appeal, Francis also objects to the trial court's unequal division of property, albeit on different grounds.

In particular, Robin first argues that the trial court erred by giving Francis an interest in her separate real property which she brought into the first marriage. In 1987, Robin's parents deeded to her a 2.5 acre tract. The parties built a house on this property, with Francis providing for the labor. The settlement agreement executed after the first divorce provided that this property and the residence would be Robin's separate property. However, on May 26, 1994, Robin executed a deed conveying to Francis a one-half interest in the property.

In addition, they made further improvements to the residence and to the property during the period between the first divorce and the re-marriage in 1996. Furthermore, during the entire period from 1987 until 2000, the parties intermingled funds in making payments on the property. Based upon these facts, the trial court concluded that Robin could not trace her separate, non-marital interest in the property, and it found the property to be entirely marital. Accordingly, the trial court awarded the real property and residence to Robin.

The court awarded the residence and real property entirely to Robin, but offset that award by awarding to Francis all of his 401k account. At the time of the parties' second

marriage, the value of Francis's 401k account was \$16,337.00, and the account had grown to \$54,675.00 as of the date of dissolution of that marriage. However, the trial court indicated that Francis had failed to trace his non-marital interest in his 401k account.

Although the trial court did not make such an express finding, the clear implication of this ruling is that that the trial court deemed the entire \$54,675.00 value of Francis's 401k account to be marital. The marital equity in the residence and real property amounted to \$98,618.00.¹ Rather than equally dividing these assets, the trial court awarded the real property to Robin and the 401k account to Francis without any offset of other marital property. The trial court recognized that this resulted in an unequal division of assets in favor of Robin, but concluded that the circumstances did not require an equal division of marital property.

Robin argues that the trial court erred by deeming the real property to be entirely marital. She asserts that the trial court's decision to give Francis an interest in the property for

¹ Neither Robin nor Francis presented any expert testimony concerning the value of the residence and real property. Francis testified that the property was worth approximately \$150,000.00, while Robin testified that the property was worth about \$140,000.00. The trial court accepted Robin's estimate of the property's value. The parties agreed that there was an outstanding mortgage on the property of \$41,382.00, leaving a total equity of \$98,618.00.

his contributions while they were co-habiting violates Kentucky's policy against recognizing common-law marriage. She further argues that she adequately traced her non-marital interest in the property. At the time of the second marriage in 1996, the mortgage on the property was approximately \$52,000.00. Robin contends that, at most, only the \$10,618.00 used to pay down the mortgage during the second marriage should have been considered marital property. Accordingly, Robin claims that the trial court's division of property substantially favors Francis.

We find no error. The concept of "tracing" is not expressly created by statute, but it is strongly implied. KRS 403.190(3) establishes a presumption that all property acquired during the marriage is marital property. The marital presumption, however, is rebuttable and may be overcome by a showing that the property was acquired by a method listed in KRS 403.190(2). A party claiming that property acquired during the marriage, other than marital property bears, the burden of proof.²

Essentially, the tracing requirement simply means that "[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously

² KRS 403.190(3), Brosick v. Brosick, Ky. App., 974 S.W.2d 498 (1998).

owned property into a presently owned specific asset."³ If the claimant does so, then the trial court assigns the specific property, or an interest in 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. Under such circumstances, the trial court will not assign the property to the claimant as non-marital property, but it may consider non-marital contribution as a factor when it makes a just division of the parties' marital property.⁴

However, the tracing requirement is only necessary when one party brings separate property into the marriage. Furthermore, KRS 403.190(3), which provides that all property acquired after the marriage and before a decree of legal separation is presumed to be marital property regardless of how the property is titled, does not apply to conveyances made outside of marriage. In such cases, record or legal title is an

³ L. Graham & J. Keller, 15 Kentucky Practice, Domestic Relations Law § 15.10, p. 512 (2nd ed. West Group 2000).

⁴ See Brunson v. Brunson, Ky. App., 569 S.W.2d 173, 176 (1978); and Angel v. Angel, Ky. App., 562 S.W.2d 661, 664-665 (1978).

indicia sufficient to raise a presumption of true ownership.⁵ While Robin correctly points out that a co-habitant does not acquire an interest in real property absent some agreement or evidence of intent,⁶ the 1994 deed clearly demonstrates that she intended to give Francis an interest in the real property.⁷ Thus, when they re-married in 1996, the real property was already held in both of their names, and Francis already had an interest in the property.

Furthermore, the parties' conduct during the period between the marriages establishes that Robin intended to give Francis an interest in the property. Although the 1993 separation agreement restored the real property to Robin, the parties did not carry out any of the terms of the agreement. Consequently, the parties' reconciliation rescinded the separation agreement.⁸ In addition, the parties jointly incurred debt to improve the property during this period, and Francis made

⁵ Rakhman v. Zusstone, Ky., 957 S.W.2d 241, 244 (1997).

⁶ Murphy v. Brown, Ky. App., 756 S.W.2d 149 (1988).

⁷ See Rakhman, *supra*, at 244-45, involving a couple who lived together from 1979 until 1992 without benefit of wedlock. In 1985, Zusstone used his separate funds to purchase a home, but the property was placed in Rakhman's name alone. The Kentucky Supreme Court found this evidence sufficient to establish a gift of the property from Zusstone to Rakhman, and not a constructive trust.

⁸ Peterson v. Peterson, Ky. App., 583 S.W.2d 707, 709 (1979).

significant contributions to the improvement of the property. The trial court recognized that the parties' intermingling of assets during the period from 1993 until 1996 made it impossible to trace Robin's non-marital interest. Given the unusual situation presented in this case, the trial court's finding was not clearly erroneous.

The trial court's findings concerning Francis's 401k account pose a more difficult problem. Indeed, the arguments presented by both Robin and Francis concerning this issue are difficult to follow. In Robin's brief, she argues that the trial court erred in finding that Francis's non-marital interest in his 401k account could not be traced. In fact, Robin concedes that Francis did have a non-marital interest of \$16,337.00 in his 401k account. Francis, however, does not pick up this point. In one section of his brief (addressing the direct appeal), Francis asserts that the trial court did not clearly err in finding that the non-marital interest in the 401k could not be traced. Yet in the next section of his brief (addressing his cross-appeal), Francis objects to the trial court's unequal division of the marital assets. But while his argument is premised upon his claim that he retained a \$16,337.00 non-marital interest in the 401k account, he does not specifically argue that the trial court erred by failing to restore his non-marital interest to him.

Consequently, we conclude that neither party has properly presented this issue for appeal. With regard to Robin's direct appeal, it is axiomatic that a party may only appeal from an adverse ruling by a trial court. In addition to having a direct and substantial interest in the subject matter, the appealing party must be "aggrieved" by the judgment.⁹ Robin's argument meets neither test. Robin's argument with regard to the 401k could be construed as an illustration that the trial court misperceived the standard for tracing with regard to the residence and real property. Nevertheless, she cannot argue that she was aggrieved by the trial court's ruling that Francis's 401k is entirely marital. If that ruling was incorrect, it was incorrect in Robin's favor.

As for Francis's cross-appeal, we note that it is not unusual or improper for a party to advance inconsistent or even mutually exclusive arguments on appeal. Such asserted positions do not invalidate each other, but merely represent alternative grounds for affirmance or relief, as the case may be.

⁹ Miller v. Miller, Ky., 335 S.W.2d 884, 886 (1960). See also Civil Service Commission v. Tankersley, Ky., 330 S.W.2d 392, 393 (1959). "In order for a party to maintain an appeal from a judgment it is essential that he shall be aggrieved or prejudiced by the judgment, for appeals are not allowed for the purpose of settling academic or moot questions however interesting or desirable such disposition may be. Only parties to litigation who have rights that may have been erroneously injured or rights which may be enforced by law in whole or in part by obtaining a reversal of a judgment are entitled to maintain an appeal."

Nevertheless, it is equally well established that this Court will not address issues which have not been named in the pre-hearing statement or discussed in the briefs.¹⁰ Francis has only raised an oblique objection to the trial court's designation of his 401k account as entirely marital, and even there, his complaint relates only to the trial court's unequal division of marital property. Therefore, we decline to address an issue which Francis has chosen not to specifically raise.

Consequently, we now turn to the question of the trial court's unequal division of marital assets. As previously noted, the trial court assigned the residence and real property to Robin and the 401k account to Francis without any offset of other marital property. Because we have already found that the trial court did not err by deeming the residence and real property to be entirely marital, Robin's objection to the division of property is moot. Likewise, Francis has failed to properly raise any objection to the trial court's designation of his 401k account as marital. Therefore, Robin received some (\$98,618.00 - \$54,675.00 =) \$43,943.00 more in marital assets than Francis.

Francis contends that such an unequal division of assets was manifestly unfair. However, as the trial court noted, KRS 403.190(1) does not require the court to divide the marital

¹⁰ CR 76.03(8); Milby v. Mears, Ky. App., 580 S.W.2d 724, 727 (1979).

property equally, but in "just proportions" without regard to marital misconduct and in light of the following factors: each spouse's contribution to the acquisition of the marital assets, including homemaking duties; the value of each spouse's non-marital property; the duration of the marriage and the economic circumstances of each spouse at the time of distribution.¹¹

Although the trial court found that Robin could not specifically trace her non-marital interest into the residence and real property, it implicitly recognized that she had made greater contributions than Francis to the acquisition and improvement of that property. Accordingly, the trial court awarded her a significantly greater share of that property in relation to the other marital assets. Based upon the evidence presented and the unique circumstances of this case, the trial court did not abuse its discretion in making this division of property.¹²

Finally, Robin argues that the trial court failed to divide a savings account and a checking account which Francis maintained at the time of the dissolution. On March 19, 2002, Robin filed objections to the commissioner's report in which, among other things, she specifically requested findings on these

¹¹ KRS 403.190(1)(a)-(d) See also Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994).

¹² Herron v. Herron, Ky., 573 S.W.2d 342, 344 (1978).

omitted items. However, these objections were filed more than 10 days after the commissioner issued his report on February 21, 2002.¹³ Furthermore, the trial court noted in its April 23, 2002, order that her objections did not make it into the court's file until after it had issued its March 25, 2002, order. Nevertheless, Francis did not object to the untimely objections, and the trial court ultimately elected to treat the objections as a motion to alter, amend or vacate.¹⁴ Moreover, Francis concedes that the trial court properly considered Robin's untimely objections.¹⁵

However, Robin's objections to the DRC's report stated only that the DRC failed to divide the savings and checking accounts. This complaint was not accompanied by a request for additional findings.¹⁶ Furthermore, in its order of April 23, 2002, the trial court denied Robin's objections, stating that "the DRC's findings and recommendations were appropriate in light of the probative evidence available to him. To reach the results proposed by the Petitioner would have required an exercise in speculation and conjecture."

¹³ CR 53.06(2).

¹⁴ CR 59.05.

¹⁵ Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716-17 (1997).

¹⁶ CR 52.04.

In the absence of a request for more specific findings, we conclude that the trial court did consider and reject each of Robin's objections, including those relating to the savings and checking accounts. Robin has waived any objection to the lack of specificity in these findings.¹⁷ Lastly, given the trial court's award of a majority of the marital assets to Robin, its *de facto* award of these accounts to Francis was not manifestly unfair.

Accordingly, the judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

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¹⁷ Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).