

RENDERED: November 21, 2003; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2002-CA-001540-MR  
AND  
NO. 2002-CA-001633-MR

TAMMY T. DAY

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM MERCER CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 99-CI-00180

BILLY C. DAY

APPELLEE/CROSS-APPELLANT

### OPINION

AFFIRMING IN PART AND

REMANDING IN PART

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BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

DYCHE, JUDGE: Tammy T. Day appeals from an order of the Boyle Circuit Court addressing various post-decree issues in a dissolution of marriage proceeding. Issues raised by Tammy are child support; private school tuition; property issues; maintenance; and attorney fees. Billy Cress Day cross-appeals

claiming that the trial court erred in assigning a Longaberger Basket collection as solely Tammy's nonmarital property and in finding that a garden greenhouse was not his nonmarital property. We remand for additional findings on the issue of maintenance, but affirm the trial court's order in all other respects.

The parties were married on August 1, 1992, in Mercer County, Kentucky. They had one child during their marriage, Carley Suzanne Day, born May 3, 1993. On July 12, 1999, Tammy filed a petition for dissolution of marriage.

The case was assigned to the Domestic Relations Commissioner (DRC). On January 22, 2002, the case was heard by the DRC, following which he issued his proposed order. Among other things the DRC recommended: (1) that the parties be awarded joint custody of Carley with Tammy being designated as the primary residential custodian; (2) that child support be calculated based upon an imputation of wages to Tammy of forty hours per week at \$7.50 per hour; (3) that tuition for private schooling of Carley be paid out of child support and that Billy not be required to pay additional sums for private school tuition; (4) that Tammy and Billy be assigned non-marital property according to the schedules contained in the order; (5) that marital property be equitably divided between Tammy and Billy by agreement, or else sold and the proceeds equally

divided; (6) that Tammy not be awarded maintenance; and (7) that Billy reimburse Tammy \$90.00 for the cost of the DRC hearing and \$1,000.00 in attorney fees.

Billy and Tammy both filed timely exceptions to the DRC's recommended order. On June 21, 2002, the trial court entered an order adopting the recommended order of the DRC and denying the parties' exceptions to the recommended order.

**APPEAL - CASE NO. 2002-CA-001540-MR**

CHILD SUPPORT

First, Tammy claims that the trial court erred in determining child support. Specifically, Tammy contends that the trial court erred by basing its child support calculation on an imputed income for her based upon a forty hour work week at \$7.50 per hour, and by failing to include in Billy's income his national tobacco settlement income, his share of the 2001 tobacco crop, and his income from his 2001 calving operations.

Tammy argues that child support should be based upon her actual income of \$813.00 per month which she earns working as a milk tester and as a fitter preparing milk cows for showing. The trial court imputed income to Tammy based upon a forty-hour week at \$7.50 per hour.

Kentucky Revised Statute (KRS) 403.212(d) sets forth the relevant standard for imputing income to a parent who is underemployed. The statute provides that:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated . . . . Potential income shall be determined based upon the employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

Although the court's order does not contain a specific finding that Tammy has the education, experience, physical ability, and mental ability to earn the imputed level of income, the trial court apparently relied upon Tammy's testimony that, until May 1999, she had worked full time at a grocery store earning \$7.00 per hour and had left the job only because she preferred working with cattle, and the inference that if she had remained in that job, by the time of the January 2002 hearing, she would have been earning at least \$7.50 per hour. The trial court also apparently considered Billy's testimony that at the time of the parties' separation Tammy was working a forty-hour week earning \$9.00 per hour.

A reviewing court should defer to the lower court's discretion in child support matters whenever possible. Downing v. Downing, Ky. App., 45 S.W.3d 449, 454 (2001). Despite the trial court's failure to make specific findings concerning Tammy's ability to earn at the imputed income level, testimony presented at the hearing, and Tammy's past employment record, support the trial court's conclusion that Tammy is capable of obtaining employment which would pay \$7.50 per hour at forty hours per week, and we will not disturb the trial court's imputation of income to Tammy.

Tammy also contends that the trial court erred by not including income from Billy's annual tobacco settlement check, income from his share of the tobacco crop, and income from his 2001 calving operations in its child support calculation. In its calculation, the trial court used only the income Billy earns as a stockyard auctioneer, \$3,250.00 per month. As justification for excluding income from Billy's farm operations, the trial court stated:

The Court finds that, due to the fact that the respondent [Billy] has a loss on his farm operation, there is no income to be imputed to him from his farm operation.

The factual findings of a commissioner, to the extent that the court adopts them, shall be considered as findings of the court. Downing at 453. "Findings of fact are not to be set

aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01.

The revenues related to Billy's annual tobacco settlement check, income from his share of the tobacco crop, and income from the sale of his 2001 calving operation are farm-related revenues. Billy's testimony and tax returns<sup>1</sup> support the trial court's finding that he has taken a loss on his farm in recent years. Accordingly, the trial court's finding that Billy has no farm income which should be included in his income for child support purposes was not clearly erroneous, CR 52.01, and the trial court did not abuse its discretion by excluding this income from its determination of child support.

#### PRIVATE SCHOOL TUITION

Next, Tammy contends that the trial court erred in discontinuing Carley's private school financial assistance from her father. During the party's marriage and following their

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<sup>1</sup> We note that KRS 403.212(2)(c) provides that "Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes." However, Tammy has not challenged Billy's farm income based upon this principle, and does not cite us to any evidence which would demonstrate that the trial court's finding that the farm operates at a loss was clearly erroneous. However, in any future child support proceeding in this case, KRS 403.212(2)(c) should be followed.

separation Carley had attended a private school rather than a public school.

At the time of initial establishment of child support, the child support guidelines in KRS 403.212 served as a rebuttable presumption for the establishment of the amount of child support. 403.211(2). Courts may deviate from the guidelines where their application would be unjust or inappropriate. Id. Any deviation must be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation. Id. A decision on whether to deviate from the guidelines is within the trial court's discretion. Rainwater v. Williams, Ky. App., 930 S.W.2d 405, 407 (1996). "As long as the trial court's decision comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard." Marshall v. Marshall, Ky. App. 15 S.W.3d 396, 400-401 (2000). A judgment concerning child support will not be disturbed "unless there has been a clear and flagrant abuse of the powers vested in that court." Bradley v. Bradley, Ky., 473 S.W.2d 117, 118 (1971).

KRS 403.211(3)(b) specifies that a child's extraordinary educational needs is a basis to deviate from the child support guidelines; however, where there is no satisfactory proof in the record that the public schools are

inadequate for educational purposes for a child, and no proof that the child suffers a handicap that would make public schools unsuitable, the trial court does not abuse its discretion by denying tuition for a private school education. Miller v. Miller, Ky., 459 S.W.2d 81 (1970).

In this case, the trial court stated "[t]he Court orders that the tuition fees for the parties' infant child is to be paid out of the child support[.]" Billy, the joint custodian of Carley, was opposed to sending the child to a private school. Further, no proof was presented that Carley suffers a handicap or that the local public schools are unsuitable. The trial court's determination not to provide additional child support for private school tuition was not a clear and flagrant abuse of its powers.

#### PROPERTY ISSUES

Cows, Calves, Bulls. Tammy contends that the trial court erred by awarding thirty-six cows, two bulls, and any calves born in the year 2001 as Billy's nonmarital property.

Under Kentucky Revised Statutes (KRS) 403.190, the trial court's division of property involves a three-step process: (1) characterizing each item of property as marital or nonmarital (see KRS 403.190(2) and KRS 403.190(3)); (2) assigning each party's nonmarital property to that party (KRS

403.190(1)); and (3) equitably dividing the marital property between the parties (KRS 403.190(1) (court to divide marital property "in just proportions considering all relevant factors")). Travis v. Travis, Ky., 59 S.W.3d 904, 909 (2001).

Property acquired by either spouse subsequent to the marriage is presumed to be marital property, except for certain enumerated types including property acquired by gift. KRS 403.190(2) and KRS 403.190(3). A party claiming that property acquired during the marriage is other than marital property bears the burden of proof. Terwilliger v. Terwilliger, Ky., 64 S.W.3d 816, 820 (2002). A trial court's determination of whether an asset is marital property or nonmarital property is in the nature of a finding of fact and will not be set aside unless its determination is clearly erroneous. See Bratcher v. Bratcher, Ky. App., 26 S.W.3d 797, 801 (2000).

The trial court awarded Billy thirty-six cows, two bulls, and any calves born in the year 2001. Billy testified that at the beginning of the marriage he had thirty-six cows, two bulls, and an ongoing calving operation. He further testified that at no time during the marriage had he owned less than thirty-six cows and two bulls, though there had been turnover in the cows and bulls.

The requirement of tracing is fulfilled, at least as far as money is concerned, when it is shown that nonmarital

funds were deposited and commingled with marital funds and that the balance of the account was never reduced below the amount of the nonmarital funds deposited. Allen v. Allen, Ky. App., 584 S.W.2d 599, 600 (1979).

While in Allen the asset under consideration was bank account funds, nevertheless, by analogy we believe the same principle is applicable in this case. Billy had thirty-six cows and two bulls at the beginning of the marriage and, while there was turnover and commingling with marital cattle, the number of cows never fell below thirty-six and the number of bulls never fell below two. In light of this, we do not believe the trial court's assignment of this livestock as Billy's nonmarital property was clearly erroneous. CR 52.01.

1994 Ford Explorer. The trial court awarded Tammy a 1985 Ford F-250 truck as her nonmarital property, but determined a 1994 Ford Explorer to be marital property. Tammy alleges that she owned a herd of non-marital cattle that she sold to her father for \$19,200.00. According to Tammy, she received payments in the amount of \$400.00 per month that she applied towards the 1994 Ford Explorer. She acknowledges that \$11,000.00 in marital funds were utilized to purchase the vehicle, but claims that she has a 63.3% nonmarital interest in the property.

On the other hand, Billy argues that Tammy admitted at the hearing that the down payment on the vehicle was made with marital funds; that checks or payments on the truck from marital funds were introduced at the hearing; that evidence was presented that the parties borrowed money to purchase the vehicle; and that the parties made annual balloon payments on the truck out of marital funds.

Here there was a dispute regarding the source of the funds used to purchase the truck. The truck was purchased during the marriage and is presumed to be marital property. The burden was on Tammy to prove by tracing that nonmarital funds were used to purchase the truck. Terwilliger, supra. However, she has not cited us to any documentation tracing the proceeds of the sale of her nonmarital herd into the 1994 Ford Explorer. Under these circumstances, the trial court's finding that the 1994 Ford Explorer Truck is marital property was not clearly erroneous. CR 52.01.

Nonmarital Cows and Calf. Tammy contends that the trial court erred by failing to award as her nonmarital property one Holstein cow, one Holstein calf, and a 25% interest in another Holstein cow. The trial court, however, assigned four cows as marital property. Any calf born in the year 2002 through the date of the hearing, March 13, 2002, was also assigned as marital property.

Again, the burden is upon Tammy to trace her premarital assets to assets held at the time of the property distribution. Terwilliger, supra. Tammy cites us to no documentation, or even hearing testimony, in support of her claim to these nonmarital assets. In light of insufficient evidence of tracing, the trial court was not clearly erroneous in failing to assign Tammy a nonmarital interest in one Holstein cow, one Holstein calf, and a 25% interest in another Holstein cow.

Miscellaneous Property. Next, Tammy claims that the following assets, which were assigned by the court as marital property, should have been assigned as her nonmarital property:

1. Glider rocker - gift from Tammy's mother.
2. Whiskey barrel chair/stool/ottoman - belongs to Tammy's mother.
3. .22 semi automatic - Tammy's birthday gift from Billy.
4. Portable television - gift from Tammy's mother.
5. Propane gas grill - Tammy's pre-marital property.
6. Ralph Lauren Indian blanket - gift from Tammy's father's friend.
7. Cherry night stand - gift from Tammy's mother.
8. Longaberger basket lamp - gift from Tammy's sister.
9. Luggage bag - gift from Tammy's father.
10. Brass picture frames - gift from Tammy's brother.
11. 8 x 10 frames (2) - gift from Tammy's grandmother.
12. Toaster oven - belongs to Tammy's mother.
13. Feed tubs (11) - Tammy's premarital property.
14. Wooden cow shelf - gift from Billy.
15. Christmas gift cookbook - gift from Tammy's grandmother.

The trial court assigned the above property as marital property. Most of the property was obtained after the marriage and is presumed to be marital property. The party claiming

property acquired after the marriage as his/her nonmarital property through the gift exception bears the burden of proof on that issue. Adams v. Adams, Ky. App., 565 S.W.2d 169, 171 (1978). Tammy cites us to no evidence in support of her position that the above fifteen items are her nonmarital property. As for the premarital property, again Tammy cites us to no evidence in support of her claim. In light of this, the trial court's finding that the above fifteen items are marital property was not clearly erroneous. CR 52.01.

Various Farm Proceeds. Next, Tammy contends that the trial court erred by failing to properly designate and divide certain marital property. Specifically, Tammy alleges that the trial court failed to properly classify and divide the following as marital property: tobacco settlement checks totaling \$13,607.00; proceeds from the 2001 tobacco crop; proceeds from the sale of cattle; and proceeds from the sale of a quarter horse.

We note that revenues derived from these sources represent income from farm operations. As previously discussed, the trial court made a specific finding that farm revenues were exceeded by farm expenses and produced a net operating loss. It would not be consistent with generally accepted accounting principles to isolate certain annual revenues from farm operations for classification as marital property while ignoring

the offsetting expenses which exceed these revenues. The trial court was not clearly erroneous in its determination that these items should not be classified as marital property. CR 52.01.

#### MAINTENANCE

Tammy contends that the trial court erred in denying her maintenance. KRS 403.200 provides, in relevant part, as follows:

(2) [Maintenance] shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, and the physical and emotional condition of the spouse seeking maintenance;
- and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

The amount and duration of maintenance is within the sound discretion of the trial court. Russell v. Russell, Ky.

App., 878 S.W.2d 24, 26 (1994). Hence, "we cannot disturb [the maintenance determinations] of the trial judge unless the discretion is absolutely abused." Platt v. Platt, Ky. App., 728 S.W.2d 542, 543 (1987).

In this case, the trial court failed to make any findings at all relating to Tammy's entitlement to maintenance, stating only: "The Court overrules Petitioner's claim for maintenance." Absent findings relating to the factors relevant to an award of maintenance, we are unable to review whether the trial court abused its discretion in failing to award Tammy maintenance. We therefore remand on this issue for additional findings on the issue of maintenance. In making additional findings the trial court should address the factors contained in KRS 403.200.

ATTORNEY FEES.

Finally, Tammy contends that the trial court erred in failing to award her sufficient attorney fees and costs.

"The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or

after entry of judgment." KRS 403.220. "The allocation of court costs and attorney fees is entirely within the discretion of the trial court." Tucker v. Hill, Ky. App., 763 S.W.2d 144, 145 (1988).

In this case the trial court required Billy to reimburse Tammy \$90.00 for the cost of the DRC hearing and \$1,000.00 for attorney fees relating to the cost of the divorce proceedings, which was approximately 25% of the fees incurred by Tammy.

In light of the division of property, the relative financial positions of the parties, and Tammy's ability to earn an income, we cannot conclude that the trial court abused its discretion in its award of costs and attorney's fees.

**CROSS-APPEAL - CASE NO. 2002-CA-001633-MR**

Billy contends that the trial court erred in awarding a Longaberger Basket collection to Tammy as her nonmarital property.

Evidence was presented that during the course of the marriage a Longaberger basket collection consisting of sixty-five baskets worth as much as \$12,000.00 was accumulated. Billy alleges that the parties together purchased many of the baskets and that others were gifts to them both.

However, testimony was also presented that it was Tammy's hobby to collect the baskets and that she collected the baskets through several sources. First, Tammy's sister sells Longaberger Baskets and on numerous occasions gave Tammy baskets as gifts; second, Tammy's mother would regularly give her baskets as gifts; and finally, Billy regularly gave Tammy baskets as gifts on special occasions.

In light of the testimony that the basket collection was accumulated by Tammy as a hobby, the trial court's determination that the basket collection was Tammy's nonmarital property was not clearly erroneous. CR 52.01.

Billy also contends that the trial court erred in its determination that a greenhouse he purchased and erected on his uncle's farm was marital property. According to Billy, he purchased the greenhouse, erected it on his uncle's farm, and the greenhouse was erected with financing through AgCredit.

However, evidence was also presented that the greenhouse was acquired during the marriage; that the parties borrowed money to utilize in the construction of the greenhouse; and that payments had been made from the parties' earnings upon the greenhouse loan during the marriage.

There is a presumption that property obtained during the marriage is marital property. In light of the conflicting

evidence, the trial court's finding that the greenhouse was marital property was not clearly erroneous.

The Mercer Circuit Court is affirmed in all respects except on the issue of Tammy's claim for maintenance. The case is remanded to the trial court for additional findings on this issue.

BUCKINGHAM, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

COMBS, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I dissent as to the fifteen items of miscellaneous property (p. 12) claimed as nonmarital property by Tammy. Her testimony should suffice to establish the ownership of certain items by her mother as well as her own entitlement to some of these items as gifts. Elaborate tracing of such items of personalty should not be necessary absent a finding by the court of a total lack of credibility in her testimony.

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