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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000775-MR

PHILLIP LOWE, SR.

APPELLANT

V. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
CIVIL ACTION NO. 01-CI-00691

ODA OLLEEN LOWE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; AND MILLER, SENIOR
JUDGE.¹

MINTON, JUDGE:

I. INTRODUCTION.

Phillip Lowe appeals from the property disposition ordered by the circuit court in the decree that dissolved his 47-year marriage to Oda Lowe. During the course of their

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

marriage, Phillip bought and sold real estate; and at the time of the divorce, the Lowes owned a few parcels and received monthly payments on a few others that they had sold on contract. At trial, Phillip and Oda were the only witnesses called to testify. And Oda's lay opinion was the only evidence offered for the current fair market value of their real estate holdings. On appeal, Phillip argues that the trial court based its division on unreliable valuation testimony, giving Oda a disproportionately large share of the marital estate. We hold that the trial court erred by placing total reliance on unqualified lay opinion evidence to establish real estate values. Thus, it is impossible to determine whether the distribution of the marital estate was made according to law. Therefore, we reverse and remand for further proceedings on these issues.

II. THE PROCEEDINGS IN CIRCUIT COURT.

Phillip was 69 years old and Oda was 65 years old when their divorce case came to trial before the circuit court's Domestic Relations Commissioner (DRC). Both parties were drawing monthly social security retirement benefits. Phillip, who was a backhoe operator, continued to earn an undisclosed amount of income doing odd jobs. And Oda worked part-time as a school bus aid. By the time of the trial, they had essentially

agreed to the division of household furnishings and most of the tools. None of their three grown children was legally dependent upon them. Neither party sought maintenance from the other. By living frugally and trading wisely, Phillip and Oda had accumulated a few pieces of real estate. So the division of real estate holdings, some items of equipment, a few pieces of furniture, and a bank account were the gist of the dispute for trial. The DRC heard the whole case in a very brief afternoon session at which only the parties testified.

As required by the trial court's standing order, Oda submitted her sworn "Mandatory Case Disclosure" (MCD) form before trial. Oda's disclosure included a Schedule A, which listed the property she claimed comprised the marital estate. Oda and her lawyer had written market values for each item of property listed in Oda's Schedule A. Oda further disclosed that she would not be calling an expert valuation witness at trial. And as the form apparently required, Oda submitted her proposal for the way property should be divided.

About a week later, Phillip filed his sworn MCD, which also listed the assets of the marital estate. He did not attempt to assign any values. Phillip's disclosure stated his intention to call a real estate appraiser as a trial expert. Phillip also made a demand for what he considered to be a fair division of the marital estate.

Along with his MCD, Phillip also filed a written motion asking the court to continue the trial and to undertake an appraisal of "all of the property owned by the parties located in Whitley County, Kentucky." This motion was noticed to be heard on the day of trial, and it provided no basis to support the relief requested. And whether Phillip's counsel ever asked for or obtained a ruling on this motion for a court-appointed appraiser for the Whitley County property is not shown in the record. But we do know that the trial did proceed before the DRC as scheduled, and there was no mention in the trial transcript of the need for a continuance or for a court-ordered appraisal.

Oda testified at trial from her MCD. She adopted its contents as her testimony for the identification and valuation of each piece of property. Phillip's counsel did not challenge Oda's knowledge of property values by way of a motion in limine, a request to voir dire Oda, a contemporaneous objection, or even by cross-examination. Then, when Phillip testified, the DRC sustained Oda's lawyer's objection to Phillip's attempt to give his own version of market values because Phillip had failed to furnish that information in the mandatory pretrial disclosure. In sustaining the objection, the DRC commented: "I think we're

pretty much stuck with what we've got."² In response to that ruling, Phillip's counsel did not make the expected offer of proof³ or mention the appraisal motion that he had filed. Phillip did not call his own expert appraiser as he had said in this pretrial disclosure statement. After both parties testified, both lawyers told the DRC that they were finished presenting the case except for an exchange of documents.

Four months later, the DRC filed her trial report and proposed decree. Unquestionably, the only values assigned to the property were Oda's values. It appears that following the trial, the DRC had instructed both sides to tender proposed findings. Oda submitted hers. Phillip did not submit his, having discharged his trial counsel right after the trial. Phillip suggests in his brief that the DRC simply signed Oda's tendered decree.

In exceptions to the DRC's proposed decree, Phillip obtained new counsel who specifically objected to the trial court's finding that Oda had proved that she had a nonmarital interest in the marital residence and that the marital equity in the property was as little as \$35,439.70. Second, Phillip objected to Oda's being given the real property on Cooper Street

² Whether this ruling by the DRC was an abuse of discretion was never argued in Phillip's exceptions to the DRC's trial report; therefore, this issue is unpreserved for review by the Court.

³ Kentucky Rules of Evidence (KRE) 103(a)(2).

in Taylor, Michigan, at the low market value assigned by the DRC. Third, Phillip objected to awarding Oda the property on Hemlock Drive, asserting that the parties never owned this property. Fourth, Phillip objected to the division of the marital property, including a Massey-Ferguson tractor, because he contended that it been sold during the marriage. Finally, Phillip objected to awarding Oda a portion of a checking account in Community Trust Bank because Oda had already withdrawn half of the account when the parties separated. The circuit court denied all of Phillip's objections and signed the decree as tendered by the DRC. Phillip raises these same five issues on appeal filed by his third counsel.

III. ANALYSIS.

A. The Standard of Review.

Our standard of review on all these issues is limited, first, to determining whether the findings of fact relied upon by the trial court for its division order were clearly erroneous and, second, to determining, based on those factual findings, whether the trial court abused its discretion in dividing the property.⁴

⁴ Kentucky Rules of Civil Procedure (CR) 52.01.

When dividing the property, KRS⁵ 403.190 gives the trial court a three-step process: (1) characterize each item of property as marital or nonmarital; (2) assign each party's nonmarital property to that party; and (3) divide equitably the marital property between the parties.⁶ Property acquired by either spouse after the marriage is presumed to be marital property, except for certain enumerated types including property acquired by gift.⁷ The party claiming the nonmarital gift exception for property acquired after the marriage has the burden of proving this issue.⁸

B. Oda Proved a Nonmarital Interest in the Homeplace.

Phillip first asserts that the trial court erred in concluding that Oda had a nonmarital interest in the marital residence, which consists of a house situated on approximately 15-20 acres located at 2011 West Kentucky Highway 204 in the Canadatown community of Whitley County. According to Oda's testimony, this is her family's homeplace; and she acquired the land by deed as a gift from her mother in 1971. Consistent with that assertion, Oda furnished a copy of the deed as a trial exhibit showing that the property is titled solely in her name.

⁵ Kentucky Revised Statutes.

⁶ Hunter v. Hunter, 127 S.W.3d 656, 659-660 (Ky.App. 2004).

⁷ KRS 403.190(2).

⁸ Hunter, *supra* at 660.

Phillip's counsel did not cross-examine Oda about the gift, and Phillip offered no evidence of his own to dispute Oda's claim. But on appeal, Phillip points to the consideration statement in the deed itself, which states that Oda's mother received payment of \$2,000.00 as consideration for the conveyance. Phillip argues that this defeats Oda's claim of a nonmarital gift. We disagree with Phillip.

We also see that the face of the deed contains what appears to be the clerk's notation stating that no deed tax was charged when the deed was recorded which seems to support Oda's assertion that the land was a gift. This is further bolstered by the PVA's record that shows \$1.00 as consideration for the transfer. Applying the clearly erroneous standard to the trial court's finding, there is sufficient evidence to support a factual finding that the homeplace was a gift to Oda. The trial court did not err when it concluded that she had sustained her burden of proving a nonmarital interest in the Canadatown homeplace.

C. No One Proved the Real Estate Values.

As Oda acknowledged and as the trial court concluded, the improvements to the homeplace after the gift were marital property because she and Phillip built their marital home there. This brings us to the second and the most pervasive error that

Phillip raises on appeal: the trial court's valuations are based on insufficient evidence.

For property division purposes, the only evidence in the record about the current value of the homeplace is Oda's testimony that the current value of the land is \$15,000.00; and the current value of the improvements is \$35,439.79. And the basis for Oda's testimony is simply that those are the numbers her lawyer suggested. Similarly, Oda placed a current value of \$25,000.00 on the Cooper Street property in Michigan. The source from which that value derives is nowhere to be found in the record. So we must agree with Phillip that the trial court's real estate valuations are clearly erroneous but not just for the Canadatown homeplace and the Cooper Street property in Michigan. But in fairness, we must further hold that the trial court's valuations are also clearly erroneous as to the two parcels on Stoney Fork Road given to Phillip and the parcel on Whipporwill Road given to Oda. The valuation and division of these properties rests on the same faulty valuation process.

We readily recognize that Kentucky law permits a property owner in divorce actions to establish a value on property she owns without the necessity of calling an expert.⁹ Indeed, a lay witness is authorized to testify regarding the value of real property even if that testimony involves the use

⁹ Roberts v. Roberts, 587 S.W.2d 281, 283 (Ky.App. 1979).

of opinions and conclusions.¹⁰ There must, however, be some qualifications for giving an opinion.¹¹ A lay witness, to be qualified to testify as to the value of realty, must know the property to be valued and the value of the property in the vicinity, must understand the standard of value, and must be possessed of the ability to make a reasonable inference.¹² And mere ownership of property does not qualify to establish a true value.¹³ Unfortunately, the record is devoid of any evidence of Oda's qualifications to express her opinion on land values. To the contrary, she candidly admitted on cross-examination (in response to what actually looks to be Phillip's lawyer's efforts to qualify her for giving a lay opinion):

Q. Alright. The period of time that you all have been married—it's fair to say that the two of you have bought and sold over time a lot of property. Is that right?

A. Yes. He has.

Q. He has.

A. I never had no say in nothing.

¹⁰ KRE 701; Commonwealth, Department of Highways v. Swift, 375 S.W.2d 691 (Ky. 1964).

¹¹ Roberts, *supra*.

¹² Commonwealth, Department of Highways v. Slusher, 371 S.W.2d 851, 853 (Ky. 1963).

¹³ Commonwealth, Department of Highways v. Fister, 373 S.W.2d 720, 721-722 (Ky. 1963).

Q. Okay. But you got money from it from time and again.

A. Well, he'd just sell it and then go and buy something else.

Based upon the record as a whole, we are compelled to hold that the trial court clearly erred when it adopted Oda's valuations of the real property. As a consequence, the division of the real property as it relates to the assignment of Oda's nonmarital share of the Canadatown homeplace and the valuation and division of the rest of the real estate that has not been sold on contract is fundamentally flawed. Oda was not required to retain a valuation expert provided she was qualified or called someone who was qualified to render a lay or expert valuation opinion. This, both she and Phillip failed to do.

D. The Note and Mortgage on the Hemlock Drive Property are Marital Assets.

Phillip argues that the trial court erred when it found that he and Oda owned the house and lot at 425 Hemlock Drive and awarded that property or its value-equivalent in money to Oda as a portion of her division of the marital property. We do agree with Phillip that there is not substantial evidence in the record to support a finding that Phillip and Oda ever owned this property. So the trial court erred when it found ownership by the Lowes and awarded the property to Oda.

But our analysis of the Hemlock Drive property does not end there. It undisputed in the record that Phillip held a promissory note or notes executed by Juanita Rose on June 6, 2000, for the principal amount of \$23,862.36, plus interest, and payable in installments over 115 months from the date of execution. And it is further undisputed that the note or notes were secured by a real estate mortgage on the Hemlock Drive property. Despite Phillip's testimony that Juanita Rose had paid the debt in full just a few days before the trial began, he produced no evidence of payment. The DRC and the trial court were understandably unconvinced by Phillip's testimony of payment. Therefore, on remand, the trial court may consider this \$23,862.36 debt an asset of the marital estate that is subject to an equitable division.

E. The Trial Court Did Not Err as to the Tractor and the Bank Account.

Finally, Phillip argues that the trial court erred in awarding Oda the parties' Massey-Ferguson tractor and half of a \$9,000.00 bank account. We disagree. Despite Phillip's assertion that the tractor had been sold during the marriage and denial that the bank account existed, there was substantial evidence in the record to support the trial court's division of these assets. Therefore, we cannot say that the trial court

clearly erred in finding the existence of these assets nor abused its discretion in dividing them as it did.

IV. DISPOSITION.

Based on the analysis set forth in this opinion, we reverse the trial court's property division and remand the case to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Marcia A. Smith
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BRIEF FOR APPELLEE:

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