

RENDERED: MAY 12, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002251-MR

DAVID MORGAN MILLER

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE KRISTI GOSSETT, JUDGE
ACTION NO. 00-CI-00168

MARY MURPHY MILLER

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: David Miller appeals from the property-division aspects of the decree dissolving his marriage to appellee Mary Murphy Miller alleging that the trial judge erred in: 1) determining the amount of marital equity in the parties' Corvette motor vehicle; 2) relying upon incompetent opinion evidence in concluding that the fair market value of the marital

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

residence was \$123,000; 3) failing to award certain pieces of furniture and other household items to either party; and 4) adopting the domestic relations commissioner's findings of fact and conclusions of law. We affirm.

On July 18, 2002, the domestic relations commissioner for the Morgan Circuit Court filed detailed findings and conclusions regarding division of the parties' property. Mary Miller filed exceptions to the report alleging that the estimated amount of a home equity loan against the marital real estate had been left blank; that David continued to borrow against the residence, and thus additional testimony as to the amount of that debt was required; and that an Oldsmobile Bravada referenced in the report was no longer part of the marital estate since it had been given to the parties' son. David also filed exceptions but cited no specific objection to the report.

On November 20, 2002, the circuit judge remanded the case to the commissioner for "further findings regarding the assets and liabilities of the parties." David filed a motion on February 20, 2003, asking the court to award him certain non-marital property and to set the matter for a final hearing. On March 7, 2003, in compliance with the circuit court's order remanding the case to the DRC, the family court judge, who had taken office in January 2003, ordered that a transcript of all proceedings be filed within 45 days. In April 2003, David filed

a motion for an order requiring each party to file an inventory of all marital and non-marital property. He also submitted an offer to purchase the marital realty for the sum of \$160,000.

On May 7, 2003, the family court judge entered an order confirming the report of the DRC predicated upon the following findings:

1. A pretrial conference regarding this matter was held on January 3, 2001 and the Court calendar indicates that appraisals were to be filed.
2. An appraisal was filed and a five (5) hour final hearing held before the Commissioner on June 18, 2001.
3. The Commissioner's Recommendations were entered July 18, 2002.
4. Respondent [David] filed Exceptions to the Recommendations that simply stated that Respondent excepted in general to the Recommendations. Likewise Petitioner filed Exceptions to the Recommendations stating that the Recommendations failed to specify the balance of a particular loan assigned to Petitioner as her sole responsibility, and further stating that a vehicle that the Commissioner designated as marital property no longer was in the possession of the parties because it had been given away to the parties' son.
5. The hearing on the exceptions was held November 20, 2002 at which time Honorable Samuel Long referred the matter back to the Commissioner for further findings. The order does not specify what additional findings were needed.
6. The matter was in fact never taken up again before the Commissioner, rather a motion was heard by this Court (Family Court being established January 6, 2003) on March 3, 2003 regarding Respondent's

request for final hearing, among other things.

7. This court then assigned the matter for a hearing on May 7, 2003. The order further required the parties to secure a transcript of all proceedings previously held in this case and to file said transcripts within forty-five (45) days of entry of the order. Said order was entered March 7, 2003.
8. More than forty-five (45) days have now lapsed since entry of the Order, the transcripts have not been filed, and counsel informed the Court that the transcripts were not in fact even yet ready.
9. Respondent has now requested the Court to order the parties to file an inventory of marital and non marital personal property including household goods and furniture, and further requested permission to enter the premises for purposes of an appraisal and an inventory. All this despite the fact that the parties have had years to conduct discovery and despite the fact that an appraisal was previously filed regarding personal property and a five (5) hour final hearing held nearly two (2) years ago.²

David's subsequent CR 59 motion resulted in an August 20, 2003, order amending the previous decision of the family court judge. Among the amended findings pertinent to this appeal were findings fixing the fair market value of the marital real property at \$123,000, setting the amount of debt against the property as well as determining the amount of Mary's non-marital interest therein, valuing the 1969 Corvette at \$16,500

² Emphasis added.

and awarding various items of personalty to each party. Again, both parties filed motions to amend the final order although Mary withdrew her motion prior to a ruling. The family judge's overruling of David's motion precipitated this appeal.

As a preliminary matter, we agree with appellee that David's failure to identify in his prehearing statement issues concerning the marital equity in the Corvette and the failure to assign certain property to either party removes them from our consideration. The penalty for a failure to comply with CR 76.03 was recently addressed by this Court in Sallee v. Sallee,³ and we are convinced that application of the rationale set out in that case precludes review of the issues omitted from David's prehearing statement:

CR 76.03(4)(h) provides that within twenty days of filing a notice of appeal, an appellant must file a prehearing statement setting out a "brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges[.]" CR 76.03(8) specifically provides that a "party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion."

* * *

However, the sole issue addressed in appellant's two-page appellate brief is "whether or not the Trial Court abused its discretion in awarding the Appellee maintenance." Since that issue was not raised either in the prehearing statement or

³ Sallee v. Sallee, 142 S.W.3d 697, 698 (Ky.App. 2004).

by timely motion seeking permission to submit the issue for "good cause shown," CR 76.03(8), this matter is not properly before this court for review.

We, therefore, confine our discussion to the issues properly designated: the proper valuation of the marital residence and the propriety of the family court's adoption of the recommendations of the DRC.

David argues that there was no competent evidence upon which the \$123,000 valuation could be based because the appraiser founded his opinion on an inaccurate assessment of the property's square footage. Although Mary's appraiser testified that he measured the square footage to be 3,000 square feet, David, who failed to call an appraiser as an expert witness subject to cross-examination at trial, testified that the residence measures 4,600 square feet and should be valued at \$160,000. Mary's appraiser also testified that the property was in poor condition and offered comparable sales to support his opinion that the fair market value of the property was \$123,000. On this state of the evidence, we find no basis for concluding that the testimony of Mary's expert was in any way incompetent, thus providing ample support for the ultimate valuation of the residence. In our view, David's argument essentially boils down to a complaint that the trial court accepted the valuation provided by Mary's expert rather than his own. Because the

value placed on the residence falls with the range of estimates provided by the testimony, the decision of the trial court may not be set aside as clearly erroneous.⁴

Finally, we find no error in the adoption of the recommendations of the DRC. As previously noted, the family judge amended those recommendations and in no way abdicated her fact-finding responsibilities. It is clear that a trial judge has discretion to utilize the recommendations of a DRC as it sees fit.⁵ No abuse of that discretion has been demonstrated in this case.

Accordingly, the judgment of the Morgan Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James T. Harris
Lexington, Kentucky

BRIEF FOR APPELLEE:

Barbara Anderson
Lexington, Kentucky

⁴ Calloway v. Calloway, 832 S.W.2d 890 (Ky.App. 1992).

⁵ Id. at 893.