

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000386-MR

RANDY JOE JONES

APPELLANT

v. APPEAL FROM WARREN FAMILY COURT  
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE  
ACTION NO. 04-CI-01368

CATHY CAROLINE JONES

APPELLEE

### OPINION AFFIRMING

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BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY<sup>1</sup>, SENIOR JUDGE

PAISLEY, SENIOR JUDGE: This appeal brings into question the division of marital assets and marital debt related to the dissolution of a marriage. We find no error in the division of the marital property and affirm the decision of the trial court.

The couple was married in 1990 and stayed together for over fourteen years. Just prior to their separation, they started to build a new home. In order to complete the construction and put the house on the market for sale, the husband removed \$50,000 from

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<sup>1</sup>Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

his 401(k) retirement plan and applied that amount to the completion of the new home. The 401(k) retirement plan had accrued during the marriage and was a marital asset. When the home sold, he received \$83,061.61 in proceeds from the sale.

The trial court found that the marital assets should be divided between the two “approximately 50/50”. There are sufficient facts within the record to create a factual basis for the decision of the trial court. *See Drake v. Drake*, 721 S.W.2d 728 (Ky.App. 1986). We will not set aside the decision of the trial court unless we are convinced that decision is clearly erroneous. *See Wells v. Sanor*, 151 S.W.3d 819 (Ky.App. 2004). The overall apportionment of the marital assets is grounded in both law and fact and will not be disturbed.

Prior to the withdrawal of the \$50,000 to complete the construction project, the husband had a balance of \$67,084.77 in his 401(k) retirement account. He removed the funds and applied them to the construction project leaving \$17,084.77 in his retirement account. When all assets were finally considered, the wife retained \$142,893.13 while the husband retained \$141,898.92. The difference of under \$1,000 falls well within the trial court's determination that the assets should be split approximately equally.

In order to arrive at the totals for the division of assets, the husband was awarded the \$17,084.77 remaining in his 401(k) retirement account as well as \$83,061.61 from the proceeds of the sale of the home that was under construction. He argues that the \$50,000 he applied to the construction should have been restored to his 401(k) retirement

account prior to the allocation of assets. The only place the \$50,000 could have come from was the proceeds from the sale of the construction project house. The trial court allocated the entire proceeds from the sale of the construction project home as well as the remaining balance of the 401(k) retirement account to the husband. Whether that \$50,000 is part of the 401(k) account or is a portion of the funds received from the sale of the construction project house is not material to the overall distribution. In one form or the other, the husband was allocated the \$50,000. Had the trial court restored the \$50,000 to the 401(k) retirement account balance the proceeds from the sale of the construction project home would have had to have been reduced by \$50,000. Because the husband was awarded both amounts, his bottom line total would have remained unchanged. There was no error in the allocation of assets and the apportionment of those funds.

Next, the husband argues that the apportionment of debt was inappropriate. We disagree. He does not point to any specific item of debt but rather suggests the overall allocation of debt was inappropriate. The trial court is granted great discretion in assigning debt between the parties. *See Spratling v. Spratling*, 720 S.W.2d 936 (Ky.App. 1986). The trial court assigned \$75,950.33 in debt to the wife while assigning \$87,156.93 in debt to the husband. Those sums included just over \$56,000 still owing on the construction project residence. That amount is contrasted with the \$61,106.20 assigned to the wife for debt owed on the former marital home which she retained. In total, the differences in the amount assigned to each party is just over \$11,000. We do

not find that difference to be unconscionable. *See Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). There was no abuse of discretion in the allocation of debt.

The judgment of the Warren Family Court is affirmed.

TAYLOR, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS AND FILES SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING. While I agree with the majority opinion, I write separately because I believe it important to note the entire value of the husband's 401(k) accrued during coverture, thus making the entire amount a marital asset. *Poe v. Poe*, 711 S.W.2d 849, 855 (Ky.App. 1986) (quoting *Light v. Light*, 599 S.W.2d 476, 478 (Ky.App. 1980)). *See also Armstrong v. Armstrong*, 34 S.W.3d 83 (Ky.App. 2000).

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