

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000488-MR

JOHN WAYNE LOSEY

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-CI-02187

PATTY A. LOSEY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: HOWARD AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

HOWARD, JUDGE: John Wayne Losey (hereinafter John) appeals from a December 6, 2005, findings of fact, conclusions of law, decree and order (hereinafter decree) of the Hardin Family Court. That decree disposed of the marital property and debts of John and and Patty Losey (hereinafter Patty) in their dissolution of marriage action. Finding no error in the Circuit Court's ruling, we affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

The parties were married on August 25, 1997, and separated on November 4, 2004. During their marriage, the parties accumulated various marital property and marital debts. Both parties also brought certain nonmarital property into the marriage, including proceeds from the sale of nonmarital real estate. While married, the parties purchased a piece of property consisting of two adjoining tracts. Originally, one tract contained approximately 32 acres and the other approximately 20 acres. After the parties built their marital residence on the property, it was resurveyed and redivided, with five and one-half acres included with the residence and the other, unimproved tract consisting of the other 46.76 acres. The mortgage securing the construction debt was placed only on the five and one-half acres which included the house.

Each party also accrued a retirement account during the marriage. Patty's was valued by the family court at approximately \$11,905.00 and John's at approximately \$5,000.00. There was various other marital property which is not subject to dispute on this appeal.

On December 6, 2005, the trial court entered its decree. As to the marital residence, the court found that Patty successfully traced \$16,673 from the sale of her nonmarital real estate into the existing residence. However, while the court found that John sold a nonmarital residence, before these parties married, for \$34,298, it found that he failed to trace any of those proceeds into the marital residence or any other currently existing asset. Therefore, based on Patty's \$16,673 nonmarital contribution and a \$20,260 reduction the parties had made in the mortgage principal during the marriage, the

family court ordered the property sold and awarded 45.1% of the equity in the marital home and real estate to Patty as her nonmarital property and declared the remaining 54.9% to be marital, to be divided equally. The retirement accounts were left undivided and awarded to the party in whose name each account was held. This appeal followed.

On appeal, John argues that the family court erred in assigning Patty too large a nonmarital percentage in the equity on the marital residence; that her nonmarital claim should only apply to the five and one-half acre tract, including the house, and not to the undeveloped 47.67 tract of real estate; that the trial court erred by failing to divide the retirement accounts of the parties; and that the court erred in not finding that Patty had dissipated \$2,500 in marital assets.

The legal standards applicable to our review of a family court's judgment are that findings of fact are reviewed only to determine if they are clearly erroneous. CR 52.01; *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004); *Ghali v. Ghali*, 596 S.W.2d 31 (Ky. App. 1980). CR 52.01 states, in part,

Findings of fact shall not be set aside unless clearly erroneous, and due respect shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Decisions of the family court concerning the division of marital property are within the sound discretion of that court, and we will not disturb those decisions except for an abuse of that discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). In *Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky. App. 1988), this court stated,

The property may very well have been divided or valued differently; however, how it actually was divided and valued was within the sound discretion of the trial court.

In *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky.App. 2007), we stated,

In dividing marital property, including debts, appurtenant to a divorce, the trial court is guided by Kentucky Revised Statute (KRS) 403.190(1), which requires that division be accomplished in “just proportions.” This does not mean, however, that property must be divided equally. . . . It means only that the division should be accomplished without regard to marital misconduct and in “just proportions” considering all relevant factors. (internal citations omitted).

Furthermore, the party claiming property as non-marital bears the burden of proving such. *Hunter v. Hunter*, 127 S.W.3d 656 (Ky.App. 2003).

After thoroughly reviewing the record herein, we are satisfied that the family court's findings regarding the designation of marital and non-marital property are not clearly erroneous. In fact, the court went to great lengths in its 16-page decree to support its decision with very detailed findings. It is clear that John failed to meet his burden of proving his nonmarital interest in any of the real estate. On the other hand, there was substantial evidence to support the trial court's findings concerning Patty's nonmarital contribution. We find no error in the family court's apportionment of marital to nonmarital interests in the residence.

Similarly, the two adjoining tracts of real estate, while listed separately by the parties on their respective financial disclosure statements, appear to have been acquired as one purchase and Patty's nonmarital contribution went either to that purchase or to the construction of the house, before the tracts were divided as they are currently,

making the marital and nonmarital interests in each of the two pieces of property identical.

As to the retirement accounts, there is no law which requires the division of retirement accounts in a divorce proceeding. As stated previously, the only requirement is that marital property be divided in “just proportions.” Again, we reiterate that “just” does not necessarily mean “equal.” *Lawson v. Lawson, supra*. The family court did not overlook these accounts, it simply decided not to divide them.² We are not convinced that this was an abuse of discretion. *Cochran v. Cochran, supra*. We note that the trial court also found that John had equity of \$5,000 in his vehicle, a 2002 Chevy Suburban SUV, and that Patty had a negative equity of \$5,500 in her vehicle, a 2000 Ford 150 pickup truck, but awarded each of them their respective vehicles and the corresponding debts, without any adjustment. This would more than offset the difference in the values of the retirement accounts.

Finally, John claims that the family court erred in not requiring Patty to reimburse him for \$2,500 in marital assets which he claims she “dissipated.” This was apparently money “left over” from a credit union vehicle loan, which she withdrew. It is not clear to us whether he intends to claim a true “dissipation of assets,” under *Robinette v. Robinette*, 736 S.W.2d 351 (Ky.App. 1987), or not. If so, he failed totally to prove any of the necessary elements of such dissipation: that she used the money for a nonmarital

² Division of the accounts would have been difficult. Patty's account is with the Kentucky Employees Retirement System and, as such, apparently cannot be divided now and is not subject to a Qualified Domestic Relations Order. The court could, of course, have required Patty to pay John one-half of the difference in the values of the two accounts, but elected, in its discretion, not to do so.

purpose, that she did so to deny him his interest, or that she did so in anticipation of the divorce. *Brosick v. Brosick*, 974 S.W.2d 498 (Ky.App. 1998). On the other hand, if he is merely claiming that she received this amount in marital assets and should therefore be required to reimburse him for half of this sum, that is part of the overall division of marital assets, as discussed above and is, again, within the trial court's discretion.

Cochran v. Cochran, supra. We do not find any abuse of that discretion in this regard.

For the foregoing reasons, the findings of fact, conclusions of law, decree and order of the Hardin Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert C. Bishop
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Barry Birdwhistell
Elizabethtown, Kentucky