

RENDERED: FEBRUARY 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001721-MR  
AND  
NO. 2006-CA-001776-MR

MICHAEL DARRELL STURGILL

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FLOYD CIRCUIT COURT  
v. HONORABLE JULIE PAXTON, JUDGE  
ACTION NO. 05-CI-01095

SANDY GENE JAMES STURGILL

APPELLEE/CROSS APPELLANT

OPINION  
AFFIRMING IN PART, VACATING  
IN PART, AND REMANDING

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BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,<sup>1</sup> SENIOR JUDGE.

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<sup>1</sup> Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

ROSENBLUM, SENIOR JUDGE: Michael Darrell Sturgill appeals the circuit court's division of property in their divorce case, and Sandy James Sturgill cross-appeals the court's denial of her request for maintenance . For the reasons stated herein, we affirm the circuit court's property division and vacate and remand for additional proceedings upon the issue of Sandy's entitlement to maintenance.

### **Background**

After a number of years of marriage, Sandy petitioned the Court for divorce from her husband, Michael. The circuit court granted a dissolution decree, and thereafter took up the subject matter of this appeal, which is the division of marital property and maintenance. The primary areas of contention in this case are the marital home and the question of maintenance. Sandy desires to keep the marital residence exclusively and also receive \$18,000 in maintenance over a period of 30 months on the ground that her demonstrated earning capacity is only about \$9,000 a year, whereas Michael's is about \$57,000. In sharp contrast, Micheal seeks a share of the marital residence but wants to make no maintenance payments whatsoever.

Steering a middle course, the circuit court awarded Sandy the marital residence, in addition to significant cash assets and other property, but gave her no maintenance award. This appeal followed.

### **Marital Property**

In overlapping arguments Michael contends that the trial court erred in its division of marital property. More specifically, Michael alleges that the trial court erred

in determining that a \$20,000 contribution by Sandy's grandfather toward the marital residence was nonmarital property; that the trial court failed to comply with KRS 403.190 in that it did not divide marital property in “just proportions”; and that the trial court failed to make adequate findings in support of its division of marital property.

KRS 403.190 provides, in relevant part, as follows:

(1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

2 (b) Value of the property set apart to each spouse;

(c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(2) For the purpose of this chapter, “marital property” means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;

(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation;

(d) Property excluded by valid agreement of the parties; and

(e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

“It is well settled that issues pertaining to the division of marital property upon divorce are reviewed under an abuse of discretion standard. An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made. A [ ] court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an [ ] erroneous legal standard.” *Overstreet v.*

*Overstreet*, 144 S.W.3d 834, 838 (Ky.App.2003) (citations and internal quotes omitted).

Michael's argument that the trial court erred by finding Sandy's grandfather's contribution toward the marital residence to be nonmarital property is based upon an erroneous premise. The trial court, rather, despite the grandfather's testimony

that his contribution was a gift to Sandy alone,<sup>2</sup> determined that the property was marital. As this argument is based upon an erroneous premise, we will not further address this issue on the merits.

We are unpersuaded that the trial court abused its discretion in its division of marital property. A trial court is to divide marital property in just proportions considering all relevant factors. *Wood v. Wood*, 720 S.W.2d 934 (Ky.1986); *See also Herron v. Herron*, 573 S.W.2d 342 (Ky.1978). However, just proportions does not necessarily mean equal proportions. *Wood, supra*. While the record discloses that Sandy received a greater share of the marital property, we find under the circumstances of this case that this disposition was proper. Michael's ongoing annual income (in the range of \$56,000 annually) is substantially greater than Sandy's (in the range of \$9,700 annually). This factor, we are persuaded, justifies the disparity in the awarding of marital property in this case.

Michael alleges that the trial court failed to make adequate findings in support of its distribution of marital property; however, pursuant to CR 52.04 “[a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by written request for a finding on that issue or by a motion pursuant to Rule 52.02 [motion for amendment].” *See Underwood v. Underwood*,

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<sup>2</sup> We note that the intent of the donor is controlling in the determination of nature of a gift.

836 S.W.2d 439, 445 (Ky.App.1992); *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky.1982); *Whicker v. Whicker*, 711 S.W.2d 857, 860 (Ky.App.1986).

Our review of the record discloses that subsequent to the entry of the trial court's July 21, 2006, order, Michael did not make a motion for additional findings in support of the trial court's distribution of marital property or otherwise bring the issue to the court's attention. As such, this issue is not properly preserved for our review, and we are precluded by CR 52.04 from remanding the cause simply on the basis that the trial court failed to make adequate findings in support of its decision.

#### **Valuation of the Marital Residence**

The parties also dispute the circuit court's valuation of the marital residence. The primary proof on this issue comes from three witnesses: (1) the Property Valuation Assessor valued the residence at \$55,000; (2) Sandy's retained expert valued the residence at \$57,000; and (3) Micheal's retained expert valued it at \$160,000. As expressly indicated in its written opinion, the trial court considered the valuations presented by both parties but accepted the valuation presented by Sandy's expert. Here, the circuit court was compelled to choose between competing valuations and its rationale for accepting Sandy's expert's valuation is supported by the record. Thus, we cannot say that its determination is clearly erroneous. *See, e.g., Robert v. Robert*, 587 S.W.2d 281, 283 (Ky.App. 1979) (property valuations reviewed for abuse of discretion).

## **Maintenance**

In her cross-appeal Sandy contends that the trial court erred by failing to award her maintenance.

Kentucky's maintenance statute, KRS 403.200, provides as follows:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order 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.

Under this statute, the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion. *Weldon v. Weldon*, 957 S.W.2d 283, 285 (Ky.App.1997); *Perrine v Christine*, 833 S.W. 2d 825 (Ky. 1992).

Under the facts at bar, the trial court abused its discretion by failing to award Sandy any amount of maintenance.

Sandy requested that she be awarded maintenance at the rate of \$600 per month for a period of 30 months. There is a significant disparity in the respective income of each party (Michael's earnings exceed \$56,000 annually while Sandy's earnings are \$9,672 annually). The parties were married in excess of 26 years. Sandy has also noted that health insurance will no longer be provided to her by Michael's employer. Although Sandy has received a greater portion of the marital property, a significant portion of that award is the marital residence as opposed to an asset which would generate income. Considering the great disparity in incomes as well as the lengthy marriage, the trial court's denial of maintenance was an abuse of discretion. We accordingly vacate the trial court's order insofar as it denied a maintenance award to Sandy and remand for additional proceedings upon the issue.

Upon remand, the trial court shall give due consideration to the standard of living to which the parties were accustomed in determining the amount and duration of the award. Furthermore, the trial court shall consider the appellant's ability to meet his own needs while meeting those of the appellee. In addition, the trial court shall address the factors enunciated in KRS 403.200 (2). *See also Powell v Powell*, 107 S.W.3d 222 (Ky. 2003).

### **Conclusion**

For the foregoing reasons, we affirm the judgment of the Floyd Circuit Court in part, vacate in part, and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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