RENDERED: NOVEMBER 21, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001946-MR

JAMES MEARL MUSIC — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 06-CI-00130

CAROLYN SUE MUSIC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: The nine-year marriage James Mearl Music and Carolyn Sue Music was dissolved by decree entered July 11, 2006. On the basis of evidence adduced at a hearing conducted on July 7, 2006, the trial court entered findings of fact and conclusions of law respecting the division of marital property and restoration of non-marital property. In this appeal, James argues that the trial court erred: 1) in finding that Carolyn had acquired an interest in real property that he had inherited from his father; 2)

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

in charging the value of a BMW automobile against his share of the marital property; and 3) in requiring him to pay Carolyn the sum of $7,500.00 to equalize the division of marital property. Because we are convinced that evidence of substance supports the trial court's findings of fact and conclusions of law, we affirm.

The findings which form the basis of this appeal are as follows:

> 11. ....The parties at one point had a 1988 BMW, which was given to the Petitioner's [James'] daughter during the marriage. The Respondent [Carolyn] testified that there was a debt on that vehicle of $8,556.00, which was paid during the course of the marriage.
> 13. The Petitioner inherited a one-half interest in some vacant property in Floyd County. In 2000, the Petitioner and his brother divided the property. Petitioner and his wife signed a deed to the brother and his wife for part of the property, and Petitioner's brother and his wife signed the deed to the Petitioner and the Respondent for the remaining property. There was no particular testimony indicating that it was intended to be a deed of transfer only to the Petitioner. It also appears that the deed may have been placed in both names because it was necessary for the Respondent to sign the deed to Petitioner's brother in order to complete the transaction. **The Court is unable to find from the evidence that there is anything other than ownership by the Respondent of an interest in the property.** The Court finds that the Petitioner owns a half interest as a nonmarital inheritance, that he owns another fourth as a marital interest, and that the Respondent own a fourth interest received by deed.
> 19. .... In order for the parties to have a roughly equal distribution of the property, it will be necessary for the Petitioner to pay the Respondent the sum of $7,500.00 [Emphasis added.]

James thereafter filed a motion to alter, amend or vacate to the judgment or to take additional proof. That motion was resolved by an order which included the following:

> The Petitioner moves to amend the judgment with respect to the Court's finding of $8,556.00 being attributed to the Petitioner from the personal property of the parties. The only evidence the Court heard with respect to the BMW was that $8,556.00 was paid on the vehicle during the marriage. **No other evidence was offered by either party to establish a different figure or to establish a fair market value of the BMW.** The BMW was clearly a marital asset, which was disposed of by a gift from the Petitioner to his daughter, and he must therefore account for the same. [Emphasis added.]

Regarding James' complaint concerning the allocation to Carolyn of an interest in the real property he inherited from his father, the trial court offered the following explanation in its order denying the post-trial motion:

> The third issue relates to a tract of land in Floyd County. The property was inherited by the Petitioner and his brother, each an undivided one-half interest. That was clearly non-marital property. Sometime during the marriage, the Petitioner and [his brother] divided the property between themselves. The conveyances were signed by their respective wives. In each instance, the wives' names were added as grantees on the deed of conveyance. The Petitioner takes the position that the entirety of the property should be non-marital, because it was originally non-marital property. The problem for the Petitioner arises in that the Respondent's name was placed on the deed.

Relying on *Hunter v. Hunter*, 127 S.W.3d 656 (Ky.App. 2003), the trial court went on to explain that James failed to overcome the KRS 403.190 definition of what constitutes marital property by offering evidence to rebut the plain language of the deed.

Although James strenuously argues that the findings of the trial court are erroneous, he fails to offer a single citation to evidence in the record upon which a contrary finding could be predicated. In fact, we cannot even determine from the briefs whether the property was inherited during the marriage or before the marriage. Under CR 52.01, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Absent citation to evidence which would satisfy that standard, we have no basis for setting aside the findings entered in this case. To the contrary, the trial court fully and clearly explained the basis for his findings, stating that no evidence had been offered which would have supported a different result.

Neither has there been a showing that the trial court abused its discretion in the division of property in this case. KRS 403.190 requires the trial court to divide the marital property in just proportions and specifically states that all property acquired by either spouse after the marriage and before legal separation is presumed to be marital, unless it is shown to fall within the exceptions set out in subsection (2). Here, we are pointed to no **evidence** which would allow us to conclude that the trial court's decision is arbitrary, capricious, unreasonable or unfair. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky.1994). On this state of the record, we are convinced that the decision of the trial court is supported by the record, comports with applicable precedent, and represents a division of the property "in just proportions."

Accordingly, the judgment of the Johnson Circuit Court is affirmed.

MOORE, JUDGE, CONCURS.

HOWARD, JUDGE, DISSENTS BY SEPARATE OPINION.

HOWARD, JUDGE, DISSENTING: Respectfully, I dissent, as to the issue of the marital or non-marital character of the real estate. I concur with the majority opinion as to all other issues.

KRS 403.190(2) defines what is marital, as opposed to non-marital, property. It states, in relevant part,

> For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except: . . .
> (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent; . . .

The trial court's findings of fact in its original decree, regarding this property, were as follows:

> The Petitioner inherited a one-half interest in some vacant property in Floyd County In 2000, the Petitioner and his brother divided the property. . . . Petitioner's brother and his wife signed the deed to the Petitioner and the Respondent for the remaining property.

In its order overruling James' motion to alter or amend, the trial court further stated,

> The property was inherited by the Petitioner and his brother, each an undivided one-half interest. That was clearly non-marital property. Sometime during the marriage, the Petitioner and [his brother] divided the property between themselves. . . . There was no consideration for the conveyance, as it was simply a division of property.

In my opinion, these were the relevant findings of fact and they were undisputed. I believe the trial court erred, as a matter of law, when it went on to state,

> The Petitioner takes the position that the entirety of the property should be non-marital, because it was originally non-marital property. . . . The problem for the Petitioner arises in that the Respondent's name was placed on the deed. . . . Significantly, no testimony was introduced from the attorney as to any instructions as to preparations of the deed. No evidence was offered from the Petitioner's brother or his wife as to their intentions in placing the names of the two wives on the deeds. . . . In this case, the court finds that the Petitioner has not met his burden of proof of explaining the presence of the Respondent's name on the deed, . . .

In other words, the trial court believed that the fact that the subject property was acquired "in exchange for" non-marital property was insufficient, in itself, to establish the non-marital character of the existing property; the Appellant had to go further and sustain a burden of proof that it was the intent that his half of the property, as divided, be owned by him individually and not jointly with his wife, and that this burden arose because his wife's name was placed on the deed. I do not believe this is the law.

KRS 403.190(2) says property is non-marital if it is "property acquired in exchange for . . . property acquired by . . . bequest, device or descent." No other proof is required. I believe the trial court erred by relying on *Hunter v. Hunter,* 127 S.W.3d 656 (Ky.App.2003), which dealt with a gift from the husband's parents, placed in both his and his wife"s names. *Hunter* did not involve the exchange of property at all, but a question concerning the intent of the donors as to the original gift. In this case that intent is not an issue. The property was inherited by James, not James and Carolyn jointly. The trial

court found that it was, at that point, his non-marital property. The question in this case concerns only the *exchange* of that non-marital property for the currently existing tract. This is a "tracing" situation, except that it is a direct exchange, and no actual tracing, in the normal usage of that term, is required.

KRS 403.190 goes on, in subsection (3), to indicate that the legal title to the property is irrelevant to a determination of its marital or non-marital character:

> 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.* (emphasis added).

Thus, in a tracing situation, it does not matter whose names are on the deed. The tracing, the "exchange," is sufficient. In *Sexton v. Sexton,* 125 S.W.3d 258, 260 (Ky. 2004), the Kentucky Supreme Court summarized the facts as follows:

> Appellee owned an apartment building before his marriage to Appellant. During the marriage, in exchange for the apartment building, the parties acquired in their joint names an undivided one-sixth (1/6) partnership interest in Autumn Park Partnership . . .

The court then held,

> Neither title nor the form in which property is held determines the parties' interests in the property; rather, "Kentucky courts have typically applied the 'source of funds' rule to characterize property or to determine parties' non-marital and marital interests in such property." "The 'source of funds rule' simply means that the character of the property,

> *i.e.,* whether it is marital, non-marital, or both, is determined by the source of the funds used to acquire the property."

Id. at 265, *quoting Travis v. Travis,* 59 S.W.3d 904, 909 (internal footnotes omitted).

The Supreme Court in *Sexton* then affirmed an award of 94% of the jointly-held partnership interest to the husband as his non-marital property. *Sexton* is further instructive in that it also involved a question of intent concerning a gift – part of the non-marital property exchanged for the interest in the partnership was acquired by gift – and the opinion shows that intent is relevant to determine to whom the gift was given, in the first place, but not to the tracing, even into jointly-held property.

I believe the trial court erred, not in its findings of fact, but in its interpretation of the law. Intent is relevant to determine the marital or non-marital character of property acquired by one spouse during the marriage, such as a gift. Once that character has been determined to be non-marital, as with the inherited property in this case, intent is no longer relevant. All that is required is a showing that the currently-held property was acquired in exchange for the non-marital property.

Based on the foregoing, I would reverse the trial court as to the real estate and award it entirely to James, as his non-marital property. I would affirm the remainder of the circuit court's ruling.

BRIEF FOR APPELLANT:

Don A. Bailey
Louisa, Kentucky

BRIEF FOR APPELLEE:

Wesley W. Duke
Paintsville, Kentucky