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ARKANSAS COURT OF APPEALS

DIVISION III

No. CV-17-139

MIKE ELLIS APPELLANT/CROSS APPELLEE	OPINION DELIVERED: DECEMBER 6, 2017
	APPEAL FROM THE RANDOLPH COUNTY CIRCUIT COURT [NO. 61DR-09-141]
V.	HONORABLE PHILIP SMITH, JUDGE
DENEE ELLIS APPELLEE/CROSS APPELLANT	AFFIRMED IN PART AND REVERSED AND REMANDED IN PART ON DIRECT APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL

ROBERT J. GLADWIN, Judge

This is an appeal of a domestic-relations case involving Denee Ellis and Mike Ellis. Both Mike and Denee appeal the circuit court's orders, and their arguments primarily relate to the division of property and Mike's child-support obligation. Mike also challenges the circuit court's refusal to hold Denee in contempt of court. After considering the merits of the appeal, we affirm in part and reverse and remand in part on direct appeal and reverse and remand on cross-appeal.

I. *Background*

Denee and Mike married in November 1996, and had two children during their marriage. Mike is a farmer, and Denee is a teacher. In July 2009, Mike filed a complaint for divorce from Denee. He later amended his complaint and requested an unequal division

of the marital property. Denee disputed Mike's entitlement to an unequal division of the marital property.

The circuit court held a bench trial over the course of seven days in 2011. The majority of the trial testimony pertained to the disposition of property. At issue was the disposition of the parties' two houses—one on Surridge Road and one on Brandi Trail. Additionally, the circuit court was tasked with dividing items of personal property including household goods and vehicles. Most significantly, the circuit court was required to dispose of entities that managed farm land and equipment—specifically Ellis Corner Farm, LP (Ellis Corner), Honeybaby Partnership (Honeybaby), and Sweetie Pie Partnership (Sweetie Pie).

Honeybaby and Sweetie Pie are marital property subject to division. The parties contest whether any portion of Ellis Corner is marital property. During Denee and Mike's marriage, Mike's parents gifted 52 percent of Ellis Corner to Mike and 48 percent of Ellis Corner to his brother Danny. Later, Danny transferred his 48 percent share of Ellis Corner to Mike, and Mike and Denee cosigned a loan to pay Danny. Mike asserted the gift from his parents of 52 percent of Ellis Corner was his nonmarital property, and Denee did not challenge this. However, the parties dispute whether any of the 48 percent share of Ellis Corner acquired during the marriage was marital property subject to division.

Ultimately, the circuit court adjudicated the issues in this case in a piecemeal fashion. The first order entered by the circuit court was a decree of divorce in June 2011. Later, in August 2011, the circuit court entered an order entitled "Visitation Order" setting out Mike's visitation schedule with the two minor children. The next order entered by the

circuit court that is pertinent to our review is an order to show cause filed in March 2012 in response to Mike's motion for contempt in which he accused Denee of lying under oath.

Time passed, and in March 2014, more than two and a half years after the trial had concluded, the circuit court circulated a memorandum of decision wherein it ordered that Denee would convey all her interest in the marital property relating to the farming operations to Mike in exchange for a sum of money. The circuit court did not determine the amount of money Mike owed Denee to account for her marital interest in the farming operations. Instead, it left a blank space in the memorandum of decision and indicated that it needed assistance from the parties to determine the amount Mike owed Denee.

Then, in February 2015, three and a half years after the trial, the circuit court entered an order that purported to equally divide the parties' property and set Mike's child-support obligation. The circuit court found Mike's 52 percent share of Ellis Corner that he received as a gift from his parents was his nonmarital property. However, it found the 48 percent share of Ellis Corner he acquired during the marriage was marital property subject to division. The circuit court awarded Mike all interest in Ellis Corner, Honeybaby, and Sweetie Pie and ordered Mike to pay Denee $316,511.50 for her marital share of these entities. In addition, the circuit court awarded Mike the house on Surridge Road and Denee the house on Brandi Trail and found that each party would have the household furnishings, equipment, and vehicles in their possession.

The court entered another order in April 2015 that included a Rule 54(b) certificate and attempted to fully and finally resolve all pending issues before the court. Ark. R. Civ. P. 54(b) (2016). Subsequently, both Mike and Denee appealed. Our court dismissed the

first appeal for lack of jurisdiction. *Ellis v. Ellis*, 2016 Ark. App. 411, 501 S.W.3d 387. In our opinion, we acknowledged that the circuit court failed to adjudicate custody and to formally rule on Mike's motion for contempt. The circuit court resolved these issues in an order entered in November 2016. It adjudicated custody in favor of Denee and denied Mike's motion for contempt. Once again, Mike timely appealed, and Denee timely cross-appealed.

II. *Issues on Appeal*

On direct appeal, Mike raises nine issues. He argues the circuit court erred by (1) finding his purchase of Danny's 48 percent share of Ellis Corner was marital property; (2) finding that 52 percent of the acquired 48 percent share of Ellis corner was marital property; (3) equally dividing the marital property; (4) determining that the Jeep Liberty was a marital asset; (5) failing to give him credit for house payments he made on the Brandi Trail property after the entry of the divorce decree; (6) failing to divide Denee's retirement benefits; (7) failing to divide the parties' household goods and furnishings; (8) refusing to hold Denee in contempt of court; and (9) improperly calculating prospective and retroactive child support.

Denee raises two issues in her cross-appeal. She contends that the circuit court erred (1) in its calculation of the value of the property the parties owned on Surridge Road and (2) in awarding Mike credit against child-support arrearages.

III. *Standard of Review*

Our court reviews divorce cases de novo on appeal. *Moore v. Moore*, 2016 Ark. 105, 486 S.W.3d 766. With respect to division of property, a circuit court's findings of fact should be affirmed unless they are clearly erroneous or clearly against the preponderance of

the evidence. *Id.* Our court applies the same standard when analyzing the propriety of a child-support order and will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Wright v. Wright*, 2010 Ark. App. 250, 377 S.W.3d 369. When considering the contempt issue, we limit our review to whether there has been an abuse of discretion. *Warren v. Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986).

IV. *Mike's Direct Appeal*

A. Whether the 48 Percent Share of Ellis Corner Was Marital Property

Mike unsuccessfully argued at trial that the 48 percent share of Ellis Corner that was purchased from his brother Danny was his nonmarital property. Arkansas Code Annotated section 9-12-315(b) (Repl. 2015) defines marital property as "all property acquired by either spouse subsequent to the marriage." There is a presumption that all property acquired during a marriage is marital property. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). Once one party has shown that property was acquired during the marriage, the burden shifts to the other party to prove by clear and convincing evidence that the property is nonmarital. *Carroll v. Carroll*, 2011 Ark. App. 356, 384 S.W.3d 50.

In support of reversal, Mike emphasizes that Ellis Corner—not Mike or Mike and Denee—secured the loan to buy Danny's share of the business. He also points out that Denee did not obligate herself when the loan was refinanced nor did she take part in any of the operations of Ellis Corner. Finally, he highlights his testimony in which he indicated that he thought Ellis Corner was his nonmarital property and that Denee had no connection to its operations.

This evidence is insufficient to require reversal. Danny assigned his interest in Ellis Corner to Mike—not Ellis Corner—during Mike and Denee's marriage. Thus, there is a presumption that this property is marital. *McKay*, *supra*. It was Mike's burden to prove by clear and convincing evidence that this property was nonmarital. *Carroll*, *supra*. The evidence reflects that Denee signed the original loan to purchase Danny's interest in Ellis Corner and that the Ellis Corner loan was repaid using marital funds. We cannot say that the circuit court clearly erred by finding that Mike failed to meet his burden of proving the 48 percent share of Ellis Corner was his nonmarital property.

B. Whether 52 Percent of the Acquired 48 Percent Share of Ellis Corner Was Marital Property

Mike's next point on appeal is related to his first point. He argues that 52 percent of the 48 percent share of Ellis Corner was his nonmarital property because the loan executed to purchase Ellis Corner was repaid with assets from Ellis Corner. Mike contends that the payments on the loan for Ellis Corner are all traceable to his nonmarital assets.

Mike first argues that it was Denee's burden to prove that this interest was marital. We disagree. Danny assigned his 48 percent interest in Ellis Corner to Mike during the marriage, and all property acquired during marriage is presumed to be marital. *McKay*, *supra*. Once a party has shown that property was acquired during the marriage, the burden shifts to the other party to prove by clear and convincing evidence that the property is nonmarital. *Carroll*, *supra*.

We are reminded that Denee personally guaranteed the loan used to finance the acquisition of Danny's 48 percent of Ellis Corner. That evidence alone is sufficient for us to

reach the conclusion that the circuit court's decision was not clearly erroneous. Additionally, Mike's tracing argument is problematic. Our supreme court in *Canady v. Canady* stated that "[u]nquestionably the tracing of money or other property into different forms may be an important matter, but tracing is a tool, a means to an end, not an end in itself." 290 Ark. 551, 555–56, 721 S.W.2d 650, 652–53 (1986). When transactions result in great difficulty in tracing the manner in which nonmarital and marital property have been commingled, the property acquired in the final transaction may be declared marital property. *Boggs v. Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988). Mike argues that because Ellis Corner repaid its loan with rental income, 52 percent of the 48 percent interest was traceable to his nonmarital property. His argument required the circuit court to analyze rent payments made to Ellis Corner that were then used to pay the loan on Ellis Corner. Those rent payments all came from Honeybaby and Sweetie Pie; both of which are marital property. For this additional reason, we hold that the circuit court did not clearly err.

C. Equal Division of Marital Property

Mike also challenges the circuit court's denial of his request for an unequal division of the marital property. Arkansas law provides that a circuit court should divide marital property equally unless the circuit court finds that equal division is inequitable. Ark. Code Ann. § 9-12-315(a)(1)(A). There is a presumption that an equal division of marital property is fair and equitable. *Davis v. Davis*, 2016 Ark. App. 210, 489 S.W.3d 195. If inequitable, the court is to divide the property equitably taking into consideration nine statutory factors enumerated at Arkansas Code Annotated section 9-12-315(a)(1)(A). When an unequal division of marital property is awarded, the court must state its basis and reasoning for not

dividing the marital property equally between the parties, and the basis and reason should be stated in the order. Ark. Code Ann. § 9-12-315(a)(1)(B).

Preliminarily, Mike argues that even if equal division of the parties' marital property was not erroneous, the decision must still be reversed because the circuit court did not consider each of the factors enumerated in Arkansas Code Annotated section 9-12-315(a)(1)(A) when it divided the parties' property. Mike's argument is without merit. Arkansas Code Annotated section 9-12-315(a)(1)(B) requires only that findings of fact be made when an unequal division of property is awarded.

With this conclusion reached, we turn our attention to the propriety of the decision to equally divide the parties' marital property. Mike's evidence in favor of an unequal division of property focuses on his contention that he was solely responsible for the growth of the parties' wealth and that, in addition to not contributing to their increase in wealth, Denee was a bad homemaker. Denee contradicted this with evidence of her involvement in their children's lives and her services to the family. Additionally, there is ample evidence of the disparity in the parties' future earning capacity and other factors that support an equal division of property. We hold the circuit court did not clearly err in awarding an equal division of the marital property.

D. The Jeep Liberty

The circuit court awarded each party his and her respective vehicles—Denee received the Chevrolet Suburban that was a gift from her parents, and Mike received the Jeep Liberty he used as his primary vehicle. Mike contends the circuit court erred because the value of the Jeep Liberty was included in the appraisal of the marital assets. It had an

appraised value of $5,000, and he argues that he is entitled to a $2,500 credit against Denee's judgment.

The order disposing of the vehicles did not determine that the Jeep was Mike's nonmarital property; it merely established that he was entitled to it. The order specifically provides, "[Denee's] Chevrolet Suburban vehicle is declared to be her own separate property, and the vehicle that plaintiff uses as his primary personal vehicle is declared to be his own separate property." The evidence shows that the Jeep Liberty was marital property subject to division by the circuit court. Accordingly, the inclusion of the Jeep Liberty in the appraisal of marital assets was proper, and we cannot say that the circuit court clearly erred in requiring Mike to compensate Denee for one-half of its value.

E. Division of the Brandi Trail House Payments

Mike and Denee equally split the house payment on the Brandi Trail property until the circuit court awarded it to Denee. Mike asked the circuit court to give him credit against his child-support arrearage for the payments he made on the indebtedness on the Brandi Trail property. The court declined to award him any credit for these payments. He contends this decision was clearly erroneous and amounts to a windfall to Denee.

This issue arises because of the large amount of time that passed between the entry of the divorce decree and the division of the parties' property. The parties' divorce decree was entered on June 20, 2011, and Mike continued to make one-half of the Brandi Trail house payments for over three years until the circuit court ultimately ruled that Denee would receive the Brandi Trail property in February 2015.

We are sympathetic to Mike's position. However, his payments toward the indebtedness on the Brandi Trail property were voluntarily made. No order required the parties to share the house payment. Our law provides that, "[a]lthough we are not insensitive to the generosity of the noncustodial parent . . . who provides support for his children additional to that expressly ordered by the court, we do not, as a matter of law, give credit for voluntary expenditures." *Glover v. Glover*, 268 Ark. 506, 508, 598 S.W.2d 736, 737 (1980). Accordingly, it was not clear error to refuse to give him credit for those payments.

F. The Division of Denee's Retirement Benefits

During the parties' marriage, Denee accrued retirement benefits as a result of her employment as a teacher. Ordinarily those retirement benefits are marital property subject to division by the circuit court. *Skelton v. Skelton*, 339 Ark. 227, 5 S.W.3d 2 (1999). However, the circuit court refused to divide Denee's retirement benefits finding that there was no evidence of their value or other details of the retirement plan. Mike contends this was clear error.

Our caselaw provides that a court does not clearly err in declining to divide an asset if the complaining party fails to produce sufficient evidence at trial on the issue. *Coombe v. Coombe*, 89 Ark. App. 114, 201 S.W.3d 15 (2005). Evidence was elicited from Denee that she taught for seven of her twelve years of marriage and that she accrued retirement benefits during that time. However, there was no evidence regarding Denee's years of service, whether her retirement plan was contributory, the dates and amounts of any contributions

she made, and, most importantly, the present value of the asset. Accordingly, we hold that the circuit court did not clearly err in refusing to divide this asset.

G. The Division of Household Goods and Furnishings

The circuit court awarded each party the household goods in his or her possession. Mike argues that this amounted to an improper unequal division of marital property in Denee's favor. Mike contends he provided the only testimony regarding the value of the household goods and furnishings, testifying that they were worth "$20,000 or so." Mike asks that the circuit court's decision on this issue be reversed and that (1) he be awarded a credit for his portion of the household goods and furnishings or (2) this case be remanded to the circuit court for findings as to why the household goods were not divided equally.

Arkansas Code Annotated section 9-12-315(a)(1)(A) provides that "at the time a divorce decree is entered, all marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable." Nevertheless, our property-division statute does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003).

Here, the parties had two marital homes. The court's February 2015 order awarded each party a house and also all the household goods and furnishings that were currently in each party's possession. Mike correctly asserts that he was the only witness to place a value on their household furnishings, but the court was not required to accept his testimony as true. *See Burnett v. Philadelphia Life Ins. Co.*, 81 Ark. App. 300, 101 S.W.3d 843 (2003). The parties had a lengthy separation, and each was living in a separate house. It is reasonable

to conclude that each party had a significant amount of household goods and furnishings and that each party had a roughly equal amount of the personal property that was marital. We hold that the circuit court did not clearly err when it awarded each party the household goods and furnishings in each's possession.

H. Contempt

Mike contends the circuit court erred in refusing to hold Denee in contempt for lying under oath. Mike claims Denee lied in a deposition by stating she had not had sexual relations with a man named Mike Miller. During the trial, Denee issued a retraction to the answers in her deposition regarding whether she had sexual relations with Mike Miller.

Although it seems clear that Denee was untruthful in her deposition, we hold that the circuit court did not abuse its discretion by refusing to place her in contempt for her untruthfulness. "The making of a false statement may constitute contumacious conduct if it obstructs the judicial process." *Jolly v. Jolly*, 290 Ark. 352, 356, 719 S.W.2d 430, 432 (1986). Here, we are lacking evidence that shows Denee's alleged contemptuous conduct obstructed the judicial process. Mike alleged that her lying "seriously hampered [his] preparation for the visitation hearing." However, there is no evidence that Denee's alleged lies interfered with his ability to present his case, and when questioning Denee at trial, Mike's counsel asked no questions regarding Mike Miller.

I. Mike's Child-Support Obligation

Mike argues the circuit court erred in its calculation of his child-support obligation. He contends that (1) the circuit court did not properly compute his monthly child-support obligation in accordance with Administrative Order No. 10 because it failed to deduct for

medical-insurance premiums he paid, his tax obligations, and the house payments on the Brandi Trail house, and (2) the court failed to make findings supporting its child-support calculation. Mike asks this court to remand the issue of child support to the circuit court.

In determining an appropriate amount of child support, we are to refer to the family-support chart contained in Administrative Order No. 10. Ark. Code Ann. § 9-12-312(a)(2). Pursuant to Administrative Order No. 10(I), "it is a rebuttable presumption that the amount of child support calculated pursuant to the . . . family support chart is the amount of child support to be awarded." "If the order varies from the guidelines, it shall include a justification of why the order varies." *Id.*

Our review indicates the circuit court intended to determine Mike's monthly net income and then set support in accordance with Administrative Order No. 10. The circuit court found that Mike's "monthly attributable income" was $6,046 and set Mike's child-support obligation for two children at $1,270 per month. Assuming arguendo that $6,046 is an accurate calculation of his net monthly income, the circuit court failed to set Mike's child-support obligation in accordance with the Administrative Order No. 10.[1]

Administrative Order No. 10(II)(b) provides that "to compute child support when income exceeds the chart, add together the maximum weekly, biweekly, semimonthly, or monthly chart amount, and the percentage of the dollar amount that exceeds that figure using the percentage above based upon the number of dependents"—in this case, 21

[1]Our court previously acknowledged this error and strongly suggested that the circuit court review its child-support determination. Nevertheless, the circuit court failed to consider the issue. *See Ellis*, *supra*.

percent. Instead of adhering to these guidelines, it appears that the circuit court reached its child-support determination by merely calculating 21 percent of Mike's monthly attributable income of $6,046. For this reason, we reverse and remand the circuit court's order setting child support.

Turning to the issues raised by Mike, we first consider Mike's argument that the circuit court erred by refusing to consider the amounts he paid for medical insurance, his tax obligations, and the house payments toward the house on Brandi Trail. We have already discussed the argument relating to the house on Brandi Trail, and it does not support reversal. However, Administrative Order No. 10(II)(a)(1) & (3) contemplates that money spent on medical insurance and taxes should be deducted from a payor's income before child support is calculated.

The circuit court's order provides that Mike "identified amounts paid out of business accounts directly to him or for his personal expenses over a two-year period." The circuit court then averaged those to reach a "monthly attributable income of $6,046." Trial exhibits identify personal expenditures made from business accounts and include payments for certain medical expenses. However, it is unclear from our review whether the circuit court deducted all medical-insurance and tax payments made by Mike when it calculated his support obligation.

In Mike's final argument relating to his child-support obligation, he challenges the circuit court's failure to make findings to support its child-support determination. A circuit court is required to make such findings only when the child support awarded varies from the amount contemplated under Administrative Order No. 10. We reiterate that our review

indicates that the circuit court unsuccessfully attempted to set child support in accordance with the family support chart found in Administrative Order No. 10, and under those circumstances, a justification for the amount of child support ordered was not required. But assuming the circuit court intended to deviate from the amount of support contemplated by Administrative Order No. 10, the order of child support must still be reversed for failure to include "a justification of why the order varies." Ark. Sup. Ct. Admin. Order No. 10, § 1.

On remand, we direct the circuit court to adhere to the guidelines of Administrative Order No. 10 when calculating support either by setting an amount pursuant to the order or by including a justification for deviation.

V. *Denee's Cross-Appeal*

A. The House on Surridge Road

Denee argues the circuit court erred in its property division because when it divided the parties' property, it counted the debt on the Surridge Road house twice. We agree.

The circuit court found that the value of the Surridge Road house was $75,000. However, in its February 2015 order, it reduced the value of the Surridge Road property to $39,748 because it took into account that the house was mortgaged to purchase Honeybaby's 151 acres. This is problematic because an exhibit to the order also demonstrates that the circuit court took into account the debt on the Surridge Road house when it determined the value of Honeybaby.

While our property-division statute does not require mathematical precision when dividing property, this court should reverse the trial court's property division when it is clearly erroneous. *Williams*, *supra*. Here, the division of property is clearly erroneous insofar

as the debt associated with the Surridge Road property was counted twice. On this point, we reverse and remand for an order consistent with our holding and direct the circuit court to show the value of the Surridge Road house as $75,000.

B. Child Support

The circuit court's order provides that Mike's child-support obligation would be retroactive, and Denee was given judgment against Mike for unpaid, retroactive support. The amount of Denee's judgment was reduced by the amount Mike had paid for Denee's cell-phone bill from January 1, 2011, to September 30, 2014. Denee argues that the circuit court erred by giving Mike credit for the money he paid towards the parties' cell-phone bills.

First, Denee argues that it was error to give Mike credit for the amount he paid for her cell-phone bills because those payments were voluntarily made. "Courts, as a matter of law, do not give credit for voluntary expenditures." *Glover*, 268 Ark. at 508, 598 S.W.2d at 737. However, we disagree with Denee's assertion that Mike's payments were voluntary. The parties' temporary order required Mike to pay her cell-phone bill.

Next, Denee argues that the circuit court erred by reopening the record to allow evidence of payments made towards cell-phone bills. A circuit court has discretion to reopen a record before the entry of a final decree. *Tackett v. First Sav. of Ark., F.A.*, 306 Ark. 15, 810 S.W.2d 927 (1991). Here, we cannot say it was an abuse of discretion to reopen the record because the circuit court ordered Mike to pay Denee's cell-phone bill; thus, the amount paid by Mike is pertinent to the disposition of the case.

Finally, Denee argues that the circuit court erred by deviating from the guidelines of Administrative Order No. 10 when it gave credit for Mike's payment of Denee's cell-phone bills. We agree that to allow credit for payments of cell-phone bills is a deviation from Administrative Order No. 10. When calculating child support, a circuit court may deviate from the chart-ordered amount for various reasons including "accustomed standard of living." Ark. Sup. Ct. Admin. Order No. 10(V)(a)(8). The parties argue about whether cell-phone bills are an appropriate ground for deviation for accustomed standard of living, but we do not reach that question. When a circuit court deviates from the amount of child support appropriate under Administrative Order No. 10, it must include in its order a justification of why the order varies. Ark. Sup. Ct. Admin. Order No. 10(I). The circuit court's order includes no such justification. Therefore, we hold that the allowance of a deduction for cell-phone bills was reversible error and reverse and remand.

Affirmed in part and reversed and remanded in part on direct appeal; reversed and remanded on cross-appeal.

GLOVER and HIXSON, JJ., agree.

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