

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Alford V. Harshbarger,
Petitioner Below, Petitioner

vs.) **No. 20-0788** (Cabell County 18-D-674)

Mary A. Harshbarger,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Alford V. Harshbarger, by counsel Michael S. Bailey, appeals the Circuit Court of Cabell County's September 8, 2020, order dismissing his appeal and affirming the Family Court of Cabell County's March 2, 2020, corrected final order distributing the marital and separate property in this family court matter. Respondent Mary A. Harshbarger, by counsel Mark W. Kelley and John J. Brewster, filed a response in support of the orders.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

The parties married on January 5, 2013, and were together for just over five years before separating on or about June 7, 2018. At the time of their marriage, both parties were retired and were receiving social security retirement benefits, which were fully owned prior to the marriage. Wife also received benefits from a pension plan, which also predated the marriage. Both parties owned real property before the marriage, all of which is located in West Virginia. In addition to the house that he lived in on Ponderosa Drive in Culloden, Husband owned property on Smith Creek in Cabell County. Wife owned a house on Martha Road in Barboursville. These premarital houses were fully furnished and remained that way throughout the marriage. During the marriage, deeds were recorded for the properties reflecting that the properties were owned by both husband and wife jointly. While they were married, the parties resided in the Ponderosa Drive house, but they also retained the Martha Road house and kept it furnished. The parties also purchased an additional tract of real estate together on Adrian Street in Lesage, West Virginia.¹

¹ This property was purchased from the proceeds of a loan the parties obtained on the Ponderosa Drive property.

Wife moved back into the Martha Road residence when she separated from Husband on or about June 7, 2018. In July of 2018, the Martha Road residence caught fire and was completely destroyed as a result of the fire. The contents of the house were also largely destroyed by the fire.

Wife filed a petition for divorce on November 18, 2018, noting irreconcilable differences and anticipated voluntary separation for a period of more than one year. A final hearing was scheduled for May 16, 2019. On May 15, 2019, the eve of the final hearing, Husband filed a motion for a continuance. Although the court continued that hearing, it utilized that time to address other issues, including ordering Husband to cease making unwanted contact with Wife. At a June 11, 2019, temporary hearing, Wife informed the court that Husband continued to make contact with her. Thereafter, she filed a motion for contempt alleging that Husband was in violation of the court's no contact order. The court entered an order to show cause on August 6, 2019, and set a hearing on the motion for August 29, 2019. A final hearing was also scheduled for August 29, 2019, but that hearing was continued on the morning of the hearing because Husband allegedly suffered a medical emergency.

Later, Wife filed a second motion for contempt alleging that Husband continued to violate the court's no contact order. A final hearing was scheduled for September 26, 2019, and that hearing began but was not completed because Husband suffered a medical episode during the presentation of evidence. A final hearing was rescheduled for November 14, 2019, but Husband filed a motion to continue two days before the hearing due to a conflict with a criminal hearing for his son. The court denied his motion and the matter proceeded to a final hearing on November 14, 2019. At the hearing, the court granted Wife's motion for contempt and second motion for contempt and ordered that the no contact order remain in effect.

The family court asked both parties to submit proposed orders and, ultimately, the court entered the proposed order submitted by Wife. The divorce decree included a no fault finding. Thereafter, the court entered a corrected final order which made minimal corrections. Both orders awarded Wife attorney's fees of \$6,059² as a result of delays and contempt proceedings that the court attributed to Husband and \$1,200 for a fee incurred by Wife in defending a magistrate court action due to Mr. H's actions.

The family court ordered that the insurance proceeds from the Martha Road home were to be divided equally, but the court awarded the entirety of the personal property insurance claim from the fire to Wife. The family court ordered that all of the parties' other real estate, except for the home that Husband occupied, be sold, and the proceeds be divided equally between the parties. In the alternative, the court noted that if Husband wished to retain the lots on Smith Creek and the lot at Adrian Street, with Wife retaining the lot on Martha Road, then Husband must pay Wife the sum of \$32,700 to equalize equitable distribution of these properties.

The family court order further awarded the parties their "separate" property. Included in this separate property were bank accounts that were listed solely in that party's name. Accordingly, all of the money in those accounts was considered the separate property of the party whose name

² Wife sought fees of \$8,059 as a result of the delays and contempt proceedings.

was listed on the account. However, the court ordered the parties to jointly share in the debt for a credit card in Wife's name only, finding that the debt was incurred during the marriage and, therefore, was marital debt.

Husband appealed the family court's order to the circuit court. The circuit court affirmed the family court order and dismissed the appeal. Husband appeals the circuit court's order raising several assignments of error. He argues that the family court and circuit court erred in the process of equitable distribution, abused their discretion in refusing to award spousal support to him, and improperly denied his request for oral argument.

At the outset, we note that

[i]n reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

Syl., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

In light of that standard of review, we first consider Husband's argument that the court erred in designating the parties' property as marital or separate property and in its distribution of the property. Husband claims that the orders on appeal favored Wife in terms of what the court determined to be marital property and how the property was distributed. Wife counters that the court properly designated the property as separate or marital property and appropriately distributed it.

As noted above, the court found that the bank accounts that were listed solely in that party's name were separate property.³ Upon our review, the circuit court did not err in this finding, as these were accounts that had been held by the individual parties prior to the marriage.

³ West Virginia Code § 48-1-237 defines "separate property" as follows:

"Separate property" means:

- (1) Property acquired by a person before marriage;
- (2) Property acquired by a person during marriage in exchange for separate property which was acquired before the marriage;
- (3) Property acquired by a person during marriage, but excluded from treatment as marital property by a valid agreement of the parties entered into before or during the marriage;
- (4) Property acquired by a party during marriage by gift, bequest, devise, descent or distribution;
- (5) Property acquired by a party during a marriage but after the separation of the parties and before ordering an annulment, divorce or separate maintenance; or

(Continued . . .)

The court determined that the marital property⁴ consisted of parcels of real estate, credit cards, and Husband's automobile.⁵ Husband argues that the court erred in designating credit card debt in Wife's name only as marital debt. Upon our review of the record, the debt was incurred during the marriage and the debt balance was the balance as of the date of separation, as set forth in Wife's verified financial disclosures. We have noted that "[t]he party seeking to exclude

(6) Any increase in the value of separate property as defined in subdivision (1), (2), (3), (4) or (5) of this section which is due to inflation or to a change in market value resulting from conditions outside the control of the parties.

⁴ Pursuant to West Virginia Code § 48-1-233, "marital property" is defined as

(1) All property and earnings acquired by either spouse during a marriage, including every valuable right and interest, corporeal or incorporeal, tangible or intangible, real or personal, regardless of the form of ownership, whether legal or beneficial, whether individually held, held in trust by a third party, or whether held by the parties to the marriage in some form of co-ownership such as joint tenancy or tenancy in common, joint tenancy with the right of survivorship, or any other form of shared ownership recognized in other jurisdictions without this state, except that marital property does not include separate property as defined in section 1-238; and (2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from: (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property; or (B) work performed by either or both of the parties during the marriage.

The definition of "marital property" contained in this section has no application outside of the provisions of this article, and the common law as to the ownership of the respective property and earnings of a husband and wife, as altered by the provisions of article 29 of this chapter and other provisions of this code, are not abrogated by implication or otherwise, except as expressly provided for by the provisions of this article as such provisions are applied in actions brought under this article or for the enforcement of rights under this article.

⁵ Husband argues that the court erred in ruling that he had to buy out the equity in his vehicle when Wife did not. However, upon our review of the record, it appears that he did not list his car as separate property on his financial statement nor designate this vehicle as separate property in discovery. We have noted that this Court may disregard errors that are not adequately supported by specific references to the record on appeal and this basic rule of practice serves a gatekeeping function for "[o]ur general rule . . . that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered." *Shaffer v. Acme Limestone Co.*, 206 W. Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999). Accordingly, Husband is foreclosed from arguing that his car is separate property for the first time on appeal. Inasmuch as Wife's vehicle was a gift from her father, we decline to disturb the court's ruling that this vehicle was her separate property.

property from the marital estate that is presumptively marital property has the burden of persuasion on that issue.” Syl. Pt. 4, in part, *Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999). Inasmuch as Husband did not testify about the credit cards or offer any other evidence that the credit card debts were separate property, they are presumptively marital debts. Thus, we decline to disturb the court’s ruling that this debt was marital debt pursuant to West Virginia Code § 48-1-233. Moreover, we do not find that the court erred in its division of the marital property.

Husband also claims that the court erred when it determined that the proceeds from the personal property destroyed in the fire were Wife’s separate property. However, as to this issue, Husband’s skeletal argument cites to no authority and does not include a discussion of how the law applies to the facts. Notwithstanding, we refuse to disturb the court’s determination that this was separate property where Husband did not meet his burden of proving that Wife either co-mingled or made a “gift” of the personal property owned by her prior to the marriage, and the personal property previously belonged to her father.

Husband next argues that the court erred in awarding Wife attorney’s fees of \$6,059 and \$1,200. Wife maintains that the award of attorney’s fees was proper and within the sound discretion of the court and was appropriate after Husband failed to comply with the court’s no contact order and where his actions caused her to defend a magistrate court proceeding. We have held that

“[i]n divorce actions, an award of attorney’s fees rests initially within the sound discretion of the family . . . [court] and should not be disturbed on appeal absent an abuse of discretion. In determining whether to award attorney’s fees, the family. . . [court] should consider a wide array of factors including the party’s ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties’ respective financial conditions, the effect of the attorney’s fees on each party’s standard of living, the degree of fault of either party making the divorce action necessary, and the reasonableness of the attorney’s fee request.’ Syllabus Point 4, *Banker v. Banker*, 196 W.Va. 535, 474 S.E.2d 465 (1996).” Syllabus, *Landis v. Landis*, 223 W.Va. 325, 674 S.E.2d 186 (2007).

Syl. Pt. 4, *Grose v. Grose*, 222 W. Va. 722, 671 S.E.2d 721 (2008).

Based upon the record before us, it appears that the court considered a wide array of factors in ordering that Wife be awarded some of the attorney’s fees that she requested. We find that the court did not abuse its discretion in setting these fees and accordingly refuse to disturb this award on appeal.

Additionally, Husband argues that the court abused its discretion by failing to award him spousal support. Upon our review of the record, it does not appear that he filed a counter-petition for divorce or requested spousal support in his initial pleadings. To the contrary, it appears that Husband first requested spousal support during a hearing on November 14, 2019, when he sought spousal support due to a disparity in income. Pursuant to West Virginia Code § 48-6-301, a family court is to consider a number of criteria in determining whether to award spousal support, including “[t]he length of time the parties were married,” and “[t]he period of time during the marriage when

the parties actually lived together as husband and wife[.]” W. Va. Code § 48-6-301(b)(1) and (2). Here, it appears that the family court considered these relevant factors. And, upon our review of the family court’s decision, we find it to be “supported by competent, material, and substantial evidence in the whole record” and further find that the “findings are supported by substantial evidence and consistent with the law.” *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 393 n.11, 465 S.E.2d 841, 850 n.11 (1995). Accordingly, we find no error in the family court’s decision not to award spousal support to Husband.

Finally, Husband maintains that the circuit court erred when it denied his request for oral argument. Wife argues that oral argument was not required because the circuit court denied Husband’s appeal. We agree. Rule 31(c) of the West Virginia Rules of Practice and Procedure for Family Court provides that a hearing is only required in certain instances. Specifically, the Rule provides, in pertinent part, that “[i]f a petition for appeal is granted,” and if oral argument is requested in writing, “the granting order shall set forth a date and time for oral argument.” Accordingly, pursuant to Rule 31(c), we find that the circuit court was not required to hold oral argument where it denied Husband’s appeal.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

NOT PARTICIPATING:

Justice C. Haley Bunn