

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000814-MR
NO. 1997-CA-001214-MR

WARREN GENE TUTTLE

APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 95-CI-000126

MILDRED ANN NEIKIRK TUTTLE

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Warren Gene Tuttle (Warren) appeals from the final judgment of the Estill Circuit Court in his divorce action against Mildred Ann Neikirk Tuttle (Mildred), and from orders denying his post-judgment motions. In this appeal, Warren claims error because the division of property does not assign every asset a value, and because the trial court awarded Mildred \$2,500 towards her attorneys' fees. We affirm.

Warren and Mildred were married on June 21, 1985. This was the second marriage for both parties. Their first marriages both ended in divorce. In fact, Warren was still in the process

of property division from his previous wife, Anna, during his marriage to Mildred.¹ A general grocery store in Estill County was involved in the property division between Warren and Anna and was valued at \$32,000 at the time of discovery. The grocery store was also the marital home for Warren and Mildred for the first four years of their marriage until it was sold in September, 1989, for \$55,000. The store appreciated \$23,000 in value during the four year marriage of Warren and Mildred. After the general store was sold in 1989, the parties acquired three video rental stores, known as Hometown Video I, Hometown video II, and Hometown Video III. The couple supported themselves off the modest income from these three stores during the marriage.

The parties separated on June 5, 1995, and this divorce action was filed August 17, 1995. The action was bifurcated and a decree of divorce was entered October 4, 1996. Thereafter, the parties litigated property division. Warren was very uncooperative and vindictive towards Mildred throughout the proceedings. In the judgment of property division, the trial court noted, "Mr. Tuttle has been found in contempt of Court for failing to provide discovery to Mrs. Tuttle and also has been found in contempt of Court for failure to return Mrs. Tuttle's personal property as ordered by the Court."

¹ The case file of the divorce between Warren and Anna is apparently missing from the Estill Circuit Clerk's Office. A copy of that file was requested in discovery during this action but was not produced by Warren's counsel. Warren's counsel had previously represented Anna in her divorce from Warren.

In the February 7, 1997, judgment of property division, the trial court awarded Warren: the Hometown Video III store; all livestock and farming equipment; a house trailer and its furnishings; \$1,000 from the sale of the marital home; two bird dogs; marital household furnishings in his possession; \$5,000 in the HNB savings account; 1988 Ford Bronco; any other bank accounts in his name; and any post-separation property he had acquired. Mildred was awarded: the Hometown Video I and II stores; 1990 pickup truck; \$1,000 from the sale of the marital home; \$5,000 in the HNB savings account; any bank accounts in her name; any post-separation property she had acquired. The court required each party to be responsible for the debts, taxes or assessments owed on the property they were awarded. Warren was also ordered to pay \$2,5000 towards Mildred's attorney's fees because, "[h]is actions have caused Mrs. Tuttle to incur additional costs and attorney fees a portion of which she should recover from Mr. Tuttle in this action."

On February 18, 1997, Warren's trial counsel filed a motion to alter, amend or vacate the judgment of property division pursuant to CR 59.05. This motion was denied by order entered February 28, 1997. On March 27, 1997, Warren's new attorney filed a motion requesting the court "assign specific dollar values to all properties awarded... ." Warren filed his first notice of appeal the next day, March 28, 1997. Also on March 28, 1997, the record reflects the trial court entered an order enlarging Warren's time to perfect an appeal to thirty days

after the ruling on the motion then pending. The order denying the motion was entered April 18, 1997. On April 29, 1997, Warren filed an amended notice of appeal indicating he appealed from the judgment of property division and the orders denying his two post-judgment motions.²

The standard of appellate review we apply to findings of fact in domestic relations cases is the findings shall not be set aside unless clearly erroneous. CR 52.01. Moreover, KRS 403.190, the property division statute, does not require property to be divided equally, only that the division be in "just proportions." McGowan v. McGowan, Ky. App., 663 S.W.2d 219 (1983). The laws gives the trial court a good deal of discretion in dividing marital property and awarding attorney's fees. It is by these standards which we must scrutinize the record in this case.

The first issue presented is whether the trial court erred in its division of marital property when it awarded two of the three video stores to Mildred without assigning specific dollar values to the three stores. Warren claims "[i]t is not possible to review the Judgment of Property Division or the record and determine if the marital property was divided in just proportions." The reason the record does not contain more information regarding the video stores and other assets is that Warren, despite repeated discovery requests and court orders,

² This appeal has two Court of Appeals case numbers because of the original and amended notices of appeal.

failed to provide it. Warren never requested an appraisal of the businesses or other assets nor did he provide one of his own. The state of the record generally and the claimed lack of evidence on value of assets specifically, is clearly Warren's fault. Our review of the record indicates the judge did the best job possible with the information he had available. The trial court found:

...[T]he increase in the value of the store from \$32,000 to \$55,000 was due to both economic inflation and the contribution of the parties in adding improvements to the store. The Court therefore finds that the value of the increase from contribution by the parties is \$10,000.00 and that each of the parties is entitled to one half (1/2) of that sum or \$5,000.³

As to the video stores, the trial court found:

The Court finds that the video stores were purchased by the parties through loans acquired from HNB Bank and that they were not purchased with the non-marital funds of Mr. Tuttle. By his own testimony Mr. Tuttle indicates that Mrs. Tuttle has been almost solely responsible for the running of the video stores located in Irvine [Estill County, Hometown Video I and II]. The evidence is that she has managed the accounts for the Beattyville store although he has been the one to physically manage the store. [Lee County, Hometown Video III]... .

...

In reviewing the information available from the video stores it appears that they do not generate a great deal of income, however they do provide enough income for the parties to make a reasonable living.

³ Mildred did not cross-appeal this finding or any other finding.

The court had to split three video stores between two parties. Absent the sale of one of the stores, either Mildred or Warren had to receive two stores. Considering this and the fact that Warren has non-marital pension income of \$638 per month, we cannot say that the trial court failed to divide the marital property in just proportions. Warren has failed to cite us to evidence sufficient to meet his burden of proving the trial court's findings are clearly erroneous. This assignment of error is completely without merit.

Warren's second assignment of error is that the trial court erred in requiring him to pay a portion of Mildred's attorney's fees. We disagree. Under KRS 403.220, the court can award attorney's fees if there is a disparity in the relative financial resources of the parties. The attorney's fees incurred by Mildred as a result of Warren's obstructive tactics and refusal to cooperate in the proceedings are recoverable under Gentry v. Gentry, Ky., S.W.2d 928 (1990):

The amount of an award of attorneys fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorney's time and must be given latitude to sanction or discourage such conduct. Id. At 938.

Separate and independent grounds supporting the award of attorney's fees are found in the record in Warren's failure to provide discovery (as authorized by CR 37.01[d]) and Warren's failure to comply with court orders (as authorized by CR

73.02[3]). Warren has failed to meet his burden of proving the trial court abused its discretion in awarding Mildred \$2,500 towards her attorney's fees.

We affirm the Estill Circuit Court's judgment of property division and the orders denying Warren's motions for post-judgment relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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