

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002406-MR

FREDERICK CECIL DAMRON

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 98-CI-00326

MARY DAMRON FOWLER

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

*** **

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Frederick Damron (Fred) appeals the judgment of the Boyd Circuit Court dividing the real and personal property acquired by him and his former spouse, Mary Fowler (Mary). He further contends the court erred in awarding Mary \$1,000.00 in attorney fees. Having reviewed the record and applicable law, we adjudge the trial court neither abused its discretion nor committed clear error on the allocation of property except the assignment of one-half of Fred's railroad retirement benefits accrued during the parties' marriage. We further believe the trial court acted within its discretion in the award of attorney fees. Hence, we affirm in part, reverse in part, and remand.

The parties were married on June 14, 1991, which marriage was terminated by decree of dissolution entered on May 22, 1998. The portion of that decree effecting property division was set aside by the court on June 5, 1998, and the subsequent order allocating same is the subject of this appeal.

In 1980, Mary purchased the marital residence for approximately \$65,000, which at the time of the parties' marriage had a mortgage balance of approximately \$42,000. The outstanding mortgage was satisfied during the course of the marriage; however, another lien was placed upon same as security for the purchase of real property on Midland Trail, which was purchased by Mary and her business partner. There was no testimony before the trial court regarding the purchase price of this latter property; however, bank records reflect that a \$52,000 lien was placed on the marital residence as additional security.

Following the parties' separation in 1997, Mary conveyed her one-half interest in the Midland Trail property to Fred in exchange for his agreement to assume the monthly payments on the promissory note and mortgage attendant thereto. There is no evidence that Fred tendered any such payments.

Fred was served with Mary's petition for dissolution on April 3, 1998. On April 11, 1998, Fred conveyed his one-half interest in the Midland Trail property to his mother¹ for the consideration of \$1.00 and love and affection. The bank, lien holder, was not notified or consulted regarding this transfer.

¹Fred's mother is a resident of Fort Gay, West Virginia.

On July 17, 1998, Fred entered into a contract for the purchase of real property located in Lakewood Village. However, this property was deeded to Fred's mother following a full cash sale. Nonetheless, Fred executed the settlement statements on this real estate transaction.

During the marriage, the parties acquired a 1992 Corvette and three (3) Toyota MR2 automobiles.² Additionally, the parties had purchased a 1993 Jeep which was totaled in June 1997, when Mary struck a deer while traveling at night. At the time of the accident the parties only maintained liability insurance coverage on this vehicle and the lien holder subsequently obtained a \$9,000 deficiency judgment. Following Mary's accident, Fred took over the operation of Boyd County Tanning, a salon owned and previously operated by Mary. Likewise, in April or May 1998, Fred purchased Carter County Tanning. Additionally, Fred purchased Campus Video, a video rental store, a few days following the initial decree of dissolution. By the time of trial on the property issues, Fred had failed or refused to provide any reliable documentation concerning the income or expenses of these businesses. He further testified that he did not maintain any checking or other bank accounts with respect to same, but apparently operated on a cash basis.

The record reflects that Fred had a history of providing his various employers with erroneous social security numbers for purposes of payroll records, that is, he submitted

²There were two (2) 1986 models and one (1) 1985 model.

either Mary's social security number or that of his son. Likewise, the record contains the testimony of Mason Hainsworth, the Director of Specialized Audits for Norfolk Southern Corporation, one of Fred's former employers. Mr. Hainsworth provided the court with his testimony regarding Fred's dishonest activities while a company employee, as well as his engagement in subterfuge and other forms of illegal conduct and deceit with regard to this employment.

In its order dividing the parties' property, the court affirmed the domestic relations commissioner's (DRC's) recommendation that Mary receive the marital residence. In exchange therefor, Fred was awarded all marital interest in the Lakewood Village property, the Carter County Tanning business, and all income earned by the Boyd County Tanning business between 1997 and 1999. The contents of Boyd County Tanning were, otherwise, ordered sold with the proceeds to be applied to the bank's deficiency judgment on the Jeep.

Mary was awarded her vehicle (the Corvette) while Fred was granted ownership of the three (3) MR2 automobiles. Mary was awarded all personal items in her possession with the exception of those which Fred specifically requested. Additionally, Fred was assigned responsibility for the lien which was placed upon the marital residence at the time the Midland Trail property was purchased. The DRC further recommended that Mary be awarded one-half (1/2) of the railroad pension funds Fred accumulated during the marriage and \$1,000 in attorney fees. This appeal ensued.

Before this Court, Fred contends that all of the above-identified findings of the court are clearly erroneous. Specifically, he argues that the trial court erred in the division of real property, personal property, and marital debt; that is, he claims Mary received all of the marital assets, whereas he was assigned the associated debt absent any personal property. First, we note that as an appellate court, under CR 52.01, our review of the trial court's decision is restricted to only reversing clearly erroneous findings, keeping in mind that the trial court is in the best position to view the evidence and witnesses as to judge the credibility of same. Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391 (1992).

In the matter sub judice, the trial court made clear that it took Mr. Hainsworth's testimony into account in making its findings. As discussed, supra, Mr. Hainsworth testified regarding Fred's lack of honesty, use of deception, and illegal conduct while in the employ of Norfolk Southern Corporation. Similarly, as noted by the court and reflected by the record, Fred failed or refused to provide any records or other documentation regarding his business transactions and the funds used to finance his various businesses and/or other financial ventures. Further, during his deposition, Fred repeatedly refused to answer any questions regarding his finances, businesses, business employees, and the like while all along claiming there were no records pertaining to such information. Therefore, it is our opinion the court acted within its discretion by questioning Fred's veracity with respect to any

sums of money in his possession, incomes available to him, and property actually owned by him, albeit titled in either his mother's or another's name. Even if Fred's testimony were clear and uncontroverted, and it was neither, the court was not compelled to believe it. As such, the court's findings cannot be deemed clearly erroneous. Rather, since the court discerned the credibility of the witnesses and made its judgment according thereto, we will not disturb its ruling. CR 52.01.

Similarly, Fred contends the court erred in awarding Mary \$1,000.00 in attorney fees. We disagree. In tandem with our above discussion regarding Fred's lack of candor with the court, the record reflects that Mary had remained unemployed since receiving bodily injuries in the aforementioned automobile accident. Likewise, it was Mary's testimony that she had no access to any cash resources but was sustaining her livelihood off the charity of friends and family. Again, we believe the court exercised sound discretion in making an award of attorney fees and will not alter that decision. KRS 403.220; CR 52.01.

The sole remaining issue raised by Fred in this appeal remains the court's allocation of fifty-percent (50%) of those sums accumulated in his railroad retirement account during the time of the parties' marriage. On this point Fred argues that this Court's holding in Elkins v. Elkins, Ky. App., 854 S.W.2d 787 (1993), controls in that Elkins states that railroad retirement benefits are non-assignable pursuant to 45 U.S.C. § 231m(a). However, we believe that application of Elkins is limited to the qualifications identified in 45 U.S.C. §

231m(b) (2) which prohibit equitable distribution of railroad retirement benefits computed under 45 U.S.C. §§ 231b(a), 231c(a) or (f).³

In March 1987, the Railroad Retirement Board established regulations under 20 C.F.R. § 295.1 et seq. setting forth a procedure by which the Board would recognize and honor a court decree or property settlement involving benefits subject to equitable distribution under 45 U.S.C. § 231m(b) (2). In its regulations the Board specifically enumerates those benefits subject to 45 U.S.C. § 231m(b) (2)'s characterization as property which may be divided upon dissolution as follows:

(b) *Benefits subject to this part.* Only the following benefits or portions of benefits under the Railroad Retirement Act are subject to this part:

(1) Employee annuity net tier II benefits component as provided under section 3(b) [45 U.S.C. § 231b(b)] of the Railroad Retirement Act;

(2) Employee annuity vested dual benefit component as provided under section 3(h) [45 U.S.C. § 231b(h)] of the Act;

(3) Employee annuity net proportionate share of the annuity increases as provided under section 3(f) [45 U.S.C. § 231b(f)] of the Act; and

(4) Supplemental annuities as provided under section 2(b) [45 U.S.C. § 231m(b)] of the Act.

Here, the court did not characterize the nature of Fred's railroad retirement benefits. As such, we reverse that portion of the court's judgment and remand this matter for a

³The benefits addressed in Elkins were exempt from distribution in that such were disability benefits.

determination of whether the benefits in issue are subject to division in accordance with 45 U.S.C. § 231m(b) (2).

Based on the foregoing discussion, the judgment of the Boyd Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodney S. Justice
Ashland, Kentucky

BRIEF FOR APPELLEE:

W. Jeffrey Scott
Grayson, Kentucky