RENDERED: MARCH 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002106-MR

GEARLIENE SLONE — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 04-CI-00628

ROGER M. MCDOWELL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Gearliene Slone, appeals from an order of the Boyd Circuit Court adopting the findings of fact and conclusions of law of the Domestic

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Relations Commissioner (DRC), and denying her motions for exceptions to the DRC's report and a new trial. Finding no error, we affirm.

Appellant and Appellee, Roger McDowell, resided together as an unmarried couple for several years. On August 19, 2002, the parties won $250,000 in the Kentucky Lottery. They initially reported that Appellant was the sole winner because Appellee owed significant child support arrearage to his ex-wife. As such, the proceeds were deposited into a separate account bearing only Appellant's name. The parties continued to live together until approximately 2004. During such time, they made numerous joint and individual purchases with the lottery proceeds, including a new mobile home and a prefabricated garage, both of which were located on property owned by Appellee.

Following the parties' separation in 2004, Appellant filed a complaint in the Boyd Circuit Court asserting that she was the sole owner of the lottery proceeds and demanding reimbursement for all expenditures made by Appellee, as well as possession of the mobile home and garage. The matter was initially set for a jury trial in December 2006. However, after the jury was empanelled, the parties announced they had reached an agreement disposing of all issues. Said agreement was allegedly dictated into the record in open court.[2] Although the record contains a copy of the agreed order, it was never signed by Appellant.

Ultimately, another agreed order was signed on November 9, 2007, wherein Appellant abandoned her claim that she was the sole owner of the lottery

[2] There is no video or written transcript contained in the record.

proceeds and stipulated that the ticket was owned on a 50/50 basis by the parties. Further, the agreed order stipulated that the sole issue to be decided was the allocation of the remaining proceeds and/or the assets purchased there from. The parties waived a jury trial and the matter was referred to the DRC for a hearing and recommendation.

At the July 30, 2008, hearing, Appellant presented expert testimony from a certified public accountant, Terry Fyffe, and an appraiser, Kenneth Smith. Again, there is no video or transcript for this Court to review the testimony of any witness during the hearing. However, in his report, the DRC noted that although Appellant claimed that numerous expenditures she made from the proceeds were directly to or for the benefit of Appellee, Fyffe "did not summarize those disbursements and no evidence as to precisely what they were and what the amounts were or where the monies ultimately went was provided." Further, although Appellant alleged that Appellee had not worked from the time they won the lottery until the spring of 2004, Appellee "produced a log book itemizing each and every trip he made as an independent trucker and the amount of payment he received thereon. [Appellant] acknowledged that the document was in her own hand and that she had written it out."

In the final report and recommendation rendered August 7, 2008, the DRC concluded:

> It appears that the total funds available after the payment of taxes for disbursement were about $224,000.00. According to [Appellant's] evidence, [Appellee] received

possession of the double wide mobile home for which approximately $45,000.00 was expended and the garage building for which approximately $21,000.00 was expended. Thus, [Appellee] has in his possession items with an original cost of $63,000.00. Mr. Fyffe used original cost rather than current fair market value. In addition, Mr. Fyffe indicates that [Appellee] may have received items of personal property now in the residence totaling $11,132.00. By contrast, [Appellant] concedes that she received the Firebird automobile, the truck (although there was a debt against it) and $18,000 in cash. The remainder of the funds is unaccounted for. [Appellee] alleges that a large sum was spent for the benefit of [Appellant's] family. She denies this but, although she hired a certified public accountant to review the record, provides no evidence as to precisely what did happen to the remainder of the funds. The Commissioner notes that the funds were solely in her name at all times.

. . .

The parties, having elected to create no formal relationship as to the distribution of the lottery ticket or the assets and benefits realized there from, and indeed having apparently made conscious efforts to obscure that relationship, the Commissioner has no remedy available to him other than an equitable distribution. A strict accounting cannot be made because the parties have not presented records that would permit doing same. The Commissioner finds that a substantial portion of the funds in question were expended for purposes other than the purchase of tangible objects. It is unclear who was the beneficiary of the majority of those expenditures. The Commissioner finds however that nether party is entitled to disregard the disbursement of funds which were either consumed or lost and take into account only those expenditures which resulted in acquisition of tangible items. Based thereon, the Commissioner finds that [Appellant] has offered no proof that [Appellee] has received a greater portion of the total proceeds received by them than was received by her or expended by her for the benefit of third parties at her discretion.

As a result of his findings, the DRC recommended that a "just distribution" of the lottery proceeds had occurred and that each party would remain the owner of the tangible property currently in his or her possession. Appellee was awarded the mobile home, the contents thereof, and the garage. However, Appellee was required to reimburse Appellant for all mortgage payments she had made since the parties' separation. Appellant was awarded the cash and vehicles in her possession, her personal belongings, as well as numerous firearms.

On September 5, 2008,[3] the trial court entered an order denying Appellant's motions for exceptions to the DRC's report and a new trial, and adopting the DRC's recommendations. This appeal ensued.

On appeal, Appellant argues that the DRC's findings and conclusions are not supported by substantial evidence, and that the trial court erred in awarding Appellee the mobile home and garage. Further, Appellant contends that the lack of a record warrants a new trial. We disagree.

At the outset we would note that Appellant's brief fails to comport with the requirements of CR 76.12(4), in that there is no citation to the record as to if and where the issues are preserved for appellate review. In fact, Appellant's brief is totally devoid of any citation to the record or legal authority to support her arguments. Nevertheless, as the evidentiary hearing was conducted by the DRC, without a jury, our review of the DRC's findings, as adopted by the trial court, is governed by CR 52.01, which provides in pertinent part:

[3] It appears as though the order was actually entered on October 22, 2008, with the court's notation that it was effective September 5, 2008, "nunc pro tunc."

> Findings 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. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court . . . .

A finding of fact is not clearly erroneous if supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Questions of law are reviewed de novo and legal conclusions thereon made by the trial court will not be disturbed absent an abuse of discretion. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

As previously noted, there is no video or transcribed record of the proceedings herein. According to Appellant, the first half of the hearing before the DRC, including the expert witness testimony, was recorded on an audiotape that was subsequently misplaced. At the conclusion of the expert testimony, the parties were required to relocate due to a scheduling conflict in the courtroom and were advised by the DRC that he would be unable to record the proceeding from that point forward. Nonetheless, both parties agreed to continue the hearing. As a result, this Court is without any record to review the proceedings before the DRC.

It is incumbent upon an appellant to present a complete record to this Court for review. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). The provisions of CR 75.13 provide a complete vehicle for an appellant to remedy the lack of part of a hearing if he or she feels that this would be helpful on appeal. CR 75.13 provides:

> (1) In the event no mechanical or stenographic record of the evidence or proceedings at a hearing or trial was taken or made or, if so, cannot be transcribed or are not clearly understandable from the tape or recording, the appellant may prepare a narrative statement thereof from the best available means, including his recollection, for use instead of a transcript or for use as a supplement to or in lieu of an insufficient mechanical recording. This statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the trial court for settlement and approval, and as settled and approved shall be included in the record on appeal.
>
> (2) By agreement of the parties a narrative statement of all or any part of the evidence or other proceedings at a hearing or trial may be substituted for or used in lieu of a stenographic transcript or mechanical recording.

CR 75.14 makes further provisions to cover difficulties in preparing a narrative statement. Although not specifically required under the rule, courts have generally refused to grant a new trial in the absence of an attempt to supplement the record via a narrative statement. *Davis v. Commonwealth*, 795 S.W.2d 942, 949 (Ky. 1990).

Moreover, "it is the duty of a party attacking the sufficiency of the evidence to produce a record of the proceedings and identify the trial court's error. Failure to produce such a record may preclude appellate review." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303-04 (Ky. 2008). Without question, Appellant did not avail herself of the procedure outlined in CR 75.13. And we cannot think of any reason why the record could not have been supplemented herein. Since

Appellant has failed to present this Court with a complete record, we will not undertake a detailed analysis of the merits of her claim.

The DRC was in the best position to judge the credibility of the evidence and testimony presented during the hearing. From his report, it is apparent that he engaged in a thorough examination of such before rendering his findings and conclusions. In the absence of a record or evidence to the contrary, we cannot conclude that the DRC acted erroneously in his division of the remaining lottery proceeds and assets derived there from. As such, the trial court properly adopted the DRC's findings and conclusions.

The order of the Boyd Circuit Court adopting the report of the Domestic Relations Commissioner is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey D. Hensley
Flatwoods, Kentucky

BRIEF FOR APPELLEE:

Gordon J. Dill
Ashland, Kentucky