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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-002427-MR

REBECCA JOY MCCOY — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE O. REED RHORER, JUDGE
ACTION NO. 06-CI-00853

DANIEL JASON MCCOY — APPELLEE

AND NO. 2008-CA-002428-MR

DANIEL MCCOY — CROSS-APPELLANT

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE O. REED RHORER, JUDGE
ACTION NO. 06-CI-00853

REBECCA MCCOY — CROSS-APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

NICKELL, JUDGE: Rebecca Joy McCoy appeals from an order of the Franklin Circuit Court modifying a property settlement agreement. Rebecca argues the trial court erred in: (1) ignoring a provision in the agreement prohibiting modification; (2) failing to require Daniel McCoy to reimburse her for various expenses for their child in accordance with the agreement; and (3) requiring her to reimburse Daniel for funds used from their joint checking account. On cross-appeal, Daniel argues the trial court erred in: (1) refusing to allocate the marital credit card debt; (2) refusing to require a complete reimbursement of funds from the joint checking account; and (3) failing to require full reimbursement for the value of personal property. We affirm in part, reverse in part, and remand.

Daniel and Rebecca were married in 1991. One minor child was born of the marriage. Daniel filed a petition seeking dissolution of the marriage in 2006. The trial court entered a temporary order on October 18, 2006, requiring Rebecca to satisfy the parties' marital debts from their joint checking account. The parties subsequently entered into a property settlement agreement. The trial court found the agreement was not unconscionable and incorporated the agreement into the final decree of dissolution which was entered on March 19, 2007.

[1] Senior Judge Joseph E. Lambert 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.

On December 27, 2007, Daniel filed a motion to modify the separation agreement regarding the division of the parties' retirement accounts. Paragraph 14 of the agreement states as follows:

> ***Retirement Plans***. The parties have agreed that the difference between the Petitioner's retirement account and the Respondent's retirement account will be calculated as of March 1, 2007, and the difference, or $16,000.00 (whichever is greater) will be paid to the Respondent upon the sale of the marital residence.

On December 28, 2007, Rebecca filed a motion to comply with the decree and a motion for release of funds from the sale of the marital residence held in escrow. Paragraph 21 of the agreement states:

> ***Incorporation Agreement***. Both parties agree that this document, in the event a decree of dissolution is granted by the Franklin Circuit Court, shall be incorporated by reference into said decree and that there shall be no modification or alteration of its terms except for terms concerning child custody, support, and visitation, or by written documents signed by both parties.

Rebecca also filed a motion for sole custody of the child and child support.

The trial court held a hearing on the issues and entered findings of fact, conclusions of law, and an order modifying the separation agreement. Pertinent to this appeal, the trial court ordered: (1) equal division of the retirement benefits as of March 1, 2006, rather than March 1, 2007; (2) Rebecca shall reimburse Daniel in the amount of $1,413.51, which she spent in violation of the temporary order; and (3) Rebecca shall return Daniel's personal property in her

possession and reimburse him in the amount of $1,200.00 for the value of clothing she intentionally destroyed. This appeal and cross-appeal followed.

Rebecca first argues the trial court erred by modifying the separation agreement provision relating to the retirement accounts because the agreement contained a provision prohibiting modification. We agree.

KRS 403.180(6) states:

> Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

This statute permits parties to "settle their affairs with a finality beyond the reach of the court's continuing equitable jurisdiction elsewhere provided." *Brown v. Brown*, 796 S.W.2d 5, 8 (Ky. 1990).

In the present case, the separation agreement expressly prohibited modification and was incorporated into the decree of dissolution. The trial court found the separation agreement was not unconscionable. Daniel testified he entered into the separation agreement voluntarily and read all of the terms. The separation agreement was prepared by Daniel's attorney.

Daniel argues KRS 403.250(1) permits the modification of separation agreements notwithstanding KRS 403.180(6). KRS 403.250(1) states:

> Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree regarding maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The

> provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

In relying upon KRS 403.250(1) to modify the separation agreement, the trial court ignored KRS 403.180(6). The well-established rule of statutory construction is "when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails." *Land v. Newsome*, 614 S.W.2d 948, 949 (Ky. 1981). KRS 403.180(6) specifically permits parties to preclude modification of separation agreements. KRS 403.250(1) does not specifically refer to separation agreements, rather KRS 403.250(1) deals with the modification of property divisions in general. We conclude the trial court erred by modifying the retirement account provision of the agreement. Therefore, we reverse the modification of the agreement regarding the retirement accounts and remand for proceedings consistent with this opinion.

Rebecca next argues the trial court erred by failing to require Daniel to reimburse her for various expenses for their child as required by the separation agreement. Provision 5 of the separation agreement states:

> ***Child Support.*** The parties agree that, under the present circumstances, no child support will be paid by either party. In the event that employment status of either changes, the subject of child support will be subject to re-evaluation at that time.
>
> The parties agree that Matthew's expenses for high school, college/higher education, extracurricular activities, clothing, entertainment, etc. will be shared equally.

Provision 7 states:

> ***Health Insurance.*** Petitioner shall maintain health insurance for Matthew until he completes college. Any costs for medical expenses not covered by insurance will be divided equally.

The trial court found that Daniel would be required to pay child support because the child now lives primarily with Rebecca. The court further found that some of the claimed expenses were not contemplated by the separation agreement and Daniel had not been reimbursed for expenses he had paid. The court ordered that the legitimate expenses Rebecca claimed were offset by the amounts Daniel had paid since entry of the decree.

CR[2] 52.01 provides that "[f]indings 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 witnesses." A judgment is not "clearly erroneous" if it is "supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id.*

Rebecca has not demonstrated that the trial court's findings were clearly erroneous. While she lists the various expenses for which she claims she is entitled to reimbursement, we cannot discern anything in the record contradicting the trial court's finding that there were no receipts for many of the claimed items

[2] Kentucky Rules of Civil Procedure.

and that some of the items were not contemplated by the separation agreement. Regarding the offset of expenses, Rebecca states that if the offset included amounts Daniel paid for health insurance, then the offset was in error. However, the trial court did not specify the amounts of particular payments that were offset and Rebecca did not file a motion for additional findings. The failure to move for additional findings of fact in writing constitutes a waiver. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Thus, because Rebecca did not file a motion for additional findings on this issue, we conclude the issue was waived under *Cherry*.

Rebecca next argues the trial court erred in requiring her to reimburse Daniel in the amount of $1,413.51 for payments she made for her personal benefit out of the parties' joint checking account. On cross-appeal, Daniel argues the trial court erred by failing to require Rebecca to reimburse him in the amount of $4,239.01 for payments she made out of the joint checking account.

When there is conflicting evidence and testimony, an appellate court should not substitute its judgment for that of a trial court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Due regard should be given to the trial court's opportunity to judge the credibility of the witnesses and the weight of the evidence presented. CR 52.01.

Neither party has demonstrated a lack of substantial evidence to support the trial court's findings. Our review of the parties' citations to the record reveals conflicting evidence on this issue. As stated above, it is not our function to weigh the evidence. Further, Daniel's citation to *Turley v. Turley*, 562 S.W.2d 665

(Ky. App. 1978), is inapplicable because that case dealt with the valuation of marital and non-marital property under KRS 403.190, which is not at issue here. There was no error.

Next, Rebecca argues the trial court erred by requiring her to reimburse Daniel in the amount of $1,200.00 for clothing she destroyed. On cross-appeal, Daniel argues the trial court should have awarded him $2,715.00 for the clothing. Both parties cite *Callahan v. Callahan*, 579 S.W.2d 385 (Ky. App. 1979), in support of their positions. In *Callahan*, this Court held it was error for the trial court to value household furnishings at $500.00 and an automobile at $100.00 when the only evidence produced was the appellant's valuation of $2,000.00 for the furnishings and at least $650.00 for the automobile. Rebecca further cites *Jones v. Jones*, 245 S.W.3d 815 (Ky.App. 2005), however, this case is inapplicable because it dealt with lay opinions of real property rather than personal property.

This case is distinguished from *Callahan* because Daniel's valuation of the property was not the sole evidence on this issue in the record. Daniel testified his destroyed clothing was worth $2,715.00, but he fails to take into account Rebecca's testimony that she replaced much of the wardrobe she destroyed. Again, there is conflicting evidence on the issue and we will not disturb the trial court's findings. *Wells, supra.*

On cross-appeal, Daniel argues the trial court erred in failing to allocate the marital credit card debt to Rebecca. The temporary order stated:

> ***Marital Debts:*** The parties agree that the Petitioner shall continue to deposit his earnings from the City of Frankfort into the parties' joint checking account. The Respondent shall be responsible for paying all of the parties' joint marital debts during the pendency of this case, and she shall provide the Petitioner a monthly accounting of the bills and amounts paid. The parties agree to close all joint credit card accounts to eliminate any additional joint marital debt and to secure individual credit card accounts for which they will be solely responsible. The Petitioner reserves the right to have this provision reviewed by the Court if necessary due to the fact that he is depositing all of his primary income into the parties' joint account.

Provision 15 of the separation agreement states:

> ***Debts.*** All debts incurred during the parties' marriage will be divided equally, and the parties have established the outstanding indebtedness and agreed to equal payment of same. Each party will be responsible for any debts incurred in their individual name and will hold the other harmless on said debts.

As Daniel points out, the trial court made findings concerning the marital debt, but failed to apply those findings in its conclusions of law and order. This issue was preserved for review by Daniel's motion to alter, amend, or vacate the judgment.

CR 54.01 states:

> A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order."

The trial court made findings on the marital debt issue, but failed to apply the findings to its conclusions of law and judgment. Without order language, the claim

for marital debt was not fully adjudicated. CR 54.01. Upon remand, the trial court shall order the allocation of marital debt in accordance with the separation agreement.

Accordingly, the order of the Franklin Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/ CROSS-APPELLEE:

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