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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000510-MR
AND
NO. 2015-CA-000517-MR

SABU VARGHESE — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 10-CI-00542

JEANETTE VARGHESE
(NOW AUMON) — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Sabu Varghese appeals, and Jeanette Varghese (now Aumon) cross-appeals, from an Opinion and Order of the Shelby Circuit Court adjudicating the parties' respective Motions to Alter, Amend or Vacate a November 16, 2011 Final Decree. The parties raise various claims of error including venue, the

introduction of exhibits, spousal maintenance and attorney fees. For the reasons stated below, we find no error and AFFIRM the Opinion and Order on appeal.

Sabu Varghese ("Mr. Varghese") and Jeanette Varghese (now Aumon, and referred to herein as "Ms. Aumon") were married on July 19, 1987, in India. The marriage produced two children, who have reached the age of majority. During the marriage, which lasted approximately 24 years, Ms. Aumon was a homemaker although she briefly worked outside the home on two occasions. At the time of the trial, Ms. Aumon was a student and planned ultimately to obtain a nursing degree. Mr. Varghese was a computer consultant whose net income in the years 2006 to 2009 ranged from $271,058 to $720,713.

On July 15, 2010, Ms. Aumon filed a Petition for Dissolution of Marriage in Shelby Circuit Court. The matter proceeded for approximately 16 months, culminating in the court's Findings of Fact, Conclusions of Law and Decree of Dissolution ("Final Decree") rendered on November 16, 2011. The Final Decree disposed of marital and non-marital property, and adopted various agreements entered into by the parties. As part of the Final Decree, the court awarded Ms. Aumon maintenance in the amount of $6,000 per month for four years, followed by $3,000 per month for the following 15 years. The Final Decree also noted that Mr. Varghese failed to reach an agreement with Ms. Aumon on an agreed exhibit list or to file one of his own. This resulted in Mr. Varghese being precluded from offering exhibits or presenting witnesses other than himself. Finally, the court noted that Mr. Varghese failed to prove the veracity of his claim

that Ms. Aumon sought to preclude him from his proper share of the marital assets by dissipating those assets in contemplation of the dissolution. The court determined that certain asset transfers undertaken by Ms. Aumon were for marital purposes and consistent with a long-established practice during the marriage.

After the parties filed Motions to Alter, Amend or Vacate the Final Decree, Mr. Varghese filed a Complaint with the Chief Justice of the Kentucky Supreme Court seeking to disqualify Judge David Myles. The Complaint arose after a contentious exchange between Judge Myles and Mr. Varghese's trial counsel on February 21, 2012. Though no recusal order is found in the record, the Kentucky Supreme Court assigned Judge Martin McDonald to oversee the case. After a status conference and other matters were undertaken, Judge McDonald rendered new Findings of Fact, Conclusions of Law and Decree on May 22, 2012.

The following month, on June 20, 2012, Ms. Aumon filed her Notice of Appeal from Judge McDonald's May 22, 2012 Decree. In an unpublished Opinion rendered by this Court, a three-judge panel determined that Judge McDonald's Decree was improperly rendered because neither party made a motion under Kentucky Rule of Civil Procedure (CR) 59.07. The panel of this Court went on to find that since motions were made under CR 52.02, 52.04 and 59.05, the Final Decree was converted to an interlocutory Order. The panel concluded that since post-trial motions were still pending in Shelby Circuit Court (Family Division), the Court of Appeals was without jurisdiction to hear the appeal. The

matter proceeded for discretionary review by the Kentucky Supreme Court, which was denied on April 11, 2014.

Thereafter, the case was returned to Shelby Circuit Court and assigned to Special Judge Bailey Taylor. Before Judge Taylor undertook any substantive action on the matter, Judge S. Marie Hellard was elected and replaced Judge Taylor. The parties, through counsel, then moved the trial court for a Case Management Conference, which was conducted on February 19, 2015. After the matter was taken under submission, Judge Hellard rendered an Opinion and Order on February 25, 2015, addressing all pending motions and bringing the matter to final resolution. Mr. Varghese now appeals, and Ms. Aumon cross-appeals, from the November 16, 2011 Final Decree and February 25, 2015 Opinion and Order adjudicating the parties' respective Motions to Alter, Amend or Vacate.

Mr. Varghese first argues that the Shelby Circuit Court "usurped and then abused its self-proclaimed discretion" by denying his Motions to Dismiss for lack of venue. Mr. Varghese notes that Kentucky Revised Statute (KRS) 452.470 mandates that "[a]n action for maintenance or dissolution *must* be brought in the county where the husband or wife usually resides." (Emphasis added). He maintains that Ms. Aumon never resided in Shelby County, Kentucky, instead residing solely in Oldham County, Kentucky, for 14 years prior to filing the Petition for Dissolution. Mr. Varghese argues that the statutory language requires mandatory compliance and does not allow the exercise of discretion. As such, he

contends that because Ms. Aumon never resided in Shelby County, Kentucky, the Shelby Circuit Court erred in exercising jurisdiction over the proceeding.

KRS 452.470 states that an "action for . . . dissolution must be brought in the county where the husband or wife usually resides." In examining the question of residency, the Court may consider the county of the parties' marital residence prior to separation, the usual residence of the children, the accessibility of witnesses and the economy of offering proof. *Hummeldorf v. Hummeldorf*, 616 S.W.2d 794, 798 (Ky. App. 1981). Additionally, intent alone is not sufficient to establish residency, good faith is required and the evidence must show that the party has actually and completely abandoned the former residence. *Sebastian v. Turner,* 320 S.W.2d 794, 795 (Ky. 1959). Finally, it is sufficient that the wife established residency on the day the Petition was filed. *Carter v. Carter*, 273 S.W.2d 823 (Ky. 1954).

We must first note that Mr. Varghese has not complied with CR 76.12(4)(c)(v), which requires the Appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad,* 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey,* 706 S.W.2d 409 (Ky. App. 1985).

Arguendo, even if Mr. Varghese's written argument was made in conformity with CR 76.12(4)(c)(v), we would find no error. In the matter before

us, the evidence was conflicting on the issue of residence, jurisdiction and venue. Mr. Varghese maintained that at all relevant times, Ms. Aumon resided in Oldham County, Kentucky, where jurisdiction would have been proper. Conversely, Ms. Aumon testified that her new address was 532 Jurich Court, Shelby County, Kentucky. She further claimed that she used her attorney's office address in court filings due to the issuance of an Emergency Protective Order in accordance with KRS 403.150(2)(a), that she had relocated her horses to Shelby County, and that her new and permanent residence was located in Shelby County prior to the filing of the Petition for Dissolution.

In *Lancaster v. Lancaster*, 738 S.W.2d 116 (Ky. App. 1987), a panel of this Court concluded that while a circuit court may look to the *Hummeldorf* factors for guidance, "it is nonetheless within the discretion of the court to accept or decline jurisdiction." *Id.* at 117. Additionally, "[s]uch a determination will not be reversed absent an abuse of discretion." *Id.* As there was conflicting testimony regarding residency, including testimony sufficient to support finding jurisdiction in Shelby Circuit Court, we cannot conclude that the Shelby Circuit Court abused its discretion on this issue. Further, it appears from the record that Mr. Varghese now resides in California. As such, even if the matter were reversed and remanded on this issue, Oldham Circuit Court could not properly exercise jurisdiction. We find no error.

Mr. Varghese next argues that the Shelby Circuit Court abused its discretion by prohibiting him from introducing any exhibits at trial. On March 2,

2011, the parties were ordered to tender a joint Exhibit and Witness List by July 1, 2011. Such a list was not produced by either party. Thereafter, on August 4, 2011, Ms. Aumon filed her own Exhibit and Witness List. Later at trial, Judge Myles noted that Mr. Varghese had tendered neither a joint Exhibit and Witness List nor an individual list. Judge Myles then determined that there would be no Exhibits presented by Mr. Varghese. Mr. Varghese now contends that the decision to prevent him from presenting any exhibits was draconian, arbitrary and capricious. He notes that he was never ordered to prepare an individual list, that Ms. Aumon did not file a joint list, and that the exhibits he sought to introduce were not "joint" exhibits.

Again, this argument was not made in conformity with CR 76.12(4)(c)(v). Nevertheless, we have closely examined this issue and find no error. The corpus of Mr. Varghese's claim of error centers on his assertion that the "sanction" imposed by Judge Myles bore no reasonable relationship to the seriousness of the defect. However, it is uncontroverted that Mr. Varghese did not tender either a joint or individual Exhibit and Witness List. No Exhibit or Witness List was submitted by Mr. Varghese prior to trial; therefore, there is no basis for finding that the Shelby Circuit Court erred in disallowing Mr. Varghese's submission of exhibits or witnesses. Additionally, Mr. Varghese does not contend that he suffered any prejudice from the alleged error. We find no error on this issue.

In a related argument, Mr. Varghese argues that Judge Myles denied him an opportunity to be heard on the issue of Ms. Aumon's alleged dissipation of marital assets. He maintains that on September 9, 2011, Judge Myles rendered an Order stating that the court was not in a position to rule on Ms. Aumon's Motion to preclude Mr. Varghese from presenting evidence that Ms. Aumon had dissipated assets. The Order also noted that Mr. Varghese would bear the burden of proof on the dissipation issue. Mr. Varghese argues that Judge Myles knew or should have known at that time that neither party had tendered a joint Exhibit and Witness List by the July 1, 2011 deadline. Then, two months later at a November 10, 2011 hearing, Judge Myles stated that there was nothing in the record to support a claim of dissipation, and "that issue is over". Mr. Varghese argues that these rulings effectively - and improperly - barred him from presenting proof on his claim that Ms. Aumon dissipated marital assets.

More than three years later, Judge Hellard rendered an Opinion and Order on February 25, 2015 finding that Mr. Varghese was denied the right to address the issue at the final hearing. Judge Hellard then opined that this error was cured when counsel for Mr. Varghese examined Ms. Aumon regarding her cash flow for calculating maintenance. Mr. Varghese maintains that the court first erred in failing to allow him to produce evidence as to Ms. Aumon's alleged dissipation, and second by ruling that the error was cured by his counsel's cross-examination of Ms. Aumon. Mr. Varghese also directs our attention to Ms. Aumon's deposition testimony, which he argues supports his claim of dissipation.

In Kentucky, the court may find dissipation when marital property is expended during a period when separation or dissolution was pending and where there is a clear showing of intent to deprive a spouse of his or her proportionate share. *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998). As to the matter now before us, Mr. Varghese's written argument has again run afoul of CR 76.12(4)(c)(v). This matter also is borne of a quagmire of approximately four years of depositions, interrogatories, Ms. Aumon's Motion for Summary Judgment, and at least two trial judges who have rendered contradictory rulings. The burden, however, rests with Mr. Varghese to distill these proceedings into a cogent argument, to present that argument to the trial court in a manner properly preserving it for appellate review, and then to demonstrate with clarity how the argument was preserved, and if so, in what manner. He has not done so. In short, the last apparent ruling on this matter occurred on or around February 25, 2015, when Judge Hellard determined that any prior error in failing to allow Mr. Varghese to produce evidence on this issue was cured by his counsel's cross-examination of Ms. Aumon. Mr. Varghese has not sustained his burden of demonstrating error on this issue. For the same reason, we have no basis for disturbing the related issue of the circuit court's assignment of $8,500 from a safety deposit box to Ms. Aumon as her non-marital property.

Mr. Varghese also argues that the trial court erred in awarding maintenance to Ms. Aumon because there was substantial evidence in the record that she had sufficient property to provide for her reasonable needs and was able to

support herself through employment. Conversely, and in her first argument on cross-appeal, Ms. Aumon contends that the trial court's maintenance award is insufficient and improper based on the court's Finding and Conclusions, as well as because of her loss of non-marital monies.

> KRS 403.200(1) states that a trial court,
>
> may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
>
> (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

It goes on to provide that,

> (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (c) The standard of living established during the marriage;

> (d) The duration of the marriage;
>
> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
>
> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

The proposed payor's ability to meet his own needs while paying spousal maintenance is also a factor a trial court must consider when deciding to award maintenance. *Dotson v. Dotson,* 864 S.W.2d 900, 903 (Ky. 1993). A maintenance award will be upheld on appeal unless the reviewing court determines that the trial court abused its discretion or based its decision on findings which were clearly erroneous. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

We find no error in the amount or duration of the maintenance award. In considering the parties' respective Motions to Alter, Amend or Vacate, the trial judge expressly considered all relevant factors including the parties' respective incomes and prospective future earnings, the division of marital and non-marital property, the standard of living and duration of the marriage. While it is often the case that the trial judge could have rendered a different maintenance award, the dispositive question is whether the award rendered was clearly erroneous in light of the statutory language. *Powell*, *supra*. Based on the totality of the record and the law, we find no basis for concluding that the award rendered was clearly erroneous.

Ms. Aumon's final claim of error is that the trial court improperly denied her Motion for attorney fees. She argues that at the time of trial, her monthly expenses were $7,000, and she was a student with only part-time employment. She again notes that Mr. Varghese earned annual incomes ranging between $271,058 and $720,713 in the years just prior to dissolution. The substance of her claim of error is that the facts, when considered in their totality, required an award of attorney fees in her favor and that the court erred in failing to so rule.

A trial court possesses "great discretionary power in its determination to award or deny attorney fees." *Hollingsworth v. Hollingsworth,* 798 S.W.2d 145, 148 (Ky. App. 1990); *see also Wilhoit v. Wilhoit,* 521 S.W.2d 512, 514 (Ky. App. 1975), *citing* KRS 403.220. It *may* make such an award where "there exists a disparity in the relative financial resources of the parties in favor of the payor." *Neidlinger v. Neidlinger,* 52 S.W.3d 513, 519 (Ky. 2001). Similarly, KRS 403.220 requires only that a trial court consider the parties' respective financial resources prior to making such an award. However, even where such a disparity exists, "there is nothing mandatory about" an award of attorney fees. *Moss v. Moss,* 639 S.W.2d 370, 373 (Ky. App. 1982).

The trial court's decision not to award attorney fees in favor of Ms. Aumon does not constitute an abuse of discretion. While it is true that Mr. Varghese earns a substantial income, and while the other factors noted by Ms. Aumon in her written argument are accurate, the award of attorney fees falls

squarely within the sound discretion of the trial court. We find no abuse of discretion on this issue.

For the foregoing reasons, we AFFIRM the Findings of Fact, Conclusions of Law and Decree of Dissolution of the Shelby Circuit Court rendered on November 16, 2011, as well as February 25, 2015, Opinion and Order addressing the parties' respective Motions to Alter, Amend or Vacate the 2011 Decree.

D. LAMBERT, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I concur with the majority opinion but write separately to comment on the trial court's order requiring the parties to tender a joint exhibit and witness list.

This has been a protracted and vehemently contested dissolution action. As evidenced by the issuance of an emergency protective order, the parties have been far from amicable since their separation and unable to reach an agreement resolving the issues. Despite the antagonism between the parties, the trial court ordered them to submit a joint exhibit and witness list. Under the tenacious circumstances of this dissolution action, their noncompliance with that order was inevitable.

"[A] trial court has inherent authority to enforce its own orders." *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 688 (Ky. App. 2009) (citation omitted). That inherent authority includes the exclusion of

witnesses and exhibits not identified as required by a pretrial order. However, courts have no inherent authority to issue orders that are unreasonable and arbitrary. The order requiring that the parties tender a joint exhibit and witness list was such an order.

With my opinion stated that the order requiring the parties to submit a joint exhibit and witness list was unreasonable and arbitrary and any sanctions imposed for Mr. Varghese's noncompliance was an abuse of discretion, I agree with the majority that any error was harmless. He has not demonstrated the prejudice necessary to warrant reversal.

BRIEFS FOR APPELLANT/ CROSS-APPELLEE:	BRIEFS FOR APPELLEE/ CROSS-APPELLANT:
Marcia L. Sparks Louisville, Kentucky	Patrick F. Graney Shelbyville, Kentucky