

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001969-MR

HEIDI SUE HUTCHERSON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH W. ROARK, JUDGE
CIVIL ACTION NO. 94-CI-01748

KENNETH RAY HUTCHERSON

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: HUDDLESTON, JOHNSON and KNOPF, Judges.

HUDDLESTON, Judge: Heidi Hutcherson appeals from a Hardin Circuit Court decree distributing the marital assets from her marriage to Kenneth Hutcherson.¹ The issues presented are: (1) whether the circuit court erred in awarding Kenneth, in the absence of sufficient evidence, all of the funds from the marital home except for the undisputed amount of the nonmarital contribution of Heidi;

¹ In her appellate brief, Heidi has failed to include a copy of one of the orders that she is appealing from — namely, the circuit court's July 15, 1998, decree. Heidi is required to include it in her brief pursuant to Kentucky Rule of Civil Procedure (CR) 76.12(4)(b)(vi).

and (2) whether the circuit court erred in failing to redetermine maintenance after the court altered the property division.

The Hutchersons were married for approximately eight years. In 1994, Kenneth filed a petition for the dissolution of marriage, claiming that their marriage was irretrievably broken. While they tried to reconcile their marriage, they were unsuccessful.

Following years of proceedings, the commissioner filed recommendations with the circuit court. The commissioner made recommendations regarding the distribution of marital property in an equitable manner and the assignment of nonmarital property.²

As part of the dissolution proceedings, the court ordered the sale of the marital home, and the profits from the sale were \$42,000.00. The parties had used nonmarital funds to construct their first residence. While neither party disputed that Heidi contributed \$5,601.16, Kenneth claimed that he contributed \$42,000.00 from his retirement account. Heidi alleged that the amount was only \$20,000.00. The commissioner recommended that Kenneth receive only \$14,398.84 as nonmarital property and Heidi receive \$5,601.16. The remaining profits were considered marital property and divided equally. After considering the economic situations of the parties and applying Kentucky Revised Statute (KRS) 403.200, the commissioner recommended that neither party be awarded maintenance.

² Because the distribution of the marital property by the circuit court is not disputed, it is unnecessary to set out the specific scheme used in distributing the marital property.

The circuit court chose, as is its prerogative, not to accept the commissioner's recommended findings of fact and conclusions of law in their entirety.³ The court determined that Kenneth's nonmarital contribution to the first marital residence was \$40,000.00 from his retirement account. The court agreed that Heidi had contributed \$5,601.16. In awarding Heidi her full nonmarital property contribution, the court placed the entire investment loss burden on Kenneth. He received only \$36,398.84.

In following the recommendation of the commissioner, the circuit court declined to award maintenance to either party. Heidi had requested it, but the court concluded that Kenneth did not have the financial resources to make additional payments and to continue to support himself. After holding a hearing on Heidi's motion to alter, amend or vacate the court's previous order, the circuit court declined to award Heidi maintenance or to alter the court's findings of fact as to the nonmarital contributions of the parties to their first marital residence and the division of profits from the sale of the third marital residence. This appeal followed.

Heidi argues that Kenneth failed to prove by clear and convincing evidence that he was entitled to all of the funds from the sale of the marital home except for the undisputed amount of the nonmarital contribution of Heidi.⁴ We disagree.

³ See CR 53.06(2) ("The court after hearing may adopt the [commissioner's] report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.").

⁴ In Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992), we questioned the validity of applying the "clear and convincing evidence" standard in this type of case noting the language of
(continued...)

Under KRS 403.190, all property acquired during marriage is presumed to be marital property.⁵ A party can overcome this presumption by establishing that the property falls within an exception found in KRS 403.190(2).⁶

In this case, Kenneth presented evidence that he contributed \$42,000.00 of nonmarital property from his retirement account towards the couple's first marital home. In response, Heidi disputed this amount and alleged that Kenneth contributed only \$20,000.00 in nonmarital property to the first marital home.

After considering the evidence, the commissioner recommended that Heidi receive her nonmarital property and that the remainder be split equally. The circuit court declined to follow the commissioner's recommendation and instead awarded Heidi \$5,601.16 and Kenneth \$36,389.99.

When both parties have presented conflicting evidence on an issue, the fact-finder must make a factual determination. The fact-finder may accept some evidence and reject other evidence because it is within the purview of the fact finder to determine credibility and the weight to be given to evidence.⁷

⁴ (...continued)
Kentucky Rule of Evidence (KRE) 301 and the discussion of KRE 301 in Robert Lawson's Kentucky Evidence Law Handbook § 10.00 (2d ed. 1984). The standard of proof in this cases is probably no greater than a preponderance of evidence.

⁵ Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 502 (1998).

⁶ Chenault v. Chenault, Ky., 799 S.W.2d 575, 578 (1990).

⁷ Calloway v. Calloway, Ky. App., 832 S.W.2d 890, 893 (1992) ("It is axiomatic that the findings of fact of the lower court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the
(continued...)

The circuit court chose to not follow the recommendation of the commissioner and awarded Heidi \$5,601.16 and Kenneth \$36,398.84.⁸ Under this distribution, Heidi received the entire amount of her nonmarital contribution to their first home, while Kenneth realized a loss of nonmarital property in the amount of \$3,601.16. After the circuit court found that Kenneth contributed \$40,000.00 to the first marital home, the court proceeded to place the entire burden of the loss on him. We cannot say that the circuit court abused its discretion in failing to award Heidi additional profits from the sale of the marital home.

Heidi also avers that the circuit court erred in failing to award her maintenance after the court modified the recommendations of the commissioner. In particular, she notes that the circuit court erred in failing to fact find on this issue. However, the record refutes this argument.

As the Kentucky Supreme Court said in Perrine v. Christine,⁹

Under [KRS 403.200], the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a

⁷ (...continued)
credibility of witnesses.").

⁸ In her brief, Heidi states that "[t]he commissioner found that Ken was entitled to \$20,000.00 and Heidi was entitled to \$5,601.16 as their non-marital contributions" Under CR 53.06, the commissioner files a report containing recommended findings of fact and conclusions of law. It is ultimately the responsibility of the circuit court to make the final determinations. CR 53.06(2).

⁹ Ky., 833 S.W.2d 825 (1992).

determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion.¹⁰

In its July 15, 1998, order, the circuit court clearly articulates its basis for denying Heidi's request. The court believed that Heidi had failed to substantiate her financial need for maintenance and that Kenneth did not have the means to pay it. The court clearly considered her motion for maintenance and decided maintenance was not warranted. We cannot say that the circuit court's findings of fact were clearly erroneous or that the court abused its discretion in declining to award maintenance.¹¹

The decree is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

James T. Kelley
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¹⁰ Id. at 826.

¹¹ Clark v. Clark, Ky. App., 782 S.W.2d 56, 60 (1990) ("[M]aintenance determinations are within the sound discretion of the trial court. In such matter, unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge") (citations omitted).