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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002868-MR

TERESA FAITH WALDRON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
CIVIL ACTION NO. 95-CI-02891

JOSEPH NEAL WALDRON — APPELLEE

** ** ** ** **

NO. 1999-CA-000460-MR

TERESA FAITH WALDRON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
CIVIL ACTION NO. 95-CI-02891

JOSEPH NEAL WALDRON; and
MORRIS & MORRIS, PSC — APPELLEES

OPINION

AFFIRMING IN PART, VACATING IN PART,

REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: HUDDLESTON, McANULTY and MILLER, Judges.

HUDDLESTON, Judge: In these consolidated appeals Teresa Waldron challenges various rulings made by Fayette Circuit Court in a decree dissolving her marriage to Joseph Waldron and in a post-decree order awarding costs and a fee to Joseph's attorney pursuant to Kentucky Rule of Civil Procedure (CR) 68.

We hold that CR 68 is not applicable to actions for dissolution of marriage and, therefore, that the circuit court erred in awarding costs and an attorney's fee based on Teresa's failure to obtain a decree more favorable than Joseph's offer of judgment; that the circuit court did not err when it adopted a decree prepared by Joseph's attorney; that the court's award of custody of the parties' two teen-aged sons to Joseph and visitation to Teresa is supported by substantial evidence; that there is substantial evidence to support the court's finding as to Teresa's weekly wages for the purpose of awarding child support; that the court erred in failing to apply the parties' stipulation fixing the cut-off date for the accumulation and valuation of marital assets; that the court did not err in dividing a marital debt; and that the court properly classified a fifteen-year-old VCR as marital property.

I. FACTS AND PROCEDURAL HISTORY

Teresa and Joseph were married for over thirteen years. They are the parents of two children, Christopher (now age 17) and Steven (now age 15).

In 1995, the parties separated, and a month later Joseph filed a petition for dissolution of marriage. Initially, the parties agreed to joint custody of their sons with Teresa as the primary residential custodian. In time, however, the proceedings became contentious.

Due apparently to the discontinuation of the use of domestic relations commissioners, the proceedings were delayed. Following a one-day trial, the circuit court issued a decree dissolving the parties' marriage and, inter alia, awarding sole custody of the children to Joseph. Teresa appealed.

While the first appeal was pending, the circuit court considered Joseph's motion to award an attorney's fee pursuant to CR 68. During the course of the proceedings, Joseph had made an offer of judgment pursuant to CR 68, which Teresa had not accepted. In granting Joseph's motion, the court found that the offer of judgment was more favorable than the decree obtained. The second appeal on the issue of the award of costs and an attorney's fee followed.

II. AWARD OF ATTORNEY'S FEE AND COSTS

Teresa raises various issues regarding the award of an attorney's fee and costs to Joseph. Because we deem it unnecessary to address all of her claims of error, we shall only consider whether CR 68 is applicable to actions for dissolution of marriage.

CR 68 provides, in relevant part, that:

> (1) At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken

against him for the money or property, or to the effect specified in his offer, with costs then accrued. The offer may be conditioned upon the party's failure in his defense. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with the proof of service thereof, and thereupon judgment shall be rendered accordingly, except when the offer is one conditioned upon failure in defense, in which case the judgment shall be rendered when the defense has failed.

* * *

(3) * * * If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. * * *

There is a dearth of authority addressing whether CR 68, which requires an award of costs after a judgment is obtained that is not more favorable than a previously filed offer of judgment, is applicable to actions for dissolution of marriage or, more generally, to equitable actions. The parties do not cite a case so holding, nor have we found one. The only reported case we have located, In re the Marriage of Marshall,[1] holds that a Colorado civil rule like CR 68[2] "is not applicable to an action in equity

[1] 781 P.2d 177 (Colo. Ct. App. 1989).

[2] Both the Colorado rule and Ky. R. Civ. Proc. (CR) 68 are (continued...)

that does not seek a money judgment at law."[3] The Colorado court went on to say that: "A request for the entry of permanent orders requesting child custody and support, maintenance, and property division in a dissolution of marriage action cannot be considered to be an action at law for money damages."[4]

In Kentucky, an action for dissolution of marriage is a statutory action in which the circuit court exercises its equitable powers.[5] While as a general rule parties to lawsuits are responsible for their own attorney's fee, the General Assembly has authorized an award of such fees in certain circumstances. Kentucky Revised Statutes (KRS) 403.220 provides that:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

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[2] (...continued)
based on Fed. R. Civ. Proc. (FRCP) 68.

[3] Marshall, supra, n. 1, at 181.

[4] Id.

[5] Ky. Rev. Stat. (KRS) Chapter 403.

The purpose of this statute is to put the parties, insofar as possible, on an equal footing, that is, to insure that a party who lacks financial resources will be able to employ counsel to represent the party's interests in such an important matters as the custody and support of children and the division of marital property and debts. Consistent with the Colorado decision cited above, it is our opinion that CR 68 is not applicable to actions for dissolution of marriage.[6] Instead, an attorney's fee must be assessed under KRS 403.220 which requires the court awarding the fee to consider the financial resources of both parties.[7] This is not to say that in making an award of such fees that the court may not consider whether one party or the other unnecessarily prolonged the action or otherwise acted irresponsibly in preventing the matter from being brought to a timely conclusion.[8] Accordingly, we vacate the award of a fee to Joseph's attorney of record under CR 68 and remand this case to Fayette Circuit Court to determine whether an attorney's fee should be awarded to either party under KRS 403.220.

III. TENDERED DECREE

Teresa contends that the circuit court erred in adopting Joseph's tendered decree as its own. Joseph responds by arguing

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[6] In many, if not most cases, it would be virtually impossible to determine who is the prevailing party when considering all aspects of the decree — child custody, visitation, child support, maintenance, and division of marital property and debts.

[7] As a prerequisite to assessing attorney fees, the circuit court need only find disparity in the financial resources of the parties. Gentry v. Gentry, Ky., 798 S.W.2d 928, 937 (1990).

[8] Id.

that Teresa has failed to preserve this error. Even if she has not, Teresa contends, the court committed a palpable error.

We must first determine whether Teresa has preserved the alleged error. CR 52.04 provides:

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

And CR 52.02 provides that:

> Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

In this case, Teresa did not move the court pursuant to CR 52.02 or 52.04 to amend its decree. Thus, Teresa has not preserved the issue for appellate review. Furthermore, the circuit court did not commit a palpable error. According to CR 61.02:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and

appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

This alleged error does not rise to the level of palpable error contemplated by CR 61.02. In Prater v. Cabinet for Human Resources,[9] Prater asserted that "the trial court failed to make independent findings of fact as required by CR 52.01."[10] Although the circuit court in Prater did not make any changes to proposed findings of fact submitted by the Cabinet, the Supreme Court concluded that "[i]t is not error for the trial court to adopt findings of fact which were merely drafted by someone else."[11] Likewise, the circuit court did not err in this case in adopting findings drafted by Joseph's counsel where the findings were clearly the court's own.

IV. STATUTORY GUIDELINES IN AWARDING CHILD CUSTODY

Teresa claims that the circuit court erred in awarding sole custody of the parties' sons to Joseph, and she cites evidence to support an award of custody to her.

"[I]n reviewing the decision of a trial court the test is not whether [an appellate court] would have decided [the case] differently, but whether the findings of the trial judge were clearly erroneous or [the trial court] abused [its] discretion."[12]

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[9] Ky., 954 S.W.2d 954 (1997).

[10] Id. at 956.

[11] Id. (citing Bingham v. Bingham, Ky., 628 S.W.2d 628 (1982)).

[12] Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

The findings in this case are not clearly erroneous nor did the court abuse its discretion in awarding custody to Joseph.

KRS 403.270 outlines the procedures to be followed by the circuit court in awarding child custody and sets out the factors to be considered by the court. In announcing its findings of fact and conclusions of law, the court stated that it would be in the best interest of the children to award sole custody to Joseph with reasonable visitation for Teresa and gave its reasons for doing so. In the decree, the court simply awarded sole legal custody to Joseph without further explanation.

In Cherry v. Cherry,[13] the Supreme Court considered a similar challenge to perfunctory findings. The circuit court in Cherry had utilized a cursory application of the statute in its determination of child custody. The Supreme Court concluded that the appellant should have moved for in-depth findings pursuant to CR 52.02 or 52.04.[14] Because no objection had been raised, the Court found that the argument had been waived. Nevertheless, after reviewing the record, the Court concluded that "[e]ven though the trial judge may not have made in-depth findings of fact as contemplated by CR 52.01; . . . when the record as a whole is considered, we do not find that the action of the trial judge was clearly erroneous . . . ."[15] In this case, the court's finding that it was in the best interest of the children to award Joseph sole

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[13] Ky., 634 S.W.2d 423 (1982).

[14] Text, supra.

[15] Id. at 425.

custody was not clearly erroneous nor did the court abuse its discretion in awarding sole custody.

V. AWARD OF TIME SHARING

Teresa also argues that the circuit court erred in limiting its award of time sharing to her. In particular, she criticizes the court's use of standardized guidelines for visitation utilized by Fayette Circuit Courts in awarding visitation.

KRS 403.320(1) provides:

> A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

The statute provides no guidance for determining what is reasonable. To promote uniformity and to provide a starting point for making a determination of what is reasonable, the circuit court used the standardized guidelines.

While the statute does not specifically authorize the creation of such standardized guidelines, we cannot say that their use is an abuse of discretion. The guidelines are simply that - guidelines; they provide a framework for establishing visitation in this case. Due to the ages of the children, the issue of visitation is not as important as it would be with younger

children. The issue of time sharing is a discretionary issue for the trial court. It is not our prerogative to second-guess the court.

VI. AWARD OF CHILD SUPPORT

Teresa also claims that in setting the amount she was required to contribute to the support of her children the circuit court erred in finding that she was earning $552.00 per week. Instead, she argues that her weekly income is but $534.00.

As has been said, we will not set aside a trial court's findings of fact unless they are clearly erroneous. In determining child support, the court has to apply KRS 403.211-.212. In fixing the amount of support pursuant to KRS 403.212, the court must consider the adjusted gross income of the parties and set support payments in proportion to their incomes.

The circuit court heard evidence as to Teresa's weekly income. The crux of her claim is that the court incorrectly based her weekly income on four hours of overtime instead of three. During cross-examination, she testified that she averaged three hours per week overtime. However, in the three weeks prior to her testimony, she had four hours of overtime per week. She conceded that her weekly income during those weeks was $480.00 at her hourly rate plus $72.00 in overtime. In light of this testimony, the circuit court's finding of fact that her weekly income was $552.00 is not clearly erroneous.

VII. CUT-OFF DATE FOR ACCUMULATION OF MARITAL ASSETS

Teresa also argues that the circuit court erred in failing to follow the parties' stipulation regarding the cut-off date for the accumulation of marital assets. We agree.

On October 12, 1998, the parties stipulated that "[t]he cut off date for the accumulation of marital assets was January 7, 1997." However, in its October 22, 1998, decree, the court used the value of Joseph's 401(k) and employee stock option plan (ESOP) at the time of separation in awarding marital property.

Under Kentucky law, parties are free to enter into stipulations, and they are then bound by the stipulations.[16] Courts have recognized various exceptions to the general rule, including "[t]he right to repudiate a stipulation . . . where it is shown that it was inadvertently made, provided notice is given to the opposite party in sufficient time to prevent prejudice to him."[17]

In this case, Joseph agreed to the stipulated cut-off date for the accumulation of assets after the cut-off date. This fact is important because it directly undermines Joseph's argument that it would have been inequitable to use the stipulated cut-off date for his 401(k) plan and employee stock ownership plan (ESOP). Joseph knew or could have ascertained the value of the 401(k) and ESOP when he entered into the stipulation. He never attempted to repudiate the stipulation. Thus, the circuit court erred in failing

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[16] See, e.g., Baker v. Reese, Ky., 372 S.W.2d 788, 788 (1963) (noting that the parties' stipulation to limit the issue to the determination of the location of a disputed boundary will be honored unless some reason can be shown to invalidate it).

[17] World Fire & Marine Ins. Co. v. Tapp, 286 Ky. 650, 151 S.W.2d 428, 430 (1941) (citing Karnes v. Black, 185 Ky. 410, 215 S.W. 191 (1919)) (emphasis supplied).

to value the 401(k) and ESOP as of January 7, 1997, when dividing the parties' marital property.

VII. FAILURE TO UTILIZE UNIFORM CUT-OFF DATE

Next, Teresa claims that the circuit court erred in not utilizing a different cut-off date for the accumulation of marital debts. We disagree. As we have discussed, the parties signed a stipulation on October 12, 1998, addressing the accumulation of marital assets. However, the stipulation does not mention marital debts.

KRS 403.190(3) provides that "[a]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property . . . ." Under Kentucky law, "[d]ebts accrued subsequent to separation, but before entry of a divorce decree are rebuttably presumed to be marital debts."[18] "This presumption may be rebutted by clear and convincing proof" to the contrary.[19]

In this case, Teresa had the burden of proving that a disputed loan was nonmarital. Joseph testified that he incurred the debt by borrowing money from his father to make payments on marital debts and presented three notes evidencing the loans that he had signed. Teresa cites to no evidence to rebut Joseph's claim. Thus, the finding was not clearly erroneous and the court

[18] Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 445 (1992) (citing Daniels v. Daniels, Ky. App., 726 S.W.2d 705, 706 (1986)).

[19] Id. at 442 (citations omitted).

did not abuse its discretion in awarding one-half the debt to Teresa.[20]

IX. CLASSIFICATION OF PROPERTY

Finally, Teresa argues that the circuit court improperly classified a fifteen-year-old VCR as non-marital property. We will not set factual findings aside unless they are clearly erroneous.[21] As we said in Calloway v. Calloway:[22]

> In determining whether an item was a gift, consideration should be given to the factors which include the source of the money used to purchase the item, the intent of the purported donor, and the status of the marriage at the time of the transfer. This determination must be based on the facts of each case.[23]

In this case, Joseph and Teresa were married at the time his parents gifted the VCR. That fact is undisputed. There was conflicting evidence as to whether the VCR was marital or nonmarital property. In his itemized schedule of income and personal property, Joseph listed the VCR as a gift to him from his

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[20] See Spratling v. Spratling, Ky. App., 720 S.W.2d 936, 938 (1986) (concluding that the trial court did not err in dividing a marital debt in conjunction with the division of marital property and assignment of marital assets and debts).

[21] CR 52.01; Ghali v. Ghali, Ky. App., 596 S.W.2d 31, 32 (1980) ("It is well settled that [] [CR] 52.01 applies to domestic matters and that the principles of that rule require reviewing courts to accept findings of a trial judge unless they are clearly erroneous").

[22] Ky. App., 832 S.W.2d 890 (1992).

[23] Id. at 892 (internal citation omitted) (citing O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980)).

parents. During direct examination, Joseph likewise testified that the VCR was given to him. However, on cross-examination, Joseph was equivocal as to whether the VCR was a gift to the family or him. As fact-finder, the circuit court could choose to believe all, some or none of Joseph's testimony.[24] The court's finding is supported by evidence of record and is not, therefore, clearly erroneous.

X. CONCLUSION

Accordingly, that portion of the decree awarding Joseph the accretions to his 401(k) plan and ESOP after the separation date is reversed. The orders of November 30, 1998, January 4, 1998, and January 7, 1999, which award an attorney's fee and costs to Joseph pursuant to CR 68, are vacated. The balance of the decree is affirmed. This case is remanded to Fayette Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

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[24] Webb Transfer Lines, Inc. v. Taylor, Ky., 439 S.W.2d 88, 95 (1968) ("[A] [fact finder] may believe any of the witnesses in whole or in part") (citing Cross v. Clark, 308 Ky. 18, 213 S.W.2d 443 (1948)).