

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003023-MR

BARBARA K. JETT

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE RON DANIELS, JUDGE
ACTION NO. 97-CI-00821

CHARLES E. JETT

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from an order of the McCracken Circuit Court granting a motion pursuant to CR 60.02. The trial court entered a second amended decree of dissolution to address a matter which was inadvertently left out of the original decree and the first amended decree. Although we are concerned by the trial court's failure to record the evidentiary hearing, the appellant did not object at the time, nor has she attempted to offer a narrative statement showing how she was prejudiced by the action of the trial court. Under the circumstances, we must presume that the evidence presented at the hearing supported the trial court's factual findings. Hence, we affirm.

On March 4, 1997, the appellee, Charles E. Jett (Charles), filed a petition for dissolution of his marriage to the appellant, Barbara K. Jett (Barbara). On January 28, 1998, the trial court conducted an evidentiary hearing on the issues relating to assignment of the non-marital property, and the division of the marital property and debts between them. However, this hearing was not recorded or transcribed. At the conclusion of the hearing, the trial judge apparently made oral findings of fact. The trial court directed Charles's attorney to prepare the written findings of fact and decree of dissolution. The trial court entered the prepared findings and decree on March 12, 1998. The trial court also entered an amended decree on May 13, 1998 to reflect the parties' settlement of issues related to Barbara's interest in Charles's retirement plan.

On October 19, 1998, Charles filed a motion pursuant to CR 60.02 to amend the trial court's findings of fact. In the motion, Charles stated that the trial court had made oral findings following the hearing regarding a debt which Charles owed to Barbara.¹ However, Charles contended that this oral finding had inadvertently been left out of the final decree. The trial court conducted a hearing on the motion on November 19, 1998. Again, this hearing was not recorded or transcribed.

¹ Prior to the filing of this motion, Barbara filed a complaint against Charles in the McCracken Circuit Court, seeking recovery from Charles in the amount of the debt owed. Barbara Jett v. Charles E. Jett, Action No. 98-CI-00867. On January 29, 1999, the circuit court (by the same judge presiding in the dissolution action), dismissed Barbara's complaint because "the matters complained of in his action have been addressed in the . . . Dissolution action." The dismissal of the civil complaint is not an issue in this appeal.

Later that same day, the trial court entered a second amended decree, setting out its findings regarding the debt:

[t]he Court having considered the Motion and having reviewed the file, including the Court's own notes; and having determined that at the conclusion of the Final hearing on January 28, 1998, the Court found that if there was a debt which the Petitioner [Charles] owed to the Respondent [Barbara], that debt had been paid, and the money was used for marital purposes; . . .

Barbara now brings this appeal from the trial court's second amended decree. She does not specifically take issue with the trial court's finding. Rather, Barbara contends that the trial court abused its discretion in relying on its written notes to determine whether the court had made factual findings regarding the debt. Since there is no recording or transcript of either the January 22 or the November 19 hearings, Barbara contends that this matter must be remanded for a new hearing and findings regarding the debt at issue.

There is nothing in the record to explain the trial court's failure to record the hearings on January 22 and November 19. Particularly in the case of an evidentiary hearing where substantive rulings are to be made, the trial court has an obligation to make a record of the proceedings. We certainly recognize that recording equipment can break down at inopportune times and court reporters may be unavailable to fill the gap. However, under normal circumstances, all substantive hearings (at least) should be recorded or transcribed.

Nevertheless, the Civil Rules contemplate that a videotape, mechanical or stenographic record of court proceedings

may not be available always. CR 75.13 allows an appellant to prepare a narrative statement of a trial court's proceedings for use on appeal. If the trial court refuses to approve or is unable to approve a record of the proceedings or a narrative statement which is acceptable to the appellant, CR 75.14 provides the remedy by allowing the filing of a bystander's bill.

However, a party who fails to object to proceeding to trial without a reporter, and has not tendered a narrative statement is not in a position to complain about the lack of a record.

Crowder v. Spears, Ky., 249 S.W.2d 164 (1952).

In the absence of a narrative statement or a bystander's bill, this Court has no way to tell if Barbara was prejudiced by the trial court's failure to record the proceedings. National Dairy Products Corp. v. Rittle, Ky., 487 S.W.2d 894, 896-97 (1972). Indeed, Barbara states in her brief that the trial court heard evidence at the January 22 hearing regarding the existence of the debt. Again, as there is nothing in the record on appeal to indicate what evidence was considered by the trial court, we must presume that the evidence supported the findings which were made. Whicker v. Whicker, Ky. App. 711 S.W.2d 857, 860 (1986) (citing, Reid v. Reid, Ky., 300 S.W.2d 225 (1957)). Therefore, we find no basis for remanding this matter for an additional evidentiary hearing.

Accordingly, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Mitchell Boeschel
Mayfield, Kentucky

BRIEF FOR APPELLEE:

Jim L. Linblad
Paducah, Kentucky