

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003054-MR (DIRECT APPEAL)
AND
NO. 1999-CA-003059-MR (CROSS-APPEAL)

JOHN D. MAUPIN

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 97-CI-00257

MARY ANN MAUPIN

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, EMBERTON AND TACKETT, JUDGES.

EMBERTON, JUDGE: This case arises from an action for dissolution of marriage. John Maupin appeals alleging that the trial court erred in awarding permanent maintenance to Mary Ann Maupin; that the court erred when it found there was no agreed value of certain personal property; and when it ordered the sale of the marital property at public auction which was allowed to be purchased by Mary Ann. Mary Ann cross-appeals alleging that the trial court awarded an insufficient amount of maintenance and erred when it denied her attorney's fees.

The initial issue we address is whether failure to file a transcript of the proceedings below is fatal to John's appeal and Mary Ann's cross-appeal. Before the 1976 amendments to our civil rules, failure to designate the record on appeal resulted in dismissal.¹ Under the current version of Kentucky Rules of Civil Procedure (CR) 75.07(1), the appellate record shall contain the original record on file in the circuit clerk's office in addition to that designated by the parties. As noted by the court in Johnson v. Maloney's of Olive Hill, Inc.:²

Therefore, it is now possible to bring a case before this court without designation of record when the lack of stenographically recorded evidence or proceedings would make the filing of the designation an empty exercise.

John contends that a transcript of the Commissioner's hearing is unnecessary because he does not dispute the findings of fact of the court below but only the application of the law. Without the transcripts we are not in a position to review any of the findings of fact and must accept those as found by the trial court. We are left, therefore, to review the trial court's judgment to determine if it abused its discretion.³ Having recognized our limited role in this case, we turn to the issues raised. The pertinent findings of the trial court are summarized as follows:

¹ See Timmons v. Allen, Ky., 449 S.W.2d 27 (1969); Motorists Mutual Insurance Co. v. Mercer, Ky., 462 S.W.2d 188 (1970).

² Ky., 569 S.W.2d 704, 706 (1978).

³ Perrine v. Christine, Ky., 833 S.W.2d 825 (1992).

A. REAL ESTATE

The Commissioner finds that the value of the Taylor County property, which by agreement is to be awarded to Respondent, is \$55,000.00.

The Bullitt County property was sold when the parties could not reach an agreement, at which time Petitioner bought it for \$46,000.00. She paid a 10% buyer's premium to the auctioneer, which is the equivalent of a real estate commission.

The Commissioner finds that Respondent should pay \$4,500.00 to Petitioner to equalize the property.

B. PERSONAL PROPERTY

Appraisals were done to determine the value of the personal property taken by each. Respondent disputes the Taylor County appraisal. The Commissioner finds that the value of the Taylor County property taken by Respondent is \$37,265.00.⁴ The value of the Bullitt County property taken by Petitioner is \$10,356.00.

Respondent should pay to Petitioner \$13,454.50 to equalize the division of the personal property.

C. PENSION

A qualified domestic relations order should issue to divide the marital interest in Respondent's pension.

D. SAVINGS AND INVESTMENT ACCOUNT

Respondent has a savings and investment plan which is held in shares of stock. The number of shares of stock which were owned at the date of separation should be equally divided.

3. Petitioner asserts a claim for maintenance. She is currently employed with

⁴ The value of the Taylor County property was later amended to \$29,000 and the property division was adjusted.

an hourly rate of \$6.75 per hour, with little prospect of increased earnings. Respondent is employed at Colgate Palmolive with a gross income in excess of \$52,000.00 per year.

The parties were married in excess of 21 years with Respondent being the primary income producer during that time. While both parties are in reasonably good health, Respondent's earning capacity far exceeds that of Petitioner. The Commissioner finds that Petitioner is unable to meet her reasonable needs through appropriate employment, and lacks sufficient property to meet those needs. She should be granted maintenance of \$250.00 per week until her death, remarriage, or further Order of Court.

4. Each party should pay his or her own attorney's fees.

The amount and duration of maintenance are within the sound discretion of the trial court.⁵ The trial court considered the factors set forth in Kentucky Revised Statutes (KRS) 403.200 and found Mary Ann lacked sufficient property to provide for her reasonable needs and is unable to support herself through appropriate employment. We also find the amount awarded sufficient. Although Mary Ann's earnings, combined with the maintenance award, will not be as great as John's income, the award is not unreasonable, unfair, nor unsupported by sound legal principles so as to constitute an abuse of discretion.

John's next contention that the trial court erred when it disregarded an agreement of the parties that the value of certain personal property was \$29,000, is meritless. The commissioner entered an amended order on January 7, 1999, in which he found that an agreement existed and equalized the

⁵ Russell v. Russell, Ky. App., 878 S.W.2d 24 (1994).

division of the personal property. This amendment was adopted by the trial court on November 22, 1999.

The marital residence was ordered sold and was purchased by Mary Ann for \$46,000. John now alleges that there was an agreement that such value was \$62,000. The commissioner found there was no agreement and we are bound by this finding. John's attempt to back-door portions of the transcript below by inclusion in his brief is contrary to CR 75.01 and is accordingly disregarded by this court.

Finally, there was no error in the trial court's failure to award Mary Ann attorney's fees. The court considered the factors set for in KRS 403.220 and we find no error.⁶

ALL CONCUR.

BRIEF FOR APPELLANT:

Armand I. Judah
Louisville, Kentucky

BRIEF FOR APPELLEE:

Rodney Burress
Shepherdsville, Kentucky

⁶ Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986).