

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001288-MR
AND
NO. 2000-CA-001289-MR

VIRGIL KEITH GIFFORD

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT B. OVERSTREET, JUDGE
ACTION NO. 98-CI-00292

JANICE ELAINE GIFFORD

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS and DYCHE, Judges; POTTER, Special Judge¹.

COMBS, JUDGE: Virgil Keith Gifford appeals from an order of the Scott Circuit Court that directed him to pay a portion of his former spouse's attorney fee. Virgil also contends that the trial court erred in its classification of the couple's personal property. In her cross-appeal, Janice Elaine Gifford contends that the trial court erred by concluding that the parties' post-nuptial agreement was valid and enforceable against her. A consideration of the transcript of evidence is necessary to the

¹Senior Status Judge John Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

determination of the issue raised by way of Janice's cross-appeal. However, it has not been provided. As a result, she cannot prevail. In light of the inadequate state of the record before us, we are also unable to review properly the issues (with one exception) presented by Virgil on appeal. Having reviewed this one issue, we affirm the judgment.

Virgil and Janice were married in October 1991. No children were born of the marriage. In July 1998, Janice filed a petition for dissolution of the marriage, and Virgil was ordered to pay \$462.00 per week as temporary maintenance.

The trial court referred the matter to a domestic relations commissioner, who took evidence and heard testimony. The commissioner entered findings of fact, conclusions of law, and a recommended order in March 1999. Based upon the evidence presented, the commissioner found that the parties had entered into a valid post-nuptial agreement with respect to the real property and concluded that the terms of the agreement were fully enforceable. The commissioner also assigned and divided the parties' personal property - including certain watercraft valued at approximately \$7,000.00 and the proceeds from a claim made against a homeowner's insurance policy. While the commissioner did not recommend a maintenance award, she did suggest that Virgil be ordered to pay more than \$2,000.00 toward Janice's attorney fee.

Both parties filed objections to the commissioner's recommended order. The objections were overruled, and in April 2000, the trial court entered its order substantially adopting

the commissioner's recommendations. The parties' timely notices of appeal and cross-appeal followed.

In August 2000, Virgil filed a motion with this court requesting an extension of time in which to prepare and file a narrative statement in accord with the provisions of CR 75.13. In his motion, counsel declared that while a proper record of the testimony offered during the commissioner's hearing was missing, such a record was "essential for any meaningful review of the final judgment for error. . . ." Appellant's motion at 1. Through our order, Virgil was permitted to supplement the record on appeal as the record had already been certified by the Scott Circuit Clerk's office. However, despite his previous assertion that a proper record of the testimony was "essential," Virgil's counsel did not supplement the record.

In January 2001, Janice's counsel filed a motion to dismiss the appeal. Counsel contended that without a "transcript, narrative statement, [or] agreed statement of the proceedings," this court could not review the merits of the case on appeal. Appellee/Cross-Appellant's motion at 2. In the alternative, Janice sought a ninety-day extension in which "to obtain an approved narrative statement of the final divorce proceedings because the Appellee believes that a statement of the proceedings is crucial to this Court's review of the testimony and is necessary in the preparation of the Appellee's brief." Id. at 3.

In February 2001, this court abated the motion to dismiss the appeal and ordered the parties to complete a

narrative or agreed statement, to obtain the approval of the trial court as to its contents, and to insure that the circuit clerk prepared a supplemental certification of the record. In June 2001, and in response to the motion of Virgil's counsel to withdraw from representation, we ordered the parties to file a response with our clerk indicating the status of the narrative or agreed statement. In response, Janice's counsel indicated that Virgil's counsel bore the primary responsibility to prepare the statement and admitted that nothing had been done to comply with our previous order. Virgil's counsel agreed that neither party had adequately addressed the requirements of our February order but nevertheless contended that he should be permitted to withdraw from representation.

On August 31, 2001, we entered a show cause order, indicating that sanctions against the parties' counsel might be appropriate in view of their blatant and inexcusable failure to abide by the requirements of our February order. Additionally, we directed that the appeals proceed without a narrative statement or supplemental certification of the record. The question of whether the record as certified would be sufficient for adequate appellate review was specifically reserved for the merits panel. Following our examination of the record, we believe that a full and proper review of the issues presented is not possible.

On appeal, Virgil argues that the trial court erred by designating the watercraft and the insurance proceeds as marital property subject to division. To support his position as to the

watercraft, he recounts testimony offered during the commissioner's hearing, including evidence suggesting that the boat and seadoos were owned by others. However, a proper review of this issue would clearly require reference to a complete record. Without an adequate record on appeal, we must presume that the commissioner's findings of fact were properly supported by the evidence. Commonwealth Dep't of Highways v. Richardson, Ky., 424 S.W.2d 601 (1968).

Next, Virgil contends that he should not have been ordered to pay a portion of Janice's attorney fees. KRS² 403.220 authorizes a trial court to order one party to a divorce action to pay a "reasonable amount" for the attorney fees of the other party if it finds a disparity in the relative financial resources of the parties. While Virgil offers evidence to support his view that Janice's financial resources were never fully explored, we are limited to a review of the certified record. Once again, in the absence of a record, we must presume sufficiency and adequacy of the evidence to support the finding underlying the award of attorney fees. See Miller v. Commonwealth Dep't of Highways, Ky., 487 S.W.2d 931 (1972). Moreover, we cannot say that the trial court abused its discretion in this case by awarding attorney fees as a sanction against Virgil for his dilatory behavior. Gentry v. Gentry, Ky., 798 S.W.2d 928 (1990).

Virgil also attacks the order of the trial court requiring him to pay temporary maintenance. An award of temporary maintenance is made on the same basis as permanent

²Kentucky Revised Statutes.

maintenance. KRS 403.160(3). Permanent maintenance is appropriate where the court finds that the spouse seeking it: (1) lacks sufficient property to provide for his or her reasonable needs and (2) is unable to support himself or herself through appropriate employment. The trial court carefully considered the circumstances of both parties prior to awarding temporary maintenance to Janice. In her temporary order, the commissioner specifically found that Janice was unable to support herself through appropriate employment and that she lacked sufficient property to meet her reasonable (as distinguished from minimal) needs. The commissioner's findings were supported by substantial evidence, and she did not abuse her discretion by ordering Virgil to pay temporary maintenance.

Finally, Virgil contends that Janice has unfairly refused to release certain liens against his property. This issue was not presented to the trial court and, therefore, cannot be reviewed here.

On cross-appeal, Janice contends that the trial court erred by finding valid and enforceable the post-nuptial agreement of the parties to divide two parcels of real property between them. A review of the evidence would be necessary for a proper determination of this issue.

It is well established that parties may enter into an agreement whereby each relinquishes his or her respective interest in the property of the other. Such agreements are recognized as enforceable. The court has authority to uphold the

validity of such an agreement and to divide the property according to the terms of the agreement.

Janice argues that the court failed to consider factors relevant to a finding of whether the agreement was enforceable. She also contends that it failed to consider evidence that the agreement had been abandoned by the parties prior to separation. In support of her argument, Janice cites evidence adduced at the hearing to indicate the nature of the change in value of the disputed property and to support her contention that Virgil failed to make an adequate disclosure of the property's initial value. Once more, in the absence of a proper record, we are unable to review the evidence upon which Janice's argument is based. Therefore, we are compelled to presume that the actions of the trial court were correct.

The judgment of the Scott Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS IN RESULT.

POTTER, SPECIAL JUDGE, CONCURS.

BRIEF FOR APPELLANT *PRO SE*:

Virgil Keith Gifford
Georgetown, Kentucky

BRIEF FOR APPELLEE:

Robert G. Johnson
Georgetown, Kentucky