

RENDERED: JULY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001287-MR

PATRICIA SMITH

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 00-CI-00625

MICHAEL SMITH

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; AND EMBERTON, SENIOR JUDGE.¹

JOHNSON, JUDGE: Patricia Smith has appealed from a final order of the Boyd Circuit Court entered on April 25, 2003, overruling her objections and confirming and adopting the report of the Domestic Relations Commissioner dated April 9, 2003. Having concluded that Patricia has failed to demonstrate that the

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

evidence did not support the findings and decision of the circuit court, we affirm.

Patricia and Michael were married on May 19, 1990. On July 18, 2000, Michael filed a petition for dissolution of marriage and a motion for temporary custody of their child and for temporary possession of their house. After a failed reconciliation attempt, Michael filed a motion for a Putnam v. Fanning,² decree on December 11, 2001, which was granted on December 14, 2001.

Michael claimed below that the parties reached an agreement on November 25, 2002, concerning the division of their assets and debts, but that Patricia refused to sign an agreed order. The disputed agreed order provided: (1) that the parties would list the marital residence with a local realtor, with the money from any sale to be paid into an escrow account to be followed by a hearing to determine any non-marital contribution and the subsequent distribution thereof; (2) that a Qualified Domestic Relations Order would be entered concerning both of the parties' retirement accounts; (3) that Michael would receive the Harley Davidson motorcycle and a truck, while Patricia would receive a 1994 Chevrolet Blazer, with each party assuming any debt owed on the vehicle he or she received; and (4) that

² Ky., 495 S.W.2d 175 (1973) (stating that a circuit court may enter a final decree of dissolution before resolving other issues in regards to the dissolution).

Patricia and Michael would both be responsible for one-half of the Commissioner's fee. On March 18, 2003, the circuit court entered an order accepting the agreement save the paragraph pertaining to the division of the motorcycle, the truck and the Blazer. The division of these vehicles was to be determined along with all other outstanding issues at a hearing before the Commissioner.

An evidentiary hearing was held before the Commissioner on March 27, 2003. In a report filed on April 9, 2003, the Commissioner recommended that the vehicles and debts thereon be divided as previously discussed, i.e., Patricia would receive the Blazer and Michael would receive the motorcycle and the truck; that Patricia and Michael would retain possession of the items each had taken from the home; and that Patricia and Michael would be individually responsible for any debts she or he was currently in the process of paying. The Commissioner also found that Patricia and Michael had been separated for 33 months before the final dissolution. Patricia's objections to the Commissioner's recommendations were overruled by the circuit court in the final order entered on April 25, 2003. This appeal followed.

Patricia's primary claim of error is that the circuit court abused its discretion by failing to comply with the

mandates of KRS³ 403.190. Patricia offers several arguments in support of her claim of error, but none of her arguments include proper citations to the record, nor citations to any applicable case law as required by CR⁴ 76.12(4)(c)(v).⁵

It has long been established that a brief may be stricken if it does not meet procedural requirements.⁶ The Court will not search the record, transcript, or video recording to determine if the issue was properly preserved,⁷ and the Court may also refuse to review issues and arguments not properly referenced.⁸ However, the decision to strike the brief for noncompliance is within the discretion of the court,⁹ and in the case sub judice, we choose not to do so.

However, there is an additional procedural deficiency which is fatal to Patricia's appeal. Patricia seeks review of errors she claims the circuit court made in its findings of

³ Kentucky Revised Statutes.

⁴ Kentucky Rules of Civil Procedure.

⁵ CR 76.12(4)(c)(v) provides as follows:

An "ARGUMENT" conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

⁶ CR 76.12(8).

⁷ Hollingsworth v. Hollingsworth, Ky.App., 798 S.W.2d 145, 147 (1990).

⁸ Elwell v. Stone, Ky.App., 799 S.W.2d 46, 48 (1990).

⁹ Burberry v. Bridges, Ky.App., 427 S.W.2d 583, 585 (1968).

fact. She contends that the circuit court erred by failing to properly value the property before it was divided between the parties, thus failing to comply with the requirements of KRS 413.190. However, the record on appeal does not include a transcript or recording of the evidentiary hearing.

It is well-established that "for purposes of appellate review, a finding of fact of a trial judge ranks in equal dignity with the verdict of a properly instructed jury, i.e., if supported by substantial evidence, it will be upheld, otherwise, it will be set aside as 'clearly erroneous.'"¹⁰ A factual finding is not clearly erroneous if it is supported by substantial evidence.¹¹ Also, CR 53.06 "allows the trial judge complete discretion as to the use of a commissioner's report," up to and including adopting the commissioner's findings as its own.¹²

However, it is impossible for this Court to conduct an adequate review of the evidence in this case since the record on appeal does not include either a recording or a transcript of the March 27, 2003, hearing. While the designation of record filed by Patricia includes "the transcript of the Domestic

¹⁰ Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998).

¹¹ Id.

¹² Squires v. Squires, Ky., 854 S.W.2d 765, 770 (1993).

Relations Commissioner's Hearing of March 27, 2003[,]” no transcript was ever filed. It was Patricia's duty to ensure that a transcript or recording of the hearing was included in the appellate record.¹³ When the appellate record does not include evidence presented to the circuit court, we must presume that the missing evidence supported the judgment of the circuit court.¹⁴ The only time this presumption does not arise is when the omitted portions of the record “were not considered by the trial court or did not influence its decision[.]”¹⁵

Since we do not have a record of the March 27, 2003, hearing before us and the circuit court adopted the Commissioner's recommendations, we must presume that the evidence and testimony from that hearing supported the circuit court's order. In the absence of the transcript of the hearing from the record, we can only conclude that the findings of the circuit court were not clearly erroneous and met the requirements of KRS 403.190. To the extent Patricia wishes to argue that the circuit court's findings are inadequate on their face, we must still decline to remand this matter for more complete findings when the record does not demonstrate that Patricia presented any evidence to allow the circuit court to

¹³ Burberry, 427 S.W.3d at 585.

¹⁴ Miller v. Commonwealth, Dept. of Highways, Ky., 487 S.W.2d 931, 933 (1972).

¹⁵ Cadden v. Commonwealth, Ky., 242 S.W.2d 409 (1951).

make such findings. Again, it is incumbent upon the complaining party to demonstrate in the record on appeal how the circuit court fell short in meeting its obligation to make appropriate findings. Without a transcript for this Court to review, we must assume that the circuit court made findings to the extent it was able based on the evidence presented. If Patricia's proof fell short of meeting her burden, which we must assume that it did, we cannot vacate the circuit court's findings based upon the inadequacy of Patricia's evidence.

For the foregoing reasons, the judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael J. Curtis
Ashland, Kentucky

BRIEF FOR APPELLEE:

Jeffrey L. Preston
Catlettsburg, Kentucky