RENDERED: November 19, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000516-MR

RONNIE JOE MYATT — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 00-CI-00218

DONITA JEAN MYATT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from various orders in a domestic case which divided the parties' real property and debt and awarded the appellee sole custody of the parties' five minor children. We affirm both the custody and property division rulings.

Ronnie Myatt, appellant herein, and Donita Myatt, appellee, were married for 30 years at the time the petition for

dissolution was filed on June 26, 2000. Ten children were born of the marriage, five of whom were of minority age at the time of the decree.

Both Ronnie and Donita initially sought joint custody of the children, but later in the course of litigation Donita sought sole custody. Donita was awarded temporary sole custody in 2001.

As for property division, on November 19, 2001, the parties placed a settlement agreement on the record, but the final document incorporating it into an order was never signed by Ronnie. On April 22, 2002, the matter was referred to the Domestic Relations Commissioner who held a hearing on June 24, 2002. Another agreement was reached by the parties and placed in the record. This agreement was subsequently incorporated into an agreed order entered on August 15, 2002. In the agreement, the parties agreed that Donita should receive the Cooper Lane property and accompanying debt and that Ronnie should receive the Brookview property and accompanying debt, both properties on which foreclosure proceedings had been initiated at the time of this agreement. In the agreed order, Donita waived further maintenance claims and agreed to pay Ronnie $30,750 in exchange for her receiving tract 5 of the Cooper Lane property. Ronnie’s child support and maintenance arrearage was reduced from $25,500 to $16,500, and his future

child support obligation was reduced to $250 a week. Ronnie also agreed to pay a business loan that was secured by both parties. Relative to this distribution of the real property, the agreement specifically stated:

> Each party shall immediately apply for refinancing on the real estate to be owned by them. Petitioner shall quitclaim to Respondent all of his right, title and interest in and to Tracts 3, 4 and 5 of the Faye Miller Estate [the Cooper Lane property] Divided. Respondent shall quitclaim to Petitioner all of her right, title and interest in the real estate located at 124 Brookview Drive, Shelbyville, Kentucky. It is the intention of the parties to complete refinancing and have the foreclosure action dismissed within sixty (60) days from this date. Upon refinancing by both parties, Respondent shall pay to Petitioner the sum of $30,750.

Subsequently, Ronnie failed to refinance the Brookview property and refused to sign the quitclaim deed to Donita. Donita secured financing to purchase the Brookview property and to borrow an additional $31,115 she owed Ronnie under the agreed order. Both properties proceeded to foreclosure – the Brookview property being sold to a third party for $80,000 and the Cooper Lane property being sold for $310,000. At the foreclosure sale, Ronnie bid $75,000 on the Brookview property which was appraised for $90,000. According to the court's findings, Ronnie had an employee bid $305,000 on the Cooper Lane property for him at the foreclosure sale, which was appraised for $150,000. This forced

Donita to pay the inflated price of $310,000 for the property. This, in turn, essentially required Donita to pay off, not only the remaining debt on the Cooper Lane property, but also certain debts that Ronnie would otherwise have been responsible for under the agreed order - a business debt of Ronnie's, the remainder of the debt on the Brookview property after foreclosure (the loans were cross-collateralized), and a sewer assessment lien of $3,625.72.

On November 19, 2002, Ronnie filed a motion to have the August 14, 2002, agreed order set aside. Ronnie argued that the parties' agreement was inequitable because the amount the Cooper Lane property sold for was much greater than the Brookview property and because he was unable to refinance the Brookview property, which was a condition precedent to the agreement. On February 11, 2003, the court entered an order denying the motion. Ronnie then filed a motion to reconsider. On August 19 and September 11, 2003, the Commissioner held a hearing on the motion to reconsider as well as on custody. On November 5, 2003, the Commissioner filed his recommended order in which he found that the agreed order of August 15, 2002, was enforceable and that Donita should receive sole custody of the children. On December 3, 2003, the trial court entered an order overruling Ronnie's exceptions to the Commissioner's recommended

order. From the subsequent order denying Ronnie's motion to alter or amend, this appeal by Ronnie followed.

Ronnie's first argument is that the trial court abused its discretion in granting sole custody to Donita. The hearing on permanent custody took place on August 19, 2003, and September 11, 2003. Per the August 15, 2002, agreed order, the Cabinet for Families and Children ("the Cabinet") prepared a custody report based on interviews with the parties and their children. These interviews took place in 2002 and the report was filed with the court on January 16, 2003. The custody report recommended awarding sole custody to Donita with visitation one weekend per month to Ronnie. In the report, the Cabinet recognized that all the children appeared uncomfortable with their father and were angry that he left their mother. When asked by the Cabinet whom they wanted to live with, all the children responded that they wanted to live with their mother and never wanted to see their father. At the custody hearing, Ronnie testified that he should have custody because Donita works much of the weekend and the children were sometimes at home unsupervised. He also testified that since the preparation and filing of the Cabinet's report, some of the children have enjoyed visiting him. In awarding Donita sole custody, the court stated:

> Although the children did not testify, it appears clear from the record that they would prefer that Donita have custody and their interaction with their father has been strained at best since his departure from the family home. . . . The children are apparently well adjusted in their current circumstances although the location of their schooling has been a continuing point of controversy between their parents.
>
> Under the circumstances of this case, it is in the best interests of the children that their mother, Donita, have sole custody. There seems little likelihood that the parties will ever be able to cooperate on issues relating to their continued upbringing. Also, all of the children are of sufficient age to have significant input into the decision concerning custody.

Ronnie contends that the trial court erred in considering the custody report of the Cabinet since the information contained therein was not current. Ronnie also complains that the court erred in relying exclusively upon this report in making the custody decision, citing Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). The record indicates that the children were brought to court to be interviewed two different times, but Ronnie did not want them to be interviewed and Donita did not press the issue, so the only evidence as to the children's preference was in the Cabinet's report. Further, Ronnie could have subpoenaed the Cabinet employee who conducted the interviews and filed the report, but did not. Ronnie was free to and did present his own evidence regarding the current

state of his relationship with the children. Whether to admit or exclude evidence to ensure the fairness of a trial is within the discretion of the trial court and its determination will not be overturned on appeal in the absence of a showing of an abuse of such discretion. Mullins v. Commonwealth, Ky., 956 S.W.2d 210 (1997). In looking at the Cabinet's report, even though it was eight months old at the time of the hearing, we cannot say that it was an abuse of discretion to allow it to be admitted at the hearing.

As for Ronnie's argument that the court erred in relying exclusively on the Cabinet's report, we would note that Reichle involved the lower court's sole reliance on a psychological evaluation, not a report by the Cabinet as in this case. Further, there is no indication from the court's findings in the instant case that the court only considered the Cabinet's report.

Ronnie also argues that the court erred in considering the fact that the parties were unable to cooperate, citing Scheer v. Zeigler, Ky. App., 21 S.W.3d 807 (2000). In Scheer, the Court overruled Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994), which held that in order to modify an award of joint custody, there must be a threshold finding that the parties were unable to cooperate in the joint custody arrangement. The Scheer Court eliminated that threshold

requirement for modification of joint custody. However, the Scheer Court qualified its holding, stating, "Our holding in no way alters or destroys the ability of courts to modify joint custody in situations where the parties are unable to cooperate." Scheer, 21 S.W.3d at 814. Hence, this Court did not hold that the parties' inability to cooperate can never be considered by the courts, only that it cannot be a threshold requirement for a modification of joint custody. The present case was not a modification of joint custody; it was an original award of sole custody. Under KRS 403.270(2), we believe it was a relevant factor to be considered in this case.

Ronnie's next argument is that the trial court erred in its division of the parties' property and debt. In particular, Ronnie maintains that the August 15, 2002, agreed order should not have been enforced because the requirement that the parties refinance the loan on their respective property was a condition precedent to the contract and Ronnie never refinanced the Brookview property. As to this claim, the lower court found:

> Nothing in the agreement supports this assertion [that the provision relative to refinancing was a condition precedent to the contract]. Again, everyone involved at the time knew of the pending foreclosure and could have easily made the agreement contingent upon refinancing the properties before the foreclosure sale. This would have in effect left either party free to

> scuttle the agreement by failing to cooperate prior to the sale. This in effect appears to be what Ronnie attempted to do.

Under Kentucky law, if a contractual condition precedent is not satisfied, then the contract is not enforceable. In re Big Rivers Electric Corp., 233 B.R. 726 (Bkrtcy. W.D. Ky. 1998).

> The general rule of contract construction is that: (C)onditions precedent are not favored and the courts will not construe stipulations to be precedent unless required to do so by plain, unambiguous language or by necessary implication. This is particularly so when interpreting a stipulation as a condition precedent would work a forfeiture or result in inequitable consequences.

A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co., 650 F.2d 118, 121 (6th Cir. 1981).

Although the agreed order stated that the parties shall apply for refinancing and that it was the intention of the parties to complete refinancing to avoid the foreclosure, those provisions in the agreement were not stated as conditions of the contract. The purpose of the refinancing provision was clearly to eliminate the cross liens on the properties so each party would be responsible only for the liens on the property they were awarded. As the trial court noted, if the refinancing provision was a condition precedent, the parties could easily avoid the contract by refusing or not making a good faith

attempt to refinance, which would be wholly inequitable. There was evidence that this is precisely what Ronnie did in this case.

Finally, Ronnie argues that the agreed order was inequitable because the property Donita was awarded sold for $310,000, whereas his property sold for only $80,000. Given the appraisals done on the properties prior to the agreed order, both parties knew that the Cooper Lane property was valued much higher than the Brookview property. Moreover, there was evidence that Ronnie was the sole reason the property sold for an inflated price – he had his employee bid against Donita for the property. It is axiomatic that a party seeking equitable relief must come with clean hands. Gastineau v. Bradley, Ky., 249 S.W.2d 529 (1952). Ronnie did not have clean hands regarding the sale of the Cooper Lane property. Hence, his argument is devoid of merit.

For the reasons stated above, the orders of the Shelby Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Paul C. Harnice Frankfort, Kentucky	C. Lewis Mathis, Jr. Shelbyville, Kentucky