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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000601-MR

MICHAEL K. JUSTICE APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
CIVIL ACTION NO. 01-FC-007898

HEIDI D. JUSTICE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: Michael K. Justice and Heidi D. Justice married on March 23, 2001. Michael filed a petition seeking dissolution of the marriage less than eight months later, on November 2, 2001. Michael and Heidi reconciled in December 2001, but finally separated on August 20, 2002.

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Although Michael has children from a prior marriage, no children were born of his marriage to Heidi.

Following a two-day bench trial, Jefferson Family Court equally divided property it determined to be marital and ordered Michael to pay a portion of Heidi's attorney's fee. On appeal, Michael claims that the court erred when it determined that Heidi had made an equal contribution to the acquisition of marital property, that a bank account and certain tax refunds were marital property, and that he should be required to pay a portion of Heidi's attorney's fee.

Our review is circumscribed by procedural rules and statutory and decisional law. Kentucky Rules of Civil Procedure (CR) 52.01 instructs us that findings of fact made by the family court may not be set unless clearly erroneous, that is, not supported by credible evidence. And, we must give due regard to the family court's opportunity to judge the credibility of witnesses. When there is a conflict in the evidence, it is the family court's function, not ours, to decide what evidence to believe.[2]

Family courts are given broad discretion to fashion a remedy in dissolution actions that is fair and is appropriate to the particular case since no two dissolution cases are alike. We may only reverse a family court decree when we perceive that

[2] See Ghali v. Gahli, 596 S.W.2d 31 (Ky. App. 1980); Adkins v. Meade, 246 S.W.2d 980 (Ky. 1952).

the court has abused its discretion.[3] This Court, as an appellate court, exists to correct errors of law made by the lower courts. It is not our function to retry cases. With these perimeters to our review of the family court's decree in mind, we turn to the facts in this case.

Michael is a certified financial manager who owned an American Express Financial Advisors franchise. In the year he and Heidi married, Michael earned some $480,000.00. By 2003, his income had declined to $256,000.00 per year. Heidi was not employed outside the home during the first eight months of the marriage. However, she was responsible for maintaining the household. She also helped Michael care for his daughter from a prior marriage when the child visited on weekends, and, on a few occasions, helped out in Michael's office. In late 2001, Heidi began working as a registered nurse, a position which paid $36,000.00 annually.

In its decree, the family court noted the huge disparity between Michael's income and Heidi's income. Nevertheless, the court determined that each party had contributed equally to the marriage. Therefore, it concluded that Heidi was entitled to half of all the couple's marital property.

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[3] Cochran v. Cochran, 746 S.W.2d 568, 570 (Ky. App. 1988).

Among the couple's assets were three cash accounts: one at Stock Yards Bank (SYB), another at American Express (AmX, sometimes referred to as the "One" account), and a third at Citizens Union Bank (CUB). The court determined that the SYB account, which at the date of separation had a balance of $38,900.00, was non-marital and belonged to Michael. The court determined that the AmX account, which had a date of separation balance of approximately $8,449.00, was also non-marital property and belonged to Michael. The court found that Michael had failed to establish that the CUB account, which had a separation date balance of $61,000.00, contained non-marital funds, so it determined that the account was marital property. Half of this account, $30,500.00, was awarded to Heidi.

Heidi and Michael filed joint 2002 federal and state tax returns. They were due a federal tax refund of $17,889.00, and a state refund of $4,455.00, a total of $22,344.00. Although Michael applied these refunds to his estimated tax for 2003, the family court found that these refunds were marital property and awarded half, $11,172.00, to Heidi.

Michael owned a SEP individual retirement account and a money purchase plan. In 2001, he contributed a total of $30,000.00 to these two accounts, and in 2002 he contributed another $30,000.00. The family court found that the

contributions made in both 2001 and in 2002 were marital property and awarded half, $30,000.00, to Heidi.

Finally, the family court determined that Michael had far greater financial resources than Heidi, and it found that Michael had caused difficulties for Heidi's attorney in obtaining his financial information (a finding Michael disputes). Based on these findings, the court ordered Michael to pay $20,000.00 in legal fees directly to Heidi's attorney of record; and it permitted Heidi's attorney to enforce this award in his name sixty days following entry of the decree.

Michael moved the family court pursuant to CR 59.05 to alter, amend or vacate the decree. When the motion was denied, he appealed *pro se* to this Court.

On appeal, Michael insists that the family court erred when it found that Heidi contributed equally to the marriage and when it awarded Heidi half the marital assets. He contends that his testimony, as well as the testimony of his witnesses, was more credible than the evidence adduced on Heidi's behalf. Thus, he reasons, the court's findings of fact were not supported by the evidence. As pointed out above, the family court's finding, if supported by credible evidence as in this case, must be upheld, even in the face of conflicting evidence. Michael has failed to show that the findings of fact made by the family court are clearly erroneous.

When the parties married, Michael claims, the SYB account contained approximately $91,566.00 and the AmX account contained approximately $27,059.00. Although the family court found that these two accounts were Michael's non-marital property, he insists that the court should have gone farther and restored to him the amount of money that they contained at the beginning of the marriage. The SYB and the AmX accounts had an aggregate balance of approximately $47,349.00 when the parties finally separated. Michael failed to trace to the satisfaction of the family court the funds that he withdrew from these accounts, so he was only entitled to the aggregate balance that existed on the date of separation, the amount he was awarded.

Michael also insists that he produced sufficient evidence at trial to show that the CUB account contained non-marital funds. According to Michael, he transferred $10,000.00 from the AmX account, which contained only non-marital funds, to the CUB account. So, he reasons, the CUB account contained at least that much in non-marital funds. Furthermore, he claims to have received cash payments from non-marital stock options and from a non-marital retirement fund totaling approximately $46,000.00. He says that he deposited approximately $30,000.00 of these proceeds into the CUB account. Accordingly, he insists, the CUB account contained approximately $40,000.00 of non-marital funds that the family court failed to return to him.

Michael has attached to his brief copies of financial documents that he contends support his argument. However, he failed to include any citations to show where these documents may be found in the record.[4] Nor do the copies contain pagination from the trial record. We must conclude that these documents are outside the trial record, and we will not take them into consideration in reaching our decision. In short, Michael failed to establish by clear and convincing evidence[5] that the CUB account, or any part thereof, was non-marital property. The contrary finding by the family court was not clearly erroneous.

Michael insists that the family court erred when it awarded Heidi half the contributions that he made in 2001 and 2002 to his retirement accounts. According to Michael, any contributions that he made for any specific year were in actuality made for the prior tax year. Accordingly, he asserts, his 2001 contribution was in actuality for the 2000 tax year. And since he and Heidi were not married in 2000, she was not entitled to half of the 2001 contribution.

While for tax purposes the 2001 contribution may have been considered to have been made in 2000, for the purposes of

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[4] See Ky. R. Civ. Proc (CR) 76.12(4)(iv).

[5] Ky. Rev. Stat. (KRS) 403.190(3) provides that all property acquired during marriage is presumed to be marital property. The presumption may be rebutted by clear and convincing evidence. See Underwood v. Underwood, 836 S.W.2d 439, 441 (Ky. App. 1992), and Brosick v. Brosick, 974 S.W.2d 498, 502 (Ky. App. 1998).

defining marital property this is irrelevant. Michael made the contribution in 2001 during the marriage, and, as earlier pointed out, all property acquired during a marriage is presumed to be marital property. The family court correctly determined that Michael failed to rebut this presumption.

Michael argues that the family court erred when it found that the 2002 tax refunds were marital assets. He insists that the tax refunds were counted twice because he deposited the tax refunds in the CUB account. He contends that the family court should have reduced the CUB accounts balance by $22,000.00 before it awarded half to Heidi.

This argument is without merit. The tax refunds were acquired during the marriage; thus, they are presumed to be marital property. Michael has not rebutted this presumption by clear and convincing evidence, nor has he shown that the family court abused its discretion in dividing the refunds.

Finally, Michael argues that the family court erred when it found that he caused difficulties for Heidi's attorney in obtaining his financial information. Michael insists that he was always cooperative. Thus, he says, the court erred when it ordered him to pay $20,000.00 toward Heidi's attorney's fee. We

cannot address the merits of this issue since Michael failed to name Heidi's attorney as a party to this appeal.[6]

Michael seeks in this appeal to re-litigate this dissolution action *de novo*. However, CR 52.01 makes it abundantly clear that we are not to examine the evidence *de novo,* but instead to review the family court's findings of fact applying the clearly erroneous standard. The burden was on Michael to show that the court's findings of fact were erroneous or that the court abused its discretion in making the awards that it did. Because he has not met his burden, the decree is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael K. Justice, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stephen H. Miller
FORE, MILLER & SCHWARTZ
Louisville, Kentucky

[6] Knott v. Crown Colony Farm, Inc., 865 S.W.2d 326 (Ky. 1993); Beaver v. Beaver, 551 S.W.2d 23, 25 (Ky. App. 1977).