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MARCH 12, 2003
(2002-SC-0683-D)

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000453-MR

ASHLEY JUDSON PARKER

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JUDGE
ACTION NO. 98-CI-00447

NATHAN SETH PARKER

APPELLEE

AND: NO. 2001-CA-000481-MR

NATHAN SETH PARKER

CROSS-APPELLANT

v. CROSS-APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JUDGE
ACTION NO. 98-CI-00447

ASHLEY J. PARKER (NOW NESBIT)

CROSS-APPELLEE

OPINION
REVERSING ON DIRECT APPEAL NO. 2001-CA-000453-MR;
VACATING AND REMANDING ON CROSS-APPEAL NO. 2001-CA-000481-MR
** ** * * * * *

BEFORE: GUIDUGLI, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Ashley Judson Parker brings Appeal No. 2001-CA-000453-MR and Nathan Seth Parker brings Cross-Appeal No. 2001-CA-000481-MR from a February 1, 2001 order of the Hopkins Circuit Court. We reverse on Appeal No. 2001-CA-000453-MR; we vacate and remand on Cross-Appeal No. 2001-CA-000481-MR.

Nathan and Ashley were married June 24, 1995. One child, Mary Alexandria, was born of the marriage on December 19, 1996. Neither party was employed during the marriage. Nathan was the beneficiary of two substantial trusts. The distributions from the trusts provided the parties' income and allowed for a high standard of living.

On April 1, 1997, Nathan was notified by the Superior Court of New Jersey that an order for child support would be entered against him April 15, 1997 in a paternity action. This action involved a child born in New Jersey in 1994 as a result of an earlier relationship. The order required Nathan to disclose his assets for the three years prior to the order. On the same day, April 1, 1997, Nathan transferred \$186,760.90 into a credit union account in Fort Campbell, Kentucky, which Ashley held jointly with her mother, Mary J. Poole. About two months later, he transferred \$94,242.75 into a separate "investment

account" in Ashley's name only with Harris Bank. Nathan ultimately settled the paternity action before filing any asset disclosure with the New Jersey court.

Nathan and Ashley separated in March of 1998. Ashley filed the instant action for dissolution July 6, 1998. The matter was referred to a Domestic Relations Commissioner (DRC), who filed a report and recommendation. Exceptions were taken by both parties. The circuit court adopted the DRC's recommendations in part, but granted some exceptions. The circuit court found, *inter alia*, that the parties should have joint custody of the infant child with Ashley having "final decision-making power"; that Nathan's income for the purposes of computing child support was \$275,000.00 a year, with a \$25,000.00 deduction for child support paid to his child in New Jersey. The circuit court further ordered that the funds transferred to the Fort Campbell credit union account and the Harris investment account be returned to Nathan as his non-marital property. This appeal and cross-appeal follow.

ASHLEY'S APPEAL NO. 2001-CA-000453-MR

Ashley contends the circuit court erred in restoring to Nathan the funds which he placed in her hands to avoid the impact of the New Jersey court. The circuit court restored the funds to Nathan as non-marital property. We believe this was error.

The funds were, of course, non-marital, but this begs the question of whether the equitable powers of the court may be invoked to cause their return to Nathan.

Ashley desires to invoke the ancient equitable maxim that one who seeks equity must come with clean hands. See Sherman v. Sherman, 290 Ky. 237, 160 S.W.2d 637 (1942). The circuit court, in fact, found that the money was transferred in an attempt to circumvent the New Jersey court:

It is the [circuit court's] finding that the transfers were made to avoid disclosure to the New Jersey court.

This finding is the predicate of Ashley's claim that Nathan should not recover the funds. She insists that Nathan's placing of the funds in her hands to evade action of the New Jersey court was sufficient evidence of wrongdoing to violate the clean-hands doctrine. This being so, she claims Nathan may not invoke the power of equity to cause their restoration.

It is well established that equity will not lend its aid to a party who attempts to defraud his creditors by transferring title of property to another. See Asher v. Asher,

278 Ky. 802, 129 S.W.2d 552 (1939); Ballance v. Ballance, 213 Ky. 73, 280 S.W. 473 (1926).

In Eline Realty Company v. Foeman, Ky., 252 S.W.2d 15 (1952), Eline transferred real property to Foeman for tax evasion purposes. Foeman, who was in a lower tax bracket, sold the property to a third party and incurred reduced tax liability. Eline reimbursed Foeman for the taxes. In subsequent litigation between the parties, Eline sought credit for the reimbursement made to Foeman. The Court refused and reasoned as follows:

In all cases involving moral delinquency or turpitude, all parties participating are deemed to be *in pari delicto*. (Citations omitted). Equity will not relieve one party against another where both are *in pari delicto*. (Citation omitted).

Id. at 19. In such a case, equity will leave the parties where it finds them. Id.; see also Ballance, 280 S.W. 473.

In the present case, Ashley and Nathan together attempted to hide assets from the New Jersey court by transferring the funds in question from Nathan to Ashley. This constituted an *in pari delicto* attempt to defraud the court.

We are aware the clean-hands doctrine is not inflexible and may be applied in consideration of the relative culpability of the parties. Cf. USACO Coal Company v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982). It is hard, however, to find greater culpability than that of attempting to defraud a court. It was Nathan and not Ashley who sought to lessen his

child support obligation in New Jersey by transferring funds to the latter. Certainly, such an act is more egregious than the transfer of real estate for the purpose of evading a levy of execution. See Asher, 129 S.W.2d 552.

Finally, we note that Nathan tries to escape the clean-hands doctrine by pointing out that he had settled his New Jersey litigation before he was required to make financial disclosure. Perforce, he argues there was no fraud upon the New Jersey court. We cannot offer him succor in this contention. The dispute here is not with the New Jersey court. Rather, it is a dispute with Ashley, with whom he stands *in pari delicto*. Had there been a dispute with the New Jersey court, perhaps his failure to consummate the fraud would have been material. Here, where the dispute is between two individuals of unclean hands, we think the failure to consummate the fraud upon the New Jersey court is of no consequence.

In sum, we are of the opinion that the circuit court erred in ordering restoration of the funds to Nathan. We think the funds should remain with Ashley; this being the situation in which the court found the parties.

NATHAN'S CROSS-APPEAL NO. 2001-CA-000481-MR

Nathan maintains that the circuit court erred by making Ashley "final decision-maker" in an award of joint

custody. We agree.¹

"[J]oint custody envisions shared decision-making and extensive parental involvement in the child's upbringing, and in general serves the child's best interest." Squires v. Squires, Ky., 854 S.W.2d 765, 769 (1993); see also Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391 (1992); Burchell v. Burchell, Ky. App., 684 S.W.2d 296 (1984). "The inherent nature of joint custody negates the possibility of vesting one parent with the primary authority to make decisions concerning the upbringing of the child." Aton v. Aton, Ky. App., 911 S.W.2d 612, 614 (1995). Upon the above authority, we are of the opinion the circuit court, in purporting to grant joint custody while using the limiting language of sole custody, failed to render a valid award of custody. Such custody arrangement is legally incongruous. As we understand the law, it does not permit the granting of joint custody on one hand, and, on the other hand, vesting primary decision-making power in one party.

In sum, we vacate the judgment of the circuit court and remand this cause for reconsideration as to custody of the infant child, at which time appropriate child support shall be considered.

For the foregoing reasons, the order of the Hopkins Circuit Court is reversed on Appeal No. 2001-CA-000453-MR, and

¹In her direct appeal, Ashley also maintained that the circuit court erred in fixing child support. As we view the circuit court's award of custody improper, we deem this assignment of error moot.

vacated and remanded on Cross-Appeal No. 2001-CA-000481-MR.

ALL CONCUR.

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