

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002624-MR
&
NO. 2007-CA-000444-MR

VANDANA KUMAT

APPELLANT

v. APPEALS FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 02-CI-00730

ASHUTOSH LOHE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; KNOPF,¹ SENIOR JUDGE.

STUMBO, JUDGE: In this consolidated appeal, Vandana Kumat appeals from Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage of the Knox Circuit Court (2006-CA-002624-MR), and from a subsequent Order (2007-

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CA-000444-MR) striking her post-decree affidavit. Ms. Kumat contends that the trial court abused its discretion in failing to award maintenance, in its division of the marital estate, and its award of child care expenses. She also argues that the court erred in failing to allow her to submit evidence of child care expenses incurred since August, 2004. For the reasons stated below, we affirm the judgment on appeal.

Ms. Kumat and Dr. Ashutosh Lohe were married in Jaipur, India on March 11, 1993. The marriage produced three children. The parties moved to the United States, and, after residing in California, moved to Kentucky in 1995.

Dr. Ashutosh is a medical doctor who was educated in India and the United States. He is board certified in medicine and nephrology. Ms. Kumat earned bachelor's degrees in physics, chemistry and applied statistics, and master's degrees in statistics and computer science. At the time the instant appeal was filed, she was taking course work towards a master's degree in computer science at Eastern Kentucky University.

The parties separated on June 9, 2001, and Ms. Kumat filed a petition for dissolution of marriage in Knox Circuit Court on October 18, 2002. The matter proceeded before the Domestic Relations Commissioner ("DRC"), who rendered her recommended Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage on April 3, 2006. After objections to the recommendations were considered, the circuit court accepted the recommendations and rendered its

Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage on July 7, 2006. It reserved for later adjudication the issue of attorney fees.

The court ruled in relevant part that Ms. Kumat was entitled to \$2,763.99 per month in child support and \$174,262.80 (after a \$10,000 credit) representing a division of the marital assets. It also determined that she was not entitled to permanent maintenance since she possessed the education and work skills to attain employment.² In so doing, it noted that Ms. Kumat earned approximately \$42,000 at her last full-time employment in 1999. The court found that Ms. Kumat had sufficient education to become employed full-time, and that her \$42,000 potential income in addition to the cash accounts, cash payment, stock and retirement award was sufficient to meet her minimum monthly expenses after the receipt of child support. Numerous additional findings and conclusions were rendered which are not relevant to the instant appeal.

Ms. Kumat first argues that the trial court erred in failing to render an award of maintenance. She maintains that the court ignored the evidence that her educational degrees were obsolete; that she has not worked in any meaningful way since 1993; and, that computer technology has advanced substantially since the single year of her most recent employment in 1999, rendering her background and training obsolete. She claims that the court erred in failing to determine that because of the age of her degrees and lack of experience, she is not a competitive candidate for the positions listed by Dr. Lohe's job placement witness. She also

² It appears from the record that Ms. Kumat received temporary maintenance during the pendency of the divorce, but the duration of the temporary support is not clear.

points to the fact she has three children to raise, which prevents her from becoming employed in the demanding field of private start-up technology. In sum, she seeks an order compelling the trial court to award maintenance.

KRS 403.200 states that,

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

- (d) The duration of the marriage;
- (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

The circuit court expressly found that Ms. Kumat possessed sufficient marital property to provide for her reasonable needs (KRS 403.200(1)(a)) and was able to support herself through appropriate employment (KRS 403.200(1)(b)).

This conclusion, which precedes any determination of the amount and duration of an award, is supported by substantial evidence of record. It is uncontroverted that Ms. Kumat has earned bachelor's degrees and two master's degrees in a variety of scientific applications, was employed in the field of computer science, and has received or is receiving additional educational experience in the field. In reaching its conclusion that Ms. Kumat is able to support herself through appropriate employment, the court expressly noted these accomplishments. While Ms. Kumat correctly notes that her educational achievements and work experience occurred some time ago, the court's conclusion that she is employable is supported by the record. We may not disturb that conclusion absent a finding that the trial court abused its discretion, or that its findings were clearly erroneous. *Perrine v. Christine*, 833 S.W.2d 825 (Ky. 1992). Accordingly, we find no error on this issue.

Ms. Kumat next contends that the circuit court erred in its division of the marital estate. The focus of her claim on this issue is that the marital estate was not equally divided. According to her calculations, the total value of the marital estate was \$557,999.97. Since she already possessed \$39,920.44, an “equalizing award” would have been \$239,079.55. Instead, she was awarded \$174,626.80 which is \$64,816.75 less than the amount to which she claims entitlement. She notes that the parties mutually agreed that she would forego a career outside the home and be the primary caretaker for their children. She further points out that she was instrumental in establishing Dr. Lohe’s career, and maintains that when the record is viewed as a whole it was clearly inequitable for her to receive less than one-half of the marital estate.

KRS 403.190(1) states that,

In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse’s property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

Of import is the requirement that the marital property be divided “in just proportions”:

In dividing marital property, including debts, appurtenant to a divorce, the trial court is guided by Kentucky Revised Statute (KRS) 403.190(1), which requires that division be accomplished in “just proportions.” This does not mean, however, that property must be divided equally. *Russell v. Russell*, 878 S.W.2d 24 (Ky.App.1994); *Wood v. Wood*, 720 S.W.2d 934 (Ky.App.1986). It means only that the division should be accomplished without regard to marital misconduct and in “just proportions” considering all relevant factors. *Brosick v. Brosick*, 974 S.W.2d 498 (Ky.App.1998). “Misconduct” relative to the dissipation of assets, however, is not marital in nature and may be considered.

Lawson v. Lawson, 228 S.W.3d 18 (Ky. App. 2007).

In the case at bar, the circuit court examined the contribution of each party, the duration of the marriage, the value of the property set apart to each party, and the economic circumstances of each party at the time the division became effective. While the circuit court could have relied on the same facts to reach a different conclusion, its division of marital property comports with the statutory requirement and is supported by the record. Accordingly, we find no error.

Ms. Kumat’s third argument is that the circuit court erred in its award of child care expenses. Specifically, she maintains that though the court properly awarded child care expenses incurred as a result of employment, it improperly

failed to award such expenses incurred as a result of her pursuit of education. She also claims that the court erred in failing to allow her to submit evidence of child care expenses incurred since August, 2004.

A brief recitation of the procedural history on this issue is required. On April 3, 2006, the DRC filed her Recommended Findings of Fact and Conclusions of Law. It ordered in relevant part that Ms. Kumat file within 30 days (of such date that the circuit court accepted the recommendation and rendered its final order) “evidence of actual work-related child care expenses that have been incurred since” August, 2004. (Emphasis original). This order was recommended by the DRC for the apparent purpose of resolving Dr. Lohe’s claim that he reimbursed allegedly work-related child care expenses which had not been incurred by Ms. Kumat.

On April 19, 2006, both parties filed exceptions to the recommendations. Ms. Kumat maintained that Paragraph 26 of the recommendation was not correct. It set forth the finding that Ms. Kumat continued to receive from Dr. Lohe the sum of \$200 per week for work-related child care expenses even though Ms. Kumat admitted that she did not incur any such expenses after August, 2004.

On July 7, 2006, the circuit court rendered a final decree and order overruling the exceptions with leave to supplement the record only on the issue of attorney fees. The decree was made final by way of an order rendered on August

21, 2006, which awarded to Ms. Kumat attorney fees and expressly stated that the July 7, 2006, decree was now final and appealable.

A motion to alter, amend or vacate was denied on November 22, 2006, and Ms. Kumat filed a notice of appeal on December 19, 2006.

On December 27, 2006, Ms. Kumat filed a “Notice of Compliance” purporting to give an accounting for her child care expenses. Dr. Lohe moved to strike the pleading, arguing that the filing was not timely and that jurisdiction over the proceeding had vested with the Court of Appeals by virtue of the filing of Ms. Kumat’s notice of appeal. The circuit court was persuaded by Dr. Lohe’s argument and rendered an order striking the Notice of Compliance on February 6, 2007.

The corpus of Ms. Kumat’s claim of error on this issue is threefold: first, that she was not awarded child care expenses incurred as a result of her pursuit of education; second, that the circuit court erroneously ordered her to provide evidence of actual work-related child care expenses incurred after August, 2004 (Case No. 2006-CA-002624-MR); and third, that the court erred in failing to allow her to provide evidence of actual work-related child care expenses incurred after August, 2004 (Case No. 2006-CA-000444-MR).

To clarify, Ms. Kumat’s second argument on this issue addresses the court’s final decree, wherein she was ordered to provide evidence of actual work-related child care expenses. Her third argument addresses the court’s post-decree order striking her affidavit addressing work-related child care expenses.

As to the first claim of error on this issue, to wit, that Ms. Kumat was improperly denied child care expenses arising from her pursuit of education, we find no error. While such expenses are compensable, they are limited to expenses related to “education leading to employment.” KRS 403.211(6). Since the court found that Ms. Kumat was employable without additional education, there is no basis for finding error on this issue. This is especially true given that the award of child care expenses is left to the discretion of the court. *Van Meter v. Smith*, 14 S.W.3d 569 (Ky. App. 2000).

Similarly, we find no error on Ms. Kumat’s second argument. The circuit court merely ordered her to produce evidence of actual work-related child care expenses incurred after August, 2004. This order was reasonably related to the award of child care expenses, and the record is devoid of any basis for concluding otherwise.

As to the remaining argument on this issue, i.e., that the court erred in failing to allow her to provide evidence of actual work-related child care expenses incurred after August, 2004, we must note that the Knox Circuit Court lost jurisdiction over the proceeding when Ms. Kumat filed the notice of appeal. “A notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court.” *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990).

The notice of appeal was filed on December 19, 2006, at which time jurisdiction vested with the Court of Appeals. *City of Devondale, supra*. On

December 27, 2006, Ms. Kumat filed an affidavit setting forth some of the child care expenses she incurred since August, 2004. Since the affidavit was filed after the circuit court lost jurisdiction, Dr. Lohe's motion to strike the affidavit was properly sustained on February 22, 2007. We find no error.

For the foregoing reasons, we affirm the Final Decree and subsequent Order Striking Affidavit of the Knox Circuit Court.

ALL CONCUR.

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