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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001211-MR

MICHAEL HARSTAD APPELLANT

v.

APPEAL FROM JESSAMINE FAMILY COURT
HONORABLE C. MICHAEL DIXON, JUDGE
ACTION NO. 04-CI-00361

BONNIE HARSTAD APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

KELLER, JUDGE: In this dissolution action, Michael Harstad has appealed from the judgment of the Jessamine Family Court related to property division and visitation. We affirm.

Michael and Bonnie Harstad were married in St. Louis County, Missouri on June 1, 1974. Three children were born of the marriage, and the youngest, Keith, has not yet reached the age of majority. Michael and Bonnie

separated on June 6, 2003, and Michael filed a Petition for Dissolution of Marriage on May 24, 2004. At the time he filed the petition, Michael was a college professor; he now works at a Louisville high school. Bonnie is a musician and music teacher.

This action was initially assigned to Jessamine Circuit Court Judge Hunter Daugherty and, in turn, to then-Domestic Relations Commissioner C. Michael Dixon (the DRC), who heard the proof in this case. Although the record is somewhat unclear, the DRC scheduled a hearing for December 16, 2005. At that time, the parties addressed motions concerning custody, support, and the payment of the mortgage on the marital residence. The DRC's January 3, 2006, report concerning those issues was confirmed by the circuit court in an order entered February 7, 2006.

A final hearing was scheduled for January 6, 2006, on the remaining issues, including the division of marital property.[1] The DRC issued a report on January 9, 2006, detailing his findings and recommendations as to the division of real estate, automobiles, and retirement and investment accounts, among other issues. Bonnie filed timely exceptions to the DRC's report, addressing her ability to raise non-marital claims, the assignment of non-marital interests, the DRC's failure to address one of the Schwab accounts, the value of various accounts, the division of credit card debt, and the division of musical instruments and other

[1] The record of this hearing is not in the certified record. We have attempted to retrieve the videotaped recording of this hearing from the clerk's office in the Jessamine County, but it is apparently missing.

personalty.[2] On January 26, 2006, the circuit court entered a calendar order, in which it granted the decree of dissolution and ordered the parties to submit the decree, including all resolved matters. The unresolved matters would then be referred back to the DRC. The decree was eventually entered on March 27, 2006. That order also confirmed the DRC's report as to custody, support and partial timesharing. The circuit court specifically remanded all other issues that were not resolved by the decree to the DRC for hearing, redetermination, and report.

A trial on the remaining issues was held on January 9, 2007. By that time, the DRC had been sworn in as the new family court judge and was presiding over this action as the judge, rather than as a DRC. Prior to the trial, the parties filed their respective trial disclosure statements pursuant to the discovery schedule. In addition to the property issues, the family court heard testimony concerning the visitation schedule. Bonnie moved the family court to modify Michael's visitation due to a change in circumstances, in that she no longer had any leisure time with Keith. Regarding the visitation issue, the family court found that the parties' situations had changed and that it would be in Keith's best interest to modify visitation. It then entered a new visitation schedule effective January 9, 2007. Michael filed a CR 52.02 motion requesting that the family court make findings of fact on its decision to modify visitation.

On May 23, 2007, the family court entered an order addressing the property issues as well as the previously decided visitation issue. In many

[2] Bonnie specifically contested the valuation amount of the marital residence, as the DRC used an incorrect mortgage payoff amount.

instances, the family court indicated that a particular issue had been dealt with at the first hearing and adopted the earlier factual findings as to that issue. After assigning non-marital interests, including assigning Bonnie a non-marital interest in the Corbitt Drive property in the amount of $84,150, the family court split the marital equity equally between Bonnie and Michael. It is from this order that Michael has appealed.

On appeal, Michael argues that 1) he was denied his due process right to a fair hearing; 2) the family court's findings on the amount of equity in the marital home were erroneous; 3) the family court failed to follow KRS 403.190 in dividing the property; 4) the family court erred in finding a gift from Bonnie's father to her in relation to the Corbitt Drive real estate; 5) the family court committed error regarding its award and division of the Mazda and in allocating credit card debt; and 6) the family court erred in modifying visitation. In her brief, Bonnie responds to each of Michael's arguments, and specifically argues that several of his arguments were not preserved for appeal. We shall review each of the six issues in the order as they appear in Michael's brief.

Our standard of review is set forth in *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003):

> Under CR 52.01, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." *See also Greater Cincinnati*

> *Marine Service, Inc. v. City of Ludlow*, Ky., 602 S.W.2d 427 (1980). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, Ky., 976 S.W.2d 409, 414 (1998); *Uninsured Employers' Fund v. Garland*, Ky., 805 S.W.2d 116, 117 (1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. *Golightly*, 976 S.W.2d at 414; *Sherfey v. Sherfey*, Ky.App., 74 S.W.3d 777, 782 (2002). An appellate court, however, reviews legal issues *de novo*. *See, e.g., Carroll v. Meredith*, Ky.App., 59 S.W.3d 484, 489 (2001). (Footnote omitted).

With this standard in mind, we shall consider the issues raised in the present action.

1) Lack of Due Process

For his first argument, Michael contends that his due process right to a fair hearing was violated. He bases this argument on what he described as a disjointed and piecemeal procedural history that took place in this action. Specifically, Michael contends that the family court should have reheard all of the property issues, as it was precluded from relying upon any testimony or evidence from the first hearing in January 2006. Bonnie disagrees with Michael's contentions, arguing that he failed to preserve the issue below for our review or list it as an issue in his prehearing statement, that he agreed to the use of the factual findings from the first hearing as evidence at the second one, and that the case law is not supportive of his argument.

In his prehearing statement, Michael listed the following issues that he would be raising in his appeal:

> VISITATION: Court failed to make specific findings and abused its discretion in restricting Appellant's visitation.
>
> PROPERTY: Court erred in awarding Appellee non-marital property found to be and designated to be Appellant's. Court failed to award Appellant his non-marital interest in the marital residence and awarded Appellee an improper share of the marital residence.

Michael did not list any issue as to his claimed violation of his due process rights to a fair hearing. Accordingly, we agree with Bonnie that Michael failed to raise this issue before the family court or list it as an issue on his prehearing statement, precluding appellate review.

Before an issue may be raised on appeal, "a trial court must first be given the opportunity to rule on a question for which review is sought." *Taxpayer's Action Group of Madison County v. Madison County Board of Elections*, 652 S.W.2d 666, 668 (Ky. App. 1983). Failure to do so renders an argument unpreserved for appeal. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995). Furthermore, CR 76.03(8) provides: "A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." The Supreme Court of Kentucky addressed an appellant's failure to list an issue on his civil prehearing statement in *Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000):

> We must also note that Payne has failed to preserve properly his claim against the diocese. Civil Rule 76.03(8), provides that a party shall be limited on appeal to the issues in the prehearing statement before the Court of Appeals. Here, the civil appeal prehearing statement contained no issue regarding the diocese. The argument sections of the brief of Payne in the Court of Appeals referred only to the ruling of the circuit court regarding the conduct of Osborne. The failure to argue before the Court of Appeals that summary judgment was improper as to the diocese is tantamount to a waiver. *Cf. Hall v. Kolb*, Ky., 374 S.W.2d 854 (1964). Any part of a judgment appealed from that is not briefed is affirmed as being confessed. *Cf. Stansbury v. Smith*, Ky., 424 S.W.2d 571 (1968).

Despite our holding that Michael failed to preserve this issue, our review of the videotaped records reveals that the parties extensively discussed this issue on several occasions below, including on the morning of the January 2007 hearing. At that time, the parties indicated that they agreed that the testimony from the January 2006 hearing (with a few exceptions, including the amounts of the respective investment accounts) would stand, and that the family court could rely on the previous recommendations as made by the DRC. They agreed that the only disputed issues at the 2007 hearing would relate to the marital shares in the Corbitt Drive house, the Mazda and the Harley Davidson motorcycle, as well as visitation and other expenditures. Therefore, we disagree with Michael's contention that he was entitled to a new trial *de novo* on all of the property matters at issue or that he was denied any of his due process rights. The family court did not commit any error in adopting several of the DRC's prior recommended findings in its final judgment.

2) Corbitt Drive *Brandenburg* Calculation

Next, Michael attacks the family court's *Brandenburg*[3] calculation concerning the marital residence on Corbitt Drive. Michael argues that the family court used the wrong amount of equity in its calculation; that the family court did not show its calculation; and that Bonnie was precluded by her prior judicial admission from asserting that there was an additional gift. Bonnie disputes each of these arguments.

First, we agree with Bonnie that the family court used the correct equity amount in its calculation, although in the body of the order the number is incorrect. As Bonnie pointed out, the spreadsheet attached to the judgment contained the correct equity amount, $158,572, rather than the incorrect amount mentioned in the body, $155,572. Likewise, we perceive no error with regard to the family court's failure to set out its calculations, as the calculation that it ultimately used was set forth in the record. Finally, Bonnie was not limited in claiming that she had an additional non-marital interest in the Corbitt Drive property, and was not precluded by what Michael described as a "judicial admission" in the first hearing from supplementing her proof in the second one.

3) Application of KRS 403.190

Next, Michael contends that the family court failed to follow the mandatory three-step process as outlined in KRS 403.190 when it assigned and divided the property. Bonnie asserts that this issue was not preserved below and

[3] *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. App. 1981).

was not included as an issue on Michael's prehearing statement, precluding our review. She also asserts that the family court properly followed the three-step process and was not precluded from using findings from the first hearing before the DRC. While we agree with Bonnie that Michael did not specifically preserve this issue below or in his prehearing statement, we shall briefly review it.

The Supreme Court of Kentucky extensively addressed the classification and division of property in *Sexton v. Sexton*, 125 S.W.3d 258, 264-65 (Ky. 2004):

> The disposition of parties' property in a dissolution-of-marriage action is governed by KRS 403.190, and neither record title nor the form in which it is held, *e.g.*, partnership, corporation, or sole proprietorship, is controlling or determinative. Under KRS 403.190, a trial court utilizes a three-step process to divide the parties' property: "(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties." "An item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court." Neither title nor the form in which property is held determines the parties' interests in the property; rather, "Kentucky courts have typically applied the 'source of funds' rule to characterize property or to determine parties' nonmarital and marital interests in such property." "The 'source of funds rule' simply means that the character of the property, *i.e.*, whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire the property." (Footnotes omitted).

Our review of the record supports Bonnie's argument that the family court properly followed the three-step process set out in KRS 403.190 by first characterizing and assigning the non-marital property, and then equitably dividing the remaining marital property between Bonnie and Michael. This is clear from the spreadsheet the family court attached to its final judgment, in which it set forth the assets, along with each asset's value, net equity, any non-marital interests, marital equity, and the ultimate division. As we stated earlier, the family court was not precluded from relying upon the findings from the January 2006 hearing to support its ultimate decision.

4) Gifts from Bonnie's Father

Michael next argues that the family court erred when it determined that money from Bonnie's father, Edward Nissen, was her non-marital property, rather than a part of the marital estate. The family court determined that Bonnie was given a total of $21,000 by her father, which was traced to the purchase of real estate and the building of the residence on Corbitt Drive. Michael asserts that the family court prejudged this issue and that there was not clear and convincing evidence that the transfers of money were gifts to her. Bonnie contends that Michael failed to preserve the argument that the family court prejudged this issue, that the proper standard of proof is the preponderance of the evidence standard, and that the family court's decision that the gifts were to Bonnie alone was supported by substantial evidence of record.

We agree with Bonnie that Michael failed to preserve his argument that the family court prejudged this issue in determining that the transfers were gifts to Bonnie. Therefore, we shall concentrate our review on the decision itself.

We recognize that gifts are specifically excluded from marital property pursuant to KRS 403.190(2)(a): "'[M]arital property' means all property acquired by either spouse subsequent to the marriage except: (a) Property acquired by gift . . . during the marriage and income derived therefrom[.]" In *Hunter v. Hunter*, 127 S.W.3d 656 (Ky. App. 2003), this Court addressed the application of this subsection, and specifically stated that "[t]he party claiming property acquired after the marriage as his/her nonmarital property through the gift exception bears the burden of proof on that issue." *Id*. at 660. Regarding the standard of proof, the Court stated, in a footnote, "that the preponderance of the evidence standard is the proper standard of proof necessary to rebut the [marital property] presumption." *Id*. at 660 n.8. The Court then listed the relevant factors a lower court must consider in determining whether property was a gift, including "the source of the money used to purchase the item, the intent of the donor, and the status of the marriage at the time of the transfer." *Id*. at 660. However, the Court made it clear that "the intent of the purported donor is considered the primary factor in determining whether a transfer of property is a gift." *Id*. Finally, the Court stated that "[w]hether property is considered a gift for purposes of a divorce proceeding is a factual issue subject to the clearly erroneous standard of review." *Id*. We specifically reject Michael's assertion that a clear and convincing standard of proof

applies in this case, and agree with Bonnie's argument that a preponderance standard applies.

We have also examined *Sexton* for its explanation of the concept of tracing, as it applies to determining whether property, or some portion of it, is marital or non-marital:

> "Tracing" is defined as "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present." In the context of tracing nonmarital property, "[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset." The concept of tracing is judicially created and arises from KRS 403.190(3)'s presumption that all property acquired after the marriage is marital property unless shown to come within one of KRS 403.190(2)'s exceptions. A party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof. (Footnotes omitted).

Sexton, 125 S.W.3d at 266.

Turning to the record in the present case, we agree with Bonnie that substantial evidence supports the family court's decision on this issue, specifically the deposition testimony of Mr. Nissen in which he testified that the gifts of money he gave were intended for Bonnie, not Bonnie and Michael. Furthermore, Michael agreed that the $16,000 was a gift from Bonnie's father. Although this is a close call, especially due to the timing of the transfers of money several years before the separation, we decline to disturb the family court's decision on this issue.

5) Apportionment of Mazda and Credit Card Debt

Next, Michael contends that the family court committed error in failing to credit him with his non-marital portion of the Mazda, along with his marital portion, and in failing to allocate the credit card debt as it did in the first order. We agree with Bonnie that Michael failed to preserve these issues for our review by moving the family court to amend its order pursuant to CR 52.02 or CR 59.05. Michael is precluded from seeking such review before this Court by operation of CR 52.04.

Despite this holding, it appears to the Court that Michael was indeed assigned his non-marital portion of the Mazda. The family court assigned the non-marital portions of the Mazda to Michael and Bonnie, and then divided the remaining marital portion of the Mazda equitably between them. It further appears that the credit card debt issue was addressed in the first order and was not disputed by Michael.

6) Visitation

For his final argument, Michael contends that the family court erred in modifying his visitation schedule with their youngest son, Keith. For four years, Michael exercised visitation with Keith every weekend, based on his and Bonnie's respective work schedules. Once Bonnie stopped home-schooling Keith, she did not have as much time with him as she did before, which led her to file a motion to modify visitation. In a calendar order entered on January 9, 2007, following the second hearing, the family court wrote: "The parties' situation has changed for [Bonnie] and for the child, leaving [Bonnie] with no liesure [sic] time. The

attached schedule is Ordered." The attached schedule provided for visitation between Michael and Keith during the first, third, and fifth weekend of each month, for two evenings per week, as well as holidays. Presumably based upon Michael's request for findings pursuant to CR 52.02, the family court made additional findings in its May 23, 2007, order:

> [Bonnie] seeks a change in visitation for the son with the father. Her employment situation has changed and the son's schooling has changed over time. She now is off on weekends and works some evenings. He [sic] child now attends public [school] and returns home later than previously with home school and at a private school. She states that her only time with the child is on school nights and that her interaction is by necessity that of disciplinarian or taskmaster i.e., homework, bed time etc. She states that this is not in the best interests of the child and that he and she also need to spend casual leisure time where the interaction is not so skewed to making sure tasks are accomplished as he does with his father. The court agrees and the schedule attached to the order of January 9, 2007 is adopted and ordered.

Michael contends that the family court did not have any basis for restricting his visitation with Keith and did not make sufficient findings to warrant the modification. Bonnie disagrees, asserting that the family court entered sufficient findings to support its decision to modify visitation.

The law applicable to visitation is set forth in KRS 403.320:

> (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration,

conditions, and method of scheduling visitation and which reflect the development [sic] age of the child.

(2) If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.

(3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

In *Hornback v. Hornback*, 636 S.W.2d 24, 26 (Ky. App. 1982), this Court addressed the requirements of KRS 403.320 as follows:

> Under K.R.S. 403.320(1), the noncustodial parent has absolute entitlement to visitation unless there is a finding of serious endangerment. No "best interests" standard is to be applied; denial of visitation is permitted only if the child is seriously endangered. . . .
>
> Under subsection (2)[4] of the statute, a "best interests" of the child standard is required when a judgment is sought to be modified. In modifying a previous denial of visitation to allow visitation, there is no presumption, as in subsection (1), of entitlement to visitation. Instead, the child's best interests must prevail. . . .
>
> We interpret the second clause of subsection (2) as referring to a situation where a party seeks to modify visitation rights that have been previously granted. In such a situation the court may not take away a parent's visitation rights without a showing that the child would

[4] In the current version of the statute, this is subsection (3).

> be seriously endangered by visitation. The standards for modifying a judgment to disallow visitation are no less stringent that the standards to deny visitation at the outset of the case. Once a finding has been made that the children's welfare is endangered, however, the court may not modify the judgment without finding that the best interests of the child are served.

For purposes of the present case, we must first determine whether Michael's visitation with Keith was restricted by the modification. In such cases, the statute requires a showing of serious endangerment before visitation with the non-custodial parent may be restricted. KRS 403.190(3). However, we note that "[a]s used in the statute, the term 'restrict' means to provide the non-custodial parent with something less than 'reasonable visitation.'" *Kulas v. Kulas*, 898 S.W.2d 529, 530 (Ky. App. 1995). When viewed in this light, it does not appear that Michael's visitation was restricted, as he would continue to receive reasonable visitation with Keith pursuant to the schedule adopted by the family court. Accordingly, we must review the family court's decision in light of the best interest of the child. KRS 403.190(3). The evidence introduced at the hearing, as set forth in the family court's findings, supports the decision to modify Michael's visitation. The modification was in Keith's best interest, as it would provide Bonnie with the leisure time with Keith that she no longer had, and the family court specifically found that it was not in his best interest to interact with Bonnie in a purely disciplinarian role. Therefore, we hold that the family court did not commit any error or abuse its discretion in modifying Michael's visitation with Keith.

For the foregoing reasons, the judgment of the Jessamine Family Court is affirmed.

ALL CONCUR.

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