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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001772-MR

TIMOTHY FOSTER BEAVERS

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 06-CI-00025

KAREN KAY BEAVERS

APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** * ** * ** *

BEFORE: CAPERTON AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

MOORE, JUDGE: Timothy Foster Beavers appeals from an order of the Grant Circuit Court in which the trial court adopted several recommendations made by a court-appointed Domestic Relations Commissioner (DRC), which resolved the outstanding issues in the parties' dissolution action. On appeal, Timothy argues

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the DRC took improper judicial notice of information regarding an unrelated visitation case, failed to consider evidence regarding Karen Beavers' allegedly violent behavior, and inequitably divided the parties' debts and assets. After reviewing the parties' briefs and the applicable law, we affirm in part, vacate in part, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Karen and Timothy were married in 1998, and during the marriage, they had two sons, one born in 1999 and the other born in 2001. Timothy also had a child from a prior relationship but did not have custody of that child. In early 2006, Timothy filed a petition for dissolution in the Grant Circuit Court. The dissolution case was referred to the DRC. Upon the DRC's recommendation, the trial court entered a decree which dissolved the parties' marriage but reserved the issues of custody and property division for later resolution.

After holding a final hearing, the DRC filed his report with the trial court. Regarding custody, the DRC reluctantly recommended the trial court grant joint custody to the parties. The DRC also recommended that Karen should be appointed as the children's primary residential custodian, contrary to Timothy's expressed desire for the parties to share equal parenting time.

Concerning the parties' assets and debts, the DRC recommended that the trial court award a 2004 Chevrolet Silverado pick-up truck and a 1993 GMC Rollback wrecker to Timothy and that Timothy refinance the debts secured by

those vehicles to remove Karen's name from those debts. The DRC recommended that the trial court award a 1999 Chevrolet Suburban to Karen.

After the DRC filed his report, Timothy filed written objections and two sets of amended objections to the DRC's recommendations. In his objections, Timothy claimed the DRC, in analyzing the custody issue, considered Timothy's prior visitation case involving his prior-born child. The DRC found that although Timothy had established a relationship with the child, he later stopped having contact with the youngster and consistently failed to pay child support for that child. Timothy argued no evidence was presented at the final hearing about his prior visitation case. He also claimed he did not receive notice that the DRC was going to use his prior case against him, which denied him the opportunity to refute the DRC's statements.

In addition, Timothy noted in his objections that the DRC found that no evidence had been introduced at the final hearing that would cast doubt on Karen's parenting abilities. According to Timothy, several witnesses testified regarding Karen's violent tendencies and the DRC found Karen had, on more than one occasion, acted violently and irrationally in quarrels over the parties' parenting time. Thus, Timothy reasoned the DRC erred when it found no evidence had been introduced to cast doubt on Karen's parenting ability. In his second set of amended objections, Timothy objected to the DRC's recommendations regarding the vehicles, claiming the division was inequitable.

Ultimately, the Grant Circuit Court overruled Timothy's objections and adopted the above recommendations from the DRC's report. Timothy, subsequently, appealed to this Court.

II. STANDARD OF REVIEW

When we review a trial court's child custody decision, we will not reverse unless its findings of fact are clearly erroneous or its decision reflects a clear abuse of the considerable discretion granted trial courts in custody matters. Kentucky Rule of Civil Procedure (CR) 52.01. *See also Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986).

Regarding the distribution of debts and assets, the lower court has very broad discretion to fashion a fair and appropriate remedy. *Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky. App. 1988); *see also Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). Thus, we may only reverse if the court has abused its considerable discretion. *Herron*, 573 S.W.2d at 344. A court has abused its discretion when it has acted arbitrarily, unreasonably or unfairly or if its decision was unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

Furthermore, we must give due deference to the lower court's opportunity to judge the credibility of witnesses. Hence, if there is a conflict in the evidence, the trial court, not this Court, has the responsibility to decide which evidence to believe. *See Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. App. 1980); *Adkins v. Meade*, 246 S.W.2d 980 (Ky. 1952).

III. ANALYSIS

A. JUDICIAL NOTICE

In Timothy's brief, he renews his challenge to the DRC's statements regarding his prior-born child. Timothy claims the DRC took judicial notice of this information. Citing *Colley v. Colley*, 460 S.W.2d 821, 824 (Ky. 1970), Timothy asserts a court may only take judicial notice of matters of common knowledge that would be known to the court acting in its judicial capacity. Moreover, a court cannot base its decision on such individual knowledge. *Id.* Timothy argues a court must only act on the evidence presented before it. *Gray v. Commonwealth*, 264 S.W.2d 69, 71 (Ky. 1954). A court is also prohibited from privately investigating a pending matter and cannot base its decision on the results of its private investigation. *Id.*

Timothy argues the DRC erred in taking judicial notice of his behavior in his prior case and reiterates no evidence about that case was introduced at the final hearing. According to Timothy, the DRC's statements were not amenable to cross examination; thus, he was deprived of the opportunity to learn the basis of the statements. Furthermore, Timothy argues the DRC based his decision on his personal knowledge about Timothy's visitation case rather than the evidence adduced at the final hearing.

In the DRC's report, he stated

[Timothy] appeared before this Court several years ago seeking visitation with his other child. He made a similar argument at that time that it would be in that child's best

interest to know and have a relationship with his father. This visitation was granted. After establishing a relationship with this child, [Timothy], for whatever reason, has now limited or no contact with him. Further, he is continuously behind on his support obligation and has, on at least one occasion, been charged criminally for nonsupport.

Kentucky Rule of Evidence (KRE) 201 governs the doctrine of judicial notice and reads in its entirety,

- a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
 - (1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or
 - (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) When discretionary. A court may take judicial notice, whether requested or not.
- (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.
- (g) Instructing the jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

Hence, according to the rule, a court may take judicial notice of a fact at any time, whether or not a party so requests. KRE 201(c) and (f). However, there are limits on a court's ability to take judicial notice. As subsection (a) points

out, a court may only take notice of an “adjudicative fact.” Unfortunately, the rule does not define that term. Quoting the drafters of the Federal Rules of Evidence, Professor Robert G. Lawson defines “adjudicative fact” as a fact to which the law is applied in the adjudicative process that would normally go to a jury and relates to the parties, their activities, their properties, or their businesses. ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 1.00[2][c] (4th ed. 2003). In the present case, the DRC took judicial notice that, allegedly, Timothy has no contact with his prior-born child and is in arrears regarding his child support obligation for that child. These facts are from Timothy’s prior visitation case; however, the record in this present case does not mention this prior proceeding. Moreover, the DRC did not explain whether these facts were adjudicative. As a result, we cannot determine whether this information constitutes adjudicative facts.

Still, even if these facts are adjudicative, it does not mean they are judicially noticeable. To be noticeable, they must meet other requirements.

According to Professor Lawson,

KRE 201 establishes **indisputability** as the prerequisite for notice, provides a traditional general definition of this requirement (i.e., “not subject to reasonable dispute”), and then defines two independent tests by which to judge the indisputability of given facts. Under the first test, a fact is noticeable if it is “generally known within the county from which the jurors are drawn, or, in a non-jury matter, the county in which the venue of the action is fixed.” Under the second, a fact is noticeable if it is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 1.00[3][a] (4th ed. 2003) (citations omitted and emphasis added.). To reiterate, for a fact to be noticeable, it must be indisputable pursuant to one of the two tests set forth in KRE 201(c)(1)-(2). However, in the present case, there is nothing in the record that would allow us to determine whether these facts are indisputable. In addition, the record does not contain any information that would allow us to determine whether these facts meet either of the tests found in the rule.

The facts about the prior-born child may or may not be judicially noticeable. But without an explanation in the record regarding the DRC's reasons for relying on them, as an appellate court we are in no position to make such a determination. Because the DRC and the trial court relied on these facts in naming Karen as the children's primary residential custodian, we must vacate that part of the trial court's order adopting that part of the DRC's report and remand the issue to the lower court.

Upon remand, the circuit court should determine whether these facts meet the requirements discussed *supra*. If the facts do not pass muster, then the court should revisit the issue of primary residential custodian versus equal parenting time without considering those facts. However, if the court determines the facts are judicially noticeable, it must give Timothy an opportunity to be heard per KRE 201(e) before it relies on those facts in revisiting this issue.

B. WITNESS TESTIMONY

In analyzing the custody issue, the DRC found, “No evidence was introduced which would bring the abilities of [Karen] into question.” On appeal, Timothy insists this finding was erroneous. According to Timothy, he testified at the final hearing about multiple incidents in which Karen acted violently toward him. To support his contention, Timothy points out that Karen’s brother testified that Karen has a bad temper and Karen admitted she had bit Timothy on the arm. Consequently, Timothy claims there was ample evidence of Karen’s violent tendencies introduced at the final hearing, which the DRC ignored.

According to Kentucky Rule of Civil Procedure (CR) 53.06(2),

[w]ithin 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04. The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

Pursuant to this rule, the trial court was free to use the DRC’s report as it saw fit as a tool to resolve the parties’ case. Turning to the trial court’s order, we find that the lower court unequivocally adopted paragraphs one, two, three, four, seven, eight, nine, ten, and eleven of the recommended order found in the DRC’s report.² Additionally, the trial court adopted but modified paragraph six of the recommended order and rejected paragraph five. Furthermore, the trial court specifically adopted recommended conclusion of law number six. In this

² The DRC’s report consisted of three sections: findings of fact, conclusions of law, and recommended order.

recommended conclusion, the DRC analyzed and resolved the custody issue by granting joint custody and naming Karen as the primary residential custodian.

However, regarding all of the DRC's recommended findings of fact and the remainder of its recommended conclusions of law, the trial court's order is silent.

Hence, while we know the trial court adopted some of the DRC's report, we do not know which parts the trial court rejected, creating ambiguity in its order.

In Timothy's brief, he argues the testimony adduced at the final hearing contradicts the DRC's finding, "No evidence was introduced which would bring the abilities of [Karen] into question." When the trial court adopted recommended conclusion six, it adopted this finding. However, in recommended finding of fact number eight, the DRC found, "It is clear from the testimony that the wife has, on more than one occasion, acted violently and irrationally in disputes regarding parenting time." Obviously, finding number eight contradicts the finding in conclusion number six. In addition, finding number eight demonstrates the DRC considered the evidence regarding Karen's allegedly violent tendencies and found that evidence both credible and persuasive. As a result, there is an irreconcilable inconsistency between finding number eight and conclusion number six.³

³ Although the issue of joint custody is not before us, the DRC's treatment of this issue reveals further inconsistencies in his report. In recommended conclusion of law number six, the DRC found that both parties had continually acted immaturely and selfishly and concluded that they could not cooperate with one another to act in the best interest of the children. Yet, despite this conclusion, the DRC recommended joint custody because the parties requested it.

Due to this inconsistency and the ambiguity in the trial court's order, we cannot resolve Timothy's assignment of error because our analysis of this issue would differ depending on whether the trial court adopted or rejected recommended finding of fact number eight. For example, if the trial court, in fact, rejected finding number eight, the inconsistency would not be before us, and we could surmise the trial court, acting as the fact-finder, considered the evidence cited in Timothy's brief, found it lacking in credibility and rejected it. Of course, such decisions would fall squarely within the trial court's discretion as the fact-finder under the prevailing case law. *See Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985) (The fact-finder has the sole discretion to determine the quality, character, and substance of the evidence.); *Ghali*, 596 S.W.2d at 32 (The fact-finder has the sole duty to judge the credibility of the witnesses and may choose to believe or disbelieve any part of the witnesses' testimonies.). Consequently, if the trial court has rejected finding number eight, then Timothy's argument is effectively eviscerated.

On the other hand, if the trial court has adopted recommended finding of fact number eight, the inconsistency would be before us. We could infer the trial court considered the evidence regarding Karen's alleged violent behavior, found it credible and persuasive yet, without any explanation, decided this behavior, which would ordinarily reflect negatively on a parent's ability, did not reflect poorly on Karen's parenting ability. Without an explanation from the trial

court clearing up the inconsistency, Timothy's argument on appeal would be much stronger.

Because of the ambiguity in the trial court's order and inconsistencies in the DRC's report, we remand this matter to the trial court with instructions for it to clarify which parts of the DRC's report it has adopted and which parts it has rejected. Upon making this decision, we instruct the trial court to revisit, as previously instructed, the issue of equal parenting time versus primary residential custodian in light of which findings the trial court has adopted and/or rejected.

C. THE PARTIES' VEHICLES

On appeal, Timothy points out that the 2004 Chevrolet Silverado he received was encumbered by substantial debt, which he must pay off, while the 1999 Suburban received by Karen was debt free. Timothy believes that this was an inequitable distribution of the parties' assets and debts.

Timothy also takes issue regarding the 1993 GMC Rollback. According to Timothy, Karen borrowed \$12,000.00, securing the loan with the Rollback. Timothy explains Karen obtained the loan after the parties had separated in order to pay for a surgical procedure and avers the DRC failed to address this loan. According to Timothy, the DRC erred by not recommending that Karen refinance, pay off, and transfer the Rollback to Timothy.

As previously mentioned, a family court has very broad discretion in dissolution proceedings to fashion a fair and equitable remedy. *Cochran*, 746 S.W.2d at 570; *see also Herron*, 573 S.W.2d at 344. We will not disturb the

court's decision regarding the distribution of assets and debts unless the court abused its vast discretion. While Timothy insists the DRC's decision was inequitable, he has failed to demonstrate an abuse of discretion. Absent such abuse, we will not disturb the lower court's decision.

E. CONCLUSION

For the foregoing reasons, that part of the Grant Circuit Court's order adopting the DRC's recommendation regarding the issue of primary residential custodian versus equal parenting time is vacated, and the matter is remanded for further proceedings not inconsistent with this opinion. The remainder of the circuit court's order is affirmed.

ALL CONCUR.

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