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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000255-MR
AND
NO. 2009-CA-000662-MR

MICHAEL FOLK — APPELLANT

v.

APPEALS FROM BOONE FAMILY COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 06-CI-01661

KATHRYN FOLK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; SHAKE,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Michael Folk appeals from orders of the Boone Family Court dividing his marital property, denying him maintenance, and denying his motion for a change of venue. For the reasons stated, we affirm.

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On August 30, 2006, while residing in Boone County, Kathryn Folk filed a petition to divorce Michael after a twenty-six year marriage. Michael, who resided in Kenton County, filed a response alleging that the marriage was not irretrievably broken and requested reconciliation. Over the next year and a half, the parties engaged in numerous discovery requests and motions to prevent the dissipation of marital property.

On January 31, 2008, Michael, an Administrative Office of the Courts Staff Attorney, joined as co-counsel of record in the action. On February 20, 2008, an agreed order was entered stating that Michael had withdrawn $58,870.61 from the parties' joint account for his personal use after the separation. The order also stated that Michael withdrew $30,000 on November 26, 2007, and November 27, 2007, from the parties' joint Fidelity account. The agreed order further directed that Michael "account for his exclusive withdrawal of the aforementioned funds, whereupon the Petitioner may be entitled to a distributive share of the withdrawals made by the Respondent . . . ."

On March 6, 2008, the family court issued a divorce decree dissolving the parties' marriage and reserving the matter of the division of their property. On April 4, 2008, Michael moved for temporary maintenance and listed his monthly living expenses as $3,110. Michael also filed a Kenton District Court action against Kathryn and her sister, Rosanne Rickabaugh, for damages arising from the sale of a van, which he partially owned, to Rosanne. He alleged that Kathryn was interfering with his ability to receive the payments for the van.

On May 5, 2008, the family court conducted an extensive hearing regarding the classification and value of the parties' property. On June 5, 2008, the family court issued its "SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW" and its "SUPPLEMENTAL DECREE." In its supplemental findings and decree, the family court made extensive findings of fact and conclusions of law regarding the majority of the parties' assets with the only remaining issues being Michael's maintenance claim and the classification and distribution of a Fidelity account financed by Michael's mother.

On June 25, 2008, Michael moved to alter or amend the family court's supplemental findings and decree. The family court denied this motion on the ground that it was outside of the ten-day period of CR[2] 59.05. Subsequently, the family court denied Michael's claim for maintenance and ruled that the Fidelity account funded by Michael's mother was non-marital property. Additional facts relevant to the issues on appeal will be set forth as the claims are reviewed.

Michael contends that the family court's factual finding that he agreed to legally pursue Kathryn's sister, not Kathryn, for any remaining debt owed on the van that he sold to Kathryn's sister was erroneous. He contends that he did not agree to release Kathryn from reimbursing him for all of the van payments that she collected from her sister but did not forward to him.

During the parties' marriage, Michael inherited a share of the ownership of a van from his uncle. The van, a non-marital asset, was purchased by

[2] Kentucky Rules of Civil Procedure (CR).

Kathryn's sister for an amount of which $3,250 was owed to Michael. Kathryn's sister gave Kathryn a $1,500 check, which was deposited into the couple's joint checking account. After the couple separated, Kathryn received an additional $600 from her sister toward the van payments. During the divorce proceedings, the family court found that Kathryn agreed to reimburse Michael the $600 in payments and to return $750 to him as her former one-half share of the $1,500 payment.

The family court then found that Michael agreed not to pursue Kathryn but only her sister in his civil suit filed in Kenton District Court. This finding is based on Michael and his counsel's discussion of the van issue on the record and in the presence of the family court. According to Kathryn's brief, Michael testified that her sister purchased the van and Kathryn was not involved in the transaction except her collection of the payments. He then testified that Kathryn returned $750 to him and agreed to pay him an additional $600, which eliminated her liability for any debt owed on the van. When Michael's counsel asked if he was satisfied with the arrangement, he testified that he would obtain the balance owed in his Kenton County action.

The family court had the opportunity to hear the testimony and observe the witnesses and, thus, is in the best position to make findings of fact. *Bealert v. Mitchell*, 585 S.W.2d 417, 418 (Ky.App. 1979). The family court's findings of facts will not be set aside unless they are clearly erroneous. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Factual findings are not clearly erroneous unless they are manifestly against the weight of the evidence in the record. *Id*.

The family court heard Michael testify that Kathryn was not involved in the van transaction other than collecting payments from her sister. The family court further heard that Kathryn had or would return all of the payments collected from her sister to Michael and, therefore, eliminate any financial liability that Kathryn had regarding the debt owed on the van.

We conclude that the family court did not err by finding that Michael agreed not to pursue Kathryn for her sister's debt. The family court heard the parties' testimony and determined that Kathryn met her obligation to return the proceeds that she had acquired from the sale of the van. At this point, the family court, in conformity with Michael's testimony, determined that Kathryn had no further liability regarding the purchase of the van and that Michael agreed not to pursue her any further in his civil action. While Michael now disagrees, we do not believe that the family court's finding was erroneous.

Michael argues that the family court erred by finding that there was no evidence that he expended $30,000 from the parties' joint account on preparing the marital residence for sale. He contends that he gave specific testimony that he spent the money on new carpeting, a heat pump, garage doors, and painting. Thus, he argues that the family court erred by finding that he expended the entire $30,000 withdrawal on his personal living expenses.

Although Michael testified that he spent money on improving the marital home for the purpose of selling it, he did not introduce any receipts or invoices detailing his purchases. Moreover, the family court had previously issued

an agreed order finding that Michael had used marital funds for his personal use and was required to account for the money. In contrast, Kathryn introduced documentary evidence indicating that Michael expended the money for personal living expenses. When there is conflicting evidence, an appellate court must defer to the factual findings of the trier of fact. *Boon Edam, Inc. v. Saunders*, 324 S.W.3d 422, 429 (Ky.App. 2010). Accordingly, we conclude that the family court's factual finding was not clearly erroneous.

Michael argues that the family court erred by excluding his proof regarding the valuation of the parties' marital vehicles. He argues that he offered valuation documentation that was rejected in favor of Kathryn's older valuation evidence from the same source.

When a party alleges that its documentary evidence was improperly excluded, he must move to admit such evidence by avowal to preserve the issue. *Garrett v. Commonwealth*, 48 S.W.3d 6, 15 (Ky. 2001). If a party fails to move for the document to be admitted as an avowal exhibit, the evidentiary issue is not preserved and the matter will not be addressed. *Id*. In this case, Michael has not cited to the location of this document in the record or stated that he sought to have the document admitted as an avowal exhibit. Thus, Michael's allegation of error regarding his valuation document is unpreserved.

Michael contends that the family court erred by finding that Kathryn's employee bonus, earned after the parties' separation but before their divorce, was non-marital property and excluded from division. He argues that Kathryn's bonus

was earned for her work on an annual basis and not a monthly basis and, thus, was subject to division in its entirety because the parties remained married for a portion of the year in which the bonus became due.

We observe that a family court has broad discretion in the division of marital property, and its decision will not be disturbed absent an abuse of discretion. *McGregor v. McGregor*, 334 S.W.3d 113, 119 (Ky.App. 2011). A family court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky.App. 2010).

Citing *Shively v. Shively*, 233 S.W.3d 738 (Ky.App. 2007) and KRS 403.190(1) and (2), the family court found that seven-twelfths of Kathryn's bonus was non-marital because it was earned after the parties' separation. The family court found that five-twelfths of the bonus was marital because it was earned before the parties separated. While the family court used incorrect terminology as Kathryn's bonus was marital property, the court properly applied the *Shively* decision, which upheld an unequal distribution of a couple's marital assets obtained after their separation under the "just proportions" doctrine. *Id*. at 740-41.

Kathryn's brief states that she testified that Michael did not contribute, including as a homemaker, to her earning of any portion of the bonus after the parties' separation. Based on this testimony, the family court divided the bonus in relation to the timing of their separation. Thus, the family court did not

abuse its discretion by awarding Kathryn the entire amount of her bonus that she earned after the parties' separation. *Shively*, 233 S.W.3d at 740-41.

Michael contends that the family court erred by valuing Kathryn's employee profit sharing account, consisting of securities, as of February 29, 2008, rather than as of March 6, 2008, the date of the parties' divorce decree. He argues that Kathryn's profit sharing account was subject to daily market fluctuations and, thus, should have been valued as of the date of the parties' divorce decree.

Although a profit sharing account should be valued on the date of the divorce decree, a family court's valuation findings will not be set aside unless they are clearly erroneous. *Armstrong v. Armstrong*, 34 S.W.3d 83, 86-87 (Ky.App. 2000). In this case, the February valuation of Kathryn's profit sharing account was the most recent evidence presented to the family court. The date of the valuation and the divorce decree are separated by just a week, and Michael has not stated that he in fact suffered a detriment due to market decreases. Therefore, the family court's valuation of Kathryn's profit sharing account was not clearly erroneous.

Michael argues that the family court erred by valuing the parties' Ascencia certificate of deposit (CD) as of September 19, 2007, rather than as of the date of the parties' divorce decree. He contends that the value of this asset had increased in value by the date of the decree.

Michael has not cited to any valuation evidence that he provided or attempted to provide to the family court. He has not cited to any evidence in the record reflecting the value of the asset after September 2007. Kathryn's brief

indicates that the September valuation evidence was the most recent and only evidence presented to the family court regarding the parties' CD. Therefore, we conclude that the family court's CD valuation was not clearly erroneous. *Id*.

Michael contends that the family court erred by not finding that Kathryn dissipated marital assets by redeeming points from the parties' marital frequent flyer program account to obtain airline tickets.

Despite Michael's contention, he has not cited to the record where he made a dissipation argument regarding the frequent flyer points to the family court. Accordingly, we conclude that Michael's dissipation allegation is not reviewable because he has not demonstrated that he presented the matter to the family court. *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985).

Michael argues that the family court erred by not crediting him for his $4,000 home repair expenditure for damage to the marital residence. He argues that Kathryn and her agents caused the damage when she moved from the marital residence. He further contends that his testimony was uncontradicted by other evidence and, thus, should have been accepted as binding fact.

In their briefs, both parties indicate that Michael did not submit any documentary evidence to establish that he expended $4,000 for housing repairs. While Michael's testimony that he spent $4,000 on repairs was not contradicted, the finder of fact is not required to accept the uncontradicted testimony of interested witnesses. *Miller v. Square D Co.*, 254 S.W.3d 810, 814 (Ky. 2008). In this case, the family court noted that Michael offered no receipts to support his

claim. The family court's decision to reject Michael's testimony was not erroneous. *Id*. The family court had to value and divide numerous accounts and relatively substantial assets, and its emphasis on the lack of documentary evidence was not erroneous. *Id*.

Michael contends that the family court erred by ordering him to reimburse Kathryn for her expenses related to obtaining his medical records. He contends that the reimbursement order was based on the incorrect finding that he discontinued his maintenance claim and, thus, was required to reimburse Kathryn. He also points out that Kathryn did not introduce his medical records in this case.

In Kathryn's brief, she indicates that Michael's initial maintenance claim was that his health prevented him from being able to earn sufficient income. She indicates that she was then required to move the family court to force Michael to produce his medical records in order to investigate his health-related claim. She states that Michael could have obtained copies of his medical records at no cost but chose to give her medical release forms, which resulted in $150.17 in costs to her. She states that the family court reserved the issue of assigning this cost until trial.

However, Kathryn's brief states that Michael abandoned his claim for maintenance based on his medical condition for an alternative basis. Due to Michael's abandonment of his health condition claim, Kathryn did not seek to introduce Michael's medical records. While the family court's findings provided that Michael did not go forward with his maintenance claim, this finding in light of

the record clearly indicates that Michael discontinued his health-related claim.[3] Thus, the family court required Michael to reimburse Kathryn for the costs that she unnecessarily expended to obtain Michael's medical records. We conclude that the family court did not abuse its discretion. *Wilder v. Wilder*, 294 S.W.3d 449, 453 (Ky.App. 2009).

Michael argues that the family court erred by listing the same account in its findings of fact in a manner implying the existence of two unique accounts. However, in Michael's and Kathryn's briefs, both parties concede that they agreed that there was only one account and agreed on the account's value. Accordingly, we conclude that Michael waived any allegation of error. An appellate court will not consider a decision where a party has not been aggrieved. *Brown v. Barkley*, 628 S.W.2d 616, 618 (Ky. 1982). After Michael's concession, he cannot be said to be aggrieved by the family court's finding of fact. *Id*.

Michael contends that the family court's factual finding that the parties agreed to close their joint "AT&T Universal Credit Card" was erroneous. He contends that there was no agreement to close their credit card.

Although Michael does not cite to the record where the discussion regarding this card exists or indicate if any discussion occurred, Kathryn cites to Michael's counsel's statement that his client was okay with closing the account. Therefore, we conclude that the family court's finding was not erroneous.

[3] The record reflects that Michael filed a memorandum in support of his claim for maintenance primarily based on the disparity in the parties' income on November 3, 2008, and the family court denied Michael's motion for maintenance on November 7, 2008.

Moreover, we observe that the closing of this account is an appropriate step toward the creation of two separate estates following a divorce.

Further, if he desired to maintain the credit line following his divorce, Michael should have sought the family court's permission to settle Kathryn's share of the credit debt and to obtain the release of her legal liability under the account. Regardless, we conclude that the family court's finding was not clearly erroneous.

Michael argues that the family court's finding in Paragraph 54 that there was no proof of Kathryn's dissipation of marital assets is in conflict with its finding in Paragraph 42 that Kathryn removed $5,700 from the parties' joint account.

In Paragraph 42 of the supplemental findings of fact, the family court found that Kathryn used $5,700 of the parties' money to pay taxes due on the parties' joint investment account. While Kathryn unilaterally expended funds from the parties' account, her expenditures cannot be classified as dissipation. Rather, dissipation occurs when a party spends marital assets prior to dissolution and where there is a clear showing of intent to deprive one's spouse of his just share of the marital property. *Heskett v. Heskett*, 245 S.W.3d 222, 227 (Ky.App. 2008). In this case, Kathryn paid the parties' joint taxes and did not dissipate their assets. *Id*.

Michael contends that the family court did not provide sufficient findings of fact and conclusions of law to support Paragraphs 6, 8, 9, 27, 30, and 35 in its June 5, 2008, supplemental findings of fact. He argues that the family court was obligated to make such findings and conclusions.

"It is the mandatory duty of the trial court in all actions tried upon the facts without a jury to find the facts specifically and state separately its conclusions of law thereon." *Fleming v. Rife*, 328 S.W.2d 151, 152 (Ky. 1959). Without knowledge of the facts relied upon and an understanding of a trial court's legal conclusions, appellate courts cannot intelligently review the decision of the lower court. *Standard Farm Stores v. Dixon*, 339 S.W.2d 440, 441 (Ky. 1960).

After reviewing the record, we conclude that the family court's findings of fact and conclusions of law were sufficient for the purpose of appeal. In Paragraphs 6, 8, 9, 27, 30, and 35, the family court merely recites both parties' testimony and arguments rather than make specific findings and legal conclusions. These recitations permitted the family court to make factual findings and legal conclusions elsewhere in the June 5, 2008, order. Accordingly, we fail to see how the family court failed in complying with its duty to create a sufficient record. *Id*.

Michael argues that the family court abused its discretion when it ordered him to deliver a Paul Molitor picture and a gold necklace to Kathryn. He contends that Kathryn already possessed the items preventing him from having the ability to deliver the items to her. Specifically, he contends that Kathryn, her boyfriend, and her sister removed these items from the marital residence during multiple visits to remove her personal belongings from the residence.

The family court made these findings following the May 5, 2008, hearing when substantial testimony was heard. The family court was in the best position to make a determination regarding the location of the personal items that

Michael was required to turn over to Kathryn. *Justice v. Justice*, 421 S.W.2d 868, 870 (Ky. 1967). Thus, we "are unwilling to substitute our decision for [its] judgment," and conclude that there was no error. *Id.*

Michael contends that the family court erred by denying his motion to alter or amend the family court's supplemental findings of fact and conclusions of law and its supplemental decree. He argues that the family court's ruling to deny his motion as being beyond the ten-day limit of CR 59.05 was erroneous, because the findings and conclusions and decree were not a final and appealable judgment.

In *Cannon v. Cannon*, 434 S.W.2d 48 (Ky. 1968), the court stated that a final and appealable judgment is a final order adjudicating all the rights of all the parties in an action, or a judgment made final under CR 54.02. The court further stated that an order that does not resolve all claims is interlocutory and does not constitute a final or appealable judgment under CR 54.01. *Id*.

Further, CR 54.02(1) provides that courts may grant a final judgment upon one or more but less than all of a party's claims only upon a determination that there is no just reason for delay. Such a judgment must state such conclusion and shall recite that the judgment is final. *Id*. If such recital is absent and the judgment does not resolve all the claims involved in the litigation, the action does not terminate and is subject to revision at any time before the entry of the judgment adjudicating all the claims and liabilities of all the parties. *Id*. Additionally, CR 54.02(2) provides the following:

> When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

From a review of the record, the family court's supplemental findings of fact and conclusions of law and its supplemental decree entered on June 5, 2008, did not contain the recital language of finality as required by CR 54.02(1). Because the issue of maintenance and the division of another financial asset remained to be resolved after June 5, 2008, all the claims of the parties were not concluded and the judgment could not be final pursuant to CR 54.02(1). The parties' case remained open and subject to revision. Accordingly, the family court abused its discretion by not considering Michael's motion to amend.

However, Michael has not stated with specificity what relief he would have obtained from his motion to amend. This has been found to be insufficient to permit appellate review. *Grief v. Wood*, 378 S.W.2d 611, 612 (Ky. 1964)(alleged claims must be sufficiently argued in appellant's brief). Furthermore, it is well established that a motion to alter or amend is not a prerequisite to preserving the right to appeal. *Queen City Dinette Co. v. Grant*, 477 S.W.2d 808, 811 (Ky. 1972). Therefore, Michael still maintained the ability to address any family court error on appeal.

Michael argues that the family court erred by failing to require Kathryn to reimburse him half of the money that she spent from their marital

funds. He contends that she removed $5,700 from their account on one occasion and removed over $7,000 from their account on another occasion.

We have previously addressed Kathryn's expenditure of $5,700 to pay for the parties' joint tax liability. This was a marital liability and its payment with marital funds cannot give rise to a dissipation claim. Regarding his second dissipation claim, Michael has not cited to the record where this issue was first presented to the family court. When a family court is not presented with an issue for a decision, an appellate court cannot consider the issue for the first time on appeal. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009). Therefore, we conclude that the family court did not err.

Michael contends the family court erred by requiring him to reimburse Kathryn for her share of the taxes paid on his non-marital asset for the duration that the parties incurred a joint tax liability. He argues that the family court abused its discretion because it had no authority to order the reimbursement of any expense related to a non-marital asset which Kathryn had no right to receive.

In this case, Michael's mother gave the parties money over a period of time that was deposited into a Fidelity account. This account incurred a tax liability which was paid by the parties through their joint tax returns. During divorce proceedings, the family court determined that the Fidelity account was Michael's non-marital property. However, on November 7, 2008, the family court ordered Michael to reimburse Kathryn for her share of the taxes paid as a result of the Fidelity account over the life of their joint liability on the account.

Michael contends that the family court abused its discretion because he asserts no liability could arise from a non-marital account. He further argues that the family court's statement in its order that Michael could be reimbursed from his mother's estate was erroneous. He contends that it was erroneous to consider this non-marital, family asset in property distribution.

The family court was permitted to return Kathryn's share of the marital funds expended for the tax liability created by the Fidelity account during the life of their joint possession of the account. *Kleet v. Kleet*, 264 S.W.3d 610, 613-14 (Ky.App. 2007). Basic arithmetic demonstrates that Michael would be obtaining a greater share of the marital estate if Kathryn was required to spend her marital share to service Michael's non-marital asset. Therefore, despite Michael's argument, the family court did not abuse its discretion by ordering the tax reimbursements. *Id*.

Additionally, the family court's discussion of Michael's possible reimbursement by his mother's estate for repaying Kathryn was not error. While it was not necessary that Michael be reimbursed for returning Kathryn's marital share of the parties' past tax payments on the account, the family court stated that Michael could be reimbursed for paying taxes on his mother's estate just as his brother's minor children had been reimbursed for taxes that they paid. We believe the family court was stating a possible option for Michael to explore. Ultimately, the issue was the return of Kathryn's share of the marital assets. *Id*.

Michael argues that the family court erred by failing to award him maintenance because he lacked sufficient assets to meet his needs. He contends that the assets that he was awarded from the property division largely remain in his wife's hands, that his age and health make it highly improbable that he could obtain higher paying employment, and that a large disparity exists between his income and Kathryn's. Thus, he contends that he was entitled to maintenance.

When determining whether an award of maintenance is appropriate, KRS 403.200(1) requires a family court to find that the spouse seeking support lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and that he is unable to support himself from appropriate employment. *Croft v. Croft*, 240 S.W.3d 651, 655 (Ky.App. 2007).

An award for maintenance is within the sound discretion of the family court and cannot be disturbed absent abuse of discretion. *Powell v. Powell,* 107 S.W.3d 222, 224 (Ky. 2003). An appellate court cannot substitute its own findings for those of the family court where its findings are supported by substantial evidence. *Daunhauer v. Daunhauer*, 295 S.W.3d 154, 156 (Ky.App. 2009).

In this case, the family court found that Michael received a value of $1,200,000 worth of marital assets of which $968,000 were liquid assets, that he has no mortgage, and he has no car payment. While observing that Kathryn earns $116,780 in yearly income and Michael earns $44,226, the family court noted that Michael obtained an equal share of the marital estate and was able to support himself through appropriate employment and provide for his reasonable needs.

Although Michael argues that he cannot provide for his reasonable needs, suffers from a history of cancer, has endured a drastic reduction in his standard of living, and enjoyed a twenty-six year marriage with Kathryn, the family court engaged in considerable analysis and ruled that maintenance was not appropriate. The family court reviewed Michael's financial assets, his lack of outstanding debt, his ability to obtain appropriate employment and denied his request. While another court may have decided differently, we conclude that the family court did not abuse its discretion by denying Michael's request for maintenance. Therefore, we cannot conclude that the family court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Celina Mut. Ins. Co. v. Harbor Ins. Agency, LLC*, 332 S.W.3d 107, 111 (Ky.App. 2010).

Michael contends that the family court erred by denying his motion for a change of venue from Boone to Kenton County. He argues that the parties' marital residence was in Kenton County, they lived as a married couple in Kenton County, and their attorneys' offices were in Kenton County. Thus, he contends that the family court abused its discretion by denying his motion for change of venue and thus, permitted Kathryn to engage in improper forum shopping.

In establishing proper venue, KRS 452.470 provides that "[a]n action for maintenance or dissolution must be brought in the county where the husband or wife usually resides." Furthermore, an improper venue defense must be asserted in a responsive pleading or by motion within twenty days after service of summons.

Stipp v. St. Charles, 291 S.W.3d 720, 724 (Ky.App. 2009). If such a defense is not brought within the prescribed time, the defense will be deemed waived. *Id*.

While residing in Boone County, Kathryn filed her petition for divorce on August 30, 2006, and Michael participated in the action without protest until he filed a motion for a change of venue on August 29, 2008. By this time, the divorce decree had been entered and most of the property had been divided. Therefore, while not passing on the merits of his claim, we conclude that Michael's improper venue defense is waived. *Id*.

For the foregoing reasons, the orders of the Boone Family Court are affirmed.

CAPERTON, JUDGE, CONCURS.

SHAKE, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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