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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001268-MR

BRADLEY A. WINCHELL APPELLANT

v.

APPEAL FROM OLDHAM FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 07-CI-00475

DANA L. WINCHELL APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

COMBS, JUDGE: Bradley Winchell appeals from the order of the Oldham Family Court which decided custody and property issues in an action for dissolution of marriage. After our review, we affirm in part, vacate in part, and remand.

Brad and Dana Winchell married in 1993. Their older daughter was born in 1998, and a second daughter was born in 2003. Throughout the marriage, Dana was employed as a human resources manager; Brad was a self-employed contractor. They accumulated more debt than assets; the debt was the main subject of this litigation. In June 2007, Dana sought an Emergency Protection Order (EPO) against Brad following an incident in which he assaulted her and broke dishes in their home. In July 2007, Dana filed a petition for divorce. In the meantime, a Domestic Violence Order (DVO) was entered prohibiting Brad from having contact with Dana. However, he maintained visitation with the two children.

A decree of dissolution was entered on June 5, 2008. The court reserved ruling on custody, child support, and property issues. After those findings were entered on November 20, 2008, both parties filed motions to alter, amend, or vacate them. The court entered its final order on June 12, 2009. This appeal follows.

Our standard of review is governed by Kentucky Rule[s] of Civil Procedure (CR) 52.01. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986) (The rule applies to child custody cases); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. 1980) (CR 52.01 applies to domestic cases). CR 52.01 directs that in actions tried without a jury, the court's findings of facts should not be reversed unless they were clearly erroneous. Clear error occurs only when a record lacks substantial

evidence to support the court's findings. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

Brad first claims that the court erred when it did not make specific findings regarding how domestic violence has affected the children. Kentucky Revised Statute[s] (KRS) 403.270(3) mandates that "[i]f domestic violence . . . is alleged, the court shall determine the extent to which [it] has affected the child and the child's relationship to both parents." In this case, Brad had been convicted of assault against Dana, and she obtained a DVO against him. However, the court did not consider the impact of the situation with respect to the children in its written findings. Nonetheless, CR 52.04 prohibits us from reversing a final judgment if the failure to make written findings was not brought to the trial court's attention. The record does not contain a motion from either party asking the trial court to make these findings. Therefore, we will not reverse on this issue.

Brad's second argument is that the trial court erred when it did not make specific findings pertaining to his request for maintenance. Brad relies on KRS 403.200, which grants the trial court the discretion to award maintenance to either party in a dissolution proceeding. The statute requires the court to make findings based on enumerated factors; *e.g.,* there must be a showing of threshold requirements of the lack of sufficient property to meet one's reasonable needs or of the inability to work. In this case, the court found that the threshold factors did not apply to Brad's situation. In spite of his claims of having virtually no income, the court found that Brad owns a business that received considerable receipts in

previous years, that he has at least twenty years of experience, and that he is able-bodied. As this court has said, the trial court was not required "to make a finding as to [Brad's] reasonable needs if it finds that [he] is able to support [himself] through appropriate employment." *Graham v. Graham*, 595 S.W.2d 720, 722 (Ky. App. 1980). Therefore, the trial court did not err as to this issue.

Brad's third contention is that the trial court erred when it failed to set out specifically why it deviated from the Kentucky child support guidelines. KRS 211(2) explicitly states that:

> [c]ourts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

Contrary to Brad's assertion, the record reflects the requisite specific findings by the court regarding its deviation from the guidelines. On January 30, 2008, it entered an order that noted the deviation was **a downward** deviation from the guidelines – a result redounding to Brad's benefit rather than detriment. It explained that it had imputed Brad's income as being equal to Dana's. It then reasoned that because the payment of the marital residential mortgage was coming from joint funds, a downward deviation was appropriate. The final order from which Brad appeals incorporated this order by reference. There is no basis for a finding of error on this point.

Brad also argues that it was an abuse of discretion for the court to award him only one-third of Dana's 401K.[1] KRS 403.190(1) provides that marital property be divided **in just proportions --** without regard to marital misconduct – in light of the following factors:

> (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.

In its order, while the court listed all of these factors, it applied only one. It stated that Dana had made all of the contributions to the account and that while Brad could have chosen to invest in a retirement savings account, he had not done so. The court then observed that Brad had spent money beyond the couple's means[2] and awarded him one-third of the account.

The court applied KRS 403.190(1)(a), observing only that Dana had contributed to the acquisition of the 401K as noted above. The court did not apply any of the other factors. It did not consider the value of other property that Brad and Dana had been awarded, the duration of the marriage, or their prospective

[1] Neither party disputes that the entire account -- up to the date of dissolution -- is marital property.

[2] We have examined Dana's itemization of her "reasonable needs" and note that some considerable degree of extravagance is included. Brad's list of his reasonable needs was more restrained.

economic situations. In addition, the court failed to consider Brad's contributions to the marriage, such as building the marital residence and purchasing an interest in two Texas Roadhouse franchises. Rather, the court considered solely Brad's misconduct in direct contravention of KRS 403.190(1). Therefore, we are persuaded that the court abused its discretion regarding division of Dana's 401K. We vacate its order as to this issue and remand this matter to the trial court for proper analysis pursuant to KRS 403.190.

Brad's fifth argument is that the court erred by failing to divide all of the personal property that he and Dana had acquired. He correctly states that KRS 403.190 mandates division of **all** marital property. However, as Dana points out in her brief, both parties entered into an agreed order that divided the personal property. The court's final order incorporates the agreed order by reference. Therefore, the trial court did not err on this issue.

Brad's next argument is that the court erred when it did not make specific findings regarding whether Brad and Dana owed $17,000 to Dana's mother. In 2003, Brad and Dana borrowed $21,000 from Dana's mother in order to complete construction of the marital residence. Prior to commencing the divorce proceedings, they had repaid $4,000. The trial court's order included the directive that the remaining debt of $17,000 should be split equally between Brad and Dana. Brad contends that the court's statement was conclusory and lacking in specific findings. In accordance with CR 52.04, his motion to amend the order included a request for more specific findings regarding this debt; and so the issue is

preserved for our review. The statement to which Brad refers is in the "Conclusions of Law" section of the order. However, previously, in the "Findings of Fact" section, the court identified the debt as having been incurred to complete construction of the marital home.

We may not set aside the trial court's findings unless they were clearly erroneous. *General Motors Corp. v. Herald*, 833 S.W.2d 804, 806 (Ky. 1992). In this case, both Dana and her mother had testified concerning the debt at trial, giving the trial court the opportunity to weigh their credibility. Dana also presented checks that she had written to her mother. There was sufficient evidence to support the court's findings. We cannot say that it abused its discretion when it divided the debt equally between Brad and Dana.

Next, Brad contends that the court erred when it found that he had inadequately accounted for money that he withdrew from the parties' joint saving account, finding that it was not used for marital purposes. Soon after the petition for dissolution was filed, Brad and Dana entered into an agreed order directing them to put certain funds into an escrow account to be used to pay certain approved expenses, including their mortgage payments. The order recited that the amounts deposited into the escrow account would include their joint savings account "less ordinary and necessary living expenses incurred between 06/24 and current (07/06/07)." Prior to the agreement, Brad had withdrawn approximately $17,000 from the joint savings account. From that sum, he contributed approximately $5,800 to the escrow account. The trial court found that Brad had shorted the

escrow account by approximately $8,000 and ordered him to restore half of that amount.

Brad now claims that the money that he did not repay to the escrow account was used on marital expenses. Brad had the opportunity to present this evidence at the trial. Dana also presented evidence -- but to the contrary. The court was able to weigh the evidence and to draw its conclusions. Brad has not presented substantial probative evidence which persuades us that the trial court abused its discretion. *See O.S. v. C.F.*, 655 S.W.2d 32 (Ky. App. 1983).

Brad next contends that the court erred when it awarded him one hundred percent of the interest in Signature Home Builders, LLC. During the marriage, Brad and William Spear formed an Indiana limited liability company, Signature Home Builders. The venture effectively failed. At the time of the order, Signature and Spear had filed a lawsuit against Brad. A retainer of $3,000 had been paid to Brad's counsel for that lawsuit. The trial court awarded Brad all of the interest in the company and the first $1,500 of any recovered funds to repay Dana for her half of the retainer. Brad complains that the trial court's findings were incomplete and that the court should have ordered Signature's assets and liabilities to be divided equally between Dana and him.

In its order, the court analyzed the nature of the Signature venture and found that Dana's involvement was limited to being "a conduit of communication" between Brad and Spear. It then awarded one hundred percent interest in Signature to Brad, rendering him solely liable for any adverse judgment that might

result from the lawsuit. However, the record indicates that Dana's involvement consisted of significantly more than merely passing messages between Spear and Brad. She was involved in financial decisions, kept financial records, and selected materials for the houses that the company built. Additionally, she was involved in meetings when the company was founded. We conclude that the trial court's ruling on this matter was not supported by substantial evidence. Therefore, we vacate and remand on this issue.

The final issue that Brad presents is that the court erred when it caused Brad to be responsible for all of the tax liability resulting from the sale of the couple's shares in the Texas Roadhouse franchise. During their marriage, Brad and Dana invested in the Texas Roadhouse franchise. In 2007, they received approximately $90,000 from the sale of that interest. The proceeds were placed in an escrow account and were used for paying the mortgage on the marital home and other marital expenses. The court's final order directed Brad and Dana to file separate federal income tax returns for 2007. Because the Texas Roadhouse shares were listed only in Brad's name, he was solely liable for the taxes due on the proceeds of the sale.

Although KRS 403.190 creates a presumption that property acquired during a marriage is marital, no such presumption exists for **debt** acquired during a marriage. *Bodie v. Bodie*, 590 S.W.2d 895, 896 (Ky. App. 1979). Debt that is incurred for the benefit of both spouses is marital debt. *Gipson v. Gipson*, 702 S.W.2d 54, 55 (Ky. App. 1986). Our court has recently acknowledged that marital

tax liability is marital debt because the taxes are a cost of producing marital income. *Dobson v. Dobson*, 159 S.W.3d 335 (Ky. App. 2005). When assigning marital debt, trial courts should consider:

> 1) whether the debt was incurred purchasing marital assets;
> 2) whether it was necessary for maintenance and support of the family;
> 3) economic circumstances of the parties;
> 4) extent of participation and receipt of benefits.

Neidlinger v. Neidlinger, 52 S.W.3d 513, 523 (Ky. 2001).

In this case, despite the use of the money to fund a joint escrow account throughout the pendency of the divorce, the court did not apply any of the *Neidlinger* factors to the disputed tax liability. We agree that this omission was an abuse of discretion; therefore, we vacate and remand for further findings.

In summary, we affirm the numerous correct rulings of the Oldham Family Court with three exceptions: the division of Dana's 401K, the assignment of the interest in Signature Builders, LLC, and the assignment of the Texas Roadhouse tax liability. We vacate and remand as to those three matters for further consideration of the trial court.

LAMBERT, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

KELLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully concur in part and dissent in part. I concur with all parts of the majority opinion except the portion relating to the assignment of the interest in Signature Home Builders, LLC.

The majority concluded that the family court erred in awarding Brad one hundred percent of the interest in Signature Home Builders because the record indicates that Dana's involvement consisted of significantly more than merely passing messages between Brad and Mr. Spear. However, in its Findings of Fact, the family court made the following findings of fact with respect to Dana's involvement in Signature Home Builders:

> The Respondent is the member (the Petitioner is not a member); the Respondent receives the K-1 statements; the Respondent is the registered agent for the LLC; and the Respondent is a party in a Civil Action filed in the State of Indiana, Case No. 22CO1-0802-PL-134 styled "William M. Spear, Jr., individually and on behalf of Signature Home Builders, LLC versus Bradley A. Winchell."

The family court further noted that Brad was involved in the day-to-day building of the spec house owned by Signature Home Builders. Additionally, the family court found that Dana's "involvement was a conduit of communication between Mr. Spear and the Respondent because the Respondent worked out in the field every day and the Petitioner had access to a computer and, thus, e-mails."

As noted in *Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989), decisions of the family court concerning the division of marital property are within the

discretion of that court, and we will not disturb those decisions except for an abuse of that discretion. Moreover, the appellate courts of the Commonwealth have repeatedly held that "domestic cases require a greater degree of deference to the determinations made by trial courts." *Marcum v. Marcum*, 779 S.W.2d 209, 212 (Ky. 1989); *see also Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990). Therefore, this Court is not authorized to substitute its own judgment for that of the family court when the family court's decision is sound and supported by the record.

Having reviewed the record, including the e-mails between Dana and Mr. Spear, I believe there was substantial evidence to support the family court's finding that Dana was merely a "conduit of communication" between Brad and Mr. Spear. Because I believe the family court's findings were supported by substantial evidence, I do not believe that the family court erred when it awarded Brad one hundred percent of the interest in Signature Home Builders.

BRIEF FOR APPELLANT:

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