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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002122-MR

JOE DAVID WALKER

APPELLANT

v. APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
ACTION NO. 06-CI-00052

KAREN LEE WALKER

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, KELLER, AND NICKELL, JUDGES.

DIXON, JUDGE: Joe David Walker appeals a judgment of the Webster Circuit Court enforcing a property settlement agreement in favor of his former wife, Karen Lee Walker. Because we find clear error, we reverse and remand for further proceedings.

This case has been fraught with difficulty from the very beginning. Joe and Karen divorced in February 2006, after thirty years of marriage. While Joe hired attorney William Clint Prow to file the dissolution of marriage petition in the Webster Family Court, Prow was well known to both Joe and Karen. Prow had represented both of them in various legal matters prior to this action. In fact, Prow testified that his representation of either party was contingent upon the case remaining uncontested.

Joe conferred with Karen and presented a list of marital property to be divided between them to Prow. Thereafter, Prow drafted an agreement for Joe and Karen to sign. Joe testified that he is illiterate but able to sign his name. The document had to be mailed to Karen for her signature as she was residing out of state at the time.

Subsequently, the trial court approved the property settlement agreement executed by the parties, and the agreement was incorporated into the final divorce decree. For purposes of our review, the settlement agreement included the following provision:

3. PERSONAL PROPERTY: The Husband shall receive the 1982 Chevy pickup and the 1990 Camaro. The Husband shall provide the Wife a car equal in value to the 1990 Camaro. The Husband shall receive the washer, dryer, refrigerator and stove. The Wife shall receive all other household furnishings which will be forwarded to her residence at the expense of Husband. The Parties have divided all remaining marital property to their mutual satisfaction.

Joe retained possession of the marital home, while Karen relocated to New Jersey to reside with the parties' adult daughter. Joe twice contacted Karen after she moved to arrange shipment of her property. Joe first attempted to send the household items immediately after the divorce decree was executed in February 2006. He again sought to ship the items to Karen in September of that year. Both times Karen declined Joe's offers of shipment because she was not ready to receive the property.

Unfortunately, the marital home was destroyed by fire on October 15, 2007, approximately twenty months after the parties divorced and more than forty-three months after the parties' separation. All of the contents of the home were destroyed. After receiving his settlement from his home insurance provider, Joe forwarded Karen a check for \$5,098.98 as reimbursement for certain items of furniture and personal property lost in the fire.

In May 2009, Karen filed a motion to enforce the settlement agreement, contending she was entitled to reimbursement for thirty additional items that were destroyed in the fire. Joe denied Karen's allegations, and argued Karen had abandoned the property in question by refusing to accept delivery of it following the divorce.

The trial court bifurcated the case and first held a hearing on the issue of abandonment. The court concluded Karen had not abandoned the property and ordered the parties to continue with discovery. Karen subsequently learned Joe had received \$86,805.00 from his insurance company based on a 21-page personal

property inventory prepared by the parties' daughter which Joe submitted, detailing the contents of the home at the time of the fire.

The court held a final hearing on April 15, 2010. Karen argued herein that she was entitled to all of the insurance proceeds for personal property pursuant to the provision of the settlement agreement awarding her "all other household furnishings." Joe maintained the court should not enforce the settlement agreement because the provision was unconscionable. On October 29, 2010, the court rendered a judgment awarding Karen the full amount of the insurance proceeds for all of the personal property contained in the house, less the \$5,098.98 Joe had previously paid to her. This appeal followed.

Joe primarily argues, as he did before the trial court, that Karen abandoned the household furnishings. He maintains that by refusing to accept delivery twice, she therefore gave up any claim she had to this property. We find no merit in this argument. Even Joe conceded during his testimony that he had no idea whether Karen ever intended to request shipment of the items. It is his burden to produce sufficient evidence of abandonment "by 'clear, unequivocal and decisive evidence' in order for an abandonment to be established." *Cameron v. Lebow*, 366 S.W.2d 164, 165 (Ky., 1962). Joe failed to present sufficient evidence to prove this claim.

Nevertheless, while we agree with the trial court that insufficient evidence exists that Karen abandoned the property in question, this appeal raises several difficult issues, many of which were not raised by either party. What is apparent is that the property settlement agreement signed by both parties and adopted by the

court, was not the actual agreement of the parties. Prow, no longer counsel of record, testified at this hearing concerning the division of personal property. When asked about the actual content of this part of the agreement he candidly acknowledged that it did not reflect his notes of his meeting with Joe as to the parties' intention regarding division. Prow testified that, according to his notes, Karen was to receive a bedroom suite, the living room suite, her personal items, a TV, and some of the dishes. Prow did not know how the language that was actually in the agreement came to be there. Moreover, although Joe signed the agreement giving Karen all the household furnishings except four appliances, clearly this was not his understanding of the agreement. Joe attempted to ship only a few items to Karen, not the entire household. While Karen now claims entitlement to everything in the house at the time of the fire, her first request to the court to enforce the parties' "agreement" did not request all household furnishings but rather merely 30 specific items. Joe's list of property in the house provided to the insurance company contains some 625 items. Upon receiving this list and the values attached, only then did Karen claim entitlement to all of it.

While the evidence at the hearing on this matter was clear that the agreement entered into the divorce decree was erroneous, the trial court opted for the legal equivalent of an escape-hatch. It relied upon the principle that errors, mistakes, or ambiguities must be held against the drafter. Consequently, because Prow

ostensibly represented Joe, at least on paper, Joe would have to bear the onerous burden mandated by the rule.¹

Thus, the trial court determined that the parties' agreement would stand. Paradoxically however, while enforcing the "agreement," the court nevertheless ignored it as well. While Joe must abide by the court's determination that Karen would receive the value of "all *other* household furnishings," under the trial court's ruling she actually received the value of *all* the household furnishings. Joe did not even receive the value of the four appliances he was allotted pursuant to the agreement. According to the erroneous property settlement agreement Joe was entitled to receive the "washer, dryer, refrigerator and stove." Yet *all* of the proceeds from the insurance company for the value of the personal property were ordered to be paid to Karen. This amounts to clear error.

Moreover, the property settlement agreement provides that Karen will receive household "furnishings." A cursory glance at Joe's itemization of the contents of the home reveals that much more than *furnishings* are listed. For example, the itemization includes Joe's personal belongings: his medications; prescription glasses; his shaving kit; his toothbrush and toothpaste; Haines boxer briefs; many items of men's clothing; and a hat collection which includes a WKU dad hat, to mention but a few. The itemization includes a gun collection which is clearly not included within the purview of "household furnishings." It also includes several "fixtures." For example, the list includes substantial values for

¹ Given the complexity of the issues before us we acknowledge our own temptation to rely upon the principle as well.

bathroom fixtures and ceiling fans. The itemized list additionally includes pantry items and cleaning supplies. Also listed are tools—again, items not ordinarily considered “furnishings.”

Furthermore, there is no indication which items were actually in the house at the time of the agreement—some 18 months prior to the fire. One would assume that the wall calendar on the itemized list was a 2007 calendar and not a 2006 one. And one would hope that the itemized food stuffs were not 18 months old. Clearly, Karen was compensated for far more than household “furnishings” existing at the time the agreement was executed.

We are mindful that the “family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.” *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007). However, where there is clear error—where the record lacks substantial evidence to support the court’s ruling—reversal is mandated. *V.S. v. Commonwealth*, 706 S.W.2d 420, 424 (Ky. App. 1986).

After careful consideration, we believe the court clearly erred by awarding all of the proceeds derived from the insurance company’s compensation of the parties’ personal and household property to Karen without consideration of Joe’s allocated property, as well as consideration of items not considered household furnishings or present when the agreement was executed. We reverse the court’s judgment awarding Karen \$81,706.02. We remand this case for the court to

determine an appropriate division of the insurance proceeds that fully takes into account Joe's personal property destroyed in the fire.

For the reasons stated herein, we reverse and remand the judgment of the Webster Circuit Court.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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