

RENDERED: JANUARY 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001658-MR

JESSICA HAWES

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE JENNIFER UPCHURCH CLARK, JUDGE
ACTION NO. 07-CI-00362

MICHAEL STEVEN HAWES

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Jessica Hawes appeals from an order denying her motion to reconsider the findings of fact, conclusions of law and decree of dissolution of marriage entered by the Russell Circuit Court, Family Court Division, on August 11, 2009. Upon review of the record, the briefs and the law, we affirm.

FACTS

Jessica and Michael Steven Hawes were married in Lexington, Kentucky, in March of 2001. Two children were born of their union; Michael is

not the biological father of a third child born during the marriage. Michael and Jessica separated on or about August 18, 2007, and on September 1, 2007, Michael filed a petition in the Russell (Kentucky) Circuit Court to dissolve the marriage. Jessica filed a similar petition in Arkansas on September 28, 2007. In his petition, Michael averred that he had been a Kentucky resident for more than 180 days prior to commencement of the dissolution action.

On October 1, 2007, Jessica moved the Russell Circuit Court to dismiss the petition due to lack of jurisdiction over her, improper venue and insufficient service of process. The motion asserted that both Jessica and Michael were Arkansas residents and “neither have been residents of the State of Kentucky or the County of Russell for more than 180 days prior to the commencement of this action.” On November 26, 2007, the Russell Circuit Court entered an order¹ denying Jessica’s motion to dismiss because Michael “has met his burden of proof, that he is a resident of Russell County, Kentucky, and that this Court has jurisdiction over the matter currently before the Court.”

According to proposed findings of fact filed by Michael, prior to the marriage, on July 20, 2000, Michael received a partial settlement of \$87,000.00 for a workers’ compensation award and \$55,000.00 in severance pay for a total settlement of \$142,000.00. Settlement proceeds were used to: 1) build a home in 2006 in Powell County, Kentucky, on land valued at \$8,500.00 that is jointly

¹ This order was entered by Russell Circuit Court Judge Phillip Morgan before the case was assigned to Russell Circuit Court Judge Jennifer Upchurch Clark of the Family Court Division.

owned by Jessica and her two sisters; 2) purchase a home in Pike County, Arkansas, mortgaged in the amount of \$75,000.00; and, 3) purchase approximately forty acres of unimproved land in Hot Spring County, Arkansas, on which there is a lien of approximately \$16,000.00. The couple's other property and debt includes a 2001 Mercury Sable on which there is no lien; a 2001 Dodge Ram truck on which there is a \$10,000.00 lien; and approximately \$10,000.00 in credit card debt that was incurred jointly. Michael argued all the real estate should be awarded to him because it was purchased with funds from his workers' compensation settlement which were obtained prior to the marriage; the Mercury Sable should be awarded to him, or, if awarded to Jessica, she should be required to pay him \$5,000.00 which is one-half of the vehicle's fair market value; and, the credit card debt should be equally divided.

Attached to Michael's proposed findings was a deed showing Arnold Ledford and his wife, Etta Louise Ledford, sold the Powell County property to Jessica and her two sisters for \$1,400.00 cash in 1984. The deed contradicted Jessica's allegation that her parents gave the property to her and her sisters as a gift. Testimony during the final hearing on September 12, 2008, indicated Michael knew he did not own the Powell County land when he built the house upon it.

On October 1, 2008, the Russell Circuit Court entered findings of fact, conclusions of law and decree of dissolution of marriage in which it: concluded "[t]he parties hereto and the subject matter of this action are properly before the court, and this Court has jurisdiction over both parties and the subject matter

herein[;]” awarded Jessica the Powell County, Kentucky, residence with the requirement that she pay Michael \$50,000.00 for his interest in the property; awarded Michael the property in both Pike County, Arkansas, and Hot Spring County, Arkansas; awarded Michael the 2001 Dodge Ram truck; awarded the 2001 Mercury Sable to Jessica; and made Jessica solely responsible for the \$10,000.00 in credit card debt.

On October 14, 2008, Jessica moved the court to reconsider the findings of fact and conclusions of law. She asked that the requirement that she pay Michael \$50,000.00 for his interest in the Powell County property be vacated because her sisters, with whom she owns the land as tenants in common, objected to the property being mortgaged and as a result she could not raise the \$50,000.00 to pay Michael. The court did not rule on the motion.

A few days later, Michael moved the court to alter, amend or vacate the findings of fact and conclusions of law to rescind the child support order since the children receive social security disability benefits from him. The court vacated the child support award.

In April of 2009, Jessica renewed her motion to reconsider based on the same reasoning, namely impossibility to pay Michael \$50,000.00. Michael responded that the court had denied the motion upon hearing it in December of 2008. Michael argued the property awarded to him is mortgaged and has value only if he continues making the mortgage payments whereas the residence awarded to Jessica is not mortgaged and therefore, he is entitled to one-half the fair market

value of the Powell County residence. In June of 2009, Jessica filed a memorandum in support of her motion to reconsider alleging Michael's work-related accident occurred *during* the marriage, not before, as asserted by Michael.² She also alleged that indispensable parties, her sisters, had not been joined in the action. On August 11, 2009, without elaboration, the court entered an order overruling Jessica's motion to reconsider. This appeal followed.

LEGAL ANALYSIS

Jessica advances three issues on appeal. First, she argues the Russell Circuit Court lacked jurisdiction to hear the dissolution action because neither party had resided in Kentucky for more than 180 days before the filing of the petition. Second, she claims the court abused its discretion in awarding Michael two pieces of property in Arkansas and requiring her to pay Michael \$50,000.00 for his interest in the Powell County residence. Third, she argues the court abused its discretion in ordering her to pay the entire \$10,000.00 in jointly incurred credit card debt.

Findings supported by substantial evidence are not clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). “[I]n reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion.” *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982) (citation omitted).

² Michael conceded in a memorandum filed in response to Jessica's renewed motion to reconsider that his work-related injury “occurred during the course of the marriage between the parties.”

Abuse of discretion occurs when a court's decision is unreasonable, unfair, arbitrary or capricious. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (citations omitted).

Regarding the issue of jurisdiction, KRS 403.140(1)(a) states:

[t]he Circuit Court shall enter a decree of dissolution of marriage if:

(a) The court finds that one (1) of the parties, at the time the action was commenced, resided in this state, or was stationed in this state while a member of the armed services, and that the residence or military presence has been maintained for 180 days next preceding the filing of the petition[.]

In his petition for dissolution, Michael alleged he met the residency requirement and supported his assertion with a Kentucky drivers' license and Kentucky vehicle registration. In an attempt to show Michael and she were both Arkansas residents, Jessica submitted invoices for utilities in Arkansas, a letter from an Arkansas school showing the couple's daughter had been enrolled there, and an Arkansas mortgage. However, none of these exhibits conclusively established Michael was residing in Arkansas. Thus, we conclude the trial court's finding that Michael had established Kentucky residency was supported by substantial evidence and therefore, will be affirmed because it was not clear error. *Cherry*; CR³ 52.01.

We turn next to Jessica's complaints about the property division, beginning with her claim that Michael was not entitled to one-half of the improvements made to the Powell County property with marital funds because he

³ Kentucky Rules of Civil Procedure.

knew he did not own the real estate at the time he built the two-story home to be inhabited by himself, Jessica and Jessica's parents. According to the brief for appellant, the claim is based upon *Anglin v. Pennington*, 296 Ky. 142, 144, 176 S.W.2d 277, 278 (1943), which confirms that “[o]nly a bona fide purchaser, that is, one who actually believes, and has no reason to believe to the contrary, that his title is good, is entitled to recover the enhancement in value resulting from the improvements which he erects.” See also *Stepp v. Leslie*, 263 S.W.2d 122, 123 (1953); *Mullins v. Mullins*, 797 S.W.2d 491, 493 (Ky. App. 1990). While Jessica's claim has merit, it is not properly before us because it was not argued to the trial court⁴ and therefore has not been preserved for our review.

A statement of preservation is required to ensure the trial court was given the opportunity to rule on the issue before we can consider it on appeal. *Hines v. Carr*, 296 Ky. 78, 81, 176 S.W.2d 99, 100-101 (1943). Appellate review is based on the principle that the lower court has first had a chance to deliberate and decide upon the issues. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky. App. 2006). Jessica asserts the issue is preserved by the filing of multiple motions to reconsider. We have reviewed her motions to reconsider; neither cites the line of cases relied upon by Jessica in her brief. Thus, we are convinced the trial court was not given the opportunity to rule on this precise issue. In fact, in her motion to reconsider, Jessica states, “Respondent would request that the property remain in the division currently ordered but that Respondent not be required to pay

⁴ Jessica is represented by different counsel on appeal.

to the Petitioner the sum of \$50,000 for his interest in the property in Powell County, Kentucky.” Jessica is attempting to assert a different argument on appeal than was argued to the trial court. Therefore it is not properly before us and will not be considered on appeal.

We next consider Jessica’s claim that her two sisters, co-owners of the Powell County property, should have been included as indispensable parties. We disagree.

Jessica asserts her sisters are indispensable parties because she cannot comply with the court’s order that she pay Michael \$50,000.00 unless she can mortgage the Powell County property, an action at least one of her sisters opposes. However, Jessica’s inability to raise \$50,000.00 without being able to mortgage the Powell County property does not mean the trial court’s division of the couple’s marital assets constitutes an abuse of discretion. The joinder of indispensable parties is governed by CR 19.01 which reads:

[a] person who is subject to service of process, either personal or constructive, shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case an involuntary plaintiff. If the joined party objects to venue and his

joinder would render the venue of the action improper, he shall be dismissed from the action.

First, neither sister has filed a claim, nor has a claim been asserted on their behalf.

Second, the trial court awarded the Powell County *house* to Jessica but directed her to pay Michael \$50,000.00 for his interest in the property. The trial court's award did not impact the interests of Jessica's sisters in the Powell County *real estate*; they remain tenants in common with her. Therefore, the sisters are not indispensable parties to the dissolution action.

Finally, Jessica claims the trial court abused its discretion in ordering her to pay \$10,000.00 in credit card debt that Michael testified was jointly incurred during the marriage. Jessica argues the court erred in making her responsible for the debt without any proof that it exists or to whom it is owed.

During the final hearing, Jessica testified she was unsure of the amount of credit card debt owed by the couple. Michael testified that Jessica had \$900.00 in credit card debt and the couple had jointly incurred \$10,000.00 in credit card debt. As asserted by Jessica in her brief, Michael offered to pay one-half of the couple's credit card debt.

CR 76.12(4)(c)(v) requires the argument of the brief to begin with "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Jessica's brief does not comply with the rule. Furthermore, no allegation about the unfairness of making Jessica solely responsible for the marital credit card debt appears in either motion to

reconsider. Thus, the issue was not presented to the trial court and will not be considered on appeal. *Hines*.

For the foregoing reasons, the findings of fact, conclusions of law and dissolution of marriage entered by the Russell Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan J. Ham
Somerset, Kentucky

BRIEF FOR APPELLEE:

Michael S. Hawes, *pro se*
Jamestown, Kentucky