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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000464-MR
AND
NO. 2012-CA-000514-MR

HOLLY R. DEBOER

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 11-CI-00325

DOUGLAS K. DEBOER

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Holly R. Deboer has appealed from the Muhlenberg Circuit Court's January 9, 2012, entry of an opinion and order in her dissolution of marriage action against Douglas K. Deboer, regarding custody of their minor children, assignment of nonmarital property, apportionment of marital property,

and denial of her maintenance request. Doug has filed a cross-appeal from the same order. Following a careful review, we affirm.

Holly and Doug began cohabitating in 1996. Shortly thereafter, Doug obtained forty acres of property, undertook site improvements, and began construction of a barn. Although the parties shared some living expenses, the money used to accomplish these tasks came solely from Doug's separate funds. Each contributed to his/her own separate retirement account. After cohabitating for about three years, the pair married on June 26, 1999, and the marriage produced two minor children.

Difficulties arose in the marriage leading to the parties' separation and institution of a dissolution action. On October 26, 2011, the matter proceeded to a final hearing on issues related to the division and allocation of marital and nonmarital property and indebtedness; child custody, visitation and support; and maintenance. The court received evidence and took testimony from the parties, their babysitter, a neighbor, Doug's sister, and a real estate appraiser. Both parties indicated their desire to be named as primary residential parent of the minor children. Each also put forth a position on the marital and nonmarital character and value of the parties personal and real property, as well as their desire for the appropriate division thereof.

On January 9, 2012, the trial court entered its opinion and order resolving the contested issues. Of importance to this appeal, the trial court awarded the parties joint custody of the minor children and named Doug the

primary residential parent; restored to each party his/her nonmarital interest in the respective retirement accounts, but also granted Doug an additional \$1,013.44 non-marital interest in his 401(k) which represented the gains attributable to the non-marital portion of that account which did not result from any effort by Doug; granted Doug a nonmarital interest in the equity and increase in value of the parties' land which he purchased prior to the marriage as well as increases based on improvements made to the property prior to the marriage; and denied Holly's request for maintenance. Subsequent motions to alter, amend or vacate filed by both parties were denied. This appeal and cross-appeal followed.

On direct appeal, Holly raises three allegations of error. First, she contends the trial court erred in designating Doug primary residential custodian of the parties' two minor children. Second, she argues the trial court erred in calculating the parties' nonmarital interests in their real estate as well as Doug's 401(k) account. Finally, she alleges the trial court erred in failing to award her maintenance. We disagree with each of her contentions.

Holly first challenges the trial court's decision to designate Doug as primary residential custodian of their minor children. She alleges the trial court's factual findings were unsupported by substantial evidence and were therefore, clearly erroneous.

The standard of appellate review of questions regarding a trial court's findings of fact is well-established. Questions as to the weight and credibility of a witness are purely within the province of the court acting as fact-finder and due

regard shall be given to the court's opportunity to judge the witness' credibility. CR¹ 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002) (*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)). Factual determinations made by the circuit court will not be disturbed on appeal unless clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. *Sherfey*, 74 S.W.3d 777. If the testimony before the trial court is conflicting, as in this case, we may not substitute our decision in place of the judgment made by the trial court. *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1998).

Trial courts are vested with broad discretion in matters concerning custody and visitation. *Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). In the absence of an abuse of discretion, we will not disturb a trial court's decision. *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky. App. 2009). "Abuse of discretion in relation to the exercise of judicial power implies an arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Sherfey*, 74 S.W.3d at 783 (internal quotation marks omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted); *see also Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). The test is not whether we as an appellate court would have

¹ Kentucky Rules of Civil Procedure.

decided the matter differently, but whether the trial court's rulings were clearly erroneous or constituted an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

Holly recounts a good deal of the testimony she presented at the hearing as support for her argument that the trial court erred in its assessment. Essentially, she contends the trial court's factual findings must be incorrect as they did not follow the testimony and evidence she presented. She asserts that the trial court should have assessed the credibility of the witnesses and weighed the evidence presented differently. Holly believes that since the uncontradicted evidence indicated she was a "good mother" the trial court should have designated her primary residential parent for the children.

"It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991) (citing *Gen. Tire & Rubber Co. v. Rule*, 479 S.W.2d 629 (Ky. 1972)). Further, as we previously stated, an "[a]buse of discretion in relation to the exercise of judicial power implies an arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Sherfey*, 74 S.W.3d at 783.

We discern no abuse of discretion by the trial court. The court utilized the correct legal standard in its review of the evidence presented and placed substantial weight on the adjustment of the children to their home and community. The court also expressed concern for Holly's lack of long-term

planning for the children while noting Doug would continue to raise them in the only community they had ever known. It further found that although a temporary agreed order had designated Holly primary residential parent, in reality the parties had followed a split-custody arrangement. Nevertheless, the court carefully analyzed and set forth its findings of fact and conclusions of law in a well-written order. The court, in its discretion, determined the best interests of the children would be served by granting the parties joint custody and designating Doug as primary residential parent. “While some of the evidence conflicted with the trial court’s conclusions, and a different trial court or a reviewing appellate court might disagree with the trial court, the standard on appellate review requires a great deal of deference both to its findings of fact and discretionary decisions.” *Frances v. Frances*, 266 S.W.3d 754, 758 (Ky. 2008).

Next, Holly argues the trial court erred in calculating Doug’s nonmarital interest in his 401(k) by including a net increase in the value of his premarital contributions realized over the course of the marriage. She also contends the trial court erred in assigning Doug the sum of \$24,942.83 as nonmarital property. This sum was calculated to represent his down payment on the forty acres, reduction of mortgage indebtedness prior to the marriage, and an increase in value based on the site improvements and partial barn construction. She argues these assignments prove the trial court’s failure to consider the financial contributions she made during the three years of cohabitation and amount to unjust enrichment or at the very least, a windfall for Doug.

While acknowledging *Murphy v. Bowen*, 756 S.W.2d 149 (Ky. App. 1988) clearly stands for the proposition that Kentucky law disfavors awards for division of property acquired during periods of cohabitation, Holly urges us to disregard this binding precedent and chart a new course. She argues “[t]here should be no practical distinction between equity or assets accrued during cohabitation, [and] assets accumulated or equity accrued following the marriage.” We decline her invitation to overturn more than twenty-five years of well-settled jurisprudence.

Kentucky law does not permit parties to claim a right in the property of each other absent written evidence of partial ownership. In *Murphy*, a panel of this Court held it proper to require one party to compensate the other for all documented financial contributions to property which the parties purchased or lived on together. Contributions to purchase or improvements of a household by one cohabiter cannot be the basis for a claim for partial ownership of the residence unless evidence of such ownership is provided. *Glidewell v. Glidewell*, 790 S.W.2d 925 (Ky. App. 1990). The trial court must determine whether evidence of a joint venture exists, and recompense a party where documented ownership and contribution exist. *Id.* at 927. Here, the court clearly found no evidence of a joint venture or partial ownership by Holly and believed all premarital contributions to the equity in the property were attributable to Doug.

The standard of review of a trial court’s determination regarding property ownership and claims is whether the appellant has shown the trial court’s

decision was clearly erroneous, or there was an abuse of discretion. *Church & Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992). Holly has made no such showing. She could provide no evidence, other than her own testimony, showing the monies she spent were in exchange for an ownership interest in the property. Further, ample evidence exists in the record tracing the funds expended on the property to Doug's separate accounts. No reversible error has been shown and the trial court's decision will not be disturbed.

Finally, Holly contends the trial court erred in failing to award her maintenance. She believes the disparity in the parties' incomes, the comfortable lifestyle enjoyed during the marriage, the impact her health issues may have on her future earning capacity, and her high living expenses as compared to her income militated in favor of a finding she was entitled to maintenance. Again, we disagree.

As correctly noted by the trial court, to award maintenance, KRS 403.200(1) requires a finding the spouse seeking such an award lacks sufficient property to provide for her needs and is unable to support herself through appropriate employment. *See also Croft v. Croft*, 240 S.W.3d 651 (Ky. App. 2007). The determination of whether to grant maintenance is vested in the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. App. 1990). Absent an abuse of that discretion, we will not disturb the trial court's ruling, *Young*, 295 S.W.3d at 146, especially given the wide deference afforded to discretionary decisions. *Frances*, 266 S.W.3d at 758.

In the case *sub judice*, after carefully analyzing the evidence presented, the trial court determined Holly was granted a substantial portion of the marital assets and had the demonstrated ability to earn a substantial wage. The court further discounted Holly's testimony regarding her "reasonable needs" and noted her unequivocal testimony that her health conditions would not progress and did not interfere with her ability to work or care for the children. In light of these findings, the trial court denied Holly's request. Our review of the record reveals the trial court utilized the correct statutory standard and its factual findings were supported by substantial evidence. Holly is not entitled to the relief she seeks as we have discerned no error.

On cross-appeal, Doug raises a single allegation of error. He contends the trial court erred in denying his motion to alter, amend or vacate its January 9, 2012, order. He argues the forty acres of premarital, unimproved property increased in value during the marriage through no efforts of the parties and he should therefore be apportioned that increase as a nonmarital asset pursuant to KRS 403.190(2)(e). We disagree.

Doug avers the expert real estate appraiser opined the increase in value of the forty-acre parcel of real estate was solely attributable to the development of other large parcels of real estate nearby. Thus, he believes market forces—rather than efforts of the parties—generated the increase in value, thereby entitling him to apportionment of any such sums related to the premarital asset. However, the trial court characterized the testimony differently, finding the real

estate appraiser “looked to the value of surrounding farms *with improvements on them* in calculating the increased value of the property in question.” (Emphasis in original). The trial court then determined the increase in value was largely due to the improvements undertaken by Doug before the marriage and by the parties following the marriage. These improvements included construction of a barn and residence on the property, installation of utility services, and construction of a driveway. Thus, contrary to Doug’s urging, the trial court determined the increase in value of the unimproved acreage was a marital asset and divided that amount equally between the parties.

Although conflicting views of the evidence are advanced, we must give due deference to the trial court’s factual and discretionary findings. *Frances*, 266 S.W.3d at 758. Substantial evidence was presented at the hearing to support the trial court’s decision and Doug has not shown the trial court clearly erred or abused its discretion in relation to this matter. *See Church & Mullins Corp.*, 887 S.W.2d at 323. Therefore, we will not disturb the trial court’s ruling on appeal.

For the foregoing reasons, the judgment of the Muhlenberg Circuit Court is AFFIRMED *in toto*.

ALL CONCUR.

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