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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001483-MR
AND
NO. 2016-CA-001291-ME

LISA KIMBERLIN MIRANDA APPELLANT

v. APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 12-CI-503266

FRANCISCO SAVIO MIRANDA APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND STUMBO, JUDGES.

LAMBERT, J., JUDGE: Lisa Kimberlin Miranda appeals from separate orders entered by the Jefferson Circuit Court, namely, an order denying Lisa's motion to force the sale of the parties' marital residence (Appeal No. 2015-CA-001483), and an order denying Lisa's motion for a hearing on visitation with the parties' children

(Appeal No. 2016-CA-001291). We affirm in Appeal No. 2015-CA-001483 and vacate and remand in Appeal No. 2016-CA-001291.

Lisa and Francisco Savio Miranda (Franky) were married from 2001 until 2015. They are the parents of three children, now ages 13, 8, and 4 years old. Lisa filed the petition for dissolution of marriage in 2012, but the final decree was not entered until three years later. The children were removed by the Cabinet for Health and Family Services from Lisa's custody in July 2013. Lisa's mother accepted emergency custody at that time, and the children were later placed in foster care until Franky was granted temporary custody of them. Franky's mother assists in his care of the children.

The facts of the first appeal concern the marital residence. In the parties' settlement agreement, Franky received possession of the parties' home. The agreement called for Franky to pay Lisa $15,000.00 after he obtained refinancing for the house. Franky had 90 days in which to do that. At the expiration of those 90 days, Lisa filed a motion to compel production of documents regarding Franky's ability to refinance the home.

The Jefferson Circuit Court held a hearing on the matter and, in an order dated June 18, 2015, granted Franky an additional 30 days in which to obtain appropriate refinancing. After Franky's extended deadline expired, Lisa asked the circuit court to compel the sale. Another hearing was held on July 6, 2016, after which the court took the matter under submission and granted Franky's counsel 10 days to file responsive pleadings.

Meanwhile, Franky was notified by his bank that a lien had been placed upon the subject property in December 2014 after a default judgment had been entered against Lisa by Capitol One for monies owed in the amount of $1,366.48. It was Franky's position that the lien explained his frustrated attempts to secure refinancing. Franky sought to have Lisa satisfy the lien and obtain its release so that refinancing could move forward and he could close on the house. Lisa initially ignored the circuit court's order pertaining to the lien, insisting that the house be sold, but she subsequently paid off the lien and signed the authorization for release of the payoff documentation. Franky was able to obtain refinancing, although it took another trip to court to get the Master Commissioner to execute a quitclaim deed (again because Lisa would not cooperate). Franky paid Lisa on September 8, 2015, and she accepted it. On September 25, 2015, Lisa filed a notice of appeal from the order denying her motion to compel the home's sale.

Lisa argues that the circuit court erred in denying her motion to compel the sale of the home. She maintains that the settlement agreement should have been enforced as written and that the circuit court abused its discretion in its interpretation of the agreement and in granting Franky additional time to comply with the terms. We disagree.

The standard of review is well settled on this issue: "The terms of a settlement agreement set forth in a decree of dissolution of marriage are enforceable as contract terms. [Kentucky Revised Statutes] KRS 403.180(5). The construction and interpretation of a contract is a matter of law and is reviewed under the *de novo* standard. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998)." *Money v. Money*, 297 S.W.3d 69, 71 (Ky. App. 2009).

> We review questions of law *de novo*. *Western Ky. Coca–Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001). However, findings of fact will "not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [family] court to judge the credibility of the witnesses." CR 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A 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. "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Sherfey*, *supra* (footnote omitted). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Janakakis–Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999) (citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky.1972)).

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007). "Thus, we review the agreement anew, giving no deference to the trial court." *McMullin v. McMullin*, 338 S.W.3d 315, 320 (Ky. App. 2011).

With those standards in mind, we turn to the Mirandas' settlement agreement, which stated in pertinent part, thus:

> Franky will keep 3123 Talisman Rd. and the equity in the home. **He will refinance the mortgage within 90 days and shall pay Lisa $15,000 as her marital and nonmarital share of equity in the home. If Franky is unable to refinance, the house shall be listed for sale.** Franky shall not incur any additional debt on the home during this period, unless for the purpose of fully satisfying the payment owed to Lisa herein. The proceeds from sale shall be calculated as if the balance of the mortgage was $90,000 (the approximate balance on the date of mediation), and Lisa shall receive one-half and Franky shall receive one-half of that calculated balance.

(Emphasis added.) The circuit court interpreted these terms as independent of each other, citing as support *Wilson v. Independent Life & Accident Ins. Co.*, 314 Ky. 624, 627, 236 S.W.2d 881, 882 (1951):

> In the clause in question, due to the use of the period between the two sentences, the Court finds each sentence stands alone and neither modifies the other. The agreement to list the property for sale if [Franky] is unable to refinance stands alone and is not tied to [Franky's] ability to refinance in 90 days.

We agree with the circuit court's interpretation, and we also agree with its findings pertaining thereto. The circuit court found that Franky was not unable to refinance, and that finding is supported by substantial evidence. *Bailey*, *supra* (citing *Sherfey*, *supra*). The record indicates that Franky made three attempts to refinance with Fifth Third Bank, namely, on March 23, May 6, and June 9, 2015 (i.e., all within the initial 90-day period). He then switched efforts to Republic Bank and received a Pre-Qualification Letter on July 2, 2015 (the date his additional 30-day extension, granted by the circuit court, expired). Lisa's attorney objected to this, stating at the July 6 hearing that Franky did not make good faith efforts to obtain financing for the home. It was shortly thereafter (between the hearing and the circuit court's ruling) that Republic Bank notified Franky of the lien, of which Franky was theretofore unaware. Once the lien was satisfied and the quitclaim deed was executed, refinancing proceeded without further complications, and Franky's obligation to Lisa was paid in full.

Therefore, it appears from the record before us that any delays in refinancing and moving forward were caused by Lisa, not Franky. We fail to be convinced that a forced sale of the home would have been more expeditious – or that Lisa would have fared better - given that the parties would have had to agree to a realtor, prepared the property for sale, shown the home to potential buyers, received an offer, and waited for the eventual buyer to obtain financing (a process that often takes much longer than the additional time Franky was afforded to complete the refinancing process). Lisa accepted the payment and should not now complain about the extension of time granted Franky. *See Mason v. Forrest*, 332 S.W.2d 634, 635-36 (Ky. 1959). We affirm in Appeal No. 2015-CA-1483.

We turn now to the second appeal, which deals with Lisa's motion for a hearing on visitation with the parties' children. As stated previously, the children were removed from Lisa's care during the pendency of the dissolution proceedings. She was granted supervised visitation (sight and sound only), which was terminated in October 2014. Lisa stipulated that the children were dependent in December of that year.

In January 2015, the dissolution proceeding and dependency actions were combined, with the circuit court taking judicial notice of orders and proceedings in the latter. In January 2016 (with multiple motions, responses, and orders in the interim), Lisa and Franky entered into an agreement which specified that the court-appointed psychotherapist (Dr. Kristen McCrary) would "provide a written update to the Recommendations contained in her July 19, 2015 Parental Capacity Assessment Report and provide said Recommendations to the court." The parties further agreed to stipulate to the updated recommendations.

Said recommendations were provided to the court. Dr. McCrary recommended that the children be evaluated by a highly qualified mental health professional to determine the children's readiness for reunification with their mother, with the proviso that "initiation of therapeutic reunification should be based upon the combined recommendations of [Lisa's] treatment provider and any mental health professional(s) who evaluates and/or provides therapy to the subject children."

The children's evaluation by Dr. Jennifer Demling Cebe (whose evaluation was referred to in the parties' agreement) was provided to the court on May 3, 2016; Dr. Cebe stated her

> clinical opinion that therapeutic contact with [Lisa] poses a significant risk for deterioration in the children's functioning at this time and that benefits of that contact for children who have a limited emotional connection to their mother do not outweigh the risks to them. Therefore this therapist does not view reunification therapy as in the children's best interest at this time.

In accord with Dr. Cebe's recommendations, Dr. McCrary opined that "[Lisa] does not presently meet minimally adequate parental standards. Should the children be returned to her care at this time, they would be at unacceptable risk of future acts of neglect and/or abuse."

Having agreed to accept the recommendations, Lisa nonetheless moved the circuit court to revisit the issue and hold a hearing, which the court denied in an order dated August 25, 2016. Lisa appeals, arguing that she was entitled to an evidentiary hearing pursuant to KRS 403.320(1), which states:

> A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.

> Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

Lisa contends that the hearing is mandatory, and that the trial court lacked discretion to deny her motion.

Franky counters that Lisa's reliance on this statute is misplaced: Custody had been determined in the dissolution proceeding, and this was instead a motion to allow visitation (which previously had been discontinued because of Lisa's mental illness and concomitant disturbing and dangerous behaviors), which would fall under KRS 403.320(3), which makes no mention of an evidentiary hearing ("The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.").

Furthermore, according to Franky, Lisa agreed to abide by Dr. McCrary's recommendations and waived her right to a hearing in the agreed order. Lisa protests that accepting Dr. Cebe's recommendations was not part of the stipulation, while Franky insists that common sense dictates that Dr. Cebe's evaluation of the children be included in the recommendation to the circuit court. Franky maintains that it was not improper for the circuit court to rely upon those recommendations because Lisa made no demonstration to the circuit court that a modification of visitation would be in the children's best interests. KRS 403.320(3); *Oster v. Oster*, 444 S.W.3d 460, 466 (Ky. App. 2014).

We agree with Franky that Lisa stipulated to the recommendations of Doctors McCrary and Cebe. However, Lisa should be given the opportunity to be heard on the issue of visitation to present her evidence to the circuit court that she has complied with the directives of the court regarding completion of therapy as referenced in the letters of Doctors Shields, Taylor, and Day (which letters draw opposite conclusions to the recommendations of Doctors McCrary and Cebe). Lisa, of course, bears the burden of proving that visitation with her will be in the children's best interests. Thereafter the circuit court can properly rule on whether visitation is in the best interests of the children. KRS 403.320(3); *Humphrey v. Humphrey*, 326 S.W.3d 460, 464 (Ky. App. 2010).

The orders of the Jefferson Circuit Court in Appeal No. 2015-CA-001483 are affirmed. We vacate the orders of the Jefferson Circuit Court in Appeal No. 2016-CA-001291 and remand the matter for an evidentiary hearing on the issue of visitation.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William D. Tingley
Louisville, Kentucky

BRIEFS FOR APPELLEE:

Elizabeth M. Howell
Louisville, Kentucky