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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NOS. 2017-CA-001147-MR
AND 2017-CA-001540-MR

ROBERT D. DOMINE — APPELLANT

v.

APPEALS FROM JEFFERSON FAMILY COURT
HONORABLE DEANA MCDONALD, JUDGE
ACTION NO. 99-FC-005548

SHERYL E. DOMINE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: In this consolidated action, Robert appeals two orders of the Jefferson Family Court. The first order modified, rather than terminated, his monthly maintenance obligation to Sheryl. The second order required Robert to pay $5000.00 towards Sheryl's attorney's fees for this appeal. Upon review, we affirm.

Factual and Procedural Background

The parties divorced in 2000 after approximately thirty years of marriage. The family court ordered Robert to pay monthly spousal maintenance to Sheryl in its findings of fact, conclusions of law, and decree of dissolution. Robert's maintenance obligation was ordered to decrease over time by the family court, and Robert has been paying Sheryl $2000.00 per month since 2006. The amount was not scheduled to decrease again, and the award was open-ended.

Robert retired from his career as a sports broadcaster in 2010. In 2016, Robert motioned the family court to terminate or, alternatively, reduce his spousal maintenance obligation. He cited his retirement and fixed income as a change in circumstances. Robert receives Social Security benefits each month plus retirement distributions. Sheryl also receives $325.00 per month as a portion of Robert's retirement benefits. Sheryl's only other source of income is spousal maintenance. At the time of the divorce, Sheryl had – and continues to have – numerous health problems.

The family court conducted a hearing and denied Robert's motion to terminate maintenance. However, the family court did reduce Robert's maintenance obligation by $325.00 per month, the sum Sheryl receives as her portion of Robert's retirement benefits. After Robert filed a notice of appeal,

Sheryl requested an advance of attorney's fees. The family court awarded $5000.00 in prospective attorney's fees to Sheryl. These appeals followed.

Analysis

At the outset, we note that our review of this matter is greatly hindered by the fact that neither party filed a designation of record pursuant to CR[1] 75.01. While we acknowledge that it is the appellant's responsibility to designate the appellate record,[2] both parties cite extensively to the hearing conducted by the family court on March 29, 2017, in their briefs to this Court. That hearing is not in the record before us. Any exhibits admitted into evidence during the hearing are not in the record before us. If the trial court conducted a hearing regarding its award of attorney's fees to Sheryl, that hearing is also not contained in the record.

> [I]f appellant's position is that the evidence does not support the trial court's finding and judgment, there is no [video recording or] transcript of it against which we can measure the soundness of the findings. On appeal, the trial court's findings of fact will not be disturbed unless they are clearly erroneous. CR 52.01. When the evidence is not presented for review, this court is confined to a determination as to whether the pleadings support the judgment and on all issues of fact in dispute we are required to assume that the evidence supports the findings of the lower court.

McDaniel v. Garrett, 661 S.W.2d 789, 791 (Ky. App. 1983) (citation omitted).

[1] Kentucky Rule of Civil Procedure.

[2] *See Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

Thus, without the recorded hearing and any exhibits admitted into evidence therein, we must assume the content of the hearing supported the trial court's order. *Id.*; *see also Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky. App. 2016) (citing *King v. Commonwealth*, 384 S.W.3d 193, 194-95 (Ky. App. 2012)). We turn now to the merits of this case with this constraint in mind.

Robert makes five arguments to this Court on appeal. He argues that the family court (1) erroneously found that the only change in circumstances was that Robert retired and Sheryl began to receive Social Security benefits; (2) erroneously found that Robert is able to provide for his own reasonable needs while continuing to pay spousal maintenance under the current circumstances; (3) erred by failing to compel production of records in response to Robert's subpoenas issued to record-keepers; (4) incorrectly applied or arbitrarily refused to apply the precedent of *Bickel v. Bickel*, 95 S.W.3d 925 (Ky. App. 2002); and (5) erred in its advance of fees to Sheryl for this appeal.

Regarding Robert's first argument, he asserts only that both parties received approximately $500,000.00 at the termination of the marriage and that the family court failed to take this into account. We agree with the family court that receipt of those funds by the parties was taken into account by the court when it made the initial maintenance award at the time of dissolution. Therefore, the funds

had no bearing on the court's subsequent decision to modify maintenance approximately seventeen years after the parties divorced. We find no error.

Robert next argues that the evidence presented during the hearing was that he must routinely transfer funds from his savings account to his checking account to prevent overdrafts. Robert asserts that, consequently, he is unable to meet his own reasonable needs while continuing to pay maintenance to Sheryl. The trial court found that Robert lives an active lifestyle and has sufficient income from assets and Social Security income to provide for his reasonable needs and meet his monthly expenses, including his maintenance obligation. Robert has presented no evidence in the record to contradict the family court's findings. Moreover, as discussed at the outset, we are obligated to assume that the evidence supports the findings of the family court. *McDaniel*, 661 S.W.2d at 791. Therefore, we find no error.

For his third argument, Robert asserts only that "[b]y prohibiting the discovery of highly relevant documents, [Robert] was without opportunity to cross examine [Sheryl's] claims. Further, the trial court was denied information which might have shed light on [Cheryl's] dissipation of her share of the marital estate." Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain "[a]n 'ARGUMENT' conforming to the Statement of Points and Authorities, with ample supportive references to the record and

citations of authority pertinent to each issue of law[.]" Robert fails to make an argument in support of *why* he believes the family court erred. Robert's brief lacks any citations of authority. Nor does it contain references to the record of any arguments Robert made to the family court in support of his assertions.[3] We will not assume what arguments Robert may intend on appeal regarding an alleged, but unsupported, error by the family court. Therefore, Robert's brief does not comply with CR 76.12(4)(c)(v). As a result, we deem that appropriate penalty in this instance is to refuse to consider Robert's assertions regarding the subpoenas. *See Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

We find no merit in Robert's argument that the trial court incorrectly applied or arbitrarily refused to apply the precedent of *Bickel*. We further discern that this is simply a repackaging of Robert's initial argument that the family court did not consider the fact that the parties each received approximately $500,000.00 at the time of the divorce. The basis for Robert's argument is that Sheryl has spent almost all of the funds she received in 2000. Robert argues that, since his retirement, he has had to use his share of the funds to make ends meet each month, including paying maintenance to Sheryl. In essence, Robert's argument is that he

[3] We again reiterate that the record before us contains no hearings. However, Robert also fails to reference any pleadings in the record that reflect arguments made to the family court regarding the subpoenas.

should not be required to continue to pay maintenance from the funds he received in the divorce because he believes Sheryl misspent her share. The family court found that Robert continued to work for many years after the divorce and invested his share. Sheryl has been unable to maintain employment due to numerous health issues and has $10,000.00 – $17,000.00 left from her share. The family court found that how each party spent the funds has no bearing on whether there is a current change in circumstance to warrant termination of spousal maintenance. We agree.

We also agree with Sheryl that Robert's interpretation of *Bickel* is too narrow. In *Bickel*, this Court looked to a decision from the Tennessee Supreme Court[4] in holding that "an obligor cannot merely utter the word 'retirement' and expect an automatic finding of a substantial and material change in circumstances . . . . Rather, the trial court should examine the totality of the circumstances surrounding the retirement . . . the burden of proof being on the party seeking a modification of the award." *Bickel*, 95 S.W.3d at 929.

Upon its review of the matter, the family court did find that a change in circumstances had occurred as a result of Robert's retirement; but, the change was not so substantial and continuing as to warrant termination of spousal maintenance. The family court found that termination would mean the financial

[4] *See Bogan v. Bogan*, 60 S.W.3d 721 (Tenn. 2001).

ruin of Sheryl, but that Robert was entitled to a reduction of $325.00 per month to offset the amount Sheryl now receives from Robert's retirement benefits. Because we must presume that the evidence supports the findings of the trial court given that the recorded hearing and any evidence admitted therein are not in the record before us, we find no error.

Finally, Robert argues that the family court erred in awarding prospective attorney's fees to Sheryl for the purpose of this appeal. Robert argues that the family court should have conducted a hearing to determine the financial resources of the parties. We disagree for several reasons. First, this court has ruled that "[i]f a party is denied attorney's fees to defend or file an appeal, the purpose of KRS[5] 403.220 would be negated by the party with superior financial ability to hire counsel at the appellate level." *Brosnan v. Brosnan*, 359 S.W.3d 480, 488 (Ky. App. 2012). Second, the trial court heard evidence of the parties' respective financial resources during the hearing to terminate maintenance, which had taken place approximately four months before Sheryl motioned the family court for attorney's fees. Robert fails to identify – in his argument to this Court or in the record before us – what additional or different evidence of the parties' financial resources would have emerged had the family court held a second hearing in such close proximity to the first. Lastly, we note that the family court retains

[5] Kentucky Revised Statute.

jurisdiction to alter its previous award after this appeal, including "reimbursement of any unjustified amounts awarded[.]" *Id.*

For the foregoing reasons, the judgment of the Jefferson Family Court is affirmed.

DIXON, JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
J. Russell Lloyd Louisville, Kentucky	William D. Tingley Louisville, Kentucky