RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000638-ME

THOMAS AMES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 17-CI-501257

REBECCA AMES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Thomas Ames brings this appeal from a March 23, 2018, Order of the Jefferson Circuit Court, Family Court Division, dissolving his marriage to Rebecca Ames, awarding Rebecca sole custody of the parties' two children, distributing the parties' marital assets, and dividing the marital debts. We affirm.

Thomas and Rebecca were married July 9, 2005. Two children were born of the parties' marriage; the first child was born in 2008, and the second was born in 2012. Rebecca filed a petition for decree of dissolution of marriage on April 17, 2017.

The relevant events preceding the parties' physical separation and divorce occurred on April 8, 2017, at their marital residence in Louisville. The parties were arguing when Thomas attempted to strangle Rebecca in the presence of their children and threatened that he was going to kill her. Rebecca was able to break free from Thomas, whereupon he brandished a weapon, again in the presence of the children, and stated that he was going to shoot himself. Rebecca and the children immediately left the home. Thereafter, Rebecca obtained an Emergency Protective Order (Action No. 17-D-501108-001) against Thomas. When Rebecca returned to the home with her father, William Jacoby, they found the home in complete disarray. Rebecca and her father gained access to a room in the basement of the home that Thomas had kept locked. In the room, Rebecca and William discovered drugs, marijuana, drug paraphernalia, ammunition, a bullet-proof vest, and a sheriff's uniform.

A hearing was subsequently conducted on Rebecca's petition for a domestic violence order (DVO). A DVO was entered April 26, 2017, awarding Rebecca temporary custody of the parties' two children. The court ordered that

Thomas and the children attend therapy separately, and upon the therapist's recommendation, Thomas and the children could start reunification therapy. Thomas was also ordered to complete a psychological assessment and follow the recommendations contained therein.

During the pendency of the dissolution action,[1] there were often issues regarding Thomas's telephonic/internet contact with the children. At one point, Thomas was granted telephonic visitation with the children three times per week. However, the children became so distressed by Thomas's inappropriate comments and questions relative to the parties' divorce that the court limited the phone contact to once weekly. Shortly thereafter, Thomas agreed to suspend his phone contact altogether. Thomas was also dismissed from reunification therapy because he was incapable of working with the therapist.

A final evidentiary hearing was conducted, and by findings of fact and conclusions of law set forth in a March 23, 2018, Order, the parties' marriage was dissolved. The order also granted Rebecca sole custody of the parties' children; Thomas was not granted visitation/time-sharing. Rather, the family court appointed a friend of the court to examine the visitation/time-sharing matter and prepare a report containing recommendations. The order, likewise, divided the parties' marital assets and assigned the marital debts. This appeal follows.

[1] At some point during the pendency of the dissolution of marriage proceeding, Thomas Ames moved to Florida in an effort to obtain employment.

On appeal, Thomas contends the family court erred in the 1) division of the parties' marital assets, 2) assignment of marital debts, 3) failure to award him part of Rebecca's retirement, and 4) award of sole custody of the children to Rebecca. We will examine each issue in the order presented.

First, Thomas asserts he should have been allocated one-half of the equity in the parties' martial residence. In support thereof, Thomas asserts the court erred by finding that Rebecca's parents loaned the couple $75,000 to use toward the purchase of a martial residence rather than finding that her parents gifted them $75,000. Thomas believes that such a finding was not supported by substantial evidence.

Whether property acquired during the marriage is considered a gift for purposes of a dissolution of marriage proceeding "is a factual issue subject to the clearly erroneous standard of review." *Hunter v. Hunter*, 127 S.W.3d 656, 660 (Ky. App. 2003). A finding of fact is not clearly erroneous if supported by substantial evidence of a probative value. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence that a reasonable person would accept as sufficient to adequately support a conclusion and, when taken alone or in light of all the evidence, has adequate probative value capable of inducing conviction in the minds of a reasonable person. *Id.* We, of course, review issues of law *de novo*.

In the case *sub judice*, extensive evidence was presented at the hearing demonstrating that the $75,000 was a loan to the couple. Rebecca and her father, William, both testified that the $75,000 was, in fact, a loan to the parties from Rebecca's parents and constituted a debt of the parties. William testified that he and his wife, Rhoda Jacoby, loaned Rebecca and Thomas $75,000 toward the purchase of real property to serve as the marital residence. In order to secure the debt, a second mortgage was executed by Rebecca, Thomas, William, and Rhoda. The executed mortgage was recorded in the Jefferson County Clerk's Office on May 30, 2007. William further testified that Rebecca and Thomas subsequently sold the property, and upon the sale of the property, William and Rhoda executed a lien release. After the lien was released, a promissory note was executed by Rebecca, Thomas, William, and Rhoda. The promissory note provided the $75,000 loan would accrue interest at the rate of one percent (1%) per annum until due on April 10, 2010. If not paid by April 10, 2010, the note would then accrue interest at the rate of two percent (2%) per annum until paid in full. The evidence presented at the hearing reflected that the amount due and owing at the time of the hearing was $135,731.34. Upon review, we believe there was substantial evidence of a probative value to support the family court's decision that the $75,000 received from Rebecca's parents constituted a loan to the parties rather than a gift. Therefore, we conclude Thomas's argument on this issue to be without merit.

Thomas next asserts the family court erred by failing to assign a particular marital debt to either party. More specifically, Thomas asserts the family court erroneously omitted from its allocation of marital debt a Capitol One credit card having a balance of $10,043.97 at the time of the divorce.

In Kentucky, there is no presumption that a debt incurred during the marriage is marital. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522 (Ky. 2001), o*verruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018). Rather, the allocation of marital debt by the court is based upon many factors including the extent of each parties' participation in acquiring the debt, and each parties' receipt of the benefit of the debt. *Neidlinger*, 52 S.W.3d at 523. The court's decision upon allocation of debt will not be disturbed absent an abuse of discretion. *Id.*

In this case, the parties had a substantial amount of consumer debt. Rebecca testified about several different credit cards and the amounts owed on each, and Thomas did not dispute Rebecca's testimony. In the Order, the family court assigned several credit card debts to each party. It does appear, however, that the family court failed to allocate the Capitol One credit card with a balance of approximately $10,043.97 to either party. Neither party objected to or raised the issue of the family court's failure to allocate this debt. *See* Kentucky Rules of Civil Procedure (CR) 52.04. Presumably, this was a joint debt and the result is that

each party remains liable thereon. The failure of Thomas to timely raise this issue before the family court precludes review on appeal. *See Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997).

Thomas's third argument on appeal is that the family court "wrongly concluded that Mr. Ames would not be entitled to any of Ms. Ames' Teachers' Retirement Pension." Thomas's Brief at 12. The family court correctly concluded that Rebecca's teacher retirement was exempt from marital distribution under Kentucky Revised Statutes (KRS) 403.190(4). *See also* KRS 161.700(3). The court then awarded each party their respective retirement accounts as their separate property. Curiously, Thomas states in his brief that he is not asking for any particular relief, only that the division be noted in the "totality of determining whether the Family Court reached a just and equitable outcome," and for this Court to consider Rebecca's entitlement to social security benefits. Thomas's Brief at 12. Effectively, Thomas has failed to raise an error below in the court's ruling on the retirement account and, thus, we decline to consider the same.

Thomas's final argument is that the family court erred in awarding sole custody of the children to Rebecca with no visitation/time-sharing to Thomas. More particularly, Thomas asserts that the court "erred when it found [Thomas's] therapist, Dr. Kathy Lichtenwalter, not to be a 'veracious witness.'" Thomas's Brief at 13.

When ruling upon motions related to child custody or time-sharing, the family court is required to make written findings of fact and conclusions of law consistent with its duty under CR 52.01. *Anderson v. Johnson*, 350 S.W.3d 453, 456 (Ky. 2011); *Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011). Our review under CR 52.01 provides that the family court's "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01; *see Asente*, 110 S.W.3d at 354. And, "[r]egardless of conflicting evidence, . . . due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Asente*, 110 S.W.3d at 354 (quotation marks and footnotes omitted). We, of course, review issues of law *de novo*. *Ball v. Tatum*, 373 S.W.3d 458, 464 (Ky. App. 2012).

In the case *sub judice*, Thomas introduced as evidence the testimony of the therapist he was seeing in Florida where he was living. His therapist, Dr. Kathy Lichtenwalter, testified telephonically. She opined that Thomas was emotionally capable of providing adequate care for the children. The family court pointed out in its order that Dr. Lichtenwalter had never met the children nor had she ever spoken to them. The family court also noted that Dr. Lichtenwalter's opinion that Thomas could care for the children was based upon her belief that

Thomas had provided care for the children during the marriage. The family court found this reasoning flawed because Dr. Lichtenwalter failed to recognize that during the marriage, Thomas had been frequently out of town for his employment for extended periods of time, and as a result, Rebecca had primarily provided for the children's daily needs during the marriage. Simply stated, the family court did not believe that Dr. Lichtenwalter's testimony was credible. As noted, it is within the sole discretion of the family court as fact finder to judge the credibility of witnesses. CR 52.01; *Truman v. Lillard*, 404 S.W.3d 863, 868 (Ky. App. 2012). Accordingly, this Court may not substitute its judgment for that of the family court. *Truman*, 404 S.W.3d at 868-69. Accordingly, we find no error by the court in failing to find Dr. Lichtenwalter's testimony credible.

For the foregoing reasons, the order of the Jefferson Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dean H. Sutton
Louisville, Kentucky

BRIEF FOR APPELLEE:

Nellie Draus Stallings
Louisville, Kentucky