In the Missouri Court of Appeals
Eastern District

DIVISION IV

DOROTHY SZRAMKOWSKI,	)	No. ED93149
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.	)	
	)	Honorable Mary Bruntrager Schroeder
JOSEPH SZRAMKOWSKI,	)	
	)	Cause No. 2106FC-10467
Appellant.	)	
	)	FILED: June 8, 2010

OPINION

In this consolidated appeal, Joseph Szramkowski (hereinafter, "Husband") appeals from the trial court's judgment dissolving his marriage to Dorothy Szramkowski (hereinafter, "Wife") after finding the marriage was irretrievably broken. Husband raises five points on appeal. Wife cross-appeals. We affirm the judgment as modified.

Husband and Wife were married on or about either December 26, 1974, or December 26, 1976, in St. Louis County.[1] No children were born of the marriage. The parties separated on September 27, 2006, when Wife went to live with her sister, Margaret Fowler (hereinafter, "Fowler"), following Wife's cataract surgery.

[1] Husband testified the parties were married on December 26, 1974, and Wife's dissolution petition avers the parties were married on December 26, 1976. The trial court's judgment refers to both dates.

On November 7, 2006, Husband filed a petition seeking the appointment of a guardian and conservator for Wife in the probate division of St. Louis County Circuit Court, citing Wife's decreasing mental capabilities due to dementia and Alzheimer's disease. One week later, Wife filed a verified petition for dissolution. Wife alleged there was no reasonable likelihood the marriage could be preserved, and the marriage was irretrievably broken. Wife requested maintenance, an equitable division of the marital property and debts, and attorney's fees. On December 11, 2006, Husband filed a motion to dismiss Wife's dissolution petition for lack of capacity based on the pending probate proceedings. Husband requested the trial court either dismiss Wife's petition or stay the dissolution proceedings until the probate court made an adjudication. The parties stipulated to stay the dissolution proceedings until the probate proceedings were resolved. While the probate proceedings were pending, the trial court appointed a guardian ad litem (hereinafter, "the GAL") for Wife on its own motion in the dissolution action pursuant to Rule 52.02(k).

On July 9, 2007, the probate court adjudicated Wife incapacitated and disabled by reason of dementia. The probate court determined Wife required a living situation with complete supervision, but found Wife shall retain her right to vote. Further, the probate court found Wife had the capacity to make and communicate a reasonable choice as to her guardian, which Wife expressed as a preference for her sister, Fowler. The probate court appointed Fowler as Wife's guardian and James R. Wright (hereinafter, "Wright") as her conservator.

After the probate court's adjudication, Husband filed several motions in the dissolution action which he now challenges on appeal. Husband renewed his motion to

dismiss Wife's dissolution action for lack of capacity in light of the probate court's adjudication. Husband sought to dismiss the GAL appointed in the dissolution action since Fowler was now Wife's appointed guardian. Husband answered Wife's petition and denied the marriage was irretrievably broken. Husband also filed a motion challenging Wife's dissolution petition, claiming it did not have the proper parties in interest since it had not been amended to include Wife's guardian or conservator. In this same motion, Husband argued the petition did not contain any allegations of abuse and Wife lacked the capacity to testify at the dissolution hearing.

One week before trial, Wife sought leave to amend her dissolution petition. The proposed amended petition contained a new caption, added allegations about Wife's capacity to testify, and averred if the trial court found Wife lacked the capacity to testify, she was a victim of abuse pursuant to Section 452.314 RSMo (2000).[2] Wife argued she only filed the proposed amended petition in the event the trial court found Wife was incapacitated because she wanted the trial court to retain jurisdiction over the dissolution action.

The trial was held on December 12, 2008. The trial court reserved ruling on the pending motions and took judicial notice of the probate court file. The parties stipulated the probate court retained jurisdiction over the parties' marital property, and as such, the only issue to be resolved was whether the marriage was irretrievably broken. Husband, Wife, Fowler, Wright, a police officer, and Husband's nephew testified at trial. Wife filed two post-trial motions, requesting the trial court amend the pleadings to conform with the evidence and a motion to substitute parties, wherein Fowler would be substituted for Wife in the dissolution action. Husband opposed both of these motions.

[2] All statutory references are to RSMo (2000) unless otherwise indicated.

The trial court rendered its judgment on April 17, 2009, wherein the trial court found Wife had the mental capacity to file her petition and the capacity to testify on her own behalf as to the issue of whether the parties' marriage was irretrievably broken. The trial court determined Wife carried her burden of proof and found the marriage was irretrievably broken. Husband's motion to dismiss for lack of capacity and all other pending motions were overruled without further comment. The trial court ordered Husband to pay the GAL $10,000 in fees and found the parties jointly and severally liable for $2,015 in GAL fees. Both parties filed post-trial motions challenging the trial court's judgment, which were denied. Husband appeals and Wife cross-appeals.

We review a court-tried case pursuant to the dictates of Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). We will affirm the judgment unless there is no substantial evidence to support the trial court's decision, the decision is against the weight of the evidence, or the trial court's decision erroneously declares or applies the law. Id. at 32; Wightman v. Wightman, 295 S.W.3d 183, 187 (Mo. App. E.D. 2009). "This Court will not retry the case, but instead, accept as true the evidence and reasonable inferences therefrom in the light most favorable to the trial court's judgment, and disregard all evidence and inferences to the contrary." Workman v. Workman, 293 S.W.3d 89, 95 (Mo. App. E.D. 2009). We defer to the superior ability of the trial court to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles not revealed in the transcript. Groenings v. Groenings, 277 S.W.3d 270, 274 (Mo. App. E.D. 2008). The party challenging the dissolution judgment has the burden of demonstrating trial court error. Roche v. Roche, 289 S.W.3d 747, 754 (Mo. App. E.D. 2009).

We will address Husband's points out of order for the sake of clarity. In his third point, Husband claims the trial court's finding Wife had the mental capacity to institute the dissolution action was against the weight of the evidence. Husband asserts the trial court ignored or failed to address several pieces of evidence adduced at trial that he argues clearly established Wife was incapacitated prior to the filing of the dissolution petition.

Capacity to sue means "the right to come into court which exists if one is free of general disability, such as infancy or insanity...." Call v. Heard, 925 S.W.2d 840, 850 (Mo. banc 1996)(*quoting* Earls v. King, 785 S.W.2d 741, 743 (Mo. App. S.D. 1990)). Section 475.078.3 declares "[a] person who has been adjudicated incapacitated or disabled or both shall be presumed to be incompetent." However, the fact Wife was subsequently adjudicated fully incapacitated and disabled will not give rise to a presumption that she was mentally incapable of filing for dissolution at least eight months prior to the probate court's adjudication. *See* Allee v. Ruby Scott Sigears Estate, 182 S.W.3d 772, 782 (Mo. App. W.D. 2006)(holding testator later adjudicated incapacitated did not create presumption she was incapacitated at time she executed will three months prior to adjudication).

Husband argues, however, he presented substantial evidence to support a finding Wife was in fact incapacitated before the parties separated. Husband called a police officer to testify about a driving incident that occurred in July 2006 wherein Wife was stopped for driving northbound in southbound lanes in the early morning hours, and was generally confused about where she was, how she got there, and how to get home. Husband testified Wife was misplacing items around the home and became more reliant

on him for her day-to-day needs. Husband also offered medical evidence of cognitive testing and findings of a doctor with respect to Wife's mental condition.

Husband faults the trial court for ignoring or failing to address this evidence. However, our standard of review compels us to disregard contrary evidence and inferences that are not favorable to the judgment. Workman, 293 S.W.3d at 95. The trial court acknowledged Wife had difficulty remembering some dates and some events, but was able to articulate why she wanted a divorce. Moreover, the trial court found Wife's testimony from the probate proceeding and the dissolution proceedings were consistent. Taking all of the evidence into consideration, the trial court determined credible evidence supported a finding that Wife had the mental capacity to file the dissolution action.

Even if we were to assume *arguendo* Wife was actually incapacitated prior to filing the dissolution action, "Rule 52.02 contemplates persons involved in litigation who suffer from mental infirmity are not prevented from initiating litigation and are not immune to civil prosecution by reason of such mental infirmity." State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 8 (Mo. App. W.D. 2003). In exercising an abundance of caution, the trial court appointed the GAL pursuant to Rule 52.02(k) while the probate proceedings were pending to protect Wife's interests in the event she was adjudicated incapacitated; however, this did not prevent Wife from filing her dissolution action. Husband's third point is denied.

Husband's fourth point and the sole point raised in Wife's cross-appeal are related, so we will address them together. In his fourth point, Husband claims the trial court erred in permitting the dissolution proceeding to go forward because there was not a real party in interest bringing the lawsuit after Wife was adjudicated incapacitated and

disabled. Husband believes the trial court's failure to substitute the GAL or Wife's appointed guardian, Fowler, as a named party in interest was in error and required dismissal of her petition. In her cross-appeal, Wife argues the trial court erred in denying her motion for leave to amend her petition and to substitute parties to remedy any alleged deficiency. Wife makes this argument on appeal alternatively to her position that amendment was not necessary given Wife's capacity to file suit. Wife believes Husband's position on appeal creates a legal paradox, wherein if Wife asserts she has capacity to sue and does not substitute her appointed guardian, Husband would seek dismissal of the suit; however, if Wife moves for substitution, then Husband would use that motion as a concession that Wife lacks capacity to sue.

Rule 52.01 requires all civil actions shall be prosecuted in the name of the real party in interest, and a guardian "may sue in their own names in such representative capacity without joining the party for whose benefit the action is brought." Rule 52.13(b) states, however, "If a party becomes incompetent, upon motion for substitution served as provided in Rule 52.13(a), the court may allow the action to be continued by or against the party's representative."

While we hold Wife had capacity to initially file the dissolution action, Fowler should have been substituted as the real party in interest pursuant to Rule 52.13(b) after Wife was adjudicated incapacitated and disabled. However, we find this defect is not fatal to Wife's dissolution action. "Missouri courts on multiple occasions have treated errors in bringing a claim directly rather than in the name of another party, or similar defects, as issues of capacity rather than standing, which may be waived or avoided by amendment of the pleadings." City of Wellston v. SBC Communications, Inc., 203

S.W.3d 189, 193 (Mo. banc 2006). Moreover, Rule 52.06 states in pertinent part: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just…." This rule "reflects Missouri's policy that, absent a showing of bad faith or prejudice in failing to sue in the name of the proper party, '[t]he law in Missouri for nearly a century is [that] a new action is not commenced by substituting the party having legal right to sue instead of another party improperly named.'" City of Wellston, 203 S.W.3d at 194 (*quoting* Asmus v. Capital Region Family Practice, 115 S.W.3d 427, 433-34 (Mo. App. W.D. 2003)).

Thus, the trial court should have granted Wife leave to file her proposed amended petition or Wife's motion to substitute parties. Husband takes issue with the way Wife has captioned her proposed amended petition, which includes Wife, the GAL, Fowler, and Wright as the named parties. Later, Wife filed a post-trial motion for the substitution of parties wherein Wife sought to only substitute Fowler as the named party. We find these captions irrelevant, given the capacity in which a party sues must be determined from the content of the pleadings, not solely from the captions or titles thereof. Singer v. Siedband, 138 S.W.3d 750, 754 (Mo. App. E.D. 2004); Nye v. Gerald Harris Const., Inc., 28 S.W.3d 905, 908 (Mo. App. S.D. 2000). Moreover, there has been no showing Wife acted in bad faith in not seeking leave to amend earlier, given it was her position she had capacity to sue and proceed with the dissolution action. Further, Husband suffered no prejudice by the lack of substitution or amendment in that the GAL was present at the trial and Fowler and Wright both testified, subject to cross-examination, that it was in Wife's best interest to proceed with the dissolution.

Rule 84.14 permits this Court "give such judgment as the court ought to give and instructs us to dispose finally of the case unless justice otherwise requires." Turner v. Turner, 214 S.W.3d 344, 346 (Mo. App. E.D. 2007). This disposition is "particularly appropriate for judgments where there is no dispute as to the facts but only a dispute as to their legal significance." Mitalovich v. Toomey, 206 S.W.3d 361, 365 (Mo. App. E.D. 2006). Thus, this Court is empowered to "enter the judgment the trial court should have where the evidence in the record before us assures us that the conclusion reached is reasonable, fair, and accurate." Id.

Therefore, we deny Husband's fourth point wherein it seeks dismissal of Wife's dissolution petition for failing to name a real party in interest. Wife's sole point in her cross-appeal is granted in that the trial court erred in failing to allow Wife to either amend her petition, substitute Fowler as the proper party in interest to cure this defect, or to allow Wife's pleadings to be amended to conform to the evidence presented at trial. However, in the absence of any prejudice suffered by Husband, we will affirm the judgment as modified, finding Wife's pleadings were amended to include Fowler, as Wife's duly appointed guardian, as the real party in interest.

In his second point, Husband argues the trial court's finding Wife had the mental capacity to testify on her own behalf was not supported by substantial evidence. Husband claims Wife failed to rebut the presumption that she was incompetent to testify in light of the probate court's adjudication finding Wife incapacitated and disabled.

As stated previously, Section 475.078.3 declares "[a] person who has been adjudicated incapacitated or disabled or both shall be presumed to be incompetent." Moreover, Section 491.060(1) creates a presumption that Wife shall be incompetent to

testify if she is mentally incapacitated at the time of her production for examination. "In appropriate circumstances, testimony may be accepted from a person even after that person has been adjudicated mentally incompetent." Sivils v. Sivils, 659 S.W.2d 525, 528 (Mo. App. W.D. 1983). "[T]he modern trend is to admit testimony from persons suffering from mental conditions, except in extreme cases, and allow the fact-finder to consider what effect the condition has on the witness' powers of observation, recollection, and communication." Simpson v. Strong, 234 S.W.3d 567, 583 (Mo. App. S.D. 2007). Thus, Wife can overcome the presumption of incompetence if she demonstrates she "(1) understands the obligation of the oath, and (2) has sufficient mind and memory to notice, recollect, and communicate events." Clark v. Reeves, 854 S.W.2d 28, 30 (Mo. App. W.D. 1993). "While the determination of a witness's competency to testify is for the trial court, the credibility of a witness's testimony is for the fact finder to determine." Turnbo by Capra v. City of St. Charles, 932 S.W.2d 851, 855 (Mo. App. E.D. 1996). We will not disturb the trial court's determination of a witness' competence to testify in the absence of an abuse of discretion. Clark, 854 S.W.2d at 30.

Acting as the fact-finder, the trial court stated credible evidence supported Wife had the capacity to testify on her own behalf. The trial court recognized the limitations in Wife's testimony that Husband asserts on appeal, specifically that Wife had trouble remembering some dates and events. However, Wife was able to competently testify with respect to her living situation, her education and previous employment, and the problems in her marriage that led her to file for dissolution. The trial court also compared Wife's testimony at the probate court proceeding in July 2007 to her testimony at the dissolution hearing in December 2008, and found the testimony was consistent in

both proceedings. The trial court did not abuse its discretion in finding Wife competent to testify at the dissolution hearing. Husband's second point is denied.

In his first point, Husband argues the trial court's finding that the parties' marriage was irretrievably broken was not supported by substantial evidence. Specifically, Husband argues Wife failed to adduce evidence to support any of the five factors enumerated in Section 452.320.2(1).

Section 452.305.1(2) authorizes the trial court to dissolve a marriage upon a finding that it is irretrievably broken. Wagoner v. Wagoner, 76 S.W.3d 288, 290 (Mo. App. E.D. 2002). Here, Husband denied the marriage was irretrievably broken in his answer. Therefore, Wife was obligated to present evidence that supports one or more of the following factors to warrant the dissolution of the marriage:

> (a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (b) That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) That the respondent has abandoned the petitioner for a continuous period of at least six months preceding the presentation of the petition;
>
> (d) That the parties to the marriage have lived separate and apart by mutual consent for a continuous period of twelve months immediately preceding the filing of the petition;
>
> (e) That the parties to the marriage have lived separate and apart for a continuous period of at least twenty-four months preceding the filing of the petition….

Section 452.320.2(1); Burns v. Burns, 872 S.W.2d 628 (Mo. App. E.D. 1994). The trial court is not required to make specific findings of fact with respect to which factors it relied upon to support its conclusion. Lawrence v. Lawrence, 938 S.W.2d 333, 336 (Mo. App. W.D. 1997); Koon v. Koon, 969 S.W.2d 828, 830 (Mo. App. S.D. 1998). However,

the finding that the marriage is irretrievably broken must have factual support and not be against the weight of the evidence. Id.

The trial court did not specify which factor it relied upon to find the marriage was irretrievably broken. However, the trial court found Wife presented credible evidence that she did not feel safe residing with Husband because Husband was abusive to her during the marriage. Wife testified Husband forced her to sleep on the floor, verbally abused her by calling her names, pitched temper tantrums, threw household items at her, and wanted to control all of their money so that she would have nothing. Wife also testified Husband and his brother would push her down the stairs for fun, and Husband frequently left her alone in the residence without proper care and food. Fowler corroborated Wife's testimony. Fowler testified Wife weighed only 100 pounds when Wife came to live with her and all of Wife's clothes were too big; however Wife gained weight within a short period of time after moving in with her and eating appropriately. Fowler recounted instances of Husband being verbally abusive and controlling, as well as Husband preventing Wife from spending time with her family. This evidence was sufficient to support a finding the marriage was irretrievably broken pursuant to Section 452.320.2(1)(b), namely that Husband has behaved in such a way that Wife cannot reasonably be expected to live with him. *See* Wagoner, 76 S.W.3d at 291 (holding husband's "dictatorial and repressive" conduct was sufficient to support a finding marriage irretrievably broken).

Husband contends he presented sufficient evidence to contradict Wife's testimony. In light of the controverted evidence presented, the trial court was required to make a credibility determination. As the trier of fact, the trial court is free to accept or

reject all, part, or none of Husband's testimony. Simpson, 234 S.W.3d at 577. "Although there may be a difference of opinion as to whether Husband's conduct was egregious enough that Wife could not be expected to live with it, we must defer to the trial court's assessment of the factual evidence in this regard." Id. (*quoting* Wagoner, 76 S.W.3d at 291). Husband's first point is denied.

In his fifth point, Husband argues the trial court erred in awarding fees to the GAL in the dissolution action. Husband claims the trial court lacked jurisdiction to continue the GAL's participation in the dissolution action after the probate court appointed Fowler as Wife's guardian. Wife takes no position on this point, merely stating she rejects Husband's argument to the extent it is inconsistent with her position on appeal regarding her competency to institute the dissolution action and to testify on her own behalf.

We review an award of fees to the guardian ad litem for an abuse of discretion. Wightman, 295 S.W.3d at 192. "An abuse of discretion is committed if the trial court's decision defies logic under the circumstances, is sufficiently arbitrary and unreasonable to shock the conscience of the court, and exhibits a dearth of careful consideration." Davis v. Schmidt, 210 S.W.3d 494, 511 (Mo. App. W.D. 2007).

Rule 52.02(k) authorizes a trial court to appoint a guardian ad litem for persons with mental competency issues. Roche, 289 S.W.3d at 753. The rule states:

> Whenever it shall be suggested or affirmatively appear to the court that any person not having a duly appointed guardian is incapable by reason of mental or physical infirmity of instituting suit or of properly caring for the person's own interests in any litigation brought by or against such person, the court shall inquire into the person's mental or physical condition for the purpose of the particular litigation and shall hear and determine such issue. If it is found to be proper for the protection of the person, the court

> may appoint a next friend or guardian ad litem for said person for the purpose of the particular litigation.

Further, Section 475.097.1 allows the trial court to appoint a guardian ad litem when an appointed guardian either fails to effectively perform his or her duties, or a conflict of interest arises between the guardian and the ward. The appointment is limited in duration for the period preceding a hearing on a petition for removal of the appointed guardian. Id.

Here, the trial court appointed the GAL in the dissolution action on its own motion and while the probate matter was pending. After the probate court appointed Fowler as Wife's guardian, Husband sought to have the GAL removed. There have been no allegations Fowler has failed to effectively perform her duties or that a conflict of interest has arisen between Wife and Fowler. However, nothing in Rule 52.02(k) requires the trial court to remove the appointed GAL merely because Wife has subsequently been adjudicated incapacitated. Furthermore, Fowler, in her capacity as Wife's guardian, never requested removal of the GAL. The GAL participated in the dissolution proceedings, and Husband does not challenge the amount of the fees as unreasonable for the duties performed by the GAL. Therefore, we find the trial court did not abuse its discretion in awarding fees to the GAL. Husband's fifth point is denied.

The trial court's judgment is affirmed as modified.

GEORGE W. DRAPER III, Judge

Kurt S. Odenwald, P.J., and Sherri B. Sullivan, J., concur