IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
ASSIGNED ON BRIEFS DECEMBER 9, 2008

LESLIE R. REESE v. JEFFREY KLOCKO

Direct Appeal from the Circuit Court for Davidson County
No. 03D-2454 Carol Soloman, Judge

No. M2007-02486-COA-R3-CV - Filed April 3, 2009

In this appeal, we are asked to determine whether the trial court unfairly denied the incarcerated pro se appellant the opportunity to fully and fairly participate in his divorce trial via telephone; whether the trial court unfairly revisited its earlier division of the marital estate; and whether the trial judge displayed bias against the appellant in rendering her opinion. We affirm the trial court's grant of a divorce to the appellee. However, we find that the trial court erred in proceeding to trial without ruling on the appellant's discovery motion. Therefore, we vacate the portions of the trial court's order regarding classification of the marital home as separate property and we remand to the trial court to dispose of the motion and to classify the marital home after the appellant is afforded an opportunity to present his arguments regarding the marital home. We decline to remove the trial judge from the case.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Vacated in Part and Remanded

ALAN E. HIGHERS, P.J.,W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Jeff Klocko, *pro se*, Only,TN

J. Robin McKinney, Jr., Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

In February of 1991, Jeffrey Mark Klocko ("Appellant" or "Mr. Klocko") began dating Leslie R. Reese ("Appellee" or "Ms. Reese"). Shortly thereafter, the couple began cohabitating. In 1994, Ms. Reese purchased a home, in her name alone, at 1107 Brookmeade Drive, Nashville, Tennessee, ("marital home") for $105,000. Ms. Reese paid ten percent, $10,500, as a down payment.

On May 15, 1998, Mr. Klocko and Ms. Reese were married. The parties' son, Max, was born on October 18, 1998. In September 2003, allegations of child abuse by Mr. Klocko were made to the Department of Children's Services ("DCS").[1] On October 15, 2003, Ms. Reese filed a Complaint for Divorce in the Davidson County Circuit Court, citing irreconcilable differences and inappropriate marital conduct. On January 29, 2004, Mr. Klocko filed an Answer to Complaint for Divorce and Counterclaim for Divorce, alleging as grounds, irreconcilable differences, inappropriate marital conduct, and cruel and inhuman treatment.

On November 15, 2004, the trial court ordered an appraisal of the marital home. The appraisal valued the marital home as of May 15, 1998, at $150,000, and as of November 18, 2004, at $200,000. On December 12, 2005, a Final Decree of Divorce was entered granting Ms. Reese a divorce based on inappropriate marital conduct, and awarding her the marital home, finding that Mr. Klocko's "equity in [the] marital residence shall satisfy his child support obligation through September of 2004." However, on May 16, 2007, the Tennessee Court of Appeals vacated the trial court's judgment, finding that the trial court erred in proceeding to trial without ruling on Mr. Klocko's motion to participate in the trial via telephone. ***Reese v. Klocko***, No. M2005-02600-COA-R3-CV, 2007 WL 1452688, at *1 (Tenn. Ct. App. May 16, 2007).

Thereafter, on July 12, 2007, Mr. Klocko filed several motions, including a Motion to Allow Telephone Communication in Lieu of Court Appearance and a Motion for Discovery, seeking discovery of the appraisal indicating the current fair market value of the marital home, Ms. Reese's financial records pertaining to the marital home, and the production of eighteen categories of financial documents. The trial court entered an Order on September 6, 2007 setting the case for trial on September 13, 2007, and allowing Mr. Klocko's request to participate via telephone. The trial court also entered an Order on September 19, 2007, requiring Ms. Reese to disclose the appraisal of the marital home.

---

[1] Mr. Klocko was charged with thirteen counts of aggravated sexual assault and battery against Ms. Reese's minor daughter. According to Ms. Reese, he was convicted on twelve of the thirteen counts. Mr. Klocko is currently incarcerated at the Turney Center Industrial Prison in Only, Tennessee, and is eligible for release in 2015.

On September 13, 2007, a trial was conducted, with Mr. Klocko participating via telephone. On October 4, 2007, the trial court entered a Final Decree of Divorce, again awarding Ms. Reese a divorce based on inappropriate marital conduct. The trial court further found the marital home to be Ms. Reese's separate property, as Mr. Klocko had not contributed to its appreciation or preservation, such that it became marital property. It is from this Final Decree of Divorce which Mr. Klocko now appeals.

II. ISSUES PRESENTED

Appellant has timely filed his notice of appeal and presents the following issues for review:[2]

1. Whether the trial court unfairly denied the petitioner a full and fair opportunity to participate in the hearing held on September 13, 2007;

2. Whether the trial court unfairly revisited the earlier decision dividing the marital estate; and

3. Whether the trial court displayed extreme bias, abandoning her judicial impartiality and acting as the plaintiff's advocate in rendering her final opinion.

For the following reasons, we affirm the trial court's grant of a divorce to Ms. Reese. However, we vacate the division of property regarding the marital home and remand to the trial court to re-classify the marital home after ruling on Mr. Klocko's discovery motion. We decline to remove the trial judge in this case.

III. STANDARD OF REVIEW

On appeal, a trial court's factual findings are presumed to be correct, and we will not overturn those factual findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d) (2008); ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. ***Watson v. Watson***, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005) (citing *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999)). We review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

[2] Mr. Klocko has further broken down these three issues into several sub-issues, which we will address below.

IV. DISCUSSION

A. Opportunity to Participate

On appeal, Appellant asserts that "even though [the trial court was] ordered to ensure that the petitioner was given the opportunity to participate in the hearing held on September 13, [2007,] it virtually ensured that the petitioner was not heard." Mr. Klocko presents five sub-arguments in support of this contention.

1. Discovery

First, Appellant maintains that the trial court "ensured that petitioner would not be able to present his case" by failing to grant his discovery request . As we noted above, Appellant filed a Motion for Discovery on July 12, 2007, requesting discovery of Ms. Reese's appraisal showing the current fair market value of the marital home, Ms. Reese's financial records of the marital home, and eighteen categories of documents, including tax returns, check stubs, bank statements, retirement accounts, credit card statements, loan documents, employment agreements, life insurance policies, and documents evidencing improvements to the marital home. However, the record does not indicate that the pending motion was ever addressed by the trial court prior to the final divorce hearing.

Appellee claims that additional discovery was unnecessary because she answered Appellant's First Set of Interrogatories in April of 2005, before the first trial. Additionally, Appellee points out that the appraisal of the marital home was disclosed to Mr. Klocko, and she makes an ill-defined assertion that Mr. Klocko "did not avail himself of the proper remedies as set forth in Rule 37 of the ***Tennessee Rules of Civil Procedure.***"

This Court has considered the situation when trial courts dispose of claims filed by or against a prisoner without first ruling on the prisoner's pending motions. We have stated

> [R]eviewing courts have consistently held that trial courts err when they proceed to adjudicate the merits of the claim without first addressing the prisoner's pending motion or motions. These oversights have generally been found to be prejudicial rather than harmless because the failure to address the pending motions "give[s] the impression that a litigant is being ignored[.]" We have also held that a prisoner's failure to comply with local rules requiring motions to be set for hearing does not provide a trial court with an excuse for failing to address the pending motions. Accordingly, when a trial court has failed to rule on an incarcerated litigant's pending motions, reviewing courts have consistently vacated the judgment and remanded the case to the trial court with directions to consider and act on pending motions.

Gilliam v. Gilliam, No. M2007-02507-COA-R3-CV, 2008 WL 4922512, at *3 (Tenn. Ct. App. Nov. 13, 2008) (quoting *Bell v. Todd*, 206 S.W.3d 86, 91 (Tenn. Ct. App. 2005); *see also Reese v. Klocko*, No. M2005-02600-COA-R3-CV, 2007 WL 1452688, at *4 (Tenn. Ct. App. May 16, 2007); *Chastain v. Chastain*, No. M2003-02016-COA-R3-CV, 2004 WL 725277, at *2 (Tenn. Ct. App. Mar. 31, 2004); *Knight v. Knight*, 11 S.W.3d 898, 906 (Tenn. Ct. App. 1999)).

In *Chastain v. Chastain*, No. M2003-02016-COA-R3-CV, 2004 WL 725277, at *1 (Tenn. Ct. App. Mar. 31, 2004), we specifically addressed the trial court's failure to rule on an incarcerated pro se litigant's discovery motions. In *Chastain*, after the plaintiff wife filed for divorce against her incarcerated husband, the husband filed a motion requesting the trial court to compel the wife to answer his interrogatories, claiming that she had failed to do so. 2004 WL 725277, at *1. However, the trial court conducted a bench trial without ruling on the husband's motion. ***Id.***

The husband claimed that the lack of discovery prevented him from adequately presenting his case, while the wife maintained that a ruling on the motion was unnecessary because she answered the interrogatories without being ordered to do so. ***Id.*** Because the record failed to substantiate the wife's claim that she responded to the husband's discovery request, we remanded the case to the trial court to dispose of the husband's motion before dividing the marital estate. ***Id.*** at *2. In so ruling, we noted that

> Since discovery plays an important, sometimes pivotal, role in a prisoner's ability to present his or her side of the controversy, an incarcerated litigant has a right to expect the trial court to address and resolve discovery disputes in a timely manner prior to a hearing on the merits. The courts should not ignore motions of substance and proceed as if they had not been filed.

Id. (citing *Marion v. Bowling*, No. 03A01-9906-CV-00229, 1999 WL 1059670, at *4 (Tenn. Ct. App. E.S. Nov. 22, 1999) (Franks, J., dissenting)).

Like the trial court, we acknowledge that "there [was] a lot of discovery in th[is] case." Appellee responded to Appellant's First Set of Interrogatories and Request for Production of Documents dated April 11, 2005. In so responding, Appellee answered the twenty-four questions propounded by Appellant and provided Appellant with copies of her bank statements from nine different accounts, transcripts of the messages left by Appellant to Appellee, and letters and cards sent by Appellant to his son, Max. Likewise, we acknowledge that Appellant obviously received a copy of the appraisal of the marital home valuing it as of May 15, 1998, at $150,000 and as of November 18, 2004, at $200,000, as Appellant attached the appraisal as an exhibit to his Memorandum of Law and Undisputed Facts in Support of Motion for Sanctions and Motion to Disqualify, filed August 10, 2007.

Additionally, we recognize that many of Mr. Klocko's discovery requests were irrelevant to the issue before the trial court. However, in his July 12, 2007 Motion for Discovery, Mr. Klocko

sought discovery of "[a]ll documents evidencing improvements to the [marital home.]" This information could have proved crucial to Mr. Klocko's claim that he made improvements to the marital home, such that it became marital property. Therefore, we cannot find that the trial court's failure to rule on his motion was harmless error.

2. Bias

On appeal, Appellant also contends that "[t]he Court displayed extreme bias, abandoning her judicial impartiality and acting as the plaintiff's advocate in rendering her final opinion[,]" such that, on remand, she should be removed from the case. In support of his contention, Appellant points to six actions by the trial judge:[3] 1) her failure to grant Appellant's discovery motion despite Appellee's failure to respond; 2) her statements that she would like to award Appellee attorney fees, and that the "injustice" of not being able to do so, because Appellant earns no income, "must be borne by [Appellee]"; 3) her statement that Appellee "has been sorely wronged but cannot get retribution in the way of attorney's fees because [Appellant] is in prison"; 4) her *sua sponte* grant of a permanent restraining order against Appellant "without making any effort to determine whether there was a legal or factual basis for [such]"; 5) her statement that Appellant could "attempt through the courts to establish whatever visitation [he] want[ed] with [his] son when [he] g[o]t out [of prison]"; and 6) her finding that Appellant was not a credible witness.

"[O]ne of the core tenets of our jurisprudence is that litigants have a right to have their cases heard by fair and impartial judges." ***Davis v. Liberty Mut. Ins. Co.***, 38 S.W.3d 560, 564 (Tenn. 2001) (citing *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998)). In fact, "'it goes without saying that a trial before a biased or prejudiced fact finder is a denial of due process.'" ***Id.*** (quoting *Wilson v. Wilson*, 987 S.W.2d 555, 562 (Tenn. Ct. App. 1998)). Judges must always act "'in a manner that promotes public confidence in the integrity and impartiality of the judiciary' and 'shall not be swayed by partisan interests, public clamor, or fear of criticism.'" ***Id.*** (quoting Tenn. Sup. Ct. R. 10, Canon 2(A), 3(B)(2)). It is not only important that justice be administered impartially, but that the public perceives it as being done so. ***See id.*** "If the public is to maintain confidence in the judiciary, cases must be tried by unprejudiced and unbiased judges." ***Id.***

A trial judge should be disqualified when "'the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.'" ***Mayes v. LeMonte***, 122 S.W.3d 142, 146 (Tenn. Ct. App. 2003) (quoting *Caudill v. Foley*, 21 S.W.3d 203, 214 (Tenn. Ct. App. 1999)). However,

> "[b]ias and prejudice are only improper when they are personal. . . . Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases.

[3] Appellant's section entitled "Issues Presented for Review" lists only five actions which he claims evidence bias. However, Appellant alleges a sixth action–the trial judge's finding that Appellant was not a credible witness–in his "Issue Three" section.

> Judges do have values which cannot be magically shed when they take the bench." Bias or prejudice in the disqualifying sense must stem from an extrajudicial source and not from what the judge hears or sees during the trial. Otherwise, any judge that makes a ruling adverse to one party would be open to a charge of bias. In addition "impersonal prejudice resulting from the judge's background experience does not warrant disqualification." Most trial judges . . . have strong feelings about certain types of behavior or conduct. When the judge perceives that one party or the other has engaged in that conduct, the party should not be surprised that he/she has incurred the judge's wrath.

Mayes, 122 S.W.3d at 146 (citations omitted). The party challenging a trial judge's impartiality "'must come forward with some evidence that would prompt a reasonable, disinterested person to believe that the judge's impartiality must reasonably be questioned.'" ***In re C.T.S.***, 156 S.W.3d 18, 22 (Tenn. Ct. App. 2004) (quoting *Davis v. Tenn. Dep't of Employment Sec.*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999)). That evidence "must come from an extrajudicial source and not be based on what the judge see[s] or hears before him." ***Id.*** at 23 (citing *Wilson*, 987 S.W.2d at 562).

Appellant has failed to provide evidence from an "extrajudicial source" of bias by the trial judge against Appellant. That the trial judge wished to award Appellee attorney fees, felt that Appellee was entitled to retribution, suggested and granted a restraining order against Appellant, and found Appellant not to be a credible witness stemmed from the evidence before her in the divorce proceeding. Such evidence ultimately led her to grant Appellee a divorce "upon the grounds of inappropriate marital conduct, due to the [Appellant's] felony conviction for aggravated sexual battery." Additionally, we find the trial judge did not "exceed her jurisdiction," as Appellant suggests, when she stated that Appellant could "attempt through the courts to establish whatever visitation [he] wanted with [his] son when [he] g[o]t out [of prison.]" The trial judge was not attempting to "adjudicate[] matters pertaining to child custody and visitation" in violation of this Court's order, but instead was merely informing Appellant of the procedure to re-establish visitation upon release, should he choose to do so. ***See Reese***, 2007 WL 1452688, at *4. Finally, we reject Appellant's argument that the trial judge displayed bias in failing to grant his discovery request despite Appellee's failure to respond. Although, as we discussed above, the trial court erred in failing to rule on the motion, we find no evidence that the trial judge's failure to do so was the result of an "extrajudicial source" of bias, warranting her removal from the case. Finding no "extrajudicial" evidence of bias, we decline to remove the trial judge from this case.

V. CONCLUSION

For the aforementioned reasons, we affirm the October 4, 2007 order insofar as it grants Ms. Reese a divorce. However, we vacate the portions of the October 4, 2007 order regarding the classification of the marital home as Ms. Reese's separate property. We remand the case to the trial court to dispose of Mr. Klocko's discovery motion and to classify the marital home after Mr. Klocko has been afforded an opportunity to present his arguments regarding the marital home. We decline to remove the trial judge from this case. All other issues raised herein are pretermitted. Costs of this appeal are taxed one-half to the appellant, Jeffrey Mark Klocko, and one-half to the appellee, Leslie Roehm Reese, for which execution may issue if necessary.

_____

ALAN E. HIGHERS, P.J., W.S.