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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002194-MR
AND
NO. 2001-CA-002390-MR

ARLENE ANDERSON BLOOM APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM POWELL CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 00-CI-00082

MICHAEL SHAYNE BLOOM APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, PAISLEY AND TACKETT, JUDGES.

PAISLEY, JUDGE. This is an appeal and cross-appeal from an order entered by the Powell Circuit Court in a dissolution proceeding. For the reasons stated hereafter, we affirm.

The parties married in 1995 and divorced in 2001. Their only child was born in 1996. After extensive hearings, the domestic relations commissioner (DRC) found that “[b]oth parents are excellent parents, and the child has bonded closely

with both of them." The DRC recommended that the parents be awarded joint custody, and that appellee/cross-appellant Michael Shayne Bloom (appellee) be designated as the primary residential custodian. Further, the DRC made recommendations regarding a visitation schedule and property issues. Both parties filed objections to the DRC's report. Subsequently, the trial court followed a portion of the DRC's recommendations when awarding joint custody, designating appellee as the primary residential custodian, setting terms of visitation, and dividing the parties' property. This appeal and cross appeal followed.

First, appellant/cross-appellee Arlene Anderson Bloom (appellant) contends on direct appeal that the trial court abused its discretion by designating appellee as the child's primary residential custodian. We disagree.

A trial court must determine custody "in accordance with the best interests of the child" after considering "all relevant factors including" those set out in KRS 403.270(2). Such findings may not be overturned on appeal unless they are clearly erroneous. <u>See</u> <u>Aton v. Aton</u>, Ky. App., 911 S.W.2d 612 (1995).

Here, it was undisputed that both parties were good parents who were closely bonded with the child, and that the child also had a close relationship with an older half-sister who resided with appellant. As noted below, the child was too

young to reliably express to the court his wishes regarding custody. See KRS 403.270(2)(b). However, much conflicting evidence was adduced regarding Greg Scott, who had resided with appellant for some months.

We are not persuaded by appellant's contention that the evidence did not support the court's findings regarding Scott, which were set out in the court's order as follows:

> The Court is concerned about the parties' minor son's physical, mental and emotional health when said child is in the presence of Greg Scott, the petitioner's boyfriend. Greg Scott has consumed alcohol to excess and has on occasion made fun of the child and called him names. There are other ways to discipline and teach a child and the court finds that name calling is detrimental to the child's emotional well being. While the petitioner has been an otherwise good parent, she has failed to prevent her son from being subjected to name calling by her boyfriend.

Our review of the record shows that although the evidence was conflicting, it certainly was sufficient to support the court's findings regarding Scott's alcohol consumption and his treatment of the parties' child. As the trial court was free to pick and choose among the conflicting evidence, we certainly cannot say that it clearly erred by making the findings set out above or by concluding that appellee rather than appellant should be designated as the child's residential custodian.

Moreover, we are not persuaded by appellant's contention that the court failed to adequately consider the child's close relationship with his half-sister when designating appellee as the residential custodian. Although it was undisputed that the two children shared a close relationship, evidence was also adduced to support the court's finding that the child had "adjusted to the separation from his half-sister." Simply put, we cannot say that the court's finding was clearly erroneous.

Next, appellant contends that the court abused its discretion when setting the terms of her visitation schedule with the parties' child. We disagree.

KRS 403.320(1) provides that a parent who is not granted child custody is entitled to "reasonable visitation rights." Appellant contends that although she and appellee agreed that she would have more visitation time than the amount typically provided under the trial court's standard visitation orders, the DRC recommended and the court adopted a visitation schedule which provided her with less time than that provided by the court's standard guidelines. The record shows that the DRC's final report in fact stated that appellee agreed for appellant "to have more than the standard visitation rights, despite the fact that the child cries when he must return to" her home. The DRC recommended, and the court adopted, a

visitation schedule which provided for the child to spend two weeks of vacation time per year with appellant, rather than the four weeks provided in the standard schedule. However, the court added a final provision which specifically provided appellee with the discretion to provide additional visitation time.

Certainly, this court may not set aside the terms of a court-ordered visitation schedule absent an abuse of the trial court's discretion. Here, any oral agreement which the parties may have reached regarding visitation was not enforceable by the court since it was not reduced to writing. Moreover, we cannot say that the court abused its discretion even if it scheduled less visitation time than that provided in the standard schedule, especially since the court provided that appellee could allow "any additional visitation." Clearly, appellant is not entitled to relief on this ground.

Next, appellee raises several issues on cross-appeal. For the reasons stated hereafter, we disagree with each contention.

Appellee asserts that the trial court erred in regard to the valuation of a 1969 Camaro which was awarded to appellant as part of her share of the marital property. Despite appellee's claim that the parties sold the vehicle prior to their separation, the court found that the vehicle was still in

the parties' possession at the time of their separation, and that appellant was entitled to either the vehicle or its value. Given the fact that appellant listed the vehicle's value at $21,700 in both her prehearing statement and her response to appellee's objections to the DRC's recommendations, and the fact that appellee failed to respond in any way to the valuation figure other than to claim that the vehicle was converted to cash which was spent prior to the parties' separation, we cannot say that the trial court clearly erred by valuing the vehicle at $21,700 in accordance with the only valuation evidence adduced below.

Similarly, appellee contends that the trial court erred in regard to the valuation of a surround system, a four-wheeler, and certain guns. However, the record shows that both parties stated in their prehearing statements that the value of the surround system was $2000 and that the value of the four-wheeler was $3000. Since the court valued those two items exactly in accordance with the parties' statements, no further discussion of these items is warranted.

Moreover, we are not persuaded by appellee's argument on appeal regarding guns. That argument consists only of the following statement:

> Likewise, the trial court ignored the Appellee's testimony regarding the nonmarital nature of his guns. The record

> is completely devoid of any values placed on these guns and no where is the sum of $700.00 recited by the Court provided as competent testimony as to the value of these guns. (Emphasis added.)

The record shows that the court adopted the DRC's recommendation that appellant should be restored nonmarital property which included "a gun that was a gift from her grandfather; and the two guns that were gifts" to her from appellee, while appellee was awarded marital property which included "all remaining guns." The court specifically stated that the DRC

> awarded to the petitioner as her non-marital property three guns; one was given to the petitioner by her grandfather and two were gifts from the respondent. The respondent states that he does not have these guns as they never existed. However, the Commissioner heard testimony regarding these guns and found evidence that they did exist. Therefore, the respondent shall give the three guns to the petitioner as her non-marital property or in the alternate the respondent shall give the petitioner the sum of $700.00, representing the monetary value of said guns.

Given the fact that appellee asserted below that the guns did not exist and that he had no control over them, no grounds exist for his argument on appeal that the court erred by categorizing the guns as appellant's nonmarital property, and by valuing the three guns at $700. This argument therefore merits no further discussion on appeal.

Next, appellee contends that the trial court erred by failing to restore to him the full value of his nonmarital interest in money held in a joint Merrill Lynch account. We disagree.

It was undisputed that appellee received significant amounts of income from a family trust fund during the parties' marriage, and that at least a portion of that income was deposited into a joint Merrill Lynch account. Moreover, it was undisputed that appellee's family provided each of the parties with at least $80,000 in cash gifts during the last few years of the marriage, and that those funds also were deposited into the Merrill Lynch account. Money from the joint Merrill Lynch account was periodically transferred into a joint bank account, where it was commingled with marital funds.

A Merrill Lynch account statement indicated that only $31,026.88 remained in the account on or about the date of the marital separation. Hence, it is clear that the account's balance was significantly less than the amount of either party's total nonmarital deposits to the account. Given the absence of evidence to specifically trace the origin of the remaining commingled nonmarital funds to one party or the other, we cannot say that the trial court clearly erred by equally dividing the funds between the parties. Cf. Allen v. Allen, Ky. App., 584 S.W.2d 599, 600 (1979) (nonmarital funds may be traced if the

balance in a bank account containing commingled marital and nonmarital funds "was never reduced below the amount of the nonmarital funds deposited").

Next, appellee contends that the trial court erred when valuing the marital residence and apportioning its value between the parties. We disagree.

The record shows that appellant submitted an appraisal valuing the marital home at $182,000, while appellee submitted an appraisal valuing it at $160,000. The court averaged the appraisals and valued the property at $171,000. After reviewing the evidence, the court concluded that there had been a total contribution of $192,404.74 toward the property, including a nonmarital contribution of $142,854 made by appellee's parents for the payment of loans, and a marital contribution of $49,550.74 made by the parties for improvements. Because the total contribution of $192,404.74 exceeded the property's appraisal value of $171,000, the court calculated the parties' respective marital and nonmarital contributions in proportion to the property's appraised value. Thus, the court determined that appellee had a $126,961.53 nonmarital interest due to his parents' contributions, and that the parties had a $44,038.47 marital interest in the property. Appellee, who was awarded the property, was ordered to pay appellant $22,019.24 as

compensation for her one-half share of the marital interest in the property.

Having carefully reviewed the record we cannot say that the trial court erred when valuing the marital residence, as that valuation fell within the range of the competent evidence presented below. Cf. Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992), overruled on other grounds by 52 S.W. 3d 513 (2001). We also are not persuaded that the court erred when apportioning that value between the parties when faced with the challenge of fairly and equitably allocating property which was valued at less than the total investment therein. We simply cannot agree with appellee’s assertion that the court erred by failing to find that a direct dollar-for-dollar relationship existed between the property’s value and his parents’ loan payments. This is especially true since the evidence did not address whether the parents’ contributions included the payment of interest or other amounts which did not directly reduce the outstanding loan principal. We therefore cannot say that the trial court erred in any way when allocating the value of the marital residence.

Finally, appellee contends that the trial court abused its discretion by awarding appellant $5000 in attorney’s fees. Having carefully reviewed the evidence adduced below, including that regarding the parties’ respective financial resources, we

cannot say that the trial court abused its broad discretion in this regard. See KRS 403.220.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Carl D. Devine
Susan Y.W. Chun
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT:

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