RENDERED: August 29, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000127-MR

SUSAN G. WEICK APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE, ROBERT A. MILLER, JUDGE
ACTION NO. 99-CI-00332

JOHN A. WEICK APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BARBER, AND DYCHE, JUDGES.

BARBER, JUDGE: The Appellant, Susan Weick ("Susan"), seeks review of the Meade Circuit Court's Findings of Fact, Conclusions of Law, and Judgment, as it pertains to child support and the award and division of property. Finding no error, we affirm.

Susan and the Appellee, John Weick ("John"), were married in 1988. On March 13, 2000, the trial court entered a

decree of dissolution of marriage. We refer to the record as necessary to resolve the issues before us.

First, Susan contends that the trial court erred in not ordering child support, more specifically that the trial court failed to make a written finding that application of the child support guidelines would be inappropriate or unjust, as required by KRS 403.211[1] and *Barker v. Hill*[2].

In *Barker v. Hill*, this Court vacated and remanded an order that the father's child support obligation be "zero," where the child received monthly Supplemental Security Income ("SSI") benefits in excess of the father's child support obligation. The commissioner had failed to make any finding on

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[1] The statute provides:

> 2) At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.
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> (3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
> . . .
> (d) The independent financial resources, if any, of the child or children;

[2] Ky. App., 949 S.W.2d 896 (1997).

the record that application of the child support guidelines would be “unjust or inappropriate” as required by KRS 403.211(3). Nor did the commissioner “investigate or provide facts” that the guidelines, if applied, would be “unjust or appropriate.” Absent such a finding, supported by substantial evidence, the guidelines are presumed to be correct. The case was remanded to determine whether deviation from the guidelines was warranted, noting that an appropriate consideration was whether the SSI benefits were an independent financial resource of the child.

John asserts that Susan’s argument is without merit, and that “it is not clear how a more detailed finding could have been made.” John explains that the amount of the monthly adoption subsidy exceeds his obligation under the guidelines, and that it is an independent resource of the child warranting deviation from the guidelines.

> Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. A reviewing court should defer to the lower court's discretion in child support matters whenever possible. As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or

> unsupported by sound legal principles [footnotes omitted.][3]

In the case *sub judice*, the Commissioner's report, filed September 27, 2001, reflects that:

> The parties are the parents of an adopted child who is classified as a special needs child who had been receiving SSI benefits. The parties have agreed that the Respondent have sole custody of the child. The Commissioner had previously found that child support was not payable by reason of these benefits. The Court initially overruled the Commissioner's recommendation, but later, considering *Barker v. Hill,* Ky. App., 949 S.W.2d 896 (1997), found that the application of the guidelines would be unjust or inappropriate. The Court directed the Commissioner to make a determination concerning the special needs Adoption Assistance paid to the adoptive parent in light of *Baker v. Hill*, supra, with the understanding that the SSI had been terminated. KRS 403.211 et seq addresses special needs of a child. The Commissioner requests the parties to supply him with the criteria for such assistance.
>
> The Commissioner finds and reports to the Court that the Respondent [Susan] is the payee of the assistance and, that such assistance should be considered as an independent resource of the child. The Commissioner notes that, considering the relative income of the parties, the child support payment would not match or exceed the assistance paid. The Commissioner recommends, therefore, that neither parent be obligated for child support.

In its December 12, 2001, Findings of Fact, Conclusions of Law and Judgment, the trial court found that the parties' adopted, special needs child receives approximately $355.00 per

[3] *Downing v. Downing*, Ky. App., 45 S.W.3d 449, 454 (2001).

month in adoption assistance funds under Title IV-E, through Susan as payee; that these funds are not includable as income to the parents for income tax purposes; and that that the adoption assistance is an independent financial resource of the child. In addition, the trial court found that the child had a custodial account with an accumulated balance of $4,601.31 at the time of the hearing, and a medical card covering his medical expenses.

The trial court confirmed the Commissioner's recommendation that neither parent be obligated for child support, explaining that the adoption subsidy is an independent financial resource of the child for purposes of KRS 403.211(3)(d). The trial court has adequately justified its deviation from the child support guidelines in writing. Thus, we affirm.

The second issue Susan raises concerns the award of the value of a one-acre tract of land to John, as his non-marital property. Susan asserts that the property was a gift to both parties after their marriage making the land marital property. Susan also asserts that the value of the property is excessive.

The division and distribution of marital property is a question of fact. Factors to consider in determining whether property acquired after marriage is non-marital include the source of money used to purchase the property and the status of

the marriage at the time of transfer."[4] The donor's intent is the touchstone, where the property is claimed as a personal gift.[5]

Here, the evidence reflects that the property upon which the marital residence was built was a gift to John from his parents. A construction loan was taken out prior to the marriage in John's name only, and construction began on the house before the parties were married. Susan's name was on the deed only because the bank later required it for financing. Evidence was presented that the value of the unimproved lot was from $10,000.00 to $15,000.00. The trial court's determination, that the lot has a value of $12,500.00 and should be awarded to John as his non-marital property, has a substantial evidentiary foundation and is not clearly erroneous.[6]

Susan also asserts that the trial court erred in awarding John a non-marital interest in a Chevy Nova. Susan claims that the Nova is marital property, because it was acquired by John after the marriage and marital funds were used to refurbish it. The trial court found that the car is part John's non-marital property and part marital property, because the car was a gift to John from his family, and John had put

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[4] *Calloway v. Calloway*, Ky. App., 832 S.W.2d 890 (1992).
[5] *Id.* at 892.
[6] *Poe v. Poe*, Ky. App., 711 S.W.2d 849, 851 (1986).

"extraordinary efforts" into restoring it. Again, the trial court's finding is supported by the substantial evidence of record and is not clearly erroneous.

Susan also asserts that the trial court erred in failing to place a value on John's "marital contributions made to farm equipment. . . ." Susan claims that John invested "marital time, effort and money to improve his father's land, care for his investments and acquire farm equipment in his father's name . . . ." Susan compares the situation to a dissipation of marital assets, and asks us to "overrule the trial court's decision not to place a value on . . . [John's] contributions to his father's farm. . . ."

The trial court found that John's father had established, through documents, that certain items of farm equipment were his own property.[7] Moreover, the court noted that services provided to one another between relatives (especially parents and children) are generally presumed to be gratuitous, and that Susan had not proved any partnership or other business agreement. We find no error.

The final issue Susan raises is whether the trial court erred in ordering the sale of the marital home and certain items of marital property. Here, the court held that the marital home

[7] Other items of farm equipment were determined to be marital property and were ordered sold with other marital property.

should be sold because the "parties value the residence at between the PVA estimate of $58,000.00 to a high of $91,000.00, [and] the discrepancy is too great for the Court to speculate at which is more accurate." The court also noted the close proximity of the residence, in which Susan wished to remain, to John's relatives. Insofar as certain items of personal property, the trial court allowed the parties' 30 days to agree in writing to a fair division of same; otherwise, the court ordered such property to be sold. The trial court's resolution of the issue was a reasonable one, well within its discretion.

Accordingly, we affirm the December 12, 2001 Findings of Fact, Conclusions of Law and Judgment of the Meade Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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