

RENDERED: April 15, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000218-MR

BILL CRIDER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 01-CI-04579

JOYCE GAINES CRIDER,
and
SHEA CHANEY, ESQ.
and
DEBRA A. DOSS, ESQ.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; TACKETT, JUDGE; MILLER, SENIOR
JUDGE.¹

MILLER, SENIOR JUDGE: Appellant Bill Crider (Bill) appeals from
a decree of the Fayette Circuit Court, entered November 25,
2003, dissolving his marriage to Joyce Gaines Crider (Joyce).

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
Kentucky Revised Statutes 21.580.

Before us, Bill contends that the trial court erred in refusing to recuse; by invalidating the parties' prenuptial agreement; in the characterization and distribution of marital property; and in awarding attorney fees. We affirm.

Bill and Joyce were married on November 20, 1999, the second marriage for both. At the time of the marriage, Bill was 36 and Joyce was 29. Just short of two years later, they separated, and within a month following separation Bill initiated dissolution proceedings. Within a year, on the day before her scheduled deposition, Joyce disappeared. She remained absent throughout the rest of the proceedings.² Her mother, Joan Gaines, was appointed as Joyce's conservator by the Probate Division of the Fayette District Court.³ The parties agreed to continue the proceedings in Joyce's absence with Joyce's mother appearing for her.

The trial court made the following findings and distributions:

- 1) 945 Dayton Avenue, Lexington: Purchased by Joyce in 1992, prior to the marriage, for \$39,000.00; Joyce made improvements before the marriage and was solely responsible for the mortgage, even after the marriage; in

² Bill initially testified by deposition that he last spoke to Joyce on the Friday evening before her disappearance the following Monday; he later gave a sworn statement contradicting that testimony and indicating instead that he and Joyce had spent that weekend together in Northern Kentucky and had agreed to a division of the property so that she would not have to give her deposition. He stated that he last saw Joyce that Sunday afternoon when they returned to Lexington.

³ Kentucky Revised Statutes (KRS) 387.590.

April, 2001, eighteen months into the marriage, house and contents destroyed by fire caused by a gas leak; insurance paid \$78,969.00 for the house, an appreciation of \$44,169.00. Court awarded Joyce \$37,519.00 as nonmarital property; remainder of appreciation of \$6,650.00 deemed marital property and each party awarded one-half (\$3,325.00). The court awarded Joyce \$17,500.00 for the value of the land, the amount spent by Bill to purchase it.

2) 2909 Jason Court, Lexington: Purchased by the parties in August 2001 for \$117,500.00; down payment of \$33,500.00 from the insurance proceeds; \$84,000.00 remained on the mortgage; Bill lived on the property and contributed to the mortgage payments for three months before moving out due to the separation; after Bill moved out, payments made by Joyce or her mother. Court awarded Bill marital share of \$3,325.00 (contribution from his marital portion of the insurance proceeds) and \$175.00 (contribution for three months residing there) and awarded Joyce the property.

3) 8102 Kentucky Highway 114, Prestonsburg: originally owned by Bill's mother; she deeded the property to Bill shortly following the mortgage payoff; \$24,000.00 in marital funds (proceeds from the personal property insurance proceeds from the fire) was used to pay off mortgage in June, 2001, and joint improvements of \$5,000.00 equal total marital contributions of \$29,000.00. Court awarded each party one-half of marital contributions (\$14,500.00). Rental income found to be 40% marital, 60% nonmarital. Court awarded each party one-half of the marital portion (\$300.00); Bill awarded the remainder of \$1,200.00.

4) Personal Property: Majority destroyed in the fire; insurance proceeds totaled \$55,250.00; Remainder of \$31,250.00 (after \$24,000.00 used to pay off Prestonsburg

mortgage); 60% Joyce's marital share and 40% Bill's marital share; Court awarded Bill the jet ski, guns purchased during the marriage, dune buggy, gooseneck trailer, Looney Tune car (totaling \$17,700.00) and awarded Joyce the remaining contents at Jason Court, the 1991 Toyota truck, and the 1993 Infinity car (totaling \$18,500.00).

5) The court awarded Bill \$3,500.00, constituting one-half of marital funds used by Joyce to repay a prior debt to her mother.

6) Four Siberian Husky Dogs: Court awarded Bill one dog purchased before the marriage and awarded Joyce three dogs given to Joyce during the marriage.

7) Attorney Fees: Joyce's fees total \$12,000.00 for Mr. Chaney and \$6,000.00 for Ms. Doss; Court found that fees reasonably incurred due to Bill's actions and ordered Bill to pay 80% or \$14,400.00.

We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01; Largent v. Largent, 643 S.W.2d 261, 263 (Ky. 1982). The trial court's application of law is reviewed *de novo*. Rehm v. Clayton, 132 S.W.3d 864, 866 (Ky. 2004). We conclude that the findings of the trial court are supported by substantial evidence and are not clearly erroneous. We also find that there was a correct application of law.

Bill initially contends that the trial judge erred 1) in not permitting his case to be heard in Fayette Family Court and 2) in not recusing under KRS 26A.015(2)(a) and (e). "The

burden of proof required for recusal of a trial judge is an onerous one." Stopher v. Commonwealth, 57 S.W.3d 787, 794 (Ky. 2001). "A party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal." Webb v. Commonwealth, 904 S.W.2d 226, 230 (Ky. 1995). The person seeking recusal must point to facts demonstrating bias or other reasons for disqualification of a trial judge. Foster v. Commonwealth, 348 S.W.2d 759, 760 (Ky. 1961), *cert. denied*, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962). For the following reasons, Bill has failed to meet his requisite burden.

On January 23, 2003, Chief Fayette Circuit Judge Gary Payne entered the following order:

IT IS HEREBY ORDERED BY THE COURT, for the purpose of transferring Domestic/Family Cases from the Civil/Criminal Divisions of the Fayette Circuit Court, namely, the 1st, 3rd, 4th, 5th, 7th and 8th Division to the Family Court Divisions, namely, 2nd, 6th and 9th, the following cases, which have been randomly selected by the Fayette Circuit Court Clerk, are reassigned from the 7th Division to the 9th Division.

* * *

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GRIDER (sic)

* * *

IT IS FURTHER ORDERED that upon motion, with notice thereof, filed in the 9th Division, a case may be reassigned to the 7th Division. The motion will state good cause for the reassignment and contained thereon, or attached thereto, the written consent to

such reassignment by the Judge of the 7th Division.

IT IS FURTHER ORDERED that these transfers shall become effective February 1, 2003 and if any proceedings or motions have been previously scheduled, parties are directed to file a re-notice of said proceeding for the new division.

Joyce asked the Seventh Division to consent to a reassignment back to the Seventh Division due to its extensive knowledge and the fact that family court's long term involvement would not be required as no children were involved. Bill objected, arguing that the Seventh Division lost jurisdiction of the case as more than ten days had passed since transfer, and "(b)y virtue of an amendment to the Constitution and enabling legislation this matter is now properly pending in the ninth Division, Family Court." On May 9, 2003, the Seventh Division concluded that Joyce was not required to file a motion in the Ninth Division to allow the Seventh Division to retain the case, and entered an order retaining the case.

On August 13, 2003, Bill filed a motion to recuse, asking the trial court "to comply with the Order of the Chief Judge." He also filed an affidavit, citing KRS 26A.015(2)(a) and (e), and alleging impropriety in the trial judge's "statements made in court; her refusal to abide by the order of the Chief Circuit Judge; her refusal to grant [Bill] his residence and his pets; and the Judge's participation in the

solicitation of support in the campaign of her husband." A hearing was held.⁴ Following the hearing, the Ninth Division entered an order reassigning the case to the Seventh Division. Although there is no order in the record overruling Bill's recusal motion, and the video hearing is not part of the record on appeal, both parties indicate in their briefs that Bill's recusal motion was overruled at this hearing. Bill raised the issue again at the conclusion of the case in his CR 59.05 motion to alter, amend, or vacate, which was overruled by the court by order entered January 5, 2004.

Pursuant to Kentucky Constitution Section 116, the "Supreme Court shall have the power to prescribe . . . rules of practice and procedure for the Court of Justice." In Supreme Court Rule (SCR) 1.040(3), the Court delineates the duties of the chief circuit judge, including the duty to (d) "reassign cases from one judge to another as necessary or convenient;" and the responsibility in (4)(a) to "regulate the assignment of cases to the judges on a random basis." SCR 1.040(4)(c) provides that absent "good cause to the contrary, all matters connected with a pending or supplemental proceeding shall be heard by the judge to whom the proceeding was originally assigned."

⁴ Although both parties cite this court to a video record of the hearing on this motion on August 18, 2003, the hearing is not in the record on appeal.

Despite this authority, Bill contends that once the Ninth Division was designated as a "family court" and his case was transferred to the Ninth Division by Chief Judge Payne's January 23, 2003 order (made effective February 1, 2003), the Seventh Division lost jurisdiction as the Ninth Division had exclusive jurisdiction pursuant to KRS 23A.100, which establishes the jurisdiction of family court. He further argues that any actions of the Seventh Division following February 1, 2003, are thus erroneous and reversible.⁵ Bill's reliance on KRS 23A.100, however, is misplaced as this statute did not become effective until June 24, 2003, *after* the reassignment of cases herein. The reassignment of Bill's case was performed under the authority of the above Supreme Court Rule. There was, therefore, no error by the trial judge in retaining this case.

Bill additionally contends that the trial judge erred in overruling his motion to recuse pursuant to KRS 26A.015(2)(a) and (e).⁶ Bill argues on appeal that recusal was mandated by the

⁵ Bill's arguments essentially relate only to actions by the Seventh Division between February 1, 2003, (the effective date of the transfer order) and August 21, 2003, (when the Ninth Division entered an order reassigning the case to the Seventh). According to the record, this includes rulings on several motions to continue, interim attorney fees, substitutions of counsel, and purchase of the Dayton Avenue property by Bill.

⁶ (2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:

(a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;

* * *

trial judge's "statements made in court, her refusal to abide by the orders of the Chief Circuit Judge, her refusal to grant him his residence and pets in the absence of his wife Joyce and the Judge's participation in the solicitation of support in the campaign of her husband." Bill fails, however, pursuant to CR 76.12(4)(c)(v),⁷ to cite in his argument to specific facts supporting these claims. Also, as stated above, although the parties refer to the video hearing on this issue, it was not made a part of the record on appeal. When the complete record is not before the appellate court, the appellate court must assume that the omitted record supports the decision of the trial court. Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985). As such, Bill has failed to carry the burden justifying recusal.

Bill next contends that when invalidating the parties' prenuptial agreement, the trial court applied an erroneous standard when it placed the burden of proof on him to establish the existence of the items claimed, and further that the trial court erroneously relied on hearsay and Bill's non-production of assets in reaching its conclusion. We must decline, however, to

(e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

⁷ (4)(c)The organization and contents of the appellant's brief shall be as follows:

* * *

(v) An "ARGUMENT" . . . with ample supportive references to the record.

review this issue. The hearing on this matter apparently occurred on August 18, 2003. As stated above, this video hearing is not part of the record on appeal. We must, therefore, assume that the omitted record supports the decision of the trial court. See *id.*

Bill next asserts that the trial court erred in the characterization and division of property. According to Sexton v. Sexton, 125 S.W.3d 258, 264-65 (Ky. 2004),

The disposition of parties' property in a dissolution-of-marriage action is governed by KRS 403.190, and neither record title nor the form in which it is held . . . is controlling or determinative. Under KRS 403.190, a trial court utilizes a three-step process to divide the parties' property: "(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties."

Footnotes omitted.

First, with regard to the Dayton Avenue property and the insurance proceeds, there is no dispute that the property was originally owned by Joyce and then served as the couple's residence after their marriage, and that the residence burned resulting in an award of insurance proceeds. The trial court found that 81% (representing 90 months of 108 months) of the appreciation and equity in the property was Joyce's nonmarital

property and 19% (representing the 18 months of the parties' marriage) of the appreciation and equity was marital, equally dividing that amount between the parties. After making this finding regarding the percentage of marital property, the trial court awarded the proceeds from the sale of the Dayton Avenue property, after the fire, to Joyce, which Bill later paid in purchasing the property. Bill takes issue with the characterization of the nonmarital property, asserting that the insurance contract was executed after the marriage and thus all the insurance proceeds were marital property; and also asserting that the proceeds from the sale were marital. We find no error in the trial court's application of the "source of funds" rule as stated in Sexton at 265:

"An item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court." Neither title nor the form in which property is held determines the parties' interests in the property; rather, "Kentucky courts have typically applied the 'source of funds' rule to characterize property or to determine parties' nonmarital and marital interests in such property." "The 'source of funds rule' simply means that the character of the property, *i.e.*, whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire the property."

Footnotes omitted.

Bill makes a similar claim with regard to the Jason Court property, of which the down payment was made with the insurance proceeds. The court awarded the property in proportion to the parties' marital percentage of insurance proceeds. As above with the Dayton Avenue property, we find no error with regard to this award.

We likewise find no error with regard to the Prestonsburg property deeded to Bill from his mother. The evidence supported that the \$24,000.00 used to payoff the existing mortgage was marital funds (proceeds from the insurance) and further that \$5,000.00 in marital funds was expended in improvements. Bill received one-half of the marital interest and 60% of the rental income.

Bill also asserts error by the trial court in the division of personal property and in the total amount of money expended by Joyce prior to their separation, keying his argument to the credibility of Joyce's mother who testified in Joyce's absence. Our standard of review is not based, however, on whether the losing side presented credible evidence; rather "[t]his court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous The property may very well have been divided or valued differently; however, how it actually was divided and valued was within the sound discretion of the trial

court." (citation omitted). Cochran v. Cochran, 746 S.W.2d 568, 569-570 (Ky.App. 1988).

As indicated above, we review these characterization and distribution issues under an abuse of discretion standard. We decline to disturb the trial court's rulings. There is substantial evidence in the record to support the trial court's determinations. The court's findings are not clearly erroneous.

Lastly, Bill complains of the trial court's award of 80% of Joyce's attorney fees. The court based this award upon misrepresentations and untruths by Bill which ultimately required Joyce's counsel to defend. Although Bill admits untruths and concealment of information during the proceedings, and the record clearly shows four changes of counsel leading to delays, he contends that Joyce was equally as culpable by disappearing, and that the court failed to recognize that there was a substantial imbalance in the parties' financial resources in favor of Joyce.

KRS 403.220 authorizes the award of attorney fees in a dissolution action. The trial court's ruling is subject to review only for an abuse of discretion. Sexton at 272.

"Obstructive tactics and conduct, which multiplied the record and the proceedings" are proper considerations "justify[ing] both the fact and the amount of the award." Gentry v. Gentry, 798 S.W.2d 928, 938 (Ky. 1990). Contrary to Bill's untruths and

delays due to changes in counsel, Joyce's mother was appointed conservator to avoid further delays in the case. The record supports the trial court's findings. As to Bill's contention of error based on a substantial imbalance in the parties' financial resources, as Joyce was awarded the "vast majority of the monies and properties," the trial court was presented with evidence on the financial resources of both parties, including evidence that Bill made substantially more in income, and that Bill has, by his own admission, a vast collection of guns and close to one-half million dollars buried in a lockbox in Eastern Kentucky. There was no abuse of discretion.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael L. Judy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Debra Ann Doss
Shea Chaney
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