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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001010-MR

DARLENE HENSLEY — APPELLANT

v.

APPEAL FROM CLAY FAMILY COURT
HONORABLE GENE CLARK, JUDGE
ACTION NO. 00-CI-00225

WILK HENSLEY, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Darlene Hensley appeals from the April 21, 2004, order of the Clay Family Court and the April 19, 2004, finding of fact, conclusion of law and decree of dissolution of marriage entered by the Clay Family Court. The April 21, 2004, order sustained Wilk Hensley's, Jr., motion to enter a Nunc Pro Tunc order making the April 19, 2004, decree of dissolution effective on the date of the final hearing before the family court on December 17, 2003. Darlene appeals the entry of the

Nunc Pro Tunc order as well as the division of property set forth in the decree. We affirm.

Darlene and Wilk were married on October 7, 1997, in Bell County. They separated on April 10, 1999, and lived separately thereafter. No children were born of the marriage. Darlene filed a petition for dissolution of marriage on June 26, 2000. On March 30, 2001, Darlene amended her petition to state that there were no marital debts to be divided by the court and that there were no marital properties to be divided by the court. (Paragraphs 10 and 11 of amended petition). Also on March 30, 2001, the parties filed an amended property settlement and child custody agreement.[1] The agreement states that there is no marital personal property to divide, that the parties do not own real property and that they have zero (0) debts to allocate. (Paragraphs 4, 5 and 6 of agreement). The agreement is signed by the parties and notarized.

On June 1, 2001, Darlene retained new counsel and moved to withdraw the settlement agreement. Although there is nothing in the record regarding the matter being referred to the domestic relations commissioner (DRC) or that a hearing before the DRC transpired, there is an unsigned order filed in the record that indicates on June 20, 2001, the DRC recommended that

[1] Although called an amended property settlement and child custody agreement, no other property settlement is in the record and neither party testified as to any previous agreement. Also in the agreement the parties acknowledge that no children were born to the marriage.

Darlene's motion to withdraw the settlement agreement be sustained. Subsequently, Wilk filed exceptions to the unsigned order and on December 7, 2001, the Clay Circuit Court entered an order remanding the matter to the DRC for a determination as to whether the agreement was unconscionable. Nothing of significance occurred until December 17, 2003, at which time the Clay Family Court held a final hearing on the dissolution petition. The hearing was video taped and made a part of the record. The family court heard testimony from both Darlene and Wilk concerning the evidence necessary to grant a dissolution and relating to marital property. Darlene testified that she expended some $17,500 to purchase land that had been transferred from Wilk's siblings to him. This property had been Wilk's parents' property and Wilk was living on the property at the time of his marriage to Darlene. Wilk denied that Darlene contributed any of her money to the purchase of the property or to maintain or repair the log cabin they lived in during the marriage.

Darlene presented proof that she has a person injury settlement for $25,000 and that near the time of the deeds transferring the property to Wilk, she had withdrawn cash or written checks in large amounts. The deeds from Wilk's siblings were introduced which indicated that his brothers and sisters had gifted the property to Wilk. The deeds stated that the

interest in the property was being transferred in consideration of the love and affection which the parties have for their brother (Wilk). There was no direct evidence that indicated Darlene had actually used her money to purchase the property. No one else testified other than Darlene and Wilk. At the conclusion of the hearing the family court judge stated his findings and granted the decree.

Following the granting of the divorce, the court on the record, reviewed the testimony and the law relative to gifts, marital property and transfer of land. While the judge admitted he believed Darlene may have been entitled to some interest in the property, he found that there was insufficient evidence to support her position. The court stated that although Darlene said she paid for the property, the deeds indicated they were gifts from Wilk's siblings, Wilk denied Darlene supplied the money, neither the sibling nor any other witnesses were called to support Darlene's contentions, and there were no documents or records presented to establish payment by Darlene. Thus the court found that the property in question had been gifted to Wilk. At the conclusion of the hearing, counsel for Darlene volunteered to prepare the decree for the court.

Unfortunately before the decree could be prepared and signed, Wilk was shot and killed. Thus, on February 26, 2004,

the attorney for Wilk filed a motion that the divorce decree be entered nunc pro tunc. On April 19, 2004, the family court entered a decree of dissolution and on April 21, 2004, a nunc pro tunc order was entered making the decree effective on the date of the final hearing, December 17, 2003. This appeal followed.

On appeal, Darlene argues that the nunc pro tunc order should not have been entered after Wilk's death and that the court's finding that the property was a gift to Wilk was erroneous. We address the nunc pro tunc order first in that if the decree is invalid we need not address the property division. Darlene concedes that courts do have the inherent power to enter orders nunc pro tunc to supply something that was done on a prior date and make the later entered judgment effective retroactively to that date. In Munsey v. Munsey,[2] the court held:

> The argument is made also that the order should have been entered nunc pro tunc. The power to enter judgments and orders nunc pro tunc is inherent in the courts and is not dependent for its existence upon any statute. Chester v. Graves, 159 Ky. 244, 166 S.W. 998; Freeman on Judgments (5th Ed., 1925), Vol. 1, Sec. 121. One of the classes of cases in which a judgment nunc pro tunc may properly be entered occurs where a judgment has been pronounced by the trial court, but has not been entered of record through some accident

[2] 303 S.W.2d 257 (Ky. 1957).

> or through negligence of the clerk. The court rendering the judgment has the power to order the judgment so rendered to be entered nunc pro tunc, provided that there is satisfactory evidence, not only of its rendition, but of its terms also. In this jurisdiction, we have followed the strict rule that only by some entry or memorandum *of record* can the rendition of a judgment be proved. Montgomery v. Viers, 130 Ky. 694, 114 S.W. 251.[3]

The Munsey case also cites to Hundley v. Hundley,[4] which states that the rendering of a judgment is the judicial act and all the rest (entering, recording or signing the judgments) are mere ministerial acts. Specifically, the court in Hundley held:

> In the first case cited above, the writer of the opinion made an historical analysis of nunc pro tunc orders and showed clearly that the record is not the judicial act but is only historical, and was a method of protecting the court's own judgments. The cases cited above, and numerous other cases following later which approve the decisions in the cited cases above, point out clearly the fact that the entering, recording, or signing the judgments are mere ministerial acts separate from the judicial act rendering the judgment. The judicial act is the rendering of the judgment. The recording of and signing the judgment is the ministerial act. Upon the showing of sufficient evidence these judgments can be entered and signed nunc pro tunc, and when so entered and signed, perfects the judgment as of the date it was rendered. It is noticeable in the cases cited by the appellant that there was lack of judicial acts in rendering the judgments which were the subjects of discussion. In one of the

[3] Id. at 259. (Emphasis in original).

[4] 198 S.W.2d 971 (Ky. 1947).

> cases cited the pretended divorcee had abandoned her divorce suit. In another the cause of action had been dismissed. On no [sic] one of them was there a basis in the record for a nunc pro tunc entry of judgment. In the instant case the Judge had signed a statement on the wrapper of the file as set out above. The Clerk had entered that judgment and had furnished the appellee with a copy attest of that judgment. This certainly constituted a sufficient foundation for a judgment nunc pro tunc. The court had acted judicially and the failure was in the ministerial act. In cases too numerous to mention here, we have held that such judgments can be entered nunc pro tunc and will be respected and enforced to the same extent as if entered on the date rendered.[5]

In this case there can be no question but that the court acted judicially when on the record (as captured by the video tape) it granted the divorce decree and entered findings of facts bases upon legal theories in determining the division of contested marital assets. The ministerial act of preparing the document to reduce the judgment to writing was accepted by Darlene's attorney. In that Wilk died prior to the written document being prepared and signed cannot and does not affect the legal effect of the judicial acts of the judge in entering the judgment on the record. In addition to allow Darlene to reap the benefits of her failure to act promptly in reducing the judgment to writing could only invite unintended mischief and unwarranted delays if left unchecked. It is clear that in this

[5] Id. at 973.

case the court pronounced its judgment which was entered on the record and the nunc pro tunc order was proper and necessary to give the court's judicial act its proper meaning and effective date.

We next address Darlene's contention that the court erred in determining the transfer of property to Wilk from his siblings was a gift. Both parties cite Hunter v. Hunter[6] for the standard of review to be applied in this matter. In Hunter, this court stated:

> We begin with a statement of our standard of review. Under CR 52.01, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." See also Greater Cincinnati Marine Service, Inc. v. City of Ludlow, Ky., 602 S.W.2d 427 (1980). A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. Golightly, 976 S.W.2d at 414; Sherfey v. Sherfey, Ky.App. 74 S.W.3d 777, 782 (2002). An appellate court, however, reviews legal issues *do novo*. See, e.g.,

[6] 127 S.W.3d 656 (Ky.App. 2003).

> Carroll v. Meredith, Ky.App., 59 S.W.3d 484, 489 (2001).[7]

With this standard in mind, a review of the video recording of the dissolution hearing clearly shows that the family court finding as to the property being a gift is not clearly erroneous. While Darlene testified that she supplied approximately $17,500 for the purchase of the land in question, other evidence including Wilk's testimony and the deeds contradicted her testimony. The family court reviewed the scant evidence before it and determined that the deeds were the best evidence as to the intent of the parties. And the deeds stated the transfers were gifts based upon the love and affection the sibling had for Wilk. The deeds were substantial evidence and support the family court's findings. Darlene failed to present sufficient probative evidence to contradict this evidence. She presented no other witnesses, no other evidence (other than her own self-serving testimony), no records and no other documents to support her position. The family court did not err in its determination that the transfer of property to Wilk was a gift.

For the foregoing reasons the decree of dissolution of marriage and the entry of the nunc pro tunc order of the Clay Family Court are affirmed.

SCHRODER, JUDGE, CONCURS.

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[7] Id. at 659. (Footnote omitted).

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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McKee, Kentucky

BRIEF FOR APPELLEE:

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