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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001923-MR

LOWELL RAY FULTZ — APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR, JUDGE
ACTION NO. 04-CI-00225

JUANITA SHELTON FULTZ — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal from a dissolution of marriage proceeding in which the Appellant was denied visitation with his daughter, ordered to pay thirteen thousand, one hundred, twenty-five dollars ($13,125) to equalize division of marital personal property, and ordered to pay ten thousand, three hundred, ninety-seven dollars and sixty-seven cents ($10,397.67) to the Appellee for her interest in marital savings.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The Domestic Relations Commissioner (DRC) made these recommendations to the trial court. The Lee Circuit Court adopted the recommendations in full and this appeal followed. This Court affirms on the first two issues and remands the third issue to the trial court for clarification.

Appellant first argues that he was improperly denied visitation with his daughter upon final dissolution of the marriage. Appellant cites Kentucky Revised Statute 403.320(1) to support his argument. That section states that "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." The lower court denied Appellant visitation, finding the child's emotional well-being was at risk.

Appellant claims there was no evidence to suggest such a ruling and that before visitation can be denied an evidentiary hearing must be held. *Smith v. Smith*, 869 S.W.2d 55 (Ky. App. 1994). According to the briefs of both parties, an evidentiary hearing was held before the DRC on May 23, 2005. However, the transcripts of this hearing are not available to the Court because they were lost. Appellee claims that during this hearing, the child was interviewed by the DRC and that "[a]fter the evidentiary hearing between the parties and interview with the child, the Domestic Relations Commissioner found that continued visitation with the Appellant seriously endangered the child's emotional health." (Appellee's Br. at 6.) Appellee also stated that the trial court interviewed the child on June 7, 2005 and came to the same conclusion.

As previously noted, the record is incomplete with regard to the DRC hearing on May 23. It was the responsibility of Appellant to make sure the events of this hearing were made part of the record. "It has long been held that, when the complete record is not before the appellate court, that 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). Where no record of a proceeding exists, "the appellant may prepare a narrative statement thereof from the best available means, including his/her recollection, for use instead of a transcript . . . ." CR 75.13(1). The narrative statement, once approved by the trial court, substitutes for the trial transcript. *Simpson v. Commonwealth,* 759 S.W.2d 224 (Ky. 1988). Since a hearing was held before the DRC on May 23, but there are no transcripts in the record, this Court must assume it was sufficient to justify the DRC's decision to withhold visitation. As noted in *Harper v. Commonwealth,* 694 S.W.2d 655 (Ky. 1985), "[w]e cannot think of any reason why the record could not have been supplemented here," by a narrative statement.

Appellant actually seems to be arguing that because there was no evidentiary hearing before the trial court, as opposed to the DRC, there was no evidence to support the final judgment. As noted by the Kentucky Supreme Court in *Squires v. Squires,* 854 S.W.2d 765 (Ky. 1933), a trial court need not necessarily review the record of a hearing before the DRC before affirming the DRC findings where the exceptions filed by a party are heard by the court and the parties are given ample opportunity to present their contentions. In the case at bar, exceptions were filed, the parties were given

an opportunity to be heard and the trial court interviewed the minor child as well, before adopting the DRC report. On this issue, the judgment of the trial court is affirmed.

Appellant also argues that he should not have to pay Appellee the sum of $13,125 to equalize the division of marital personal property. Appellant was awarded sixteen thousand, four hundred, fifty dollars ($16,450) worth of marital personal property, while Appellee was awarded three thousand, three hundred, twenty-five dollars ($3,325) worth of marital property. He claims the $13,125 equalization amount is too much and would be unjust to him. His reasoning is that Appellee was given the marital estate valued at sixty-two thousand dollars ($62,000) while he was only given a vacant lot valued at twenty-eight thousand dollars ($28,000). This division of real property was agreed upon by the parties. Appellant agreed to give Appellee the marital estate in exchange for not having to pay maintenance. It appears that as an agreed division of the real property and resolution of the maintenance issue, it should not be disturbed on appeal.

Also, he claims that in order to make the apportionment of personal property equal, he should only have to give Appellee six thousand, five hundred, sixty-two dollars and fifty cents ($6,562.50). He states that by giving Appellee $6,562.50, they each would have nine thousand, eight hundred, eighty-seven dollars and fifty cents ($9,887.50) in marital personal property ($16,450 – $6, 562.50 = $9,887.50 and $3,325 + $6,562.50 = $9,887.50).

The court is allowed to divide the property in just proportions as set forth in KRS 403.190. The court took into account the different estimated values of the pieces of property and made decisions as to what each piece would be valued at and who would get what. It is up to the court to make the decision as to what is a just proportion. Giving each party $16,450 worth of money and property appears to be a just decision that adheres to the guidelines set forth in KRS 403.190.

Concerning Appellant's third argument, this Court finds it necessary to remand to the trial court the question as to whether marital property is being awarded to Appellee twice. The trial court found that Appellant had saved approximately twenty-eight thousand dollars ($28,000) during the course of the marriage. The court directed Appellant to account for that money and give Appellee half as her share of the marital savings. Appellant contends that he did account for this money and claimed he had spent it in various ways during the marriage. Appellant claims that in 2002, he purchased a Chevy pick-up from Robert Fox for $2,500; in 2003, he purchased another pick-up from Robert Fox for $2,500 and gave the truck to the parties' son; on September 6, 2002, he purchased a GMC log truck from Ronnie Bradenburg for $5,000; in June 2004, he purchased a 1994 Jeep Cherokee from David Stamper for $2,500; he loaned $5,200 to Charles Bray, and then on June 3, 2002, he purchased a sawmill blade from Pipers Saw Shop for $1,415.26.

The trial court awarded Appellant a GMC Log Truck, 1994 Jeep Cherokee, and the Frick Sawmill as his part of the marital personal property. Appellant was then

directed to pay Appellee $13,125 to equalize the division of marital property, as set forth above. Then, the court requires Appellant to pay Appellee $10,397.67 for her share in the marital savings. The DRC came to the $10,397.67 amount by accounting for the purchases and loan set out above. Some of these same purchases consist of the marital property that was awarded to Appellant. It seems that the trial court and DRC are conceding that Appellant used marital savings to purchase marital property. They then appear to be requiring Appellant to pay Appellee for said purchases twice, once in making him pay $13,125 to equalize the division of marital property (a portion of which includes the log truck, Jeep Cherokee, and sawmill blade as part of the Frick Sawmill) and again with the $10,397.67 as Appellee's interest in marital savings. This Court requires the trial court to clarify its ruling and determine if there is a duplication of awards, specifically the Jeep Cherokee, log truck, and sawmill blade, or whether there is a finding that the full amount of marital savings ($28,000) was present at the time of separation.

For the reasons set forth herein, the judgment is affirmed in part, reversed in part and remanded, for clarification of the division of marital savings.

LAMBERT, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority opinion insofar as it relates to the visitation issue. However, I respectfully dissent from the portions of the judgment

requiring Mr. Fultz to pay Mrs. Fultz $13,125 and $10,397.67 to "equalize" the distribution of property.

The majority first affirms the trial court's judgment insofar as it orders Mr. Fultz to pay Mrs. Fultz $13,125 to, as the DRC put it, "equalize the division of personal property." The facts are that the DRC/court awarded Mrs. Fultz $3,325 in items of personal property and awarded Mr. Fultz $13,450 in items of personal property. The difference is $13,125. Then, in an attempt to "equalize the division of marital personal property", the DRC/court ordered Mr. Fultz to pay Mrs. Fultz the difference of $13,125. The result is that Mrs. Fultz now has $16,450 and Mr. Fultz now has $3,325. Clearly, the court made a mathematical error and did not accomplish its goal of equalizing the personal property. To equalize the division of personal property, the DRC/court should have ordered Mr. Fultz to pay Mrs. Fultz $6,562.50. Then, the division would have been equal at $9,887.50 each.

Likewise, the majority fails to see the error, as it states that each party is now receiving $16,450 worth of money and property. I respectfully submit that that is clearly incorrect. Mr. Fultz is receiving $16,450 worth of property less $13,125 of money for a total of $3,325. Mrs. Fultz is receiving $3,325 in property plus $13,125 in cash from Mr. Fultz for a total of $16,450. The error is not one of judgment but is purely a mathematical one. Either way, I believe it is unfairly costing Mr. Fultz $6,562.50.

As for the order of the court directing Mr. Fultz to pay Mrs. Fultz an additional $10,397.67, the majority has remanded the issue for the trial court to clarify its

ruling and determine if there was a duplication of awards. I agree that the trial court's ruling in this regard is somewhat unclear. However, I would also reverse the court on this issue rather than merely remand it for reconsideration or clarification likely followed by another appeal.

Based on the evidence before the DRC, there was clearly a duplication of awards to Mrs. Fultz by ordering Mr. Fultz to pay her one-half the value of the log truck, the Jeep Cherokee, and the sawmill blade and then ordering him to pay her one-half of the amounts that he had paid for those items. Requiring Mr. Fultz to pay Mrs. Fultz for the other items also is not supported by the record in my opinion.

In short, I concur as to the court's order regarding visitation but dissent as to the court's orders requiring Mr. Fultz to pay Mrs. Fultz $13,125 and $10,397.67.

BRIEF FOR APPELLANT:

Don A. Bailey
Louisa, Kentucky

BRIEF FOR APPELLEE:

Kendall Robinson
Booneville, Kentucky