

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001578-MR

LARRY ADAMS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 04-CI-00411

KATHERINE ADAMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,¹ SENIOR JUDGE.
ACREE, JUDGE: Larry Adams appeals from an order of the Letcher Circuit Court in a dissolution of marriage action. The trial court's order awarded him his nonmarital interest in the marital residence, fixed the increase in value due to the joint efforts of the parties, and divided the difference between Larry and his ex-wife, Katherine. Larry argues the trial court improperly accepted Katherine's unsupported testimony about the home's current value, failed to take into account bills paid by him during the separation when dividing marital property, and

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

erroneously awarded Katherine maintenance and attorney's fees. Due to the numerous factual inaccuracies in his brief, his failure to name a necessary party in the notice of appeal, and his failure to cite to the record to substantiate major elements of his claims, this case has received a more limited review for manifest injustice pursuant to *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky.App. 1990). Perceiving none, we affirm the trial court.

Larry and Katherine were married almost thirteen years before separating in October 2004. At the time of their separation, both parties were disabled and they had one minor child. Katherine received monthly Social Security benefits in the amount of \$380.00 as child support. Her only other income was from occasional work at a fast food restaurant, earning \$100.00 per month. The trial court also noted that she was currently impaired and receiving treatment for a back condition. Larry received \$1,516.00 per month Social Security Disability benefits and \$501.66 per month in pension benefits. The parties had \$22,568.15 in a joint bank account, which Larry transferred to an account accessible only to him once they separated.

The trial court initially entered a partial decree of dissolution, reserving issues of property division, custody, child support, and maintenance for future determination. After holding an evidentiary hearing at which both parties were present and represented by counsel, the trial court entered a final order containing its findings of fact and conclusions of law and resolving the remaining issues between the parties. The trial court found Larry, prior to the marriage, owned the land

and mobile home where the parties resided and assigned him its premarital value of \$18,000.00. During the marriage, the parties borrowed money and converted the mobile home into a permanent structure. Katherine testified the current value of the marital residence was \$65,000.00. The trial court found that the property's value increased by \$47,000.00 as a result of marital efforts. This improved value was found to be marital property which was split between the parties with Katherine being awarded one-third, or \$15,700.00. The trial court further found that Katherine lacked sufficient property to provide for her reasonable needs and awarded temporary maintenance of \$300.00 per month. In addition, Larry was ordered to pay her attorney's fees in the amount of \$3,712.50. This appeal followed.

The notice of appeal, filed July 27, 2006, named Katherine Adams as the Appellee and failed to include her attorney, Hon. Gene Smallwood, Jr., as a party. On October 3, 2006, Larry's counsel, Hon. James W. Craft II, filed a motion for leave to file a belated prehearing statement and also filed an Appellant's brief. The brief was returned to counsel because notification of the certification of the record had not been received, pursuant to Kentucky Civil Rule (CR) 75.07(5). The brief was further noted to be deficient for failing to include a signed judgment or order as the first document of the appendix. CR 76.12(4)(c)(vi). The prehearing statement was filed October 27, 2006, and this Court granted the motion to file a belated statement that same day. The parties failed to settle their

differences at the prehearing conference, held January 4, 2007, and the case proceeded forward. The certification of the record was filed January 30, 2007, and the Appellant's brief was refiled March 30, 2007. Despite having been returned to counsel previously, the brief still failed to include a *signed* order as the first exhibit in the appendix. Nevertheless, the brief was accepted.

Larry's first argument concerns the trial court's determination of the current value of the marital home and its decision to fix the marital increase in value at \$47,000.00. In his brief, Larry argues the trial court accepted Katherine's unsupported testimony about the home's current value. He claims no foundation was laid for her opinion, nor was she qualified to testify as an expert. Katherine's brief more fully described her testimony and included a citation to the videotape of the proceedings. According to Katherine, the parties borrowed money and transformed the trailer into a permanent house, adding a new roof, two and one-half rooms, hardwood and parquet floors, vinyl siding, a deck and front porch, new windows, replacing the bedroom carpets, remodeling the kitchen with new flooring and cabinets, and remodeling a back room. Larry failed to offer his own estimate of the home's improved value, nor did he contest any of Katherine's statements about the extensive remodeling.

Further, Larry's brief mischaracterizes the trial court's order regarding the increase in value in two ways. First, it states that the trial court "Ordered that the parties split the Forty Seven Thousand Dollars (\$47,000.00) difference."

Appellant's brief at page 5. Next, the brief claims the trial court "failed to offset the amount of bills that the Appellant paid since the date of separation against any interest that the Appellee may have in the marital property and therefore committed error." Appellant's brief at page 9. The trial court's order actually acknowledged Larry's payment of bills during the separation and adjusted Katherine's marital interest in their property accordingly.

The Petitioner shall also pay to the Respondent the sum of \$15,700.00, representing one-third of the improved value of the marital residence, which gives Petitioner credit for the payment of the indebtedness to his sister for funds expended thereon and other payments of debts made by the Petitioner as set out in numerical paragraph 10 herein.

The plain language of the order clearly contradicts Larry's representations in his brief.

In addition, we note that the brief contains no citation to the videotaped record of the evidentiary hearing. Kentucky Civil Procedure Rule (CR) 76.12, which governs the filing of appellate briefs, requires

An "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

CR 76.12(4)(c)(v). In *Elwell*, we established the principle that, where an appellant fails to comply with CR 76.12(4)(c)(v), a reviewing court need only undertake an overall review of the

record for manifest injustice. We find no manifest injustice in the trial court's determination of the increase in value to the residence due to the marital efforts of the parties and expenditure of marital funds, nor in its apportionment of that increased value between the parties.

Larry's second argument is that the trial court erred in awarding temporary maintenance to Katherine. He contends that both parties' income derived from Social Security benefits, and that Katherine received \$850.00 per month in child support from Social Security. Once again, he makes no citation to the record, and the findings of fact in the trial court's order are significantly different from the facts contained in Larry's brief on appeal. The trial court found that Larry's income was derived from Social Security Disability benefits, as well as from a pension. Katherine earned a pittance from her occasional work at a fast food restaurant. Further, the child support check she received from Social Security was \$380.00 per month, rather than \$850.00 as Larry's brief asserts.

Larry cites one case, *Mosley v. Mosley*, 682 S.W.2d 642 (Ky.App. 1985), affirming a trial court's refusal to order a man, whose income came from workers' compensation benefits after he was totally disabled, to pay maintenance. However, he ignores the fact that our rationale for affirming the trial court had nothing to do with the source of Mosley's income.

Our review is limited to a consideration of whether the trial court considered the statutory factors and whether it abused its discretion in denying maintenance. The trial court specifically stated that its action was taken pursuant to the provisions

of Chapter 403, and we cannot say that this case presents a clear abuse of discretion.

Mosley, 682 S.W.2d at 463. In the case at hand, the trial court found that Katherine lacked property to provide for her reasonable needs and was presently unable to support herself through appropriate employment. Kentucky Revised Statute (KRS) 403.200. Consequently, Larry was ordered to pay her \$300.00 per month for a period of eighteen months or until she reaches maximum medical improvement from her back condition, whichever occurs first. We do not perceive any abuse of the trial court's discretion in entering this order.

Finally, Larry contends the trial court erroneously ordered him to pay Katherine's attorney's fees. He argues the trial court improperly based its award on the disparity in their incomes and further, states "[i]t is obvious that the Parties (sic.) incomes are almost identical and the proposed award of property to the Appellant (sic.) was more than (sic.) sufficient to pay her fee." Appellant's brief at page 9. We note that this statement contains another inaccuracy since the trial court previously found Larry's monthly income to be \$2,017.66 and Katherine's to be \$100.00. The disparity between the parties' incomes is close to two thousand dollars per month. Even if the amount Katherine receives in child support is added to her monthly income, Larry still receives \$1,537.66 more per month than his ex-wife. Furthermore, Katherine's attorney was not named as an appellee in the notice of appeal. "It has been held that the attorney must be made a party to the appeal whether the fee is adjudged to be paid directly to him or is allowed to one

of the parties to the divorce and ordered to be included as a court-cost item." *Beaver v. Beaver*, 551 S.W.2d 23, 25 (Ky.App. 1977). (Citation omitted.) Consequently, we are unable to reach the merits of this issue on appeal.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Gene Smallwood, Jr.
Whitesburg, Kentucky