

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002602-MR

HOLLAND D. CUNDIFF

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 04-CI-01130

TRACEY L. CUNDIFF

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Holland D. Cundiff appeals from the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage entered by the Pulaski Circuit Court which, among other things, dissolved the parties marriage and awarded appellee Tracey L. Cundiff the marital residence free of any claims by Holland. Holland argues, in summary, that he was not given an adequate opportunity to present evidence that he had a marital interest in the residence. We agree, and vacate and remand for

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

additional proceedings upon the issue of Holland's claim to a marital interest in the residence.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on July 24, 1998, and originally separated in August 2004. They have no children. On October 15, 2004, Tracey filed a petition for dissolution of marriage. In connection with the filing, Holland filed an “Entry of Appearance,” waiving his right to an attorney. The filing included the statement that Holland “asks that notice be given of any action to be taken herein by regular U.S. Mail, postmarked not less than seven (7) days prior to the occurrence of said action . . . [.]”

The parties subsequently reconciled and no further action occurred in the dissolution case until September 2006. At some point the parties again separated. On September 29, 2006, Tracey filed a notice of her intent to take her own deposition on October 16, 2006, at the office of her attorney. The certificate of service reflects that Holland was served with the notice. Tracey's deposition was taken as scheduled. Holland, however, did not appear for the event. In the course of her deposition Tracey claimed that the marital residence was exclusively her premarital property and requested that the court assign the property to her free and clear of any claim by Holland.

On October 19, 2006, three days following her deposition, Tracey filed a motion to submit the case for the court's final adjudication. The notice stated that “the foregoing Motion will come on for hearing at the convenience of the Court.” The same

day, Tracy's deposition was filed into the record. The record does not reflect that the deposition was served upon Holland.

The next day, on October 20, 2006, the circuit court entered an order granting Tracy's motion to submit the case for final adjudication. Also on October 20, 2006, the circuit court entered its Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage. As relevant to this appeal, the order provided that "Tracey shall retain the [marital residence] which was hers prior to the marriage, free and clear of any claim by [Holland]. [Holland] shall execute a quit claim deed to [Tracey] for his interest in said real property within thirty (30) days from the date of this instrument."

On October 30, 2006, Holland filed a motion to alter, amend, or vacate the circuit court's Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage. The motion stated, among other things, that "[Holland] . . . made significant investments and improvements to the home [which is the] subject of the divorce decree and is entitled to one half (1/2) of the improvements of the value of the home which has been substantial." By order dated November 28, 2006, the circuit court denied the motion. This appeal followed.

DISCUSSION

It appears uncontested that Tracey owned the marital residence prior to the parties' marriage. However, if nonmarital property increases in value during the marriage, the trial court must determine the reason for the increase. If the increase is attributable to general economic conditions, it is nonmarital; however, where the joint

efforts of the parties caused the increase, the increase in value is marital property.

Goderwis v. Goderwis, 780 S.W.2d 39, 40 (Ky. 1989). Further, the burden of proof is on the party claiming the increase in value to be nonmarital, *Travis v. Travis*, 59 S.W.3d 904, 9010-911 (Ky. 2001), and that burden must be satisfied by clear and convincing evidence. *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky.App. 1998) (citing *Browning v. Browning*, 551 S.W.2d 823, 825 (Ky.App. 1977)).

Thus, if the value of the marital residence increased during the marriage as a result of the investment of marital funds (or other joint efforts of the parties in making improvements to the property), Holland, as he contends, has a marital interest in the property. If so, in the normal course of events, Holland would be entitled to an award as his assignment of the parties' marital interest in the residence.

FAILURE TO AMEND PETITION FOR DISSOLUTION

In her petition for dissolution Tracey identified the parties' separation date as August 2004. As previously noted, the parties subsequently reconciled and again separated. Holland contends the dissolution (and the assignment of the residence exclusively to her) should be set aside because Tracey failed to thereafter amend her divorce petition to reflect the later separation date.

KRS² 403.150(2)(c) requires that a petition for dissolution of marriage set forth that “the parties are separated and the date on which the parties separated[.]” Following the filing of a petition, KRS 403.140 and KRS 403.170 provide the findings

² Kentucky Revised Statutes.

which must be made by the court to ultimately enter a final decree. Upon a review of these statutes, we believe it unnecessary for an amended petition to be filed merely to reflect a reconciliation coupled with a later separation.

In summary, we do not believe that this argument states a grounds under which the proceedings may be reopened to litigate Holland's marital property claim.³

NOTICE/DUE PROCESS

Holland further argues that “the Motion to Submit was filed on October 19, 2006 with certificate of service on the Appellant dated October 16, 2006. Notice of the Motion was at the Court's convenience. The Court entered the Order Submitting and the Decree on October 20, 2006. Said notice was not sufficient to allow the Appellant to reply to the Motion.” We construe this argument as alleging a violation of the notice requirements of CR⁴ 6.04, as well as a violation of general due process requirements.

CR 6.04(1) provides that “[a] written motion . . . and notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing, unless a specific period is fixed by these rules or by order of the court.” To recap, Tracey's motion to submit was filed on October 19, 2006. The motion was noticed to be heard “at the convenience of the court.” The order taking the case under submission was issued on October 20, 2006, and the decree (and property award) was entered on October 20, 2006.

³ We note that this argument could be construed as a request to have the divorce decree itself set aside. However, this Court has no power to reverse a valid divorce decree. KRS 22A.020(3); *McQueen v. McQueen*, 294 S.W.2d 75, 76 (Ky. 1956). We may, of course, review other aspects of the judgment for error. *McQueen* at 76.

⁴ Kentucky Rules of Civil Procedure.

It appears from the above that the noticing of the hearing on Tracey's motion "at the convenience of the court" resulted in the hearing being held the day after the motion was filed. Clearly, then, Holland was not served notice "a reasonable time before the specified hearing."⁵ Further, the notice did not specify a date and time when the motion would be heard. As such, Tracey's motion for the court to take the case under submission did not comport with the notice requirements of CR 6.04. We are persuaded that this rule violation improperly deprived Holland of his right to present his claim to an interest in the marital residence.

Moreover, ordinary notice and an opportunity to be heard are the basic requirements of due process. *Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). The filing of the deposition and the motion to submit on October 19, 2006, followed by the entry of the order taking the case under submission and the decree on October 20, 2006, plainly violated Holland's due process right to notice of the emerging events and to assert his claim to an interest in the marital residence.⁶

CONCLUSION

Because Holland was not given proper notice of the hearing on Tracey's motion to submit and was thereby deprived of the opportunity to be heard upon his claim

⁵ We note that in his "Entry of Appearance," waiving his right to an attorney Holland requested that he be given seven days notice prior to the occurrence of any action in the proceedings.

⁶ Holland also alleges reversal is warranted because of violations of CR 43.04. While we agree the rule was violated, based upon our disposition as discussed above, we need not address this issue. Upon remand we anticipate that all protections provided by the civil rules will be afforded to both parties.

to an interest in the marital residence, we vacate the decree insofar as it awarded Tracey the martial residence free and clear of any claims of Holland.

Upon remand, the circuit court should review the value of the marital property and award Holland any marital interest he may have therein in accordance with *Goderwis v. Goderwis*, 780 S.W.2d 39 (Ky. 1989) and *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky.App. 1981).

For the foregoing reasons, the judgment of the Pulaski Circuit Court is vacated and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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