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Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000836-MR

HEATHER MARIE LOVITT

APPELLANT

v. APPEAL FROM McCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 05-CI-00333

WESLEY GENE LOVITT

APPELLEE

AND

NO. 2007-CA-000837-MR

HARLAN R. WORLEY

APPELLANT

v. APPEAL FROM McCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 05-CI-00333

WESLEY GENE LOVITT

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING AND REMANDING IN PART

** ** * * * * *

BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

WINE, JUDGE: Heather Marie Lovitt appeals from findings of fact, conclusions of law and a judgment of the McCreary Circuit Court ordering Wesley Gene Lovitt to pay \$153.00 a month in child support. She contends that the trial court clearly erred in determining both parties' incomes for child support purposes. Harlan R. Worley separately appeals from a portion of the judgment directing him to convey a tract of real property to Wesley and Heather. He argues that the trial court clearly erred in finding that he was estopped from denying title to Wesley and Heather. We affirm the trial court's judgment as to that portion which directs Harlan to convey the property to the Wesley and Heather, but reverse and remand for further findings of fact as to the award of child support.

The following facts are relevant to this appeal. Heather Marie and Wesley Gene Lovitt were married on April 24, 1999, and separated in January 2005. The parties' only child, Olivia Raine, was born on June 23, 2000. Heather filed a petition for dissolution of the marriage on August 22, 2005. In her petition, she sought, among other things, custody of Olivia and child support from Wesley.

Shortly after the filing of the petition, Wesley filed a third-party claim against Heather's parents, Harlan R. and Edith Worley. Wesley alleged that the Worleys had promised to convey a parcel of their land if he and Heather built a house on the

property. Since he actually built the house in reliance on this promise, Wesley argued that the Worleys should be equitably estopped from denying title, the trial court should enter a judgment directing the Worleys to convey the property to him and Heather, and that the real property should be divided as part of the marital estate. Edith Worley died while this matter was pending, and the matter proceeded against Harlan Worley alone by virtue of the survivorship clause in their deed.

Following a period of discovery, the matters proceeded to a bench trial on November 7, 2006. Thereafter, on December 15, 2006, the trial court entered findings of fact, conclusions of law, a decree of dissolution, and a judgment on the property issues in the dissolution action and the third-party claim. The court awarded the parties joint custody of Olivia, with Heather designated as the primary residential custodian. As to the issue of child support, the trial court found that Wesley is capable of earning a minimum wage income. The court also found that Heather earns an average of \$1,300.00 a month as a substitute teacher. Based on these incomes, the trial court calculated Wesley's child support obligation to be \$153.00 per month, effective November 1, 2006.

On the third-party claim, the trial court found that the Worleys had induced Wesley and Heather to build a house on their land by promising to convey the lot within a reasonable time following the construction of this home. Thus, the court concluded that Harlan was estopped from denying the existence of the agreement, and directed him to convey the property to Wesley and Heather. The court further found that the house and real property was a marital asset. The court awarded the house to Heather, but directed her to pay Wesley one-half of the fair market value of the premises.

The trial court subsequently denied Heather's and Harlan's motions to alter, amend or vacate the judgment. CR 59.05. This appeal and third-party appeal followed.

In her appeal, Heather first argues that the trial court erred by failing to enter a temporary child support order while this matter was pending. As Heather correctly points out, KRS 403.160(2) authorizes a trial court to award temporary child support while a dissolution action is pending. Furthermore, KRS 403.160(2)(a) requires the court to enter such an order within 14 days from the filing of a motion.

It is not clear why the trial court failed to address the motion for temporary child support. There is no dispute that Heather had custody of Olivia from the date of the parties' separation. Furthermore, she clearly requested child support in her petition and in her motion for child support filed on August 24, 2005. In his response to that motion, Wesley disputed Heather's claim that he earned \$2,500.00 a month, but otherwise agreed that child support was appropriate. Heather renoticed the motion on September 21, 2005, and again requested a hearing. The trial court scheduled a hearing for November 8, 2005, but that hearing was rescheduled and the issue of child support was not addressed until the final hearing in November 2006.

Nevertheless, a trial court's ruling, or failure to rule on a motion for temporary support, is inherently an interlocutory matter. *See Cannon v. Cannon*, 434 S.W.2d 48 (Ky. 1968). Moreover, the court's final support order supersedes any prior temporary order. Consequently, the trial court's failure to address the motion for temporary child support is not reviewable in this action.

We note that KRS 403.160(2)(a) authorizes a trial court to order child support retroactively from the date of the filing of the motion to set or modify support. Thus, the trial court would have been authorized to order Wesley to pay support retroactively from either the date of the petition or the date of her motion for support. However, Heather did not request such an award either before the bench trial or in her motion to alter, amend or vacate the trial court's findings of fact and conclusions of law. Indeed, she does not request such relief in this appeal. Therefore, the trial court's failure to designate the child support award as retroactive is not preserved for review.

Heather next takes issue with the trial court's findings regarding the parties' incomes for child support purposes. She contends that the evidence does not support the court's findings either as to Wesley's income or as to hers. However, determinations about the credibility of witnesses are within the sole province of the trial court. CR 52.01. While we find that there was substantial evidence supporting the trial court's findings as to Wesley's income, we find insufficient evidence in the record to support the court's finding Heather earned an average of \$1,300.00 each month.

Wesley is self-employed as a carpenter and builder. He submitted tax returns which showed that his total income for 2005 was \$3,750.00. The tax returns for Wesley's business partnership showed \$26,983.00 in gross receipts for 2005, but only \$7,552.00 in income after deductions. As one of two partners, Wesley was entitled to one-half of those profits. Wesley notes that he currently earns less than minimum wage, but he concedes that the trial court properly imputed a minimum wage income to him.

Heather introduced a loan application from September 2005 on which Wesley stated that his income was \$2,500.00 a month. She argues that the trial court improperly disregarded this evidence by only imputing a minimum wage income to him. But given the conflicting evidence about Wesley's income, we cannot find that the trial court's findings on this matter are clearly erroneous.

Similarly, Heather complains that the trial court's finding that she earns \$1,300.00 a month is not supported by substantial evidence. Although her work history is somewhat complicated, it appears when she filed the petition for dissolution in August 2005, Heather had just completed a co-op program working through Lindsey Wilson College. At that time she worked 40 hours each week, earning \$10.00 per hour. She was then unemployed for several months. Subsequently, Heather conceded she worked full time and earned a monthly gross income of approximately \$1,900.00 when she filed her "mandatory case disclosure" form on November 4, 2005. At that time, Heather had just been employed with Somerset Mental Health earning \$12.00 per hour and working 40 hours per week. However, during the trial, she testified she quit this job because the recent death of her mother made it impossible for her to work. Heather testified that she is now employed as a substitute school teacher for the McCreary County Board of Education for \$60.00 a day. She added that her employment was not guaranteed and that she had only worked one day of the school year as of the hearing on November 7, 2006.

Considering her prior employment history, the trial court's finding concerning her income and earning capacity is clearly erroneous particularly as the court provides no basis for its determination of a monthly income of \$1,300.00 for Heather.

Furthermore, the trial court based its calculation of child support under the guidelines on its findings concerning the parties' respective incomes. Since these findings were not supported by substantial evidence, the amount of child support ordered is clearly erroneous. Based on the parties' testimony, it would be consistent to impute minimum wage income to both Heather and Wesley, assigning equal health care cost responsibilities to both parties, as well as an equal child support obligation.

Turning to the third-party appeal, Harlan argues that the trial court erred in finding that he was estopped from denying Wesley's and Heather's claim for title to the real property on which they built their marital residence. It is well-established that the right to recover for improvements made upon another's land may be based upon the theories of estoppel or unjust enrichment. *Stepp v. Leslie*, 263 S.W.2d 122, 123 (Ky. 1953). Under either theory, the test is whether the person who made the improvements acted in good faith. *Id.* See also *Mullins v. Mullins*, 797 S.W.2d 491, 493 (Ky.App. 1990). Harlan emphatically denies that he ever promised to convey the property to Wesley and Heather. Thus, he contends that Wesley could not have acted in good faith by building the house on the property.

However, Wesley testified that Harlan offered to give Heather and him a tract of land if they would build a house on it. Wesley further testified that Harlan promised to give them a deed to the property within "a year or so" after building the house. Wesley presented evidence that he spent over \$15,000.00 on materials for the house, and that he performed much of the labor himself. Wesley also presented evidence that Heather and he paid the insurance and property taxes on the property. Heather gave

a somewhat convoluted explanation as to the taxes and insurance expenses being paid by her mother until her death in April of 2006 and then all records mysteriously disappearing shortly thereafter. Further, although she initially claimed the house to be a marital asset, in her supplemental “mandatory case disclosure,” she listed no real property and no ownership interest in the home where the parties had lived for more than five years. Given this evidence, the trial court was entitled to find Wesley’s testimony to be more credible than Harlan’s or Heather’s. Therefore, the trial court did not clearly err in finding that Wesley had built the house in good faith reliance on Harlan’s promises, and that Harlan was estopped from denying title to the property. Consequently, the trial court properly ordered Harlan to convey the property to Wesley and Heather.

Finally, Harlan asserts that the trial court denied him due process in the proceedings, and that the court improperly denied his request for a jury trial. Harlan appeared at the trial *pro se* as his original counsel, who represented Heather as well, withdrew because of a potential conflict of interest. Even though Harlan was advised on October 6, 2006, to obtain counsel within ten days, he failed to do so. Previous counsel’s motion, made the morning of trial, to continue the trial of the third-party complaint was denied. Harlan does not point to any specific instances in the record where he was denied due process, nor does he identify any unfair prejudice he suffered as a result of the trial court’s actions.

As for the jury issue, we note that Harlan’s answer included a request for a jury trial pursuant to CR 38.02. While this demand for a jury trial was filed in a domestic relations action, there are no provisions for a jury to be empanelled in domestic relations

actions. Further, Harlan never reminded the court of the request for a jury trial on the morning of November 7, 2006, nor did he raise the issue before the trial judge. “If one demands a jury trial, he should demonstrate sufficient regard for the court to be diligent in his demand.” *B.F.M. Building, Inc. v. Trice*, 464 S.W.2d 617, 620 (Ky. 1971). In *Board of Elections of Taylor County v. Board of Education of Campbellsville Independent School District*, 635 S.W.2d 324 (Ky.App. 1982), this Court held although the appellant made a timely demand for a jury trial, “No objection was made to the language of the order [setting the matter for a trial before the court] and no further demand was made It is the opinion of this Court, therefore, that appellant waived its right to a jury trial.” *Id.* at 327.

The trial court never denied Harlan’s request for a jury trial because the issue was never raised. The parties are in the best position to know what motions need to be addressed by the trial court before trial commences. Even Harlan’s previous counsel, who had made motions on his behalf, as discussed above, failed to raise the issue. Thus, the trial court was given no opportunity to correct its alleged error. Absent a showing of palpable error, which was not present here, issues may not be raised on appeal. *James v. Webb*, 827 S.W.2d 702 (Ky.App. 1991).

Harlan also notes that he proceeded without counsel for most of the proceedings, and he contends that the trial court did not advise him of the repercussions of proceeding without an attorney. But, with a few exceptions not applicable here, there is no constitutional right to counsel in a civil case. *May v. Coleman*, 945 S.W.2d 426,

427 (Ky. 1997). Consequently, the trial court was not required to warn Harlan about the perils of proceeding without counsel.

Accordingly, the judgment of the McCreary Circuit Court is affirmed in part, reversed in part, and remanded for additional findings as set forth in this opinion.

KELLER, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE: I respectfully dissent from the majority opinion which reverses the trial court's award of child support based on its finding that Heather earns an average of \$1,300 per month. According to Heather's "mandatory case disclosure" filed in the dissolution action, she reported a gross monthly income of \$1,900. This evidence is sufficient to impute income of \$1,300 per month and support the trial court's finding.

For the above reasons, I would affirm the trial court.

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