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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000130-MR

JOHN-KEVIN: STEELE — APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 03-CI-00619

KIMBERLY ANN STEELE
AND C. GILMORE DUTTON, III — APPELLEES

AND NO. 2008-CA-001801-MR

JOHN-KEVIN: STEELE — APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 03-CI-00619

KIMBERLY ANN STEELE — APPELLEE

OPINION
AFFIRMING APPEAL NO. 2008-CA-000130-MR and
AFFIRMING IN PART; REVERSING IN PART, AND REMANDING
APPEAL NO. 2008-CA-001801-MR

** ** ** ** **

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

LAMBERT, JUDGE: This opinion determines two cases involving the same parties to a domestic relations matter. In the first case, Appellant, John-Kevin: Steele, challenges two orders entered by the Shelby Circuit Court concerning the award of maintenance and division of martial property between him and his former wife, Appellee, Kimberly Ann Steele. John-Kevin also challenges an award of attorney fees to Kimberly's attorney, C. Gilmore Dutton, III. Dutton, also an appellee in this case, filed a brief in support of the award of attorney fees. Finding no reversible error, we hereby affirm the trial court's orders.

In the second case, John-Kevin appeals an order entered by the Shelby Circuit Court setting the amount of the supersedeas bond necessary to stay execution of the above judgments on appeal. Finding reversible error, we must reverse and remand this order in part.

[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 Kentucky Revised Statutes (KRS) 21.580.

I. Case No. 2008-CA-000130

In this case, John-Kevin appeals from both a November 19, 2007, order of the trial court finally adjudicating various issues between the parties, and a December 17, 2007, order of the trial court which amended the November 19, 2007, order.

The parties were married for nearly thirty (30) years prior to the entry of a limited divorce decree on April 12, 2004. This decree dissolved the parties' marriage but specifically reserved "all remaining issues of the divorce" for further adjudication. During their marriage, the parties had twelve children, five of whom were minors at the time of the divorce proceedings.

Kimberly worked as a homemaker during the marriage and John-Kevin was a cabinet maker of "considerable repute." The cabinet business, which Kimberly contributed to as a bookkeeper, was the sole means of the family's support. The business existed as a corporation until approximately 2002 when all of the business' assets were allegedly placed into an "unincorporated business trust." According to John-Kevin, he received money from this trust only at the discretion of a third-party "trustee." No documents reflecting the establishment or existence of this "trust" were ever produced to the trial court.

Tax documents submitted to the trial court showed that the parties' business grossed approximately $741,000 in 1999 and $713,000 in 2000. The trial court found that tax returns were not filed for any of the remaining years leading up to the divorce proceedings. However, the trial court was able to identify

business assets in the form of equipment which was valued at $423,800 in 2003. The parties also owned a farm in rural Shelby County which they agreed was worth $225,000.

After four years of protracted litigation, during which time John-Kevin repeatedly violated the trial court's orders, refused to produce discovery, and brought numerous meritless motions before the trial court, a final hearing adjudicating all pending issues was set for November 6 and 7, 2007.

On the second day of trial, Kimberly called John-Kevin as a witness. According to the trial court's findings of fact, the following occurred at that time:

> Upon being asked by the Court to swear that he would testify truthfully, Mr. Steele declined, stating that his religious beliefs prevented him from swearing. He was then asked to affirm that his testimony would be truthful and he again declined for the same reasons. He was then asked by the Court how he wished to proceed and, in a very uncharacteristic moment, declined to express any opinion on the issue. The Court then asked Mr. Steele to simply state that he would answer counsel's questions truthfully. Even this Mr. Steele declined to do.

Upon these refusals, the trial court declared the hearing over and allowed counsel for both parties to make closing arguments. The trial court then issued an order based on the record before it. This order, entered November 19, 2007, determined all remaining issues between the parties. As to the property division, John-Kevin was awarded the parties' business, including the business equipment, and Kimberly was awarded the parties' farm.

Thereafter, the parties filed motions to alter, amend, or vacate the November 19, 2007, order. On December 17, 2007, the trial court granted Kimberly's motion as to an award of attorney fees. Finding that "at least one half of the fees incurred by [Kimberly] . . . were the result of [John-Kevin's] brilliantly executed campaign of obfuscation relating to the financial status of the parties' business and his repeated and generally meritless motions which no attorney would have brought and which he could not have afforded to pay for if he had been represented by counsel," the trial court amended its November 19, 2007, order to include a partial award of attorney fees to Kimberly. The trial court ordered John-Kevin to pay one-half of the attorney fees, approximately $17,500, incurred by Kimberly in the parties' divorce proceedings. This appeal by John-Kevin now follows.

John-Kevin sets forth several assignments of error in his *pro se* brief to this Court. We have endeavored to address each assignment of error that is reasonably understandable and cognizable. His attorney filed a reply brief subsequent to the briefs filed by the respective Appellees in this action. In that reply brief, additional arguments were advanced by John-Kevin's attorney. We decline to address these new arguments as it is not permitted by the rules of this jurisdiction and it is unjust to the parties who did not have a fair opportunity to address the arguments. Kentucky Rules of Civil Procedure ("CR") 76.12(4)(e) ("Reply briefs shall be confined to points raised in the briefs to which they are addressed . . . ."); *Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App.

2006)("The reply brief is not a device for raising new issues which are essential to the success of the appeal.")(internal quotations and citation omitted).

In his first and primary assignment of error, John-Kevin argues that all orders relating to property division and maintenance entered after the parties' April 12, 2004, limited divorce decree are "void for lack of subject-matter jurisdiction." Citing to no pertinent authority, he claims that the entry of any divorce decree, even those that specifically reserve issues for further adjudication, absolutely terminates a trial court's jurisdiction to enter any further orders between the parties. We reject this claim as being without merit.

KRS 403.140 states that a divorce decree may be entered if certain conditions are met. One of those conditions is "the court has considered, approved or made provision for child custody, the support of any child of the marriage entitled to support, the maintenance of either spouse, and the disposition of property." KRS 403.140(1)(d).

In this case, the divorce decree entered by the trial court was limited to a mere dissolution of the marriage between the parties. The decree specifically reserved the determination of "all remaining issues of the divorce" for further adjudication. In *Putnam v. Fanning*, 495 S.W.2d 175 (Ky. 1973), Kentucky's highest court held that KRS 403.140(1)(d) allowed for the entry of such limited divorce decrees where collateral issues, like property division and the award of maintenance, were reserved for subsequent adjudication. *Id.* at 176.

John-Kevin claims the *Putnam* holding is in error. We disagree. In any event, this Court has no authority to overrule opinions of a higher court. *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000) ("The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor court."). Accordingly, we hold that the trial court had jurisdiction to enter orders addressing property division and maintenance after the parties' April 12, 2004, limited divorce decree.

John-Kevin next argues that Kimberly improperly dissipated marital assets and that the trial court erred in failing to include these "dissipated" assets in its final property division. "[T]he party alleging dissipation must prove dissipation and the value of the property." *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. App. 1998) (internal citation omitted). In this case, Kimberly specifically denied improperly dissipating marital assets. John-Kevin produced no evidence to rebut Kimberly's assertion at trial. Accordingly, we find no error in the trial court's failure to include "dissipated" assets in the final property division since John-Kevin failed to meet his burden of proof to establish misconduct by Kimberly.

John-Kevin likewise argues that the trial court erred in failing to assign to him $25,000 in non-marital funds allegedly used as payments towards the purchase of the parties' farm. All property obtained during the marriage is presumed to be marital unless evidence is submitted to establish otherwise. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002). "A party claiming that property acquired during the marriage is other than marital property[] bears the

burden of proof." *Id.* Once again, John-Kevin failed to meet his burden of proof in this case as he set forth no competent evidence before the trial court to establish a claim to this alleged non-marital property. Accordingly, the trial court did not err in failing to assign non-marital property allegedly acquired during the marriage to John-Kevin.

John-Kevin next argues the trial court erred in refusing to allow two experts to testify at trial as to the value of the parties' business and the value of the business equipment. These witnesses were excluded because they were not properly disclosed prior to an August 14, 2007, deadline established by the trial court. Generally, trial courts are vested with discretion in the management and enforcement of discovery deadlines. *Naive v. Jones*, 353 S.W.2d 365, 367 (Ky. 1961) (appellate court should respect the trial court's exercise of sound judicial discretion in the enforcement of the civil rules pertaining to discovery); CR 37.02. Sanctions issued pursuant to our discovery rules will not be set aside absent an abuse of discretion. *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 360 (Ky. App. 1999).

In this case, John-Kevin never complied with a discovery order entered in June 2006 requiring him to produce documents regarding the value and operation of the parties' business. He further ignored several subsequent motions and requests by Kimberly for the production of these documents. On July 11, 2007, the matter was set for final hearing on September 4 and 5, 2007. This hearing date was later moved to November 6 and 7, 2007. The trial court

determined that "based on the original trial date and the previous orders of the Court with which [John-Kevin] has failed to comply," it was not fair to either party to allow the admission of any financial information into evidence that was not previously disclosed to the other party prior to August 14, 2007. Upon careful review of the totality of these circumstances, we find no abuse of discretion in the trial court's ruling.

In any event, even if the trial court did err in prohibiting the testimony of these experts, John-Kevin has failed to produce any evidence or even a claim as to how this error was prejudicial to him. *See* CR 61.01. The record reflects that the business equipment alone was worth at least as much as the parties' farm. Kimberly estimated the business to be worth at least $850,000, and preliminary tax returns from 1999 and 2000 reflected gross income to the business of approximately $700,000 per year. John-Kevin was awarded both the business and the business equipment while Kimberly was awarded only the parties' farm valued at $225,000.

John-Kevin argues that Kimberly's evidence regarding the approximate value of the business equipment was not competent to support the trial court's finding that the equipment was worth at least as much as the parties' farm. Kimberly's opinion as to the value of the business equipment was based on her experience as a bookkeeper for the business. She also introduced a "Tool and Machinery Inventory" that was prepared by the business in 2003. According to this inventory, the equipment was worth $423,000 at that time.

John-Kevin states that this inventory list is not competent evidence on which to base an estimate of value since the list only provided replacement costs for the equipment and not the equipment's actual market value. He further argues that Kimberly was not qualified to offer any opinions as to the value of the equipment. We disagree as to both arguments.

A trial court's evidentiary rulings will not be set aside unless there is an abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

As to the use of the 2003 inventory list which allegedly sets forth replacement rather than market values for the business equipment, the trial court acknowledged that the business equipment was likely not worth as much as the $423,000 reflected on the list, but determined that its value was not less than the value of the parties' farm which was $225,000. We find no abuse of discretion in this determination. John-Kevin cites to no authority which renders replacement value evidence completely irrelevant to an estimation of market value.

We also disagree that Kimberly was not qualified to offer an opinion as to the value of the equipment. She testified that her experience as a bookkeeper for the business allowed her to become familiar with the purchase price and values of various types of equipment associated with the business. We believe this testimony was sufficient to establish the minimum qualifications necessary to

allow the rendering of an opinion on the matter. *See Roberts v. Roberts*, 587 S.W.2d 281, 283 (Ky. App. 1979) (property owners may set a value for their own property so long as there is some qualification for giving an opinion).

After careful consideration of these unique circumstances, we hold that even if John-Kevin's paltry valuations were considered (approximately $37,000 for the business and $23,000 for the equipment), there was no injustice in the trial court's distribution of property in this case. John-Kevin concedes that the business was the sole means of support for the parties' entire family prior to the divorce. John-Kevin and at least two of his sons continue to derive income from the business. Having never worked outside the home or the parties' business, awarding Kimberly the parties' farm while allowing John-Kevin the parties' business and its equipment was more than equitable upon conclusion of the parties' nearly thirty-year marriage. Accordingly, even if the trial court did abuse its discretion in disallowing the testimony of John-Kevin's experts, we find any error to be harmless as John-Kevin has failed to demonstrate how he was prejudiced by this error. CR 61.01.

In his final assignment of error, John-Kevin alleges the trial court erred in awarding partial attorney fees to Kimberly pursuant to KRS 403.220. An award of attorney fees is also reviewed for abuse of discretion. *Miller v. McGinty*, 234 S.W.3d 371, 373 (Ky. App. 2007).

Pursuant to KRS 403.220, "[t]he court from time to time after considering the financial resources of both parties may order a party to pay a

reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment."

To support its award of partial attorney fees to Kimberly, the trial court found that John-Kevin had "far greater earning power than" Kimberly at the time of the entry of the attorney fee award. The trial court also found as follows: "At least one-half of the fees incurred by [Kimberly] in this action were the result of [John-Kevin's] brilliantly executed campaign of obfuscation relating to the financial status of the parties' business and his repeated and generally meritless motions which no attorney would have brought and which he could not have afforded to pay for if he had been represented by counsel."

John-Kevin argues that the above findings are clearly erroneous. *See Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005) (trial court's findings of fact will not be set aside unless clearly erroneous). "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Id.* Upon careful review of this record, we disagree. There is substantial evidence to support the trial court's factual findings.

John-Kevin further argues that an award of fees should not have been granted in this case because Kimberly's attorney did not file a motion for said fees until after the entry of the final order. He also claims an award of fees was not warranted "in light of Appellant's limited opportunity to present his case" at trial.

In addition to the substantial evidence supporting the factual findings of the trial court set forth above, we further consider the fact that Kimberly's attorney did file a motion for the imposition of CR 37.01 sanctions in response to John-Kevin's refusal to comply with the trial court's June 2006 discovery order. When the record is viewed in its totality, we find no abuse of discretion in the trial court's award of partial fees to Kimberly.

As John-Kevin has set forth no reversible error before this Court, we hereby affirm the November 19, 2007, and December 17, 2007, orders entered by the Shelby Circuit Court in this case.

II. Case No. 2008-CA-001801

This case involves an appeal from an August 21, 2008, order of the Shelby Circuit Court regarding a supersedeas bond posted by John-Kevin. Prior to addressing the merits of this appeal, we must first address a pending motion filed by Kimberly to "dismiss the above-styled appeal as the trial court's order of September 18, 2008[,] is interlocutory in nature." Kimberly's motion further provides, "[t]he trial court's order of September 18, 2008[,] is not designated a final and appealable judgment and clearly sets forth that an additional hearing on the matter of Appellant's visitation will occur . . . ."

Of course, this matter does not involve a September 18, 2008, order of the trial court, nor does it involve any issues regarding "the matter of Appellant's visitation." Upon closer review, it appears that the motion currently pending before this panel was erroneously filed. Further research revealed that the motion

was also filed in another case, where it was considered and granted, involving the same parties before this Court. Accordingly, we hereby deny Kimberly's motion as moot.

We next turn to the merits of this appeal. Desiring stays on the execution of the trial court's November 19, 2007, and December 17, 2007, orders awarding attorney fees, maintenance, and the parties' farm to Kimberly, John-Kevin posted a $36,000 supersedeas bond with the Shelby Circuit Court Clerk. *See* CR 73.04 (1) ("Whenever an appellant entitled thereto desires a stay on appeal . . . he may present to the clerk or the court for approval an executed supersedeas bond with good and sufficient surety."). Upon the filing of a motion by Kimberly challenging the sufficiency of this bond, the trial court conducted a hearing on the matter on July 30, 2008.

On August 21, 2008, the trial court entered an order determining John-Kevin's bond to be "insufficient on its face in form and in content." The trial court further determined that a sufficient bond would require the following:

> [John-Kevin] shall execute (a) a proper corporate surety bond[] for fees and costs in the amount of $75,000.00 and also one for $225,000.00; or (b) a proper corporate surety bond in the amount of $75,000.00 and a deed from the current holder of the marital property to the Master Commissioner.

John-Kevin now appeals from this order.

On appeal, John-Kevin does not challenge the trial court's determination that a bond in the amount of $75,000 was necessary to secure fees

and costs. Thus, we hereby find no abuse of discretion in that portion of the trial court's order finding John-Kevin's $36,000 supersedeas bond "insufficient on its face in form and in content" since the bond posted by John-Kevin was not enough to cover the fees and costs of this action. *See* CR 73.04. We similarly find no abuse of discretion in that portion of the trial court's order finding that a corporate surety bond in the amount of $75,000 was necessary to secure such fees and costs.

However, as to the portion of the trial court's order which determined that a bond equal to the value of the parties' farm was necessary to constitute sufficient security for the portion of the trial court's judgment which awarded the farm to Kimberly, we agree with John-Kevin that the trial court abused its discretion. *See Cooper v. Roberts*, 722 S.W.2d 910, 912 (Ky. App. 1987) (trial court has discretion to set bonds pursuant to CR 73.04); *Industrial Redistribution Center, Inc. v. Plastipak Packaging, Div. of Beatrice Foods Co.*, 706 S.W.2d 2, 3 (Ky. App. 1986) ("The decision on the motion challenging the bond is addressed to the sound discretion of the trial court, and will be set aside by the appellate court only if a party can demonstrate an abuse of discretion.").

As argued by John-Kevin, the trial court erroneously utilized CR 73.04(2) to determine the sufficiency of the supersedeas bond securing that portion of the judgment relating to the parties' farm rather than CR 73.04(3). CR 73.04(1) requires the execution and posting of a "supersedeas bond with good and sufficient security" in order to stay the execution of any judgment on appeal. For judgments involving "the recovery of money not otherwise secured," CR 73.04(2) provides

that the bond amount "shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay . . . ." However, for judgments determining "the disposition of the property in controversy as in real actions or replevin," CR 73.04(3) provides that the bond amount "shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay."

The trial court set the bond relating to the award of the parties' farm at an amount equal to the value of the property in question, rather than at an amount equal to the value of the use and detention of the property. Kimberly argues that this was not error. She claims that CR 73.04(3) has no application to this case because the award of the parties' farm to her constituted a "recovery of money not otherwise secured . . . ." CR 73.04(2). This is so, she argues, because the trial court included the following language in its order:

> Kim is awarded the parties' farm as her share of the marital property. To the extent that [John-Kevin] wishes to retain ownership of the farm, he shall pay Kim $225,000 in immediately available funds in return for [a] quit claim deed from Kim within 60 days of the entry of this order.

We disagree that CR 73.04(2) would have any application to the portion of the trial court's judgment determining the distribution of the parties' farm. The award of the farm to Kimberly was not a money award. That portion of the judgment that allowed John-Kevin to pay Kimberly the cash value of the

property in lieu of the above disposition did not convert this portion of the award into a money judgment. Thus, the trial court was obligated to utilize CR 73.04(3), not CR 73.04(2), in determining the reasonable amount of a supersedeas bond as it related to the trial court's award of the farm.

For the reasons set forth herein, we hereby affirm the trial court's August 21, 2008, order finding John-Kevin's supersedeas bond to be insufficient on its face in form and in content and the trial court's determination that a proper corporate surety bond in the amount of $75,000 was necessary to secure fees and costs. However, we must reverse and remand the remaining portions of the order determining the proper amount of a supersedeas bond to secure the judgment awarding the parties' farm to Kimberly. On remand, the trial court is instructed to utilize and consider the mandatory language set forth in CR 73.04(3).

ALL CONCUR.

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