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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000298-MR
AND
NO. 2014-CA-000858-MR

EDITH TRAVIS — APPELLANT

v.

APPEALS FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS, III, JUDGE
ACTION NO. 10-CI-00183

DAVID TRAVIS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND VANMETER, JUDGES.

NICKELL, JUDGE: These consolidated appeals challenge the Boyd Circuit Court's modification of the division of marital property previously established in the divorce decree terminating the marriage of Edith Travis and David Travis, and the amount of the supersedeas bond set in the matter. Following a careful review of the record, the briefs and the law, we affirm.

David and Edith were divorced in 2011. Pertinent to this appeal, based on the report and recommendation of the Domestic Relations Commissioner ("DRC") which was subsequently adopted by the Boyd Circuit Court, Edith was awarded the marital home and responsibility for the payment of the debts owed thereon, with the parties having joint responsibility for any deficiency judgment occasioned by a potential foreclosure on the home. In addition, Edith was awarded one-half of David's retirement benefits accrued during the marriage in relation to his employment with the City of Ashland and another employer. At the time of dissolution, and based on the then-current state of the law, the use of a Qualified Domestic Relations Order ("QDRO") was not permitted by the City of Ashland as an acceptable means of dividing a retirement account. Thus, the DRC recommended a wage assignment issue to effectuate the division.

Approximately a year later, David brought a motion to hold Edith in contempt for, *inter alia*, her failure to make timely payments on the mortgages secured by the marital home resulting in a judgment in the amount of $19,143.25 being entered against David by the holder of the second mortgage. Following a hearing, the trial court ordered Edith to make the first and second mortgage payments as previously ordered, reimburse David $413.90 for amounts previously garnished from his pay, and pay him $80.35 every two weeks as reimbursement for continuing garnishments. Edith did not comply and David again requested the trial court hold her in contempt. No hearing was held on the motion and no ruling thereon appears in the record.

In July 2013, David moved the trial court for an order awarding him the marital residence based on Edith's continued failure to regularly make the required monthly mortgage payments. He alleged Edith had made only seven payments in 2012 and none in 2013 on the first mortgage, thereby accruing an arrearage of $6,523.94, and had never made any payments on the second mortgage. In response, Edith argued the home had been awarded to her by the trial court on April 5, 2011, and the time for appealing that award had long passed. She requested David be required to sign a quitclaim deed to her. Edith additionally asked for a wage assignment to issue related to his retirement accounts so she could immediately begin receiving her portion of his benefits. The trial court referred the matter to the DRC for an evidentiary hearing.

Following the hearing, the DRC's summary of the testimony indicated Edith sincerely wanted to retain the home but was unable to pay for it and foreclosure on the home was likely, if not imminent. David's interest in regaining possession of the home was borne of purely financial motives as he was already having his pay garnished and his credit was suffering due to Edith's financial missteps. David indicated he would transfer the property to Edith if she were able to arrange a refinancing loan and release him from liability. Upon concluding foreclosure would adversely impact both parties, the DRC recommended Edith make arrangements to remove David from the existing loans or obtain replacement financing within sixty days and instructed David to fully cooperate with those efforts, including signing an authorization permitting Edith to communicate with

the mortgage holders. In the event Edith was unable to make appropriate arrangements, the DRC concluded the property should be transferred to David upon his obtaining a refinancing loan.

As to the retirement accounts, the DRC found Edith held no greater interest in the accounts than David and was not entitled to receive any benefits until such time as David himself became eligible to draw the benefits. At that time, a wage assignment could issue. However, because the prevailing interpretation of the law related to QDRO's for public pensions had changed, the DRC indicated Edith could submit a QDRO to the City of Ashland to ensure her portion of David's benefits was set aside.

Edith's exceptions to the DRC's report and recommendation were rejected and the trial court entered an order adopting the report in full on December 20, 2013. Edith subsequently moved to alter, amend or vacate the December 20 order. David objected and indicated his belief the DRC's recommendations were factually and legally sound. On the date set by the DRC for her to have completed making financial arrangements, Edith moved the trial court to hold the matter in abeyance based on David's failure to execute an authorization for her to communicate with the mortgage holders. David again objected, specifically averring the prior orders placed the onus on Edith to prepare any releases or authorizations necessary to accomplish her goals and indicated he had never been presented with any authorization to execute. On February 12, 2014, the trial court rejected each of Edith's post-judgment motions. Edith timely appealed.

A short time later, David moved the trial court for immediate possession of the marital residence based on Edith's failure to refinance or vacate the home by January 17, 2014, as previously ordered. In response, Edith stated she had filed an appeal and requested the trial court set a supersedeas bond pursuant to CR[1] 62.03 and 73.04 "so that the orders will be stayed pending the outcome of the appeal." She requested separate bonds of $500 and $100 be set to supersede the requirements of vacating the premises and executing a quitclaim deed, respectively.

Following a hearing before the DRC, a recommendation was forwarded to the trial court to set a single supersedeas bond in the amount of $50,000. Edith filed an objection to the recommendation in which she requested the trial court set a separate bond in the amount of $100 to permit her to stay the requirement of executing the quitclaim deed during the pendency of the appeal. The trial court ultimately set the bond amount at $25,000 by order entered on May 5, 2014. Edith timely appealed. On motion to this Court, the two appeals were consolidated.

Edith raises three allegations of error in seeking reversal. First, she contends the trial court erred in ordering her to vacate the marital residence and execute a quitclaim deed to David. Second, she contends the trial court erroneously modified the distribution method of David's retirement account from a wage assignment to a QDRO. Third, she objects to the supersedeas bond amount

[1] Kentucky Rules of Civil Procedure.

as excessive. Tangentially, she requests David be required to pay her attorney's fees related to these appeals as well as for all proceedings below.

For her first allegation of error, Edith argues the trial court erred in ordering her to vacate the marital residence and execute a quitclaim deed to David. She argues the trial court granted her the home in 2011 and no appeal was taken from that order, thereby making the terms thereof irrevocable and unmodifiable. Thus, she contends the trial court acted without jurisdiction in modifying the two-year-old property distribution. We disagree.

Initially, we note KRS 403.110, in describing the purpose of that chapter, states it shall be "liberally construed and applied to promote its underlying purposes." One of those purposes is to "[m]itigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage." *Id.* at subsection (3). While finality in divorce proceedings is an important consideration, the law does not divest trial judges of discretion to decide when modification outweighs the virtue of finality in seeking fairness and equity in what many times may be dire consequences and complicated options. Certainly, the burden of proof is a difficult one, as it should be to insure relative stability and finality of judgments. We believe that burden was met in this case.

A careful review of the record indicates Edith's argument misapprehends the trial court's orders and ignores her failure to abide by the express terms of the obligations placed on her with respect to the home. As Edith correctly states, she was awarded the marital home in the divorce proceedings

along with the accompanying debt. However, she fails to appreciate—or acknowledge—her own failure to pay the mortgage indebtedness precipitating a judgment being entered against David, refusal to repay him amounts garnished by the judgment creditor although ordered to do so, and generally her failure to do each and every thing ordered by the trial court with respect to the home. Nevertheless, and without indicating how she would remedy the situation, Edith insisted she should be permitted to keep the residence and David should get nothing. She offered conflicting plans to either continue living in the home indefinitely or to list the home for sale as it was in a state of disrepair and was causing her to become ill. To characterize her testimony as equivocal would be generous.

David asserted his intention was to save both parties from falling into bankruptcy as a result of an impending foreclosure action occasioned by Edith's non-payment of the mortgage indebtedness. David offered alternative plans for either party to keep the residence while relieving the other of responsibility for the debt.

Although not expressly stated, David's motion sought extraordinary relief and our review of the record indicates the trial court's action was clearly permissible under CR 60.02(f)[2] which allows relief from a judgment for reasons of

[2] While the trial court did not specify its decision was premised on CR 60.02(f), it is axiomatic that an appellate court may affirm a lower court for any reason supported by the record. *Kentucky Farm Bureau Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) (citation omitted).

an extraordinary nature. Regardless of our analysis, a trial court's decisions concerning the division of marital property are within the discretion of that court, and we will not disturb those decisions except for an abuse of that discretion. *Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989). Moreover, the appellate courts of the Commonwealth have repeatedly held "domestic cases require a greater degree of deference to the determinations made by trial courts." *Marcum v. Marcum*, 779 S.W.2d 209, 212 (Ky. 1989); *see also Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990). Therefore, we are not authorized to substitute our own judgment for that of the trial court when the trial court's decision is sound and supported by the record. Here, the trial court took an extraordinary step in modifying the prior judgment in an effort to benefit both parties. The benefits and reasons for doing so were clearly laid out in the court's orders and were adequately supported by evidence of record. Thus, we cannot say the trial court abused its discretion.

Second, Edith contends the trial court erroneously modified the distribution method of David's retirement account from a wage assignment to a QDRO. She offers no new assertions other than those in her previous argument related to the finality of the 2011 divorce decree and property settlement. We have reviewed the record and again believe Edith's allegation misses the mark.

Contrary to Edith's assertion, the trial court did not require the preparation or submission of a QDRO. At the time of the divorce decree, municipalities participating in retirement plans for their employees which were administered by the Commonwealth did not permit the use of QDRO's for the

division of benefits. When brought before the court some years later, the state of the law had changed to the extent QDRO's had become acceptable means for the division of retirement benefits. The trial court merely indicated this change and suggested Edith's counsel *could* submit a QDRO to assure the appropriate allocation of Edith's share of David's accounts, but in no way required same. Edith's dissimilar reading of the trial court's order is mistaken.

In addition, the trial court did not in any way modify Edith's entitlement to her marital share of David's pension funds. Contrary to Edith's argument, she was not entitled to an immediate distribution of her full share of those funds. As the trial court correctly noted, a nonemployee spouse has no greater right to receive retirement benefits than does the employee himself. David was not yet eligible to draw from his retirement without incurring substantial penalties. Edith's eligibility was obviously the same. Her belief she was entitled to immediate payment of a non-discounted portion of the retirement accounts is unfounded in the law.

Third, Edith challenges the trial court's decision to set the supersedeas bond in this matter at $25,000.00, which she argues is excessive under the facts presented. We disagree. CR 73.04 states in pertinent part: "[w]henever an appellant entitled thereto desires a stay on appeal, as provided in Rule 62.03, he may present to the clerk or the court for approval an executed supersedeas bond with good and sufficient surety[.]" The amount of the bond varies depending on the judgment to be secured. If the judgment is for the recovery of money, the bond

amount shall be sufficient to "cover the whole judgment remaining unsatisfied" plus "costs on appeal, interest, and damages for delay[.]" CR 73.04(2). "When the judgment determines the disposition of" property, the amount of the bond shall be sufficient to "secure the amount recovered for the use and detention of the property," plus costs, interest, and delay damages. CR 73.04(3). We review a challenge to a supersedeas bond for an abuse of discretion. *Indus. Redistribution Ctr., Inc. v. Plastipak Packaging, Div. of Beatrice Foods Co.*, 706 S.W.2d 2, 3 (Ky. App. 1986).

Little has been written on the topic of supersedeas bonds. As an appellate court, we lack authority to approve them, and are limited to granting leave to file a bond in the circumstances described in CR 73.06 or "to review the sufficiency of supersedeas bonds already filed in a pending appeal." *Henry Vogt Mach. Co. v. Scruggs*, 769 S.W.2d 766, 767 (Ky. App. 1989). From the record provided to us, we cannot determine whether Edith has posted bond. If she has, the bond set is clearly "sufficient." Whether the bond amount was excessive appears to be beyond the scope of our authority to say.

Finally, Edith argues David should be required to pay the attorney fees she incurred for the instant appeals and for the proceedings below, positing only that the disparity in the parties' incomes warrants the requested relief. No citation to the record is included in her single paragraph argument. No authority supportive of her position is cited. We will not search the record to construct Edith's argument for her, nor will this Court undergo a fishing expedition to find

support for underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). No further discussion is required.

For the foregoing reasons, the judgments of the Boyd Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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