

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000491-MR

THOMAS BYRD LAWHON, JR.

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 13-CI-50188

TERRILL DELAINE MCNULTY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Thomas Byrd Lawhon, Jr. (“Appellant”) appeals from a Decree of Dissolution of Marriage rendered on January 30, 2015, by the Madison Circuit Court, Family Division. Appellant argues that the Madison Circuit Court lacked jurisdiction to consider the Petition for Dissolution of Marriage filed by Appellant’s then-wife Terrill Delaine McNulty (“Appellee”) and that venue was

improper. For the reasons stated below, we find no error and AFFIRM the Decree of Dissolution of Marriage on appeal.

The parties were married on June 21, 1990, in Owen County, Kentucky. No children were born of the marriage. The parties separated on or around June 20, 2010, after which Appellee filed a Petition for Dissolution of Marriage in Madison Circuit Court.

On November 12, 2013 – some seven months after Appellant’s Response to the Petition for Dissolution was filed – Appellant filed a Motion to Dismiss Pursuant to CR¹ 12.02. In support of the motion, Appellant argued that the court lacked jurisdiction and that venue was improper. He alleged that both parties were legal residents of Owen County, rather than Madison County. Appellee filed a responsive pleading asserting that she resided for six and one-half years in Madison County at 207 Davis Street, Berea, Madison County, Kentucky. Appellee also argued that a claim of improper venue must be brought by responsive pleading or motion within 20 days after service of summons. The Court summarily overruled the Motion to Dismiss on November 18, 2013.

A hearing on the Petition was conducted on January 12, 2015. On January 30, 2015, the Madison Circuit Court rendered a Decree of Dissolution of Marriage which disposed of all matters before it. The court first found that

¹ Kentucky Rule of Civil Procedure.

Appellee resided for six and one-half years in Madison County at 207 Davis Street, Berea, Kentucky. The court went on to find that Appellee filed a Tracing Memorandum identifying two parcels of real property as her non-marital property being received via survivorship after the death of her prior husband who died in 1990. The court also found that Appellant failed to file a Tracing Memorandum as ordered by the court to identify any interest he had in the subject parcels. The parcels at issue were located at 750 Towles Road and 755 Towles Road, Owenton, Kentucky. The court also determined that there was no marital property to be divided. This appeal followed.

Appellant, *pro se*, first appears to argue that the circuit court lacked jurisdiction to consider Appellee's Petition for Dissolution of Marriage and that venue in Madison County was improper. While styled as a claim of lack of jurisdiction and improper venue, Appellant's argument on this issue consists largely of a rambling and disjointed tale of sexual intrigue, sex trafficking, sadomasochism and alleged child abuse directed largely at Appellant's adult step-son and the step-son's minor children – none of whom are parties to this action. Appellant's argument does little to sustain his claim of lack of jurisdiction and improper venue other than passing references to Appellee's absentee voting record and driver's license. As best we can discern, and setting aside all references to Appellant's step-son, the focus of Appellant's argument on this issue appears to be

his claim that Appellee resided in Owen County and that the exercise of jurisdiction Madison Circuit Court was improper.

A circuit court of the Commonwealth may properly exercise jurisdiction over dissolution proceedings if it “finds that one (1) of the parties, at the time the action was commenced, resided in this state . . . and that the residence . . . has been maintained for 180 days next preceding the filing of the petition[.]” KRS² 403.140. “An action for . . . dissolution must be brought in the county where the husband or wife usually resides.” KRS 452.470.

It is uncontroverted that both parties resided in the Commonwealth for more than 180 days preceding the filing of the Petition. At issue is whether the Madison Circuit Court properly concluded that Appellee resided in Madison County, thus establishing proper venue. While the Madison Circuit Court made no express findings on this issue other than to conclude that Appellee lived on Davis Street in Berea, Madison County, the question for our consideration is whether this finding was clearly erroneous.

Kentucky Rules of Civil Procedure (CR) 52.01 provides the general framework for the family court as well as review in the Court of Appeals: “In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.] . . . Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be

² Kentucky Revised Statute.

given to the opportunity of the trial court to judge the credibility of the witnesses.” *See Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted) (An appellate court may set aside a lower court’s findings made pursuant to CR 52.01 “only if those findings are clearly erroneous.”). The *Asente* Court went on to address substantial evidence:

“[S]ubstantial evidence” is “[e]vidence that a reasonable mind would accept as adequate to support a conclusion” and evidence that, when “taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men.” Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses” because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, “[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal,” and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Smith v. Smith, 503 S.W.3d 178, 182 (Ky. App. 2016) (citations omitted).

The question for our consideration, then, is whether the Madison Circuit Court’s finding on this issue was supported by substantial evidence, i.e., evidence that a reasonable mind would accept as adequate. On November 13, 2015, Appellee testified that she resided at 207 Davis Street, Berea, Madison

County, Kentucky for approximately six and one-half years, and that her driver's license so stated. While Appellant has presented countervailing evidence, our duty is not to reconsider the evidence to reach a conclusion *de novo*. Rather, we must merely determine if a reasonable person would characterize Appellee's testimony as adequately supporting the conclusion reached by the Madison Circuit Court. *Asente, supra*. It is also noteworthy that KRS 452.470 only requires that the Petition be filed in a county where one of the parties *usually* resides. Appellee's testimony constitutes substantial evidence in support of the circuit court's finding on this issue, and as such we find no error.

Appellant next argues that KRS 22A.020(3) is unconstitutional because it violates Section 2 of the Kentucky Bill of Rights. KRS 22A.020(3) provides in relevant part that, "there shall be no review by appeal . . . from that portion of a final judgment, order or decree of a Circuit Court dissolving a marriage." In support of this contention, Appellant again enters into a puzzling argument implicating Santa Claus, the Sultan of Agrabah, Donald Duck, and purported civil immunity under KRS 620.050.

To our knowledge, this argument was not raised below and is therefore not ripe for appellate review. As an appellate court, we are "without authority to review issues not raised in or decided by the trial court." *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016) (quoting *Ten Broeck*

Dupont, Inc. v. Brooks, 283 S.W.3d 705, 734 (Ky. 2009)). *Arguendo*, even had this matter been adjudicated below, Appellant has not noticed the Kentucky Attorney General on a constitutional issue in conformity with KRS 418.075(2). (“In any appeal to the Kentucky Court of Appeals . . . which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant’s brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum.”). We find no error on this issue.

Lastly, Appellant argues that the circuit court improperly failed to dispose of real property in conformity with KRS 403.190. Appellant contends that Appellee gave him, “by verbal contract,” the parcel situated at 755 Towles Road. Appellant argues that Appellee “emphatically and ceremoniously” gave Appellant the parcel by “going from room to room saying ‘this is your room, this is your house.’” Appellant contends that the circuit court erred in failing to characterize the 755 Towles Road parcel as Appellant’s non-marital property.

Transfers of real property are not enforceable unless reduced to writing. KRS 371.010(6). “[A]n alleged oral contract for the conveyance of real estate is within the statute of frauds[.]” *Bennet v. Horton*, 592 S.W.2d 460, 462 (Ky. 1979) (citing *Head v. Schwartz’ Ex’r*, 304 Ky. 798, 202 S.W.2d 623 (1947)). Whether the alleged real estate transfer was a sale or a gift is “a

distinction without a difference.” *Krieg v. Pfeister*, 2015-CA-001683-MR, 2017 WL 2210744 at 2 (Ky. App. May 19, 2017). Appellant has failed to demonstrate that the Madison Circuit Court erred in characterizing the 755 Towles Road property as Appellant’s non-marital property, and we find no error.

For the foregoing reasons, we AFFIRM the Decree of Dissolution of Marriage of the Madison Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Byrd Lawhon, Jr., *pro se*
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Chadwick B. Hammonds
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