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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001536-MR

SHAUN CHRISTOPHER GOULBOURNE APPELLANT

v. APPEAL FROM BARREN FAMILY COURT
HONORABLE TRACI PEPPERS, JUDGE
ACTION NO. 16-CI-00509

AMY ANISSA GOULBOURNE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KRAMER, JUDGES; BUCKINGHAM,[1] SPECIAL JUDGE.

DIXON, JUDGE: Shaun Christopher Goulbourne appeals the supplemental decree of dissolution of marriage from Amy "Anissa" Goulbourne, and subsequent order denying his motion to alter, amend, or vacate, entered by the Barren Family Court

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

on June 15 and September 14, 2018, respectively. Following review of the record, briefs, and law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Shaun and Anissa were married seven years and have one child together. An order containing interlocutory findings of fact, conclusions of law, and decree of dissolution of marriage was entered on August 23, 2017. On October 2, 2017, the parties entered a partial agreement concerning custody of, timesharing with, and support for their minor child, as well as the division of certain debts and property. A hearing concerning the division and characterization of the remaining debts and property, as well as a determination of maintenance, was held on May 4, 2018. Shaun and Anissa were the only witnesses to testify. Following the hearing, both parties submitted proposed findings of fact and conclusions of law. The family court adopted Anissa's proposed findings and conclusions and incorporated them into its supplemental decree of dissolution of marriage entered on June 15, 2018. Thereafter, Shaun moved the family court to set aside and make additional findings, for a new trial, and to alter, amend, or vacate the order. The motion was denied on September 14, 2018, and this appeal followed.

STANDARD OF REVIEW

The standard of an appellate court's review of a trial court's findings of fact is well-settled.

> The trial court heard the evidence and saw the witnesses. It is in a better position than the appellate court to evaluate the situation. Gates v. Gates, [412 S.W.2d 223 (Ky. 1967)]; McCormick v. Lewis, [328 S.W.2d 415 (Ky. 1959)]. **The court below made findings of fact which may be set aside only if clearly erroneous**. Hall v. Hall, [386 S.W.2d 448 (Ky. 1964)]; CR 52.01, 7 Kentucky Practice, Clay 103. We do not find that they are. They are not 'manifestly against the weight of evidence.' Ingram v. Ingram, [385 S.W.2d 69 (Ky. 1964)]; Craddock v. Kaiser, 280 Ky. 577, 133 S.W.2d 916 [(1939)]. A reversal may not be predicated on mere doubt as to the correctness of the decision. Buckner v. Buckner, 295 Ky. 410, 174 S.W.2d 695 [(1943)]. **When the evidence is conflicting, as here, we cannot and will not substitute our decision for the judgment of the chancellor.** Gates v. Gates, supra; Renfro v. Renfro, [291 S.W.2d 46 (Ky. 1956)].

Wells v. Wells, 412 S.W.2d 568, 571 (Ky. 1967) (emphasis added). In the case herein, similar to the question presented in *Wells*, "[w]e do not doubt that the [family court] was correct, however, we recognize the very close question which was presented." *Id.*

> And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by 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.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted). Accordingly, the crux of this case is whether the family court's findings of fact are supported by substantial evidence. On careful review, we hold that the family court's findings are indeed supported by substantial evidence; therefore, we must affirm.

On review, "we defer to the trial court's factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court's identification and application of legal principles." *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). "[W]e review *de novo* the trial court's application of the law to the facts to determine whether its decision is correct as a matter of law." *Maloney v. Commonwealth*, 489 S.W.3d 235, 237 (Ky. 2016).

ANALYSIS

On appeal, Shaun raises six arguments of error by the family court requiring reversal: (1) failure to follow CR[2] 52.01 was reversible error; (2) the award of maintenance was an abuse of discretion not supported by the evidence; (3) the erroneous determination of marital debt; (4) the erroneous finding that a portion of Anissa's increase in retirement benefits was nonmarital; (5) failure to divide property in just proportions; and (6) failure to require Anissa to comply with prior orders. We will address each argument, in turn.

CR 52.01

Shaun's first argument concerns procedural error. He maintains that the family court failed to follow CR 52.01, constituting reversible error. CR 52.01 provides "the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment." Despite the fact the order was titled "Findings of Fact, Conclusions of Law and Supplemental Decree of Dissolution of Marriage," Shaun alleges the trial court failed to make any conclusions of law. Although the family court did not use the label "conclusions of law" in the body of its order to describe its legal analysis, it complied in substance with this requirement. *See Lynch v. Dawson Collieries, Inc.*, 485 S.W.2d 494, 496-97 (Ky. 1972). While we strongly admonish that the

[2] Kentucky Rules of Civil Procedure.

better practice is to specifically and separately set out a court's conclusions of law, here, we agree with Anissa that the family court's conclusions may be gleaned from the "Analysis" section of its order.

Shaun also takes issue with the fact the family court adopted the entirety of Anissa's proposed findings of fact and conclusions of law and rejected his. Again, while this is not the better practice, Kentucky courts have permitted this procedure with certain considerations.

> Our concern . . . is that the trial court does not abdicate its fact-finding and decision-making responsibility under CR 52.01. However, the delegation of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's responsibility.

Bingham v. Bingham, 628 S.W.2d 628, 629 (Ky. 1982).

In *Bingham*, the court "prudently examined the proposed findings and conclusions and made several additions and corrections to reflect [its] decision in the case." *Id.* Here, although the proposed findings and conclusions were adopted verbatim by the family court, there is no evidence that such adoption was "mechanical." *Id.* For reasons discussed herein, the family court's factual findings were supported by substantial evidence, it correctly applied the law to the facts, and it did not abuse its discretion in awarding maintenance. Like *Bingham*:

> [t]here has been no showing that the decision-making process was not under the control of the trial judge, nor that these findings and conclusions were not the product

> of the deliberations of the trial judge's mind. The evidence adduced at trial clearly supports the findings of fact and conclusions of law announced by the court and in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility under CR 52.01, they are not to be easily rejected.

Id. at 629-30. Thus, Shaun has failed to offer sufficient reason for us to reverse the trial court on this issue.

MAINTENANCE

Shaun's second complaint concerns maintenance. Here, he takes a shotgun approach in maintaining that the family court's award of maintenance was an abuse of discretion and not supported by the evidence.

An award of maintenance comes within the sound discretion of the trial court; however, a reviewing court will not uphold the award if it finds that the trial court abused its discretion or based its decision upon findings of fact that are clearly erroneous. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). Additionally, an award of maintenance must satisfy the statutory provisions of KRS[3] 403.200, which provides:

> (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

[3] Kentucky Revised Statutes.

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Thus, to properly award maintenance under KRS 403.200, a court must find: (1) the spouse seeking maintenance lacks sufficient property, including the marital property apportioned to her, to provide for her reasonable needs; and (2) such spouse is unable to support herself through appropriate employment.

Herein, the family court found:

> Aside from the Court's award of additional equity in the marital home and the income from her nursing job, Anissa really has no other unencumbered property to provide for her reasonable needs. Yes, she has a good job at T[.] J[.] Samson Community Hospital and has worked there for 25 years, but historically, that income has been supplemented by, or combined with, the income of a spouse. As is often the case, striking out on your own and trying to make ends meet is a daunting task after having lived many years under the same roof with a spouse and pooling the income. Anissa has a car that has negative equity. She just bought an older home, albeit in a good neighborhood, that is clearly a "fixer upper," and she has taken out 2 mortgages on it already. Therefore, the Court finds that Anissa meets the statutory criteria for maintenance—she lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs and she is unable to support herself through appropriate employment.

Contrary to Shaun's claim otherwise, these findings are supported by the record and are neither clearly erroneous nor an abuse of the family court judge's discretion. Therefore, they will not be disturbed.

Specifically, Shaun initially argues that the family court's decision concerning maintenance was erroneous because it failed to consider Anissa's

retirement account as part of her property. We note that Shaun also had a retirement account. The parties stipulated the present value of Anissa's retirement account was $88,519.73, and the present value of Shaun's retirement account was $91,387.72. Contrary to Shaun's claim, the family court indeed considered the parties' retirement accounts, as well as loans against each, in its division of marital property. Although the family court did not specifically mention Anissa's retirement account in the portion of its order relating to maintenance—quoted above—given that it was previously discussed in the order, it is clear that the court considered it and was likely referring to it in its statement, "Anissa really has no other unencumbered property to provide for her reasonable needs," since she had a loan against her retirement account. Moreover, given the record as a whole and the value assessed to the account, we cannot say that failure to specifically name Anissa's retirement account as her apportioned marital property in its maintenance award rendered the family court's award an abuse of discretion.

Additionally, Shaun maintains that the family court erred in finding Anissa was unable to support herself through appropriate employment based upon an "incorrect" calculation of income. However, substantial evidence supported the family court's finding of the amount of Anissa's monthly income. The court found Anissa's monthly net income from T.J. Samson Hospital to be $2,700, based on her actual pay statements. The court also included the previously agreed upon

monthly child support as part of Anissa's monthly income. Shaun's unsubstantiated argument that a higher amount of income should have been assigned to Anissa neither authorizes our Court to disturb the family court's finding relative to Anissa's income nor justifies our reversal of its decision to award her maintenance based on its finding.

Shaun also complains that the family court erred in its determination of his monthly income in calculating maintenance. Nevertheless, substantial evidence also supported the court's finding on this point. Shaun testified that he worked at Intrepid Rehab, T.J. Samson Hospital, Caverna Hospital, and SKY soccer. The court found Shaun's monthly net income from Intrepid Rehab to be $9,100 based on an actual pay statement. The court used the figures provided by Shaun in his income and expense schedule concerning his net monthly income from T.J. Samson Hospital and Caverna Hospital, as well as his monthly expenses, with the exception of child support for his oldest child who is college-bound. Shaun testified he earned $500 a month with SKY soccer; however, the family court chose not to include this in his monthly income. Once again, Shaun's argument that a lower amount of income should have been assigned to him neither authorizes our Court to disturb the family court's finding relative to his income nor justifies our reversal of its decision to award maintenance based on its finding.

"KRS 403.200(2) sets forth some of the factors that a trial court should consider when awarding maintenance." *Lawson v. Lawson*, 228 S.W.3d 18, 23 (Ky. App. 2007). Shaun asserts it was "reversible error for the court to fail to consider **all** of the relevant factors which the court is required to set out in its findings and separate conclusions," citing *Lawson*. However, it is clear the family court did consider all the relevant factors, as discussed below.

Shaun alleges that the family court failed to consider the first factor because it incorrectly calculated Anissa's financial resources, as stated above. For the reasons previously discussed, and not to be restated, we disagree.

Shaun also maintains that the family court erred in the second factor, concerning the time necessary to acquire sufficient education or training to find appropriate employment, in determining the length of maintenance. The court specifically stated:

> [Anissa] certainly has appropriate employment, so this factor is not perhaps as others; however, she did testify that she desires to obtain her Master[']s [d]egree which would enable her to earn more money, but that she could not afford to do that right now.

Anissa testified it would take her five years to obtain her master's degree while continuing to work full-time as a nurse. This testimony was undisputed by Shaun. Nevertheless, he argues the court erred in finding that he could afford to help with that expense. However, the record supports the family court's finding.

Additionally, in disputing the award of maintenance, Shaun contends that "[w]hen one looks at the standard of living, it is abundantly clear the parties lived off credit during the marriage." Our review of the record indicates it was Shaun who made nearly all these charges. Despite Shaun's financial strategies, the parties had three vehicles and a nice, new home. The family court found:

> The standard was what might be described as, for this community, "middle-upper class" in terms of the socio-economic standard of living. When married, the family lived quite comfortably in an upscale neighborhood, in a brand new home with a pool and all the amenities, driving very nice cars, and taking trips.

Shaun still has three vehicles—two of which are free of indebtedness—and the nice, new—if not entirely paid-for—home, while Anissa only has one encumbered vehicle and an old, smaller, encumbered home in need of repair. Shaun continues to enjoy a standard of living similar to, if not better than, that during the marriage, as indicated by his income and expenses. Anissa, on the other hand, is not enjoying a standard of living similar to that during the parties' marriage.

In yet another attempt to circumvent the family court's award, Shaun contends that because this was a short marriage, Anissa is not entitled to maintenance. The parties were married seven years, as found by the family court. The court specifically stated that it considered this length in the determination of its award of maintenance. While further analysis certainly could have been included, it is unnecessary. The court's award of maintenance for five years, or

until Anissa remarries or dies, whichever occurs first, was not an abuse of discretion.

Shaun's remaining challenges to the family court's findings and award of maintenance are equally meritless and will not be specifically addressed.

MARITAL DEBTS

Shaun's third argument of error relates to the family court's determination of marital debt. "There is no statutory authority for assigning debts in an action for dissolution of marriage." *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522 (Ky. 2001), *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018). "Nor is there a statutory presumption as to whether debts incurred during the marriage are marital or nonmarital in nature." *Id.*

> Debts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation, *Van Bussum v. Van Bussum*, [728 S.W.2d 538 (Ky. App. 1987)], *O'Neill v. ONeill*, [600 S.W.2d 493 (Ky. App. 1980)], *Bodie v. Bodie*, [590 S.W.2d 895 (Ky. App. 1979)], *Inman v. Inman*, [578 S.W.2d 266, 270 (Ky. App. 1979)]; whether the debt was incurred to purchase assets designated as marital property, *Daniels v. Daniels*, [726 S.W.2d 705 (Ky. App. 1986)]; and whether the debt was necessary to provide for the maintenance and support of the family, *Gipson v. Gipson*, [702 S.W.2d 54 (Ky. App. 1985)]. Another factor, of course, is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness.

Id. at 523. Shaun erroneously alleges that the only factor considered by the court in assigning marital debt was whether Anissa derived a direct benefit from the debt. It is clear throughout the court's discussion of the debts that the extent of Anissa's participation (or lack thereof) in incurring each debt, whether the debt was incurred to purchase assets designated as marital property or was necessary to provide for the maintenance and support of the family, and the economic circumstances of the parties after the divorce to allow for the payment of the debt, were all factors considered by the family court.

"Questions of whether property or debt is marital or nonmarital are left to the sound discretion of the trial court . . . and will be reviewed for abuse of discretion[.]" *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011). The burden of proving a debt as marital rests with the party that incurred it and now claims it as marital. *Allison v. Allison*, 246 S.W.3d 898 (Ky. App. 2008). Here, Shaun made the charges at issue and now disingenuously claims they were marital. The burden of proving the debt as marital rests solely with Shaun. However, the evidence Shaun produced at trial was insufficient to prove these debts were, in fact, marital. Therefore, on appeal, Shaun has failed to demonstrate that the family court abused its discretion in finding the debts at issue nonmarital.

RETIREMENT BENEFITS

Fourth, Shaun argues that the family court's finding of a portion of Anissa's increase in retirement benefits as nonmarital was error. The standard for review as to the nature of assets is set out in *Cobane v. Cobane*, 544 S.W.3d 672, 682 (Ky. App. 2018).

> When property is acquired through a combination of marital and non-marital funds, the trial court must first determine the parties' separate non-marital and marital interests in the property based on evidence of the source of those funds. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006) (citing *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001)). If a piece of mixed-status property increases in value during the marriage, the court must then determine from the evidence why the increase in value occurred. *Id.*
>
> > "[W]here the value of [non-marital] property increases after marriage due to general economic conditions, such increase is not marital property, but the opposite is true when the increase in value is a result of the joint efforts of the parties." KRS [403].190(3), however, creates a presumption that any such increase in value is marital property, and, therefore, a party asserting that he or she should receive appreciation upon a nonmarital contribution as his or her nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution. By virtue of the KRS 403.190(3) presumption, the failure to do so will result in the increase being characterized as marital property.

> *Travis*, 59 S.W.3d at 910-11, (quoting *Goderwis v. Goderwis*, 780 S.W.2d 39, 40 (Ky. 1989)) (footnotes omitted).

Thus, "where the value of [non-marital] property increases after marriage due to general economic conditions, such increase is not marital property[.]" *Travis*, 59 S.W.3d at 910 (quoting *Goderwis*, 780 S.W.2d at 40). A party asserting that he "should receive appreciation upon a nonmarital contribution as his or her nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution." *Id*. (footnote omitted). Anissa presented such proof. Shaun's reliance on *Cobane* for the proposition that her testimony alone is insufficient is misplaced.

In *Cobane*, no premarital values of the husband's investment accounts were established. The husband attributed certain percentages to the growth of those accounts, but his wife objected to the figures, claiming the numbers did not match the other documents regarding those accounts. Therein,

> [t]he trial court further noted that Marc did not present any evidence as to the actual growth of these accounts during the marriage, except for the beginning and ending numbers. In the absence of such evidence, the court stated that it could not find any portion of the increase in the values of these accounts were attributable to Marc's non-marital contributions.

544 S.W.3d at 683.

Here, the parties stipulated that the present value of Anissa's retirement account was $88,519.73 and its premarital value was $30,859.55. Anissa testified, without objection from Shaun, that she accessed her retirement account online. Her statement for the period ending December 31, 2016, provided the ten-year average rate of return on her account was 7.07%. The family court made corresponding findings of fact. The court determined the passive appreciation from the nonmarital portion of Anissa's retirement account from date of marriage until date of separation increased the premarital value of her account to $49,781.09. The unrefuted evidence supports the family court's finding that such is Anissa's nonmarital property.

OTHER PROPERTY DIVISION

Shaun's fifth argument is that the family court failed to divide the property in just proportions. KRS 403.190(1) provides the court "shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors[.]" Shaun alleges that the family court failed to make any findings or conclusions upon which it based the division of property. He then asserts that he should have been awarded a larger portion of the marital equity in the residence without further explanation or argument. We will not search the record to construct Shaun's argument for him, nor will we go on a fishing expedition to find support for his 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) (citation omitted).

COMPLIANCE WITH PRIOR ORDERS

Finally, Shaun argues that the family court's failure to require Anissa to comply with prior orders was error. The court previously ordered Anissa to make the October house payment in the amount of $2,000. She failed to do so but was given a partial credit for $1,000 by Shaun to offset his child support obligations. Shaun also claims that Anissa failed to properly maintain the pool, resulting in additional expenses to him for repair and cleaning of the pool. Anissa testified that Shaun told her he and a friend would close the pool. Shaun cites *Penner v. Penner*, 411 S.W.3d 775 (Ky. App. 2013), in claiming the failure of the court to enforce its order was error. In *Penner*, another panel of our Court held:

> Tom should not be forced to pay Lane $3,600.00 per month in maintenance, $1,639.00 in child support, and pay the mortgage and default fees on top of that. Lane chose not to pay the mortgage on the residence, despite ample money provided by Tom in the form of child support and maintenance to do so.

Id. at 785. The case herein, however, is factually distinguishable. At the time Anissa failed to pay the mortgage, she was neither receiving child support nor maintenance. It is clear from the evidence that she did not have the financial resources to pay the mortgage. Moreover, a court is always free to amend a

previous order. Consequently, we affirm the portions of the court's order denying enforcement of a prior order regarding payment of the mortgage. Further, we find no error in the family court's finding the cost of repairing and closing the pool "a wash."

Therefore, and for the foregoing reasons, the order entered by the Barren Family Court is AFFIRMED.

KRAMER, JUDGE, CONCURS.

BUCKINGHAM, SPECIAL JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, SPECIAL JUDGE, DISSENTING: I would vacate the findings of fact, conclusions of law, and supplemental decree of dissolution of marriage and remand because I believe this is a situation where the trial court abdicated its fact-finding and decision-making responsibility under CR 52.01.

CR 52.01 states in part that, "[i]n 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[.]" Over the years, both this Court and our Supreme Court have addressed situations where the trial court merely adopted findings and conclusions submitted by counsel rather than making its own findings and conclusions. The results have varied, and the recent trend is to approve the practice. While that may

be the trend, I do not believe our courts have adopted a hard and fast rule allowing this practice in all circumstances. I believe this is one case where the findings and conclusions were not, in fact, those of the trial court but were crafted by counsel to support the position of the client in nearly all respects.

One of the first cases addressing this issue in recent years is *Callahan v. Callahan*, 579 S.W.2d 385 (Ky. App. 1979). In that case, which involved the disposition of property in a divorce, this Court held "[t]he trial court committed reversible error in failing to draft its own findings as required by Civil Rule 52.01." *Id*. at 387. This Court further elaborated as follows:

> The appellate courts of this state have universally condemned the practice of adopting findings of fact prepared by counsel. . . . [W]e cannot condone the delegation by the trial court of its responsibility to make findings of fact, because based on such findings subsequent conclusions of law and the ultimate judgment results. It is critically important to the litigants to be assured that the decision making process is totally under the control of the trial judge. It is equally important for the appellate courts to be similarly confident if and when they become involved in the judicial process. Although under certain conditions, for purely clerical reasons, the preparation of some documents may be delegated to counsel, such a situation should be limited to routine matters and should be conducted under the close scrutiny of the trial court.

Id. (citations omitted). This Court then concluded, "the trial judge committed reversible error in failing to draft his own findings and in adopting findings presented by trial counsel that were not supported by the record." *Id*.

In *Bingham v. Bingham*, 628 S.W.2d 628 (Ky. 1982), a case often cited by our courts, our Supreme Court addressed the issue. Like *Callahan*, *Bingham* involved findings of fact and conclusions of law drafted by counsel in a case involving the disposition of property in a divorce. *Id*. at 629. Our Supreme Court in *Bingham* held as follows:

> Our concern here, as in [*Kentucky Milk Marketing & Anti-Monopoly Comm. v. Borden Co.*, 456 S.W.2d 831 (Ky. 1969)], is that the trial court does not abdicate its fact-finding and decision-making responsibility under CR 52.01. However, the delegation of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's responsibility.
>
> Careful scrutiny of the record reveals that the court was thoroughly familiar with the proceedings and facts of this case. The record indicates the trial judge prudently examined the proposed findings and conclusions and made several additions and corrections to reflect his decision in the case. . . .
>
> As distinguished from the facts in United States v. Forness, 125 F.2d 928 (1942), there was no verbatim or mechanical adoption of proposed findings of fact and conclusions of law in the present action. There has been no showing that the decision-making process was not under the control of the trial judge, nor that these findings and conclusions were not the product of the deliberations of the trial judge's mind.

Id. at 629-30. The Court affirmed the trial court and Court of Appeals. *Id*. at 630.

In *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky. 1997), our Supreme Court again examined the issue, this time in a case involving

the involuntary termination of parental rights. In *Prater*, the Supreme Court described the following findings and conclusions before it:

> The Circuit Court's judgment was predicated upon findings (1) that the children were abused and neglected as defined in KRS 600.020(1), *i.e.*, the parents had failed or refused to provide essential care for the children and there was no reasonable expectation of significant improvement in parental conduct in the foreseeable future; (2) that the termination was in the best interests of the children; and (3) that the Cabinet was the best qualified to receive custody.

Id. at 956. The Court plainly stated: "It is not error for the trial court to adopt findings of fact which were merely drafted by someone else." *Id*. (citing *Bingham*, 628 S.W.2d 628).

Thereafter, this Court addressed the issue with a different result in *Retherford v. Monday*, 500 S.W.3d 229 (Ky. App. 2016). *Retherford* was a child custody case where, following the hearing, the trial court directed the parties to submit proposed findings of fact and conclusions of law. The court then adopted verbatim the findings and conclusions submitted by one of the parties. *Id*. at 231-32. In vacating and remanding the case for the trial court to make its own findings and conclusions, this Court recognized *Callahan* as the "seminal case on this point" and noted that "[t]he practice of adopting prepared findings of counsel as those of the court has been highly disfavored not only by CR 52.01 but by case law

as well." *Id*. at 232. The Court further acknowledged, however, that with the *Prater* case "some degree of erosion of the *Callahan* rule has occurred." *Id*.[4]

Finally, this Court addressed the issue in *Keith v. Keith*, 556 S.W.3d 10 (Ky. App. 2018). In that case, this Court plainly stated:

> The Supreme Court has not overruled *Bingham* or *Prater*. . . . To the extent that *Retherford* holds that adoption of tendered findings is automatically grounds for reversal, this holding conflicts with directly controlling precedent from our Supreme Court.

Id. at 14 (footnote omitted). This Court in *Keith* held:

> In the current case, the DRC substantially adopted the proposed findings tendered by Toby's counsel. However, the DRC did so after a full evidentiary hearing. Moreover, those findings were subject to a full review by the trial court prior to their incorporation into the final order. We find no basis to conclude that the DRC or the trial court abdicated their responsibility to make required findings of fact and conclusions of law in this case.

Id.

Having reviewed the decisions of this Court and our Supreme Court over the last 40-plus years, I am mindful, as was Judge (now Justice) VanMeter in *Retherford*, that this Court is bound by published decisions of our Supreme Court.

[4] Judge (now Justice) VanMeter in his concurring opinion did not follow the majority opinion's holding concerning counsel preparing findings of fact and conclusions of law. Judge VanMeter stated: "Regardless of what we may think of the practice of trial courts signing documents prepared by counsel, *e.g.*, *Callahan v. Callahan*, 579 S.W.2d 385, 387 (Ky. App. 1979), the Kentucky Supreme Court, apparently does not share that view[.]" *Id.* at 233 (VanMeter, J., concurring).

Rules of Supreme Court (SCR) 1.030(8)(a). Therefore, *Bingham* and *Prater* are the precedents upon which we must focus.

While our Supreme Court in *Prater* clearly stated it was not error for a trial court to adopt findings of fact that were drafted by someone else, I believe three matters must be considered. First, in *Prater* the trial court's findings of fact very simply parroted language in the parental rights termination statutes. In other words, the findings of fact set forth the basic general findings required by statute and not the particular facts upon which they were based. Second, our Supreme Court in *Prater* cited *Bingham* as the basis for its decision. 954 S.W.2d at 956. And in *Bingham*, our Supreme Court noted that "the delegation of the clerical task of drafting proposed findings of fact and conclusions of law **under the proper circumstances** does not violate the trial court's responsibility." 628 S.W.2d at 629 (emphasis added). The Supreme Court did not say it was never error, only that it was not error "under the proper circumstances[.]" *Id*. In fact, our Supreme Court in *Bingham* distinguished the facts in the case before it from the facts in the *Forness* case where there had been a verbatim or mechanical adoption of proposed findings and conclusions. *Id*. at 629-30.

In short, the Supreme Court in *Bingham* approved this practice where the trial court made several additions and corrections to the proposed findings. *Id*. In neither *Bingham* nor *Prater* did our Supreme Court overrule or cite with

disapproval *Callahan*, although *Prater* did, as noted in *Retherford*, erode *Callahan* to the extent *Callahan* provided the practice was always error. Furthermore, despite the plain language in *Prater* that it was not error for a trial court to adopt findings prepared by someone else, it did not overrule, limit, or restrict its earlier decision in *Bingham* that said the practice was allowed "under the proper circumstances[.]"

In light of the above, I do not believe our Supreme Court has established a rule (in *Prater* or elsewhere) that the practice of delegating the drafting of findings and conclusions to counsel is never error. Rather, as the Supreme Court said in *Bingham*, "under the proper circumstances [it] does not violate the trial court's responsibility." *Id*. at 629.

That being said, the question in this case is whether the trial court abdicated its fact-finding and decision-making responsibility under CR 52.01. I conclude it did.

At the conclusion of the final hearing, the trial court directed counsel for the parties to each submit proposed findings and conclusions for the court's consideration, which they did. The court then adopted verbatim the findings, conclusions, and supplemental decree submitted by the appellee a mere seven days

after it was tendered by counsel.[5] It was 33 pages and contained innumerable recitations of exact figures and testimony given by the parties. The appellant moved the court for a new trial and for additional findings of fact to address specific issues. The motion for a new trial was denied, as was the motion for additional findings of fact. Concerning the latter motion, the court stated there were extensive findings of fact in its order and that additional findings were unnecessary to support the order.

It is apparent the trial court did not make any of the numerous determinations independently. Rather, it adopted verbatim the findings and conclusions proposed by the appellee, including adopting to the penny most, if not all, calculations proposed by the appellee.[6] With all due respect, the findings of fact and conclusions of law read to me more like a brief on behalf of the appellee than an independent judgment by the trial court.

Perhaps I have been too critical of the trial court's verbatim adoption of the appellee's proposed findings and conclusions. After all, following our Supreme Court's opinion in *Prater*, many, including the trial judge in this case,

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[5] The hearing was on May 4, 2018, counsel for both parties tendered findings and conclusions on June 8, 2018, and the court signed and entered them on June 15, 2018.

[6] For example, see pages 28 and 29 of the court's order where it made several exact numerical determinations, mostly related to debt, and then determined the appellee was entitled to an additional $30,499.89. I find it somewhat incredible that the court would have reached the exact result to the penny had it made these determinations itself.

may believe the practice is now acceptable in **all** circumstances. In light of the facts in *Prater* (the adopted findings merely parroting the language of the statute) and the earlier language of the Court in *Bingham*, however, I believe the Supreme Court in *Prater* did not intend a hard and fast rule that would approve of the practice in situations such as this.[7]

Therefore, I would vacate the findings, conclusions, and supplemental decree and remand the case with directions to the trial court to make its findings of fact and conclusions of law independently of the suggestions of counsel.[8]

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[7] Since its opinions in *Bingham* (1982) and *Prater* (1997), our Supreme Court had the occasion to address the issue in the context of a criminal case in *Fields v. Commonwealth*, No. 2013-SC-000231-TG, 2014 WL 7688714 (Ky. Dec. 18, 2014), which was not published. In that case, the trial court held a hearing on a motion to vacate a criminal conviction under Kentucky Rules of Criminal Procedure (RCr) 11.42. Following the hearing, the court took the matter under advisement but informed the parties he did not have the staff to prepare the order. After giving the motion consideration, the trial judge called the prosecutor, informed him of the ruling denying the motion, and asked him to prepare the order. The court then adopted the prepared order verbatim. On appeal, our Supreme Court held there was no error. Further, the Court quoted the previous high court's decision in *Ky. Milk Mktg. & Anti-Monopoly Comm. v. Borden Co.*, 456 S.W.2d 831, 834 (Ky. 1969), as follows: "We do not condemn this practice in instances where the court is utilizing the services of the attorney only in order to complete the physical task of drafting the record." *Fields*, 2014 WL 7688714, at *4. I believe this to be further indication that our Supreme Court has not intended to adopt a hard and fast rule approving the practice of delegating to counsel the preparation of findings of fact and conclusions of law in all cases.

[8] Were this case to be remanded to the trial court for that reason, it would surely require much time, effort, and fact-finding by the trial judge in light of the testimony and evidence concerning numerous issues.

BRIEFS FOR APPELLANT:

Ronald L. Hampton
Glasgow, Kentucky

BRIEF FOR APPELLEE:

T. Richard Alexander, II
Glasgow, Kentucky