

98-DR-0-2328

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

19-5303
18-2328

Jeffrey Allen Bailey,

Appellant,

v.

Darla Rice Bailey,

Respondent.

2001/10-1 PH 3:28
OFFICE
CLERK
RY

Appeal From Charleston County
Jack A. Landis, Family Court Judge

Unpublished Opinion No. 2000-UP-606
Heard September 13, 2000 - Filed October 10, 2000

AFFIRMED

Gregory S. Forman, of Charleston, for appellant.

Joseph P. Cerato, of Charleston, for respondent.

PER CURIAM: In this domestic action, Jeffery Allen Bailey (the husband) appeals from the family court's order awarding Darla Rice Bailey (the wife) a divorce on the ground of physical cruelty, finding the husband had control or use of \$17,000 in cash at the time of filing, and awarding the wife attorney's fees and costs. We affirm.

FACTS

The parties first married in 1978 and divorced in 1983. They remarried by common law and agreement in 1984. They have two children, both of whom are minors.

BAILEY v. BAILEY

The husband commenced this action against the wife on June 5, 1998 seeking, *inter alia*, a divorce on the ground of adultery, child custody, equitable distribution, and attorney's fees. The wife answered and counterclaimed, seeking a divorce on the ground of physical cruelty, child custody, child support, equitable distribution, and attorney's fees.

Prior to the final merits hearing, the family court approved and adopted the parties' agreement as to the issues of child custody, visitation, and support. The family court held the final merits hearing over a four day period between January 11 and January 14, 1999. By order dated March 12, 1999, the family court granted the wife a divorce on the ground of physical cruelty, and valued the marital estate to include \$17,000 in cash over which the court determined the husband exercised possession and control. In addition, the family court awarded the parties equal shares of the marital estate, and awarded the wife \$11,803.50 in attorney's fees and costs. Except as to issues irrelevant to this appeal, both parties' post-trial motions for reconsideration were denied.

STANDARD OF REVIEW

On appeal from the family court, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Epperly v. Epperly, 312 S.C. 411, 440 S.E.2d 884 (1994). This broad scope of review, however, does not relieve the appellant of the burden of convincing us that the family court committed error. Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979). Nor are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimonies. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981). Because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to trial court findings where matters of credibility are involved. See Aiken County Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 403 S.E.2d 142 (Ct. App. 1991).

LAW/ANALYSIS

I. Ground for Divorce

On appeal, the husband asserts there exists insufficient evidence to support the family court's award of a divorce on the ground of physical cruelty. We disagree.

South Carolina Code Ann. § 20-3-10(3)(1985) provides that a divorce may be granted on the ground of physical cruelty. In South Carolina, physical cruelty as a basis for divorce is defined as actual personal violence or such a course of physical

BAILEY v. BAILEY

treatment as endangers life, limb or health, and renders cohabitation unsafe. Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949). The determination of whether physical cruelty within the meaning of § 20-3-10(3) has occurred is governed by the particular facts and circumstances of each case. Crowder v. Crowder, 246 S.C. 299, 143 S.E.2d 580 (1965). Where an act of physical cruelty is directed by one spouse at the other, "bodily injury" is not required to support a finding of physical cruelty. Gibson v. Gibson, 283 S.C. 318, 322 S.E.2d 680 (Ct. App. 1984). A single act of violence may support a finding of physical cruelty warranting divorce on that ground if accompanied with such precedent or attendant circumstances as to satisfy the court that such acts are likely to be repeated. Brown, 215 S.C. at 508, 56 S.E.2d at 333; Smith v. Smith, 253 S.C. 350, 170 S.E.2d 650 (1969); McDowell v. McDowell, 300 S.C. 96, 386 S.E.2d 468 (Ct. App. 1989).

Contrary to the husband's assertion on appeal, the record on appeal is replete with evidence he was physically abusive to the wife. The wife testified the husband kicked her off the sofa, injured her by "flipping" her with a towel, injured her ribs by throwing her off a bed, kicked her legs from underneath her, slammed a door on her, slammed her knee to the floor, poured water on her face, pulled her hair, spit in her face, picked her up and slammed her to the floor, choked her and dragged her down a stairwell. Four witnesses, including a family therapist, testified to observing the wife's injuries.

In our view, the wife's testimony, as well as the corroborating testimony offered by her witnesses, establishes an ongoing pattern of violence amounting to physical cruelty within the meaning of the relevant case and statutory law. We are not otherwise persuaded by the husband's assertions the wife was less than truthful in her testimony and the altercations between the parties were the result of "mutual provocations . . . [that] met retaliatory cruelty in kind." We defer to the findings of the family court regarding the veracity of the wife's claims. See Wilcox, 304 S.C. at 93, 403 S.E.2d at 144.

II. Possession and Control of \$17,000

The husband next asserts the family court erred in finding he possessed \$17,000 in cash. We find no error.

In October of 1997, the wife took a bag containing \$17,000 in cash from the marital home, along with documents from the husband's business, and hid them in the home of a friend. Both the wife and her witness testified the documents and money disappeared from her home in July of 1999. The wife testified she believed the husband had possession of the money and documents because he submitted a document in response to her discovery requests that was with the money. She asserted there was only one copy of the document. The wife also directed the court's attention to the

BAILEY v. BAILEY

husband's financial declaration of October 29, 1997, which indicated the husband had \$20,000 "cash on hand and in banks." According to the wife's witness, she and the wife decided not to report the matter to the police in order to protect the parties' children.

In its final order, the court expressly found the husband's financial declaration evidenced the husband was in possession of \$20,000 in cash and in banks "which is otherwise unaccounted for unless taking into account the Seventeen Thousand and no\100 Dollars (\$17,000) admittedly contained in the bag."

The identification of marital property is controlled by the provisions of the Equitable Apportionment of Marital Property Act. "Marital property [is defined as] all real and personal property acquired by the parties during the marriage which is owned as of the date of filing or commencement of marital litigation, regardless of how legal title is held." S.C. Code Ann. § 20-7-473 (Supp. 1999); See Johnson v. Johnson, 296 S.C. 289, 294, 372 S.E.2d 107, 110 (Ct. App. 1988). The spouse claiming an equitable interest in property upon dissolution of the marriage has the burden of proving the property is part of the marital estate. Roberts v. Roberts, 296 S.C. 93, 370 S.E.2d 881 (Ct. App. 1988), *aff'd as modified* 299 S.C. 315, 384 S.E.2d 719 (1989). Where a spouse removes or secretes marital property in contemplation of divorce, he or she should be required to either account for it or have some part of its value charged against that spouse's share of the marital property. Cooksey v. Cooksey, 280 S.C. 347, 312 S.E.2d 581 (Ct. App. 1984).

The husband's assertion on appeal that the family court erroneously concluded he was in possession of the disputed funds amounts to a challenge of the family court's findings on credibility. Given the divergence in the parties' testimony regarding the disposition of the funds after the wife hid them in her friend's home, the wife's testimony concerning the document submitted in discovery, and the husband's failure to explain his possession of \$20,000 to the satisfaction of the family court, we defer to the findings of the family court.

III. Attorney's Fees

The husband next asserts the court erred in awarding the wife attorney's fees. We disagree.

The decision to award attorney's fees is within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. McElveen v. McElveen, 332 S.C. 583, 506 S.E.2d 1 (Ct. App. 1998); Henggeler v. Hanson, 333 S.C. 598, 510 S.E.2d 722 (Ct. App. 1998). In making this decision, the family court should consider: 1) a party's ability to pay his or her own fee, 2) the beneficial results obtained by a party's attorney, 3) a party's financial condition vis a vis that of his or her former spouse, and 4) the effect of the fee and possible award on each party's standard of

BAILEY v. BAILEY

living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992); Henggeler, 333 S.C. at 605, 510 S.E.2d at 726. In addition, the court should consider the following in determining the appropriate amount of attorney's fees to award: 1) the professional standing of counsel, 2) the customary legal fees for similar services, 3) the nature, extent, and difficulty of the case, and 4) the time necessarily devoted to the case by the attorney. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The husband's challenge to the award of attorney's fees is centered, in large part, on his position the court erred in ruling in the wife's favor on the issues of grounds for divorce and possession of the \$17,000 in cash. This argument is unavailing given our disposition as to those issues. Moreover, we agree with the family court the husband's conduct caused the wife to incur otherwise unnecessary fees. The husband correctly notes the parties entered into an agreement regarding custody, visitation, and support; however, the agreement was reached on the eve of trial. Moreover, the parties specifically reserved the issue of attorney's fees incurred in litigating custody for later determination.

Furthermore, although the order awarding attorney's fees does not contain specific findings of fact as to each of the factors enumerated in Glasscock, reversal is not warranted as long as each factor is supported by evidence in the record. See Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993). Here, the evidence of record supports the an award of attorney's fees.¹ In addition, the amount awarded by the family court was reasonable, as the wife incurred over twenty-five thousand dollars in attorney's fees from trial counsel.² Accordingly, we find no error in the family court's award of attorney's fees.

AFFIRMED.

CURETON, STILWELL, and SHULER, JJ., concur.

¹ The family court did make specific findings of fact regarding 1) the reasonableness of the fees and expenses incurred by the wife, 2) the professional standing of counsel, 3) the beneficial results obtained by the wife's attorney, and 4) the effect of the fee and possible award on each party's standard of living.

² The wife incurred a total of \$58,193.02 in attorney's fees in litigating this action.