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Commonwealth Of Kentucky

Court Of Appeals

NOS. 1996-CA-000114-MR,
1996-CA-001418-MR and 1996-CA-003233-MR

MELBA IVY NEIDLINGER — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE RICHARD J. FITZGERALD, JUDGE
ACTION NO. 93-FD-0816

JERRY LYNN NEIDLINGER — APPELLEE

AND — NO. 1996-CA-001471-MR

MELBA IVY NEIDLINGER — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE RICHARD J. FITZGERALD, JUDGE
ACTION NO. 93-FD-0816

JERRY LYNN NEIDLINGER
and DELORES PREGLIASCO — APPELLEES

OPINION AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This opinion covers four appeals from various orders and judgments entered in this divorce action, relating to custody, maintenance, temporary child support, division of

marital property and debt, and attorneys fees and sanctions. Upon review of the arguments in appellant's appeals in light of the record herein and the applicable law, we vacate the award of maintenance and remand for an increase therein. As to the remaining issues, we affirm.

Appellant, Melba "Mel" Neidlinger, and appellee, Jerry Neidlinger, were married on February 20, 1976 in Kona, Hawaii. At the time of the marriage, Jerry was a practicing dentist. Mel had worked full-time for five years in a dentist office and had an associates degree in health education. After the parties married, they settled in Hawaii and began a dental practice.

Mel worked full-time in the dental office until they adopted their only child, Jessica, born August 6, 1982. After that, Mel worked part-time in the office and was Jessica's primary caretaker. Early in 1984, after having been in Hawaii for eleven years, the parties sold their assets and dental practice for $450,000 and moved to Danville, Kentucky. Thereafter, the parties bought part of a medical building and opened a dental practice in Danville in which Mel worked part-time. The dental practice did not do as well as expected in Danville. Consequently, Jerry decided to pursue a second degree so that he would be eligible to teach at the University of Kentucky. In 1989, Jerry began school in Chicago Monday through Friday and would come home to Danville every weekend, when he would see patients in his practice. Jerry received a stipend of $34,000 per year for the two years he was in Chicago. During this time, Mel stayed in Danville and took care of Jessica.

In 1991, Jerry earned his degree. The parties separated for good in 1992. In August 1992, the Danville dental practice sold for about $93,000. Some of the proceeds were used to pay debts, and Mel took $25,000 of the proceeds and bought a certificate of deposit. A petition for legal separation was filed by Mel on March 18, 1993. Jerry subsequently moved to Arkansas and then to South Carolina to work for the Veteran's Administration as a dentist, where he earned approximately $83,000 a year. Mel moved to Louisville to attend Sullivan College where she obtained a two-year degree in interior design.

Throughout the time Jerry was in Chicago and when he moved to Arkansas and South Carolina, Jerry supported two households. It is undisputed that Jerry gave Mel $3,800 a month to support her and Jessica's household until November 1993. After that time, Jerry steadily reduced that amount to $700 a month. Until November 1993, Jerry also paid all the bills on the marital residence in Danville (mortgage and utilities), which the parties still owned.

On August 9, 1994, Mel filed a motion for pendente lite child support and maintenance. After a hearing on the matter, Jerry was ordered to pay Mel $798 a month in temporary child support and $700 a month in temporary maintenance.

The financial issues of the parties were tried on July 23, 1995. At that time, Jerry was 51 years old and Mel was 49. During the course of the proceedings, Mel moved from Louisville back to Danville with Jessica to live in the family residence.

The court issued its findings of fact, conclusions of law, and decree on November 1, 1995. Jerry's gross income was found to be $83,000 a year. Mel was not employed. The court awarded Mel $400 a month in maintenance for three years. The parties stipulated that the value of the marital residence was $220,000, and the court awarded the parties each one-half of the proceeds when the house was sold. As to the remaining property, including the proceeds of the sale of the medical building interest, the court divided it such that each party received approximately $35,000 in assets. As to debt, the court ordered Jerry to pay $4,787 in credit card debt, while Mel was responsible for $3,769 of the debt. As to the debts Mel claimed she incurred as a result of continuing to send Jessica to private school despite the protestations of Jerry that they could no longer afford it, the court found that said debt was "for living expenses and for her unilateral decision regarding schooling for Jessica post-separation." The court went on to conclude that "she [Mel] was the beneficiary of most of the debt and shall be responsible for payment of those 'loans'." Also, because Jerry had continued to pay the mortgage and utilities on the marital home as well as pendente lite maintenance, the court granted Jerry a credit for all pendente lite maintenance payments made after Mel moved back into the marital home. The court reasoned that because the pendente lite maintenance had been awarded based on Mel's expenses for renting a house in Louisville, Mel no longer had those expenses when she moved back into the marital

residence on which Jerry had continued to pay the mortgage and utilities.

After the decree was entered, Jerry moved the court to designate the mortgage payment he was still paying as maintenance. He also moved for child support based on the fact that the parties had agreed that Jessica would live with Jerry in South Carolina. Mel moved for attorney's fees for the portion of the case that had already been tried and for an advance of attorney's fees for the custody portion of the action.

On April 4, 1996, the court denied both of Mel's motions for attorney fees and Jerry's motion for the court to treat the mortgage payments as maintenance. However, the court adjudged that, when the marital residence was ultimately sold, Jerry would be entitled to a credit for all the mortgage payments made post-decree. The court granted Jerry's motion for child support and ordered Mel to pay $131 a month.

The custody portion of the case was tried on August 15, 1996. At that time, Jessica was 14 years of age. After a full hearing on the matter in which numerous witnesses testified, including Jessica, who testified that she wanted to remain with her father, the court awarded sole custody to Jerry, subject to reasonable visitation by Mel. From the various orders regarding custody, child support, division of marital property, maintenance, and attorneys fees, Mel now appeals.

We shall first address Mel's *pro se* appeal regarding the award of sole custody to Jerry. Mel asserts nine assignments of error, some of which are difficult to follow. She first

contends that the court was prejudiced by an agreed order, which we cannot find in the record, and by Jerry's response to a contempt motion filed by Mel regarding visitation. Upon reviewing the custody proceedings and resulting order, we do not see any indication that the court was prejudiced against Mel. As we shall discuss below, the court rendered a well-reasoned decision which was supported by the evidence.

Mel next argues in her appeal of the custody order that the court abused its discretion in not awarding her sufficient assets to afford visitation of Jessica in South Carolina and to buy a house of her own. These arguments regarding the division of marital property and other financial issues should have been raised in the appeal of the November 5, 1995 order deciding these issues and are not properly the subject of the custody appeal.

The next issue raised by Mel is that the trial court erred in ordering only one day of trial and in refusing to reopen the case to allow one other witness to testify on Mel's behalf. Every litigant is entitled to a fair hearing when brought into court. Burns v. Brewster, Ky., 338 S.W.2d 908 (1960); Bean v. Campbell, 237 Ky. 498, 35 S.W.2d 862 (1931). However, the trial court has the discretion to determine the conduct of its trials. Johnson v. May, 307 Ky. 399, 211 S.W.2d 135 (1948). A motion to reopen a case rests within the sound discretion of the trial court. Logan v. Logan, Ky., 432 S.W.2d 34 (1968). At the custody hearing, Mel called nine witnesses and she had the opportunity to cross-examine Jerry's witnesses. One of Mel's intended witnesses, Gene Mosely, was not present because he

apparently did not receive a subpoena, and the court refused to allow the case to be reopened for Mosley's testimony. Upon reviewing the custody proceedings, we believe Mel received a fair hearing and we cannot say that the court abused its discretion in denying Mel's motion to reopen the case.

The remaining arguments of Mel in the custody appeal challenge the factors relied on by the trial court in its decision to award sole custody to Jerry. A trial court's findings regarding custody will not be reversed unless they are clearly erroneous. Basham v. Wilkins, Ky., 851 S.W.2d 491 (1993). Under KRS 403.270(2), the trial court must determine custody according to the best interest of the child, considering the following factors:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
>
> (b) The wishes of the child as to his custodian;
>
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
>
> (d) The child's adjustment to his home, school, and community;
>
> (e) The mental and physical health of all individuals involved;
>
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
> . . . .

In the custody order, the court explicitly stated that it considered the testimony of various witnesses, including Mel's expert, the parties, and Jessica. The court also relied on the

report of the court-appointed psychologist, Carol Friske, who recommended that Jerry be awarded custody. The court found that both parties were fit to have custody, but could not cooperate to effectuate joint custody. In awarding custody to Jerry, the court placed great weight on the evidence that Jessica and Mel had a very hostile relationship. Jessica testified that she harbored a great deal of resentment and anger towards her mother and that she desired to live with her father. There was evidence that on one occasion Jessica had assaulted Mel during an argument. The evidence further revealed that Jessica was in therapy, and, at one point, had even been hospitalized because of this behavior. The court considered the wishes of Jessica and also her positive adjustment to her home, school, and community in South Carolina.

In Stafford v. Stafford, Ky. App., 618 S.W.2d 578 (1981), overruled on other grounds by Largent v. Largent, Ky., 643 S.W.2d 261 (1982), this Court reversed an award of custody to the mother where the two children, ages twelve (12) and sixteen (16), expressed the desire to live with their father because of their hostility and bitterness toward their mother. The Court adjudged that, under the circumstances, an award to the mother would be a detriment to the mental and physical health of the children. Likewise, in the present case, we believe that the court's award of custody to Jerry was proper considering: the antagonistic relationship between Jessica and Mel, especially the episode of domestic violence (see KRS 403.720 and KRS 403.270(f) above); the mental health of Jessica and the fact that Jessica

was in treatment as a result of her anger toward her mother; Jessica's wishes; and Jessica's positive adjustment to her home, school, and community in South Carolina. Accordingly, we reject Mel's arguments that the court's decision was based on improper factors and affirm the award of custody to Jerry.

We now turn to Mel's appeal of the November 5, 1995 order regarding the financial issues. Mel first maintains that the court abused its discretion in awarding her maintenance of only $400 a month for three years. Under KRS 403.200(1), a court may award maintenance only if it finds that the spouse lacks sufficient property to provide for her reasonable needs and is unable to support herself through appropriate employment. KRS 403.200(2) sets out the factors the court should consider in determining the amount and period of maintenance:

> (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.

The determination of whether to award maintenance and the decision as to how much and for how long maintenance should be awarded is highly within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. Beckner v. Beckner, Ky. App., 903 S.W.2d 528 (1995); Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). In reviewing the evidence, we agree that Mel was entitled to maintenance. At the time of the divorce, Mel did not have sufficient property to meet her reasonable needs and was unable to support herself through appropriate employment. The question is, was $400 a month for three years inadequate considering the relevant factors in KRS 403.200(2)?

The parties were married for over 19 years and their standard of living was relatively high at certain points. However, it appears that it was artificially high since the parties accumulated a considerable amount of consumer debt during those years. It is undisputed that Jerry was earning approximately $83,000 a year working for the Veteran's Administration. Mel was nearly 50 years of age and unemployed at the time of the decree. She had not been employed outside the home for 18 years, since she worked part-time for Jerry. She did, however, work at home as the primary care giver for Jessica while the parties were married. She received her degree in interior design prior to the divorce, as well as a real estate license. She also has a degree in health education and her work experience in the dental field. Mel testified at the hearing

that she was optimistic about her job prospects. Neither party was awarded any income-producing property.

In our view, the court abused its discretion in awarding Mel maintenance of only $400 a month for three years. Although Mel will presumably eventually find employment, it will doubtless be more difficult for her to advance in any job, given her age and the fact that she has been out of the work force for so long. Further, she will never earn the kind of money that Jerry earns. The parties were married for almost 20 years and Mel devoted much of that time to taking care of Jessica and helping Jerry in his practice. We simply do not believe that $4800 a year for three years is adequate to meet Mel's reasonable needs, given Jerry's income and the above facts. Accordingly, we reverse and remand for an increase in the award of maintenance to Mel considering the above stated factors.

Mel's next argument is that the court abused its discretion in ordering her to pay child support without reconsidering the maintenance award. Under the child support guidelines, KRS 403.212(2)(b), "gross income", for purposes of determining child support, specifically includes maintenance payments. Thus, contrary to Mel's position, simply because a non-custodial parent is reliant on a former spouse for maintenance, does not absolve that parent of her obligation to pay child support. Pursuant to KRS 403.212(2)(d), the court imputed approximately $1,200 a month in income to Mel in determining the amount of the child support under the guidelines. We do not see this as error. In any event, to the extent that we

are vacating the award of maintenance for an increase, Mel's argument is moot.

Mel's next assignment of error is in regards to the court's division of marital property and debt. Mel argues that it was reversible error to fail to allocate the debt incurred by Mel for the support of her and Jessica during the parties' separation. According to Mel, the $26,000 of debt was the result of personal loans necessary for their support and to pay Jessica's private school tuition. The court found that some of the debt was the result of Mel's unilateral decision to send Jessica to private school, but that Mel was the primary beneficiary of the funds. Findings of fact as to the division of marital property will not be reversed if they are supported by substantial evidence. Adams v. Adams, Ky. App., 565 S.W.2d 169 (1978). There is no presumption that all debts incurred during the marriage are marital. Bodie v. Bodie, Ky. App., 590 S.W.2d 895 (1979). In O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980), the Court adjudged certain debts incurred by the husband after the separation, for the children's school, income taxes and rent, to be non-marital. In the present case, there was evidence that Jerry did not approve of continuing to send Jessica to private school because the parties could no longer afford it. Thus, we cannot say the court abused its discretion in finding the debt arising therefrom to be non-marital. Similarly, as to the debt of which Mel was the beneficiary, there was no error in finding it to be non-marital since it was after the parties had separated.

Mel also complains that the court erred in allowing Jerry a credit upon the sale of the marital residence for the pendente lite maintenance paid after Mel moved back into the house and for the mortgage payments made after the decree was entered. Mel contends that by getting a credit for the mortgage payments and the pendente lite maintenance essentially allowed Jerry to "double dip" from the sale proceeds of the house. We do not agree. The pendente lite maintenance payments for which Jerry received a credit were payments made before the decree, and the court was justified in giving a credit by the fact that the pendente lite maintenance was based on Mel's expenses for living in Louisville. When she moved back to the marital residence in Danville on which Jerry was still paying the mortgage and utilities, her expenses were significantly reduced. Conversely, the mortgage payments for which Jerry received a credit were those made after the decree. We cannot say the court abused its discretion in allowing Jerry a credit for those payments since the court awarded each party one-half of the sale proceeds from the house in the decree. It would be unfair to then require Jerry alone to make the mortgage payments after the decree and not get a credit therefor at the time of the sale. See Drake v. Drake, Ky. App., 809 S.W.2d 710 (1991).

We shall next address the remaining appeal regarding the court's denial of Mel's motions for attorney's fees and sanctions. Mel's first motion for attorney's fees was for those fees incurred in litigating the financial issues of the parties. On appeal of the denial of that motion, Mel failed to name her

attorney below, Gene Mosley, as a party to the appeal. Thus, this issue is precluded from our review. See Carter v. Carter, Ky., 382 S.W.2d 400 (1964).

Mel also appeals from the order denying her motion for advance of attorneys fees for the custody portion of the case. Under KRS 403.220, a court may award reasonable attorney's fees in a domestic action "for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment." The allocation of court costs and attorney's fees under this statute is entirely within the discretion of the trial court. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). In the present case, Mel ultimately represented herself on the custody matter and, thus, incurred no attorney's fees. Further, there is no authority for allowing a party an advance of attorney's fees. KRS 403.220 clearly refers to legal services that have already been rendered, not services that are to be rendered in the future. Accordingly, the court did not err in refusing to order the advance of attorney's fees for Mel.

The final issue for our review is Mel's appeal of the order denying her motion for a hearing regarding a reprimand or sanctions against Jerry's attorney, Delores Pregliasco. Mel alleged that Ms. Pregliasco made false statements of material fact in her pleadings. Upon reviewing the record, we believe the trial court did not abuse its discretion in refusing to impose CR 11 sanctions against Jerry's attorney and, thus, properly denied the motion for a hearing thereon. See Pendleton v. Centre

College, Ky. App., 818 S.W.2d 616 (1990) and Clark Equipment Co., Inc. v. Bowman, Ky. App., 762 S.W.2d 417 (1988).

For the reasons stated above, we vacate the maintenance award and remand for a recalculation of maintenance consistent with this opinion. As to the remaining issues, we affirm the orders of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT IN CASE NOS. 1996-CA-000114, 1996-CA-001418 and 1996-CA-001471:

Bonnie M. Brown
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BRIEF FOR APPELLANT IN CASE NO. 1996-CA-003233/REPLY BRIEF IN CASE NO. 1996-CA-001471:

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BRIEF FOR APPELLEE:

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