

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001030-MR

CALVIN MICHAEL MOSLEY

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 97-CI-01148

ANGELA RENE MOSLEY

APPELLEE

OPINION

AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: GUIDUGLI, MILLER AND EMBERTON, JUDGES.

GUIDUGLI, JUDGE: Appellant, Calvin Michael Mosley, appeals from the following orders of the Hardin Circuit court: (1) the opinion and order entered on March 10, 1998, which awarded custody of the children, child support, tax exemptions, property, retirement benefits, maintenance, special maintenance, debt, and attorney fees to the parties; and (2) the order entered on April 9, 1998, which denied his motion to set aside, vacate, or amend the court's order. After reviewing the record, we affirm in part and reverse and remand in part.

On July 28, 1997, appellee filed a petition for dissolution of marriage in Hardin Circuit Court. After a hearing, the DRC found that it was in the best interest of the three children to award joint custody to the parties, with appellee having primary physical possession of Calvin, Jr. and Michelle, and appellant having primary physical possession of William. The DRC also awarded appellee child support of \$473.00 per month, maintenance of \$500.00 per month for twelve months, and special maintenance consisting of a \$1000.00 payment for relocation and furniture expenses. Upon review of the DRC's report and the parties objections, the circuit court awarded maintenance of \$500.00 per month until appellee remarries, dies, or reaches the age of 65 and adopted the DRC's recommendations for the remainder of the issues. On March 20, 1998, appellant filed a motion to set aside, vacate, or amend the court's order. On April 9, 1998, the circuit court denied appellant's motion. This appeal followed.

Appellant argues that the circuit court erred by awarding physical custody of Calvin, Jr. to appellee. As a general rule, a trial court has broad discretion in determining the best interest of children when awarding child custody. Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983). It is clear from the record that Calvin, Jr., a teenager at the time of the hearing, expressed a desire to live with appellee. Apparently, there was a history of difficulties surrounding the disciplining of Calvin, Jr. by appellant. After reviewing the record, we cannot say that the circuit court abused its discretion. Dudgeon v. Dudgeon,

Ky., 458 S.W.2d 159, 160 (1970); Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

Second, appellant argues that the circuit court erred by adopting the DRC's recommendation to award appellee \$473.00 per month in child support because (1) the \$500 per month maintenance award was not included in appellee's gross income, and (2) the DRC failed to utilize a forty-hour work week in calculating appellee's potential income under Kentucky Revised Statute (KRS) 403.212(2)(d). Review of the Child Support Schedule establishes that the maintenance awarded to appellee was not included within the appellee's gross income, as required by KRS 403.212(2)(b). However, after appellant filed his notice of appeal in this case, he filed a motion to reduce child support in circuit court. Appellant moved the court to include the maintenance payments in the appellee's gross income and recalculate appellant's child support obligation. As appellant requested, the DRC recalculated appellant's child support obligation and included the maintenance award in appellee's gross income; therefore, the issue concerning the child support payments before this court has become moot.

The second alleged error concerned the calculation of appellee's potential income under KRS 403.212(2)(d). The DRC calculated appellee's gross income by looking at her prevailing job opportunities, which consisted of a position earning \$6.35 per hour for 34 hours per week. Appellant argues that because appellee is capable of working a 40 hour per week job, her potential income should reflect such employment. If a parent is

unemployed or underemployed, the court is required to calculate child support based upon the parent's potential income. KRS 403.212(2)(d). Potential income is determined by the parent's "employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community." KRS 403.212(2)(d). Based on appellee's recent work history as a cashier, her limited occupational qualifications, and her most prevailing job opportunity, the circuit court's calculation is not clearly erroneous.

Appellant also attempts to argue that the circuit court erred in its order entered on May 26, 1998, which denied his motion to reduce child support. Because appellant's notice of appeal was filed on April 22, 1998, prior to the circuit court's order, any alleged error that occurred is not properly before this court.

Third, appellant contends that the circuit court abused its discretion by adopting the DRC's recommendation of awarding "special" maintenance. The DRC awarded appellee a lump sum payment of \$1000.00 as a "special" maintenance award for furniture and moving expenses. There is clearly no statutory authority for the court to award "special" maintenance, and KRS 403.200 should not be construed to meet that end. The circuit court abused its discretion in awarding "special" maintenance to appellee in the amount of \$1000.00 for furniture and moving expenses.

Finally, Appellant argues that the circuit court erred by awarding appellee maintenance of \$500.00 per month until she remarries, dies, or reaches the age of 65. The determination of whether to award maintenance is highly discretionary with the trial court after its consideration of the dictates of KRS 403.200. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). Appellant's monthly gross income was \$2,874.40, while appellee's potential monthly gross income was properly estimated at \$935.50. Appellant's monthly payments of \$500.00 for maintenance and \$473.00 for child support decrease his monthly gross income to \$1901.40 and increase appellee's monthly gross income to \$1908.50. After reviewing the property division, the duration of the marriage, and the age and education of appellee, the award of maintenance of \$500.00 per month is not clearly erroneous or an abuse of discretion.

By order entered on January 5, 1999, we denied appellant's motion to reconsider this court's order of October 28, 1998, which denied his motion for leave to add appellee's attorney of record as a named party to this appeal. Therefore, we decline appellant's invitation to review his argument concerning the award of attorney fees.

For the reasons stated above, this court affirms the orders of the Hardin Circuit Court regarding the issues of child custody, child support, and maintenance but reverses in regard to the award of "special" maintenance and remands for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

H. D. Callicotte
Radcliff, Kentucky

BRIEF FOR APPELLEE:

Lawrence F. Smith
Radcliff, Kentucky