

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002755-MR

JOE BARTLETT HILL

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CI-00325

DEBORAH ANN GREEN HILL

APPELLEE

OPINION
AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

McANULTY, JUDGE: In this divorce case, Joe Bartlett Hill (Joe) challenges the trial court's temporary and permanent child support orders. Joe claims that the trial court deviated from the child support guidelines without making a specific finding that was appropriate to do so in this case. In addition, Joe argues that it was fundamentally unfair for the trial court to order Joe to make the monthly payments on the former marital mobile home and pay his ex-wife \$10,500.00 -- within 90 days -- for her interest in the mobile home, but be deprived of its

possession for another six years (the time it would take until the youngest child reached the age of 18). Because it appears that the trial court did deviate from the child support guidelines and did not make a finding that it was appropriate to do so in this case, we vacate and remand. In addition, we vacate the trial court's order as to the division of the equity in the mobile home because such a division constituted an abuse of discretion given Joe's assets and financial situation after the divorce. We affirm, however, that part of the order that pertains to Joe's responsibility for the monthly mobile home loan payment.

Joe and Deborah Ann Green Hill (Deborah) married on July 4, 1981. When they married, Deborah had just turned 16 and Joe was 21. For the majority of their marriage, they resided in a mobile home on property located in Page Cutoff, Bell County, Kentucky.

Deborah and Joe have two sons who were 15 and 10 at the time Deborah and Joe separated in July of 2003. Prior to their separation, Joe spent little time at the family's home -- no more than 12 nights in the three years leading up to the separation.

At the time of separation, Deborah was a cook with the Bell County Board of Education, and Joe was a traveling salesman for Logan Corporation. Deborah filed her petition for

dissolution of marriage on July 16, 2003. In the verified statement attached to Deborah's petition, Deborah stated that her income was \$10,000 a year, and Joe's income was approximately \$45,000 a year. At some point between the time that Deborah petitioned for divorce and the time of the final hearing in December of 2003, Deborah received a promotion and a raise. She was promoted to food service manager for Bell County schools.

At the time she filed her petition, Deborah also filed a motion for temporary custody, child support and maintenance. The trial court heard the motion less than two weeks later. Although Joe was served with the motion, neither he nor an attorney on his behalf appeared at the hearing.

At the conclusion of the hearing, the trial court issued an order granting temporary custody to Deborah. On the issue of child support, the court asked Deborah's attorney if he computed child support based on Deborah and Joe's incomes. Deborah's attorney responded that the monthly child support obligation was \$933, and Joe made 80 percent of the monthly income. After hearing this, the trial court ordered Joe to pay Deborah \$750.00 per month in child support and \$750.00 per month in temporary maintenance. At this point, neither party had supplied income statements to verify his or her income.

Two and a half months after the trial court issued the order setting temporary child support and maintenance, Joe filed a motion to reduce child support. The basis of his motion was that he had not seen a chart computation on child support. The record reflects that Joe voluntarily continued this motion for a hearing about a month later than previously noticed. After a hearing, the trial court issued an order directing the parties within 10 days to submit proposed findings of fact, conclusions of law and judgment including completed child support charts.

About a week after the deadline for submitting proposed findings and conclusions, the trial court made its findings of fact and conclusions of law and issued its judgment and decree of dissolution. Deborah was awarded sole custody of the couple's two sons.

The key provisions of the decree for the purposes of this appeal are as follows:

FINDINGS OF FACT

(9) The parties have acquired the following personal marital assets:

. . .

(d) The Respondent shall receive his bicycle, Grandmother's rocking chair, gun safe, pine gun cabinet, personal clothing, reloading bench, chest of drawers, Army cot, guns, 2 carat diamond ring, 1996 Nissan pickup truck and chainsaw.

. . .

(10) The Court finds from the record that the value of the real property and its improvements is \$50,000.00, . . .

(11) The parties hereto owe \$24,000.00 against the said property and the value of the property unimproved is set out as \$5,000.00, both in the appraisal and in the tax assessment. The Court finds that the unimproved real property is that of the Respondent and is non-marital.

(12) The property is worth \$50,000.00 and there is \$29,000.00 in debt against it. There remains herefore \$21,000.00 of equity therein.

(13) The Respondent shall pay to the Petitioner within ninety (90) days of this date \$10,500.00 as her determined equity in the improvements to this property.

(14) Thereafter, the Respondent shall pay the monthly payments on the said home to Greentree Financial or their assigns until the youngest child reaches the age of eighteen (18). On or before July 1st of the year in which the youngest child turns eighteen (18), the Petitioner shall vacate the premises and it shall become the sole property of the Respondent.

. . .

(16) The parties have the following marital debts with approximate amounts:

- a. Greentree - Security agreement on mobile home - \$25,000.00.

. . .

(26) The Petitioner testified that she had received substantial raises and promotions since she has last sworn that she earned \$10,000 per year in this case.

(27) Per the pay records of the Petitioner's employer, the Petitioner's gross pay was \$608.21 every two weeks for a yearly gross of \$608.21 @ 26 equals \$15,813.40. Her monthly gross for the child support chart is \$1,317.78 (\$15,813.40 divided by 12 equals \$1,317.78).

. . .

(29) Per the payroll records subpoenaed from the Respondent's employer to the Court the Respondent's gross pay is \$3,213.50 per month.

. . .

(32) The Respondent shall pay to the Petitioner child support in the amount of \$700.00 per month beginning January 01, 2004, plus seventy-one (71%) percent of all unreimbursed medical, surgical, dental, orthodontic, optometric, nursing and hospital expenses, . . .

It is from these findings and conclusions that Joe appeals. And Joe appeals from the trial court's failure to adjust his temporary child support from the time he filed his motion to modify.

Joe presents three arguments for our review. First, Joe argues that the trial court erred in failing to reduce his temporary child support obligation of \$750 per month. Second, Joe contends that the trial court erred in ordering him to pay \$700 per month permanent child support plus the \$299.14 payment on the mobile home. Third, Joe argues that the trial court abused its discretion in ordering him to pay Deborah within 90 days \$10,500.00 for her equity in the mobile home.

The first step in resolving the issues raised by Joe is identifying the appropriate standard of review. Two different standards are applicable -- the clear error standard for findings of fact and the abuse of discretion standard for conclusions of law. As to the trial court's findings of fact, CR 52.01 states that these findings shall not be set aside unless we determine that they are clearly erroneous. Under this clear error standard, factual findings supported by significant

probative evidence will not be disturbed. See Poe v. Poe, 711 S.W.2d 849, 851 (Ky.App. 1986). And as to the trial court's conclusions drawn from its factual findings, the abuse of discretion standard of review applies. See Eviston v. Eviston, 507 S.W.2d 153, 153 (Ky. 1974). We will not reverse the trial court unless a party shows that the trial court abused its discretion.

Guided by these standards, we turn to the issue of the trial court's calculation of temporary and permanent child support. Joe argues that the trial court did not follow the guidelines in establishing his child support. Joe argues that a trial court is to use the child support guidelines set out in KRS 403.212 to establish child support. And if a court deviates from the guidelines, it has to make a written finding specifying the reason for the deviation. Here the trial court deviated from the guidelines, but did not make a specific finding as to why it was appropriate to do so in this case.

As to the temporary child support, a temporary child support order terminates when the final decree is issued. KRS 403.160. Based on the evidence in the record as of the hearing for temporary child custody and child support, it is apparent that the trial court failed to appropriately account for Joe's court-ordered temporary maintenance payments of \$750. In the final decree, however, the trial court did modify the child

support that it had previously established and found that Deborah was no longer entitled to maintenance.

So, what is to be the effect of this Court's determination that the trial court erred in establishing the amount of temporary child support? Although Joe does not directly request recoupment of the amount he may have overpaid under the child support guidelines, that seems to be the remedy he desires. However, restitution or recoupment of excess child support is inappropriate unless an accumulation of benefits exists that was not consumed for support of the child. See Clay v. Clay, 707 S.W.2d 352, 353 (Ky.App. 1986) (considering the public policy behind and the purpose of child support -- the obligation of the parent to the child, not from one parent to another -- and discussing the question of "whether the reversal or vacation of a child-support decree gives the payor the right of restitution or recoupment for amounts previously paid"). As Joe failed to argue before the trial court that any amounts he may have overpaid were not consumed for the support of his two children much less acknowledge this precedent on appeal, we shall consider the matter no further.

We move to Joe's argument that the trial court erred in ordering Joe to pay \$700.00 per month in permanent child support plus the \$299.14 monthly payment on the loan for the mobile home. First, Joe argues that the trial court erred in

calculating his monthly child support obligation. Based on the combined monthly adjusted parental gross income, his monthly child support obligation should be \$660.00 per month. We agree and remand for a determination of permanent child support in accordance with the guidelines.

Joe goes a step further and argues that the monthly payment of \$299.14 per month must be considered in the nature of child support. If not considered in the nature of child support, it should be considered in the nature of spousal maintenance and should have been deducted -- in accordance with the child support guidelines -- from the combined monthly adjusted parental gross income.

In response, Deborah argues that the loan payment is not concealed maintenance or child support. It is the assignment of marital debt to Joe, the person who will have the asset in the end. And KRS 403.190(1)(d) provides for the award of the family home or the right to live therein for a reasonable period to the spouse having custody of the children.

In its findings, the trial court listed the debt to Greentree as a marital debt. Consistent with its allocation of the parties' other marital debt, it then assigned responsibility for the debt to the party who was awarded the asset. Deborah was awarded sole custody of the children, so the trial court awarded her the right to live in the mobile home until the

youngest son was 18. But the trial court awarded the mobile home to Joe.

We review issues pertaining to the assignment of marital debt for abuse of discretion. See Neidlinger v. Neidlinger, 52 S.W.3d 513, 523 (Ky. 2001). We conclude the trial court did not abuse its discretion in assigning the debt on the financing of the mobile home to Joe.

We move to Joe's last argument that the trial court erred in ordering him to pay Deborah \$10,500.00 within 90 days for her equity in the mobile home. Joe does not dispute the amount he owes, but argues that the trial court abused its discretion in requiring Joe to pay immediately. Joe believes he should not have to pay Deborah her equity in the mobile home until he is able to take possession of the mobile home. It was unfair and inequitable to order him to pay her immediately, and Kentucky case law supports this position. See Cochran v. Cochran, 746 S.W.2d 568, 569 (Ky.App. 1988)(obligation to pay one-half equity to former spouse who was awarded the right to live in the marital home until the couple's minor child turned 19 arose when spouse vacated the home); Stephanski v. Stephanski, 473 S.W.2d 806, 807 (Ky. 1971)(under divorce decree wife permitted to remain in home with three children until the youngest child turned 18, at which time the residence would be

sold and wife would be entitled to one-third of the net proceeds).

Considering the parties' assets and liabilities and the division of property in this case, we conclude that requiring Joe to pay Deborah \$10,500.00 within 90 days constituted an abuse of discretion. Thus, we vacate and remand.

For the foregoing reasons, the trial court's judgment and decree of dissolution are affirmed in part and vacated and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Marcia A. Smith
David O. Smith
Corbin, Kentucky

BRIEF FOR APPELLEE:

Bill Hayes
Hayes Law Office
Middlesboro, Kentucky