

RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001550-ME

FORREST A. HOBBS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE CARL HURST, SPECIAL JUDGE
ACTION NO. 02-FC-504667

RUTH ANN HOBBS
And
MARK H. GASTON, ESQ.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Forrest A. Hobbs (Forrest), pro se, brings this appeal from "Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage," entered July 6, 2004, from the Jefferson Family Court. Before us, Forrest argues that the family court erred in the award of custody; the amount of child support; the amount and duration of maintenance; the failure to

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

assess interest in the division of the marital residence; and the award of attorney fees.

We review questions of fact under the clearly erroneous standard of Kentucky Rule of Civil Procedure (CR) 52.01 and questions of law *de novo*. As we conclude that the findings of the family court are supported by substantial evidence and are not an abuse of discretion, and that there was a correct application of the law, we affirm.

Forrest and Appellee Ruth Ann Hobbs (Ruth) were married on January 20, 1979, one week after Ruth graduated from high school. Forrest served sixteen years in the United States Army. During the moves associated with the military, Ruth worked various jobs such as secretary, cashier, and resident apartment manager. The parties separated briefly in the 1980s. Their only child, a son, was born in 1992. In November, 1994, Forrest retired from the military and worked in several management positions before taking employment in 1998 as a letter carrier with the United States Postal Service. In 1999, Ruth began working as a teacher's aide with her son's public elementary school. On November 19, 2002, after twenty-three years of marriage, the parties separated. At the time of the separation, Forrest, 42, was earning \$50,000.00 to \$55,000.00 per year. Ruth, 41, was earning \$11,000.00 annually.

Ruth, through counsel, filed for dissolution on November 25, 2002, and Forrest, through counsel, counter-petitioned one month later. On April 23, 2003, the parties appeared before Family Court Judge Patricia Walker Fitzgerald and agreed to equal time with their son, alternating nights and weekends; division of personal property, with the exception of vehicles; and continued payment of \$1,500.00 per month by Forrest to Ruth. Mediation of the remaining terms was unsuccessful.

At a case management conference before Judge Fitzgerald on September 29, 2003, the parties agreed to share joint custody and to continue to share equal time with their minor son; accept the appraised value of the home, including \$35,000.00 in equity; division of personalty; division of Forrest's retirement by Qualified Domestic Relations Order unless offset by other assets; maintenance of life insurance by Forrest with the minor child as beneficiary; and responsibility by Forrest for the Fleet credit card debt and by Ruth for the Capital One credit card debt.

Remaining issues were heard on January 14, 2004, before Special Judge Carl Hurst. Both parties appeared with counsel and the family court made the following findings, now contested on appeal by Forrest:

E. . . . That [Ruth] and [Forrest] shall be awarded joint custody of the parties['] minor child with [Ruth] being declared the minor child's primary custodial parent and residential custodian.

F. That [Forrest] shall pay unto [Ruth], without reduction based upon the parties['] time share, child support in the sum [of] \$529 dollars per month which is based upon the Kentucky Child [S]upport Guidelines, taking into consideration [Ruth's] maintenance award and maintaining health insurance on the parties['] minor child by wage assignment. The parties shall split any extraordinary uncovered medical, dental, orthodontic, vision, counseling or other expense incurred on behalf of the parties['] minor child with [Ruth] paying 36% and [Forrest] 64% within 30 days of receipt of final bill.

G. That the within marriage is an old Fashion [sic] marriage, one where [Ruth] stayed home, forgoing a career in order to care for [Forrest] and raise the parties['] child without the development of business necessary skills, a decision that was condoned and encouraged by [Forrest]. As such it is deemed that [Ruth] is awarded life time maintenance at a rate that will help her meet her expenses and live a life that she has come to enjoy at the rate of \$1,384 per month, by wage assignment, until she dies, remarries or cohabitates with a person of the opposite sex on a permanent basis.

H. [Ruth] shall be awarded sole possession of the parties['] marital residence. [Forrest] shall Quitclaim his interest therein unto [Ruth] upon the presentation of such deed. [Forrest] shall receive his equity interest from the parties['] marital residence through [Ruth's] waiver of her marital portion of [Forrest's] military retirement for a period of six years commencing January 2004. [Ruth] shall be free to assign transfer covey [sic] or otherwise sell her interest therein.

[Ruth] shall assume responsibility for the indebtedness on the parties['] marital residence . . . and the debt owed to MSD thereon. . . .

* * * * *

K. [Forrest] shall pay unto counsel for [Ruth] the sum of \$3,400 in attorney fees upon entry of this order.

* * * * *

After his counsel withdrew, Forrest proceeded with this appeal pro se. No brief was filed on behalf of Appellee Ruth or Appellee Mark H. Gaston, Esq.

Forrest first takes issue with the family court's findings as to custody, because although the court awarded the parties joint custody in accord with their pre-trial agreement, the court further named Ruth as "the minor child's primary custodial parent and residential custodian." As the Kentucky Supreme Court noted in Fenwick v. Fenwick, 114 S.W.3d 767, 778-79 (Ky. 2003), the term "primary residential custodian" is not defined in the Kentucky statutes, however, the trial court is authorized to appoint such a custodian, in keeping with the best interests of the child:

A child cannot simultaneously reside with both parents, and in most cases, the child will spend more time with one parent than the other - a fact that, in many cases, mirrors the family's situation prior to the parents' separation. Accordingly, in joint custody arrangements, the parties will often agree, *or the court will designate*, that one of the parents will act as the "primary residential custodian."

(citations omitted)(emphasis added). "[E]ven in joint custody cases, there is a primary custodian and the issue is not where the child stays." Chalupa v. Chalupa, 830 S.W.2d 391, 393 (Ky.App. 1992). "[D]esignating a party as the primary residential custodian logically confers on that party: (1) the primary role in minor day-to-day decisions concerning the child; (2) the responsibility for providing a residence, *i.e.*, a 'home base,' for the child, and (3) the normal routine care and control of the child." Fenwick, 114 S.W.3d at 779.

In keeping with the above, at the trial the court told the parties that, despite joint custody, it was imperative to have a primary residential custodian to allow the child a home "to run to." This was understood without objection. As indicated above, this was within the court's discretion, and did nothing to denigrate the agreement of the parties as to joint custody. We find no misapplication of the law.

Forrest next contends that the family court erred in the award of child support, alleging that the court did not utilize maintenance, military retirement, or health care in its computation of gross income, and further alleging that Ruth is voluntarily underemployed. Our review of this factual contention is subject to the following standard:

As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child

support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court. KRS 403.211-KRS 403.213; Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975). This discretion is far from unlimited. Price v. Price, Ky., 912 S.W.2d 44 (1995); Keplinger v. Keplinger, Ky.App., 839 S.W.2d 566 (1992). But generally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings. Bradley v. Bradley, Ky., 473 S.W.2d 117 (1971).

Van Meter v. Smith, 14 S.W.3d 569, 572 (Ky.App. 2000). Stated another way, this court will not disturb the trial court's findings unless the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Downing v. Downing, 45 S.W.3d 449, 454 (Ky.App. 2001).

Herein, the court awarded to Ruth \$529.00 per month in child support, and despite Forrest's contentions otherwise, the court specifically relied on the Kentucky Child Support Guidelines (Kentucky Revised Statutes [KRS] 403.212), and considered the financial considerations of the parties and Ruth's employability. As such, the findings are supported by substantial evidence and we are unable to conclude that the family court abused its discretion in awarding child support.

Forrest next contends that the family court erred as to the amount of maintenance, alleging that it failed to

consider KRS 403.200(2)(f), which states that any "maintenance order shall be in such amounts . . . as the court deems just, and after considering all relevant factors including . . . [t]he ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance."

As stated in Russell v. Russell, 878 S.W.2d 24, 26 (Ky.App. 1994):

It is appropriate to award maintenance when a party is not able to support themselves in accord with the same standard of living which they enjoyed during marriage and the property awarded to them is not sufficient to provide for their reasonable needs. Robbins v. Robbins, Ky.App., 849 S.W.2d 571, 572 (1993); and Atwood v. Atwood, Ky.App., 643 S.W.2d 263, 265-66 (1982). Furthermore, where a former spouse is not able to produce enough income to meet their reasonable needs, it is appropriate to award maintenance. Id. and Calloway v. Calloway, Ky.App., 832 S.W.2d 890, 894 (1992).

In awarding maintenance to Ruth of \$1,384.00 per month, the court considered that Ruth stayed home, "forgoing a career in order to care for [Forrest] and raise the parties['] child without the development of business necessary skills, a decision that was condoned and encouraged by [Forrest]." There was also undisputed evidence that Forrest's annual income exceeded Ruth's annual income by a five to one ratio. The amount of maintenance is within the sound discretion of the circuit court. Gentry v.

Gentry, 798 S.W.2d 928, 937 (Ky. 1990). Pursuant to Perrine v. Christine, 833 S.W.2d 825, 826 (Ky. 1992), our standard of review is whether the trial court abused its discretion, based on clearly erroneous findings of fact. Herein, the findings of the family court are supported by substantial evidence, thus we find no abuse of discretion in awarding this amount of maintenance to Ruth.

Ralph next argues error by the family court in setting the duration of maintenance for Ruth's lifetime. In Combs v. Combs, 622 S.W.2d 679, 680 (Ky.App. 1981), this Court construed an order of the trial court setting the duration of maintenance "until further orders of the court" as a permanent award of maintenance that may be rebutted. In Combs, the Court indicated that the duration of maintenance must have a direct relationship to the period over which the need exists and the ability to pay. As in Combs, Forrest has failed to rebut Ruth's showing that her needs do not have the potential to be materially different anytime soon or that she will become more self-sufficient anytime soon. Courts have upheld maintenance for longer periods than that initially deemed necessary to allow the spouse the time to acquire the skills necessary to support themselves. See Clark v. Clark, 782 S.W.2d 56, 61 (Ky.App. 1990). Although Ruth has helped to support the family through multiple clerical positions and is currently employed as a teacher's aide, given

her age, high school education, and the fact that her workforce experience was subject to the multiple moves necessitated by a military family lifestyle, leaving her without any continuity at any one particular job, the duration of the maintenance herein is supported by substantial evidence and does not amount to an abuse of discretion.

Forrest additionally argues that the family court erred in failing to assess interest in the division of the marital residence. The court awarded the residence to Ruth, requiring her to assume the remaining indebtedness but providing Forrest his equity in the home through Ruth's waiver of the marital portion of Forrest's military retirement for a period of six years. Forrest argues that the court erred by failing to assess interest on this equity at the legal rate of 12% pursuant to KRS 360.040.

Our standard of review on a question of division of property is stated as follows: "[t]his court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous . . . The property may very well have been divided or valued differently; however, how it actually was divided and valued was within the sound discretion of the trial court." Cochran v. Cochran, 746 S.W.2d 568, 569-70 (Ky.App. 1988) (citation omitted).

We decline to disturb the family court's rulings. Our review of the record indicates that there was no discussion at trial of payment of interest and the decree is silent as well. As such, KRS 360.040 is inapplicable at this time. See Courtenay v. Wilhoit, 655 S.W.2d 41 (Ky.App. 1983).

Lastly, Forrest complains error in the family court's order requiring him to pay 85% of Ruth's attorney fees, or \$3,400.00. In support, he argues that because Ruth's attorney also represented her in an automobile accident, it is unknown if this amount included time spent on the other litigation.

KRS 403.220 authorizes the award of attorney fees in a dissolution action. The trial court's ruling is subject to review only for an abuse of discretion. Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004). Ruth's attorney indicated before the court that his fees for the *dissolution* action were \$4,000.00. The record supports the family court's findings. There was no abuse of discretion.

For the foregoing reasons, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Forrest A. Hobbs, pro se
Louisville, Kentucky

No brief for appellee Ruth A.
Hobbs

No brief for appellee Mark H.
Gaston