

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000426-MR

JUSTIN R. MORGAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 03-CI-05279

PATRICE P. MORGAN

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * ** * ** *

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,¹ SENIOR JUDGE.

WINE, JUDGE: Justin Morgan appeals from a divorce decree entered by the Fayette Circuit Court, Family Division, on January 31, 2006. The issues in this case are related to the disposition of the property, assignment of debt, and custody of the children.

Specifically, Justin argues the trial court erred in finding that the 2004 tax debt was non-marital and in failing to award Justin the bedroom furniture valued at \$10,000.00. In

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

addition, Justin argues the trial court erred in giving sole custody of the parties' children to Patrice simply because Justin failed to pursue more visitation prior to this action and because Patrice had maintained physical custody of the children. Finally, Justin contends that the trial court's award of \$10,000.00 in attorney fees to Patrice was an abuse of discretion because she received an equal award of financial resources, \$6,900.00 in monthly support, and her attorney fees were unreasonable.

Relevant Facts and Proceedings

Justin Morgan and Patrice Morgan were married on May 29, 1999. Justin and Patrice had two children, Sarah Anne Morgan, born 11/20/99, and Jacob Ross Morgan, born 9/1/02. In December 30, 2003, Patrice filed for divorce; the parties reconciled for a very short time in 2004 and then separated again in June 2004.

Justin works as an attorney with a civil practice in Lexington, Kentucky. Justin's average income, prior to the parties' separation, from 2000 to 2003, was \$238,991.50. Patrice was employed by Systems Design when she and Justin married. She quit working but then returned after the parties' first child was born. Patrice testified that working outside the home did not work well after Sarah was born. Plus, Justin was urging her to not work. Thus, she quit Systems Design in 2000. In 2001, Patrice began working for Turf Town Real Estate as an agent. However, because she was unsuccessful, Patrice placed her real estate license in escrow and remained unemployed from 2001 until the parties separated.

Justin testified that prior to the parties' separation, Patrice operated on a \$10,000.00 monthly budget. As of the day of trial, Patrice worked at Lexington Furniture Store a total of 24 hours a week, earning \$250.00 per week. Patrice testified that due to child care costs and the need to care for the children herself, she was only able to work part-time.

The parties separated on December 14, 2003, but had a brief reconciliation in January 2004, before separating permanently. In June 2004, the parties reached an agreement as to child support and temporary maintenance. However, the parties had not agreed on the issues of custody, visitation, or property distribution. The trial court entered an Agreed Order on June 25, 2004, which required Justin to pay temporary maintenance and child support in the combined amount of \$6,900.00 per month. In addition, Justin would pay the minimum credit card payments which, at the time of trial, were approximately \$1,600.00 per month.

For the months of January and February 2005, Justin was in arrears on his obligation to pay temporary maintenance and child support as directed in the June 25 Agreed Order. As a result, Patrice filed a motion for contempt. The trial court heard the motion on March 1, 2005, and ordered Justin to pay the arrearage of \$20,818.69 by March 31, 2005, or be subject to contempt sanctions.

On February 23, 2005, Justin filed a motion to modify the agreed temporary order, arguing a change in circumstances. Specifically, Justin urged that the IRS had issued a levy against the parties' 2002 unpaid taxes in the amount of \$111,245.33. In

addition, Justin asserted that National City Bank had filed suit against him based on an unpaid line of credit. The trial court heard arguments on the matter and on March 22, 2005, denied Justin's motion to modify the Agreed Order.

The matter proceeded to trial on the contested issues regarding the extent and division of the marital estate, child custody, support and visitation. Prior to trial, they stipulated that the value of the marital residence was \$380,000.00. In addition, the parties agreed that a Florida time-share should be sold and the money applied to their 2002 tax liability of \$111,245.33.

While there was no visitation order in place for the parties' children, Justin and Patrice had worked out an alternating schedule where Justin would have the children for a few hours on Mondays and Thursdays after school and then every other Saturday. However, Justin has had no overnight visits with the children since the parties separated on December 14, 2003. The trial court ruled that the parties' existing custody arrangement, with Patrice having sole custody of the children, should continue as it was in the best interests of the children.

Standard of Review

In its findings of fact, the trial court held that Justin should be responsible for the 2004 tax liability minus the amount Patrice paid on the maintenance she received during the parties' separation. Justin contends this ruling is in error because the debt was incurred while the parties were still married and Justin did not start paying temporary maintenance and child support until July 1, 2004. The court further held that Justin

received \$10,000.00 in furniture. However, Justin asserts that the court erred on this issue because it failed to award him any of the furniture even though it increased the value of the property awarded to him by \$10,000.00. Justin further asserts that the court improperly mischaracterized certain debts as being dissipated marital assets.

“The trial court has wide discretion in dividing marital property . . .” and we may not disturb the trial court’s ruling on property division issues unless the trial court has abused its discretion. *Davis v. Davis*, 777 S.W.2d 230, 233 (Ky. 1989), *citing* KRS 403.190(1). KRS 403.190(1)(b) directs the court to divide the marital property in just proportions considering all relevant factors - - including the “[v]alue of property set apart to each spouse[.]” This Court will not disturb the trial court’s findings of fact unless clearly erroneous. “Findings of fact are not clearly erroneous if supported by substantial evidence.” *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky.App. 1999). “The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men.” *Id.*, *citing Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). We now turn to the arguments raised by Justin and Patrice.

The 2004 Tax Liability

Justin takes issue with the trial court’s finding that the 2004 tax debt in the amount of \$132,644.00, which occurred when the parties were still married, was labeled a non-marital debt and assigned to him. Both parties concede that the tax liability should have been designated as marital debt. The trial court found that the 2004 tax debt was

non-marital because, even though it was incurred during the marriage, it was incurred after their separation while Justin was paying temporary maintenance and child support. However, Justin contends that the 2004 tax debt was not solely incurred after separation when he was paying temporary maintenance and child support to Patrice. He points out that he was responsible for paying all of the parties' expenses through June of 2004. Justin further points out that he did not begin paying the temporary maintenance and child support until July 1, 2004, pursuant to the June 25 Agreed Order.

Conversely, Patrice asserts that the trial court was correct as to the 2004 tax debt because she and Justin filed separate tax returns for 2004. Even though Patrice failed to introduce a 2004 tax return at trial, she testified that she paid taxes on the maintenance she received from Justin for 2004. Patrice argues the trial court's assignment of the 2004 debt was thus appropriate because she was responsible for the amount of the taxes on the portion of Justin's 2004 income that benefited her during the second half of the year.

While we find some merit to this argument, the evidence presented at trial was insufficient to completely support this position. First, the June 25 Agreed Order never specified what portion of the \$6,900.00 was for maintenance only. So, while it was appropriate for the trial court to assign the debt based on Patrice's testimony that she filed a separate tax form in 2004, she never testified or presented the trial court with evidence indicating how much maintenance she declared on her tax return. Further, Justin's income was taxed in total for the year 2004. From the record, there is no way to

determine what portion of the \$132,644.00 was for the first half of the year or the second half of the year. Further, it is not necessary, as Patrice suggests, that Justin offer evidence indicating when during the year he generated the income being taxed in 2004. Justin was responsible for paying all of the parties' expenses through June 2004. Thus, Patrice benefited to some degree from his entire income for the year. On the other hand, having determined that the 2004 tax debt is a marital obligation, Patrice may be entitled to a credit for the amount she has already paid for the maintenance she received from July to December 2004. Since the trial court clearly erred in characterizing the debt as non-marital, and since the court failed to make findings on other necessary issues, we must remand the matter to the trial court for findings on how much in taxes Patrice paid for the maintenance she received from July through December 2004 and, further, for a determination of any marital share of taxes which accrued on Justin's income for January through June 2004.

The Household Furniture

The total value of all the parties' household furniture was determined by Justin's expert, Calvin D. Cranfill, to be \$10,000.00. Patrice agreed with this valuation. The parties agreed that Justin would take the bedroom furniture while all other remaining household furniture would go to Patrice. Justin testified that he attempted to pick up the bedroom furniture prior to trial but Patrice would not allow him because she wanted to wait for the court's ruling on the matter. However, at trial, Patrice agreed that Justin should receive the bedroom furniture.

Justin asserts that the trial court erred because it failed to award him any furniture but still concluded in its assignment of property that he had received furniture valued at \$10,000.00. He also points out that the trial court's findings of fact omitted an award of furniture to Patrice, yet testimony indicates that she retained all the marital furniture. In response, Patrice argues that Justin did not properly preserve this issue for review because he did not mention this error in his motion to alter, amend or vacate on February 10, 2006. However, Patrice admits that the trial court's calculation of the marital estate incorrectly credited Justin as receiving the value of the furniture that remained in her possession.

Yet, Patrice offers another explanation for the trial court's findings. Patrice suggests that the trial court may have omitted the furniture items agreed upon by the parties due to the fact that Justin purchased some furniture during the parties' separation. She further suggests the trial court may or may not have inadvertently omitted the furniture award to Justin in order to offset the value of the furniture he purchased with marital funds during the separation.

As noted above, a trial court has wide discretion in dividing marital property. "A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky.App. 2004). In this case, the trial court's finding increasing the value of Justin's property award by \$10,000.00 for furniture, when he did not receive any of the marital furniture, is wholly unfair based upon the evidence.

Thus, this issue is reversed and remanded for additional findings as to which party is entitled to what portion of the marital furniture.

Dissipation of Marital Property

Justin next argues that the trial court incorrectly characterized certain debts which he had incurred as a dissipation of marital assets. Patrice submitted a chart in her position statement to the trial court with a category titled “Debts Not Properly Paid From Marital Estate and Other Dissipation” totaling \$141,953.00. The trial court essentially agreed with the two categories but incorrectly called the entire amount “dissipation” in its own chart and referred to the amount as “non-marital expenses.” However, in the findings of fact, the trial court specifically noted which of the payments it considered dissipated marital assets. Those included Justin’s payments to the following: The Lexington Forensic Institute; Bay Investigation; Oram’s Florist; Ross Taylor; Michael Moloney; Kring, Ray, Farley & Riddle; Calvin Cranfill; John Baldwin; User Friendly Phone Book; MBNA; Emily Taylor; Grove Park Inn; the Democratic National Convention; campaign contributions; Strand Hotel; a chartered plane; and cosmetic surgery. Justin argues this was error as most of these expenses were business related.

A court may find that a party dissipated marital assets when it is satisfied by a preponderance of the evidence that marital property was expended during a period when the parties were separated or dissolution was impending and there is a clear showing of intent to deprive the other spouse of his or her proportionate share of marital property. *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky.App. 1998). As for the payments

Justin made to Emily Taylor (“Emily”), Bay Investigation, MBNA, Grove Park Inn, the Democratic National Convention, campaign contributions, Strand Hotel, a chartered plane, and cosmetic surgery, we agree with the trial court that these were correctly labeled dissipated funds. After the parties’ separation, Justin paid Emily a \$33,750.00 salary to act as his office manager for nine months. Patrice points out that Justin did not have an office manager prior to hiring Emily, nor did he hire a replacement when her employment ended. Justin then claims to have paid Emily \$35,000.00 the week before trial to satisfy a loan she had made to him during his separation from Patrice. Justin provided no evidence of the loan but testified that the actual loan amount was for less but he wanted to pay her interest. Justin and Emily went on trips, staying in lavish hotels, including the Ritz Carlton in Hawaii and a luxury hotel in London, England. In addition, Justin attended the Democratic National Convention (“DNC”) at an expense of \$15,000.00 and even made contributions to the DNC of \$5,000.00. Following the parties’ separation, Justin also chartered a plane to Florida at a cost of \$3,655.00 and spent \$3,000.00 on cosmetic surgery. Finally, Justin hired Bay Investigation to assign a private investigator to follow Patrice during the parties’ separation. Justin claims it was necessary to have Patrice followed as it was relevant to custody and maintenance. However, there is no evidence to support this argument and the expense of Bay Investigation was properly assigned as a dissipated expense.

Justin also argues that the \$200,000.00 fee reduction to receive a \$300,000.00 advance in the Zyprexa case should not be his sole responsibility since he

took the loan in order to pay taxes, current child support, and maintenance in accordance with the trial court's order. Justin argues, if anything, the loan reduced both of the parties' share of the estate. We disagree. Justin was frequently delinquent in the payment of his child support and maintenance obligations following the parties' separation even though it has been established that he spent thousands of dollars going on trips with his girlfriend and making contributions to the DNC.

From our review of the evidence, Patrice made a sufficient showing that Justin dissipated marital property during the parties' separation in order to deprive her of her share of the property. Therefore, the issue of distribution and assignment of debt as non-marital or dissipated is remanded to the trial court for findings consistent with this opinion.

On the other hand, Patrice concedes that the trial court improperly labeled all the other debts as dissipated. Justin argues the following constituted business expenses to which he offered canceled checks and invoices: Lexington Forensic Institute; Oram's Florist; Kring, Ray, Farley and Riddle; Ross Taylor; John Baldwin; and User Friendly Phone Book. The expense from the Lexington Forensic Institute was related to a particular case in Justin's firm. However, Justin testified that the cost would be recouped from the client's portion of the recovery in the case. Justin testified the flowers were sent to an injured client. Kring, Ray, Farley & Riddle were the accountants who assisted Justin in the preparation of the affidavit in support of his motion to decrease child support due to a tax levy. The User Friendly Phone Book expense was incurred for

the purpose of advertising the firm. Ross Taylor was a runner at the firm. We agree with Justin that the only evidence is that these debts were incurred for the benefit of Justin's law firm.

Nevertheless, Patrice contends that those debts were non-marital and thus properly assigned to Justin. "Debts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation, . . . whether the debt was incurred to purchase assets designated as marital property, . . . and whether the debt was necessary to provide for the maintenance and support of the family" *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522 (Ky. 2001) (internal citations omitted). In this case, the debts were incurred for the benefit of Justin's firm, which was assigned to him. The trial court would have been well within its discretion to assign these debts to Justin as his non-marital debt. Furthermore, Justin has not shown that the trial court's improper characterization of the debts compels a different division of the marital property. Consequently, we can find no reversible error on this point.

But we agree with Justin that the trial court improperly characterized the payment to Calvin Cranfill as dissipated funds. Justin hired Cranfill as an expert to value the marital estate and Justin's law practice. Cranfill's fee was \$3,750.00. The trial court then adopted Cranfill's anticipated fee collection and overhead figures even though it disagreed with his valuation of the estate. Patrice offered no alternative expert opinion on the issue. Since both parties relied on Cranfill's testimony, it was error to label his fee dissipated funds and the parties should share this expense.

Sole custody of the Parties' Two Children

Justin next argues the trial court erred in its decision to award Patrice sole custody of the children because it failed to consider all of the factors in KRS 403.270. The statute requires the trial court to “determine custody in accordance with the best interests of the child” after considering all relevant factors including those specified in the statute. KRS 403.270(2). Here, the trial court, after hearing the parties’ testimony and reviewing their post-trial statements, determined that it was in the best interests of the children to remain with their mother. The trial court noted that there had never been any motions filed regarding the custody of the minor children in this action.

Justin points out that he did express his interest in exercising joint custody, with the children primarily residing with Patrice, in his post-trial statement. However, Justin put forth no evidence indicating that joint custody was in the best interests of the children. In fact, Justin offered no response to Patrice’s testimony that Justin was an excessive drinker and had been convicted of driving while under the influence, or that he kept the conviction a secret but continued to drive the children while his license was revoked. In addition, Patrice testified that Justin spent considerable amounts of money on pornography and was concerned that the children would be subjected to pornographic material. Justin offered no testimony refuting these allegations.

The trial court concluded that the arrangement of the parties whereby Patrice had temporary custody and Justin had time-sharing with no overnight visits was working well and the existing arrangement should remain in place. The trial court,

having decided that Patrice would continue to have sole custody of the children, was hopeful to revisit the matter in the future and anticipated an increase in Justin's time-sharing and overnight visits with the children.

The court's determination of custody is subject to review under the abuse of discretion standard. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Having reviewed the record, we must conclude that substantial evidence supported the trial court's findings of fact. It follows then that the court did not abuse its discretion by concluding that it was in the children's best interests to award sole custody to Patrice with Justin continuing with time-sharing. *See Polley v. Allen*, 132 S.W.3d 223, 227-28 (Ky.App. 2004). The trial court's order is affirmed on this issue.

Attorney Fees

Lastly, Justin argues that the trial court erred in apportioning him \$10,000.00 of Patrice's attorney fees. In its determination of attorney fees, the trial court recognized that Patrice had allegedly spent \$28,096.44, much of which was for contempt issues prior to the final hearing when Justin was delinquent in paying child support and maintenance. The award of attorney fees is entirely within the discretion of the trial court. *Poe v. Poe*, 711 S.W.2d 849 (Ky.App. 1986). Considering that the contempt issues contributed to the amount of fees which Patrice incurred and the fact that there is a disparity in the financial resources of the parties where Justin is in a much better position to pay, the trial court did not abuse its discretion in ordering Justin to pay \$10,000.00 in attorney fees.

Therefore, we affirm in part, reverse in part, and remand this matter to the trial court with directions to make findings in accordance with the above opinion.

ALL CONCUR.

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