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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001747-MR

NANCY DAVIDSON APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 06-CI-00939

BRIAN DAVIDSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Nancy Davidson (Nancy) appeals the August 1, 2008, order of the Boyd Circuit Court. That order adopted a February 13, 2008, domestic relations commissioner's report in the dissolution of the marriage of Nancy and Brian Davidson (Brian). Nancy appeals the custody decision of the order, the

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[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

allocation of debt between the parties, and the court's failure to award her temporary child support. Because we hold that the trial court has not abused its discretion, we affirm

The parties were married on July 2, 1999, and one child was born of the marriage. On September 28, 2006, Nancy filed a petition for dissolution of marriage. On October 10, 2006, Nancy filed a motion requesting, among other things, temporary child support. No order was ever entered granting or denying Nancy's motion. On December 30, 2006, Nancy, along with the parties' minor son, moved to Oklahoma. Hearings were held before the Domestic Relations Commissioner on June 6, 2007, July 30, 2007, and October 29, 2007. During the pendency of the action, Brian continued to make payments on the parties' Chevrolet Trailblazer, as well as provide insurance on the vehicle. On August 31, 2007, the trial court entered an order that the Trailblazer be sold and the remaining debt be split equally between the parties. On February 13, 2008, the Commissioner entered her report, recommending, among other things, that the parties share joint custody of their child, with Brian being the primary physical custodian. Exceptions were filed and heard, and on August 1, 2008, the trial court entered an order confirming the Commissioner's report. Nancy filed a motion to alter, amend, or vacate on August 4, 2008. On August 22, 2008, the trial court entered an order confirming the Commissioner's report, with the exception of Nancy's time-sharing, which the court then altered. This appeal followed.

Nancy first appeals the award of primary physical custodian to Brian. Specifically, she argues that the award was an abuse of discretion and was not supported by substantial evidence. Nancy maintains that she should be awarded custody or, in the alternative, that the matter should be remanded to the trial court for further findings, due to the length of time that passed from the original hearing and the entry of the final order.

A custody award shall not be disturbed unless it constitutes an abuse of discretion. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782-783 (Ky. App. 2002).

> 'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.' The exercise of discretion must be legally sound.

Id. at 783 (citations omitted).

Nancy argues that several of the Commissioner's findings are improper and unsupported.

> Findings of fact shall not be set aside unless clearly erroneous, and *due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses*. A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. After a trial court makes the required findings of fact, it must then apply the law to those facts.

Sherfey, 74 S.W.3d at 782 (emphasis added).

The first finding that Nancy challenges addresses when she left for Oklahoma. It was agreed between the parties that Nancy left earlier than agreed. Just how early Nancy left was a disputed fact among the parties. Nancy argued that she only left one day early, while Brian argued, and the Commissioner agreed, that she left two days early. Nancy argues that she was "faulted" for this finding. Because it is within the court's discretion to believe one party's testimony over the other, Nancy has failed to show that this finding is improper. Furthermore, as the parties both agreed that Nancy left town early, a discrepancy of one day in the finding would be so harmless that a reversal would not be warranted.

Nancy next challenges the Commissioner's finding that Nancy had enrolled the parties' son in a different school other than the one originally mentioned by her. Nancy has failed to show that this finding is improper. Again, this is an example of the Commissioner choosing to believe the testimony of one party over the other, and it appears that Nancy's main criticism of the Commissioner is that she chose to believe Brian's testimony over that of Nancy. The record supports the Commissioner's other findings that the child's school progress was poor, that Brian had encountered difficulties in talking with his son, that Nancy may have been saying inappropriate things to the child, and that Nancy initiated an investigation into unsubstantiated sex abuse allegations. As a whole, the record supports what appears to be the Commissioner's belief that Nancy's testimony was disingenuous. As the Commissioner is the party in the best position

to judge the credibility of the witnesses, and possesses the authority to do so, we see no abuse of discretion.

Nancy also argues that the passage of time between the hearings and the eventual entry of an order warrants further hearings. We do not agree. The passage of time, in and of itself, is an insufficient circumstance to warrant a change in custody. Custody modifications are governed by KRS 403.340, which states, in pertinent part:

> (2) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:
>
> > (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or
> >
> > (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

As Nancy has failed to indicate that either of these situations were present, the trial court acted appropriately in denying a modification based on the passage of time or any other changed circumstances.

Nancy's final argument is that the trial court's assignment of one-half the debt for the Trailblazer was an abuse of discretion. Nancy argues that the assignment should be vacated due to the trial court's failure to set child support for the parties' child. As property and child support are two distinct issues this argument is actually two challenges: one to the debt division, another to the failure to grant child support. We will address each in turn.

The division of marital property is within the sound discretion of the trial court and will not be disturbed unless we find an abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519-520 (Ky. 2001).

> In dividing marital property, including debts, appurtenant to a divorce, the trial court is guided by Kentucky Revised Statute (KRS) 403.190(1), which requires that division be accomplished in "just proportions." This does not mean, however, that property must be divided equally. . . . It means only that division should be accomplished without regard to marital misconduct and in "just proportions" considering all relevant factors.

Lawson v. Lawson, 228 S.W.3d 18, 21 (Ky. App. 2007) (citations omitted).

The parties both testified that the Trailblazer was a marital debt. As Nancy has failed to show that the debt related to the Trailblazer was not divided in just proportions, we see no abuse of discretion. Accordingly, the trial court's division of this debt is affirmed.

Child support issues are governed by KRS 403.211, and deviation from the guidelines is governed by subsection 3, which provides:

> A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
>
> (a) A child's extraordinary medical or dental needs;
>
> (b) A child's extraordinary educational, job training, or special needs;

> (c) Either parent's own extraordinary needs, such as medical expenses;
>
> (d) The independent financial resources, if any, of the child or children;
>
> (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
>
> (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act [42 U.S.C.A. § 651-669b]; and
>
> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

The family court has broad discretion with regard to matters of child support and a family court's decision will not be reversed unless it has abused that discretion. *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975). However, the lower court's discretion is not without limit. *See Price v. Price*, 912 S.W.2d 44 (Ky. 1995) (holding that the trial court does not have the power to forgive child support arrearages), and *Keplinger v. Keplinger*, 839 S.W.2d 566 (Ky. App.1992) (holding that the trial court does not have the discretion to deviate from the statutory guidelines for child support merely because it believes the amounts were incorrectly created by the Legislature).

During the pendency of the underlying action, Brian was making the payments on the Trailblazer, as well as paying for its insurance and maintenance. Brian testified that he made these payments in lieu of any temporary child support which Nancy had petitioned the court for. However, no orders were entered by the court as to Nancy's motion for temporary child support, nor ordering the Trailblazer payment as a substitute**.** As such, the issue is not preserved for appellate review. *See Bratcher v. Com.,* 151 S.W.3d 332 (Ky. 2004). Although we will not address this issue herein, we note that it remains pending before the trial court.

In conclusion, we affirm the August 1, 2008, order of the Boyd Circuit Court.

THOMPSON, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Mary Hall Sergent
Ashland, Kentucky

BRIEF FOR APPELLEE:

Sharon Easthom Rowsey
Ashland, Kentucky