

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000843-MR

STEVEN LEVINE

APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 04-CI-00741

MARIA LEVINE

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: MOORE AND THOMPSON, JUDGES; WHITE,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Steven Levine appeals from an order of the Campbell Family Court finding his outstanding maintenance obligation to Maria Levine, his former wife, to be \$63,956.12 and awarding her \$1,000 in attorney's fees. For the reasons stated, we affirm in part, reverse in part, and remand.

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

Steven and Maria's marriage was dissolved by a decree of dissolution entered on January 12, 2005. A separation agreement was incorporated into the decree, which provided, *inter alia*, Steven's monetary support obligations. In addition to child support, Steven was required to pay maintenance to Maria in the amount of \$3,150 per month for the first year, \$2,900 per month for the second year, \$2,700 per month for the third year, and \$2,000 per month for the fourth year.

In March 2006, Steven obtained a home equity loan against the marital residence for approximately \$40,000. Subsequently, Maria filed a motion to hold Steven in contempt for failing to pay maintenance. The parties eventually reached an agreement, which was adopted in a family court order. The parties stipulated that Steven owed Maria \$56,400 in future maintenance payments in addition to \$13,500 in arrears; that Maria would receive the equity from the sale of the marital residence to retire Steven's maintenance debt; that Steven's share of the equity in the marital home would be reduced by \$40,000, the amount of his home equity loan; and that the contempt motion would be dismissed.

On August 20, 2008, the parties' marital residence was sold, and Maria received \$56,904.52 from the proceeds of the sale. This total, \$56,904.52, was arrived at by deducting the first mortgage on the residence, Steven's home equity loan, the attorney's lien for Maria's legal debt, and closing costs from the sale price of the marital residence. Five months later, Maria filed a motion for final payment of her maintenance award, arguing that the sale of the marital residence did not satisfy Steven's outstanding maintenance obligation. After a

hearing, the family court ruled that Steven owed Maria a total of \$63,956.12 in maintenance and awarded her \$1,000 in attorney's fees. This appeal followed.

Steven contends that the family court erred by not factoring in his \$50,000 payment to his parents as part of his maintenance payment to Maria. He argues that the payment to his parents, who possessed a lien against the marital residence, allowed Maria to receive more proceeds from the sale of their residence compared to if he had not removed the lien. We disagree.

On appellate review, a family court's findings of fact will not be set aside unless they are clearly erroneous. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003). Factual findings are not clearly erroneous if they are supported by substantial evidence which constitutes evidence having the fitness to induce conviction in the minds of reasonable men. *Rivers v. Howell*, 276 S.W.3d 279, 281 (Ky.App. 2008). After reviewing the factual findings, we review the application of law *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998).

We further note that a family court has broad discretion in awarding maintenance, and its decision will not be disturbed absent an abuse of discretion. *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky.App. 1987). A family court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky.App. 2010). With these legal standards in mind, we turn to Steven's arguments.

The sale price of the marital residence was \$358,950, which was subject to a mortgage of \$234,696.26. The closing costs and taxes for the

residence totaled \$22,332.46. When the mortgage and other costs were deducted from the sale price, the resulting amount was \$101,921.28. Dividing this amount in half, each party's share of the equity in the marital residence was \$50,960.64.

Maria received \$56,904.52 from the sale of the house, but \$50,960.64 of this total represented her share of the equity of the marital residence. Therefore, when Maria's one-half share of the equity is deducted from what Maria received, Steven only paid \$5,943.88 toward dissolving his maintenance debt, leaving an outstanding maintenance balance of \$63,956.12.²

While Steven contends that his \$50,000 payment to his parents should have reduced his maintenance obligation, the family court's order on March 6, 2007, specifically stated that "[Steven] shall be solely responsible for the lien owed to his parents in the amount of \$50,000.00." Although Steven now contends that he should not be solely responsible for this payment, he failed to file a motion to alter, amend or vacate this order within ten days as required by CR 59.05. Further, Steven did not file a notice of appeal of this ruling within thirty days of its entry as required by CR 73.02(1)(a). Therefore, Steven's contention regarding the \$50,000 payment, which was ordered in 2007, is not properly before this Court.

Additionally, Steven contends that the family court's order finding that he owed Maria \$63,956.12 constituted a misinterpretation of its March 6, 2007, order regarding the \$50,000 payment to his parents. He contends that the

² This total is based on the family court's determination. As will be illustrated later in this opinion, the family court failed to observe that Maria would not have realized \$50,960.64 in equity, but only \$45,960.64 because of her attorney's lien of \$5,000.00.

order's requirement that Maria shall receive "the entire equity from the sale of the marital residence in order to attempt the offset [of] the entire remaining balance of maintenance to be paid to [Maria]," would make no sense if he did not remove his parents' lien from the residence and permit it to be sold. Specifically, Steven's brief contains the following:

The only way to give credence and [e]ffect to the 3/6/07 Order and the agreements is to consider that the \$50,000.00 obligation against the property was removed for a reason. This reason was presented, by way of uncontroverted testimony by [Steven], establishing that the \$50,000.00 obligation was removed to create the equity and security for payment of the maintenance obligation, which otherwise would not have been available.

We disagree.

Courts of record speak only by their orders duly entered and signed into the record. *Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt*, 439 S.W.2d 313, 314 (Ky. 1968). A court must interpret an order in a manner consistent with the terms of the order, compatible with the best interests of justice, and in consideration of the order as a whole. 60 C.J.S. Motions and Orders § 73 (2008); *Fredericksburg Const. Co., Inc. v. J.W. Wyne Excavating, Inc.*, 260 Va. 137, 144, 530 S.E.2d 148, 152 (Va.. 2000) (courts may interpret their own orders).

The family court's order specifically stated that Steven was "solely responsible" for the lien owed to his parents in the amount of \$50,000. While Steven contends that he should have received a credit for this payment against his outstanding maintenance obligation, the family court ruled that its March 6, 2007,

order required Steven to be responsible for the lien, not both parties. Therefore, based on an interpretation of the order, the family court did not err by denying Steven's claim for a maintenance credit for removing his parents' \$50,000 lien.

Steven next contends that the family court erred by granting Maria's request for attorney's fees. He argues that Maria presented no evidence to prove her right to attorney's fees or to establish the appropriate amount. We disagree.

A family court has broad discretion in determining to award attorney's fees. *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky.App. 1982). Further, the amount of an award is placed in the family court's discretion, because it is in the best position to decide a proper amount due to its observation of the proceedings from beginning to end. *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990) (plurality opinion).

In this case, the family court observed Steven's failure to pay Maria's maintenance award, which resulted in at least two motions to force payment. In ruling on Maria's request for \$3,000 in attorney's fees, the family court wrote, in its order entered on April 3, 2009, the following:

the Court does believe that this matter is before the Court for [Steven's] failure to pay maintenance as ordered and for failure to follow the rulings of this Court. Having reviewed the circumstances of the parties, the Court finds that [Steven] should pay the sum of \$1,000.00 to [Maria] to be applied to her attorney's fees.

Accordingly, we conclude that Steven has failed to demonstrate that the family court abused its discretion in its award of attorney's fees to Maria. Clearly, the family court considered the record and based its ruling upon such review.

Steven next contends that the family court erred when it relied upon documents which were not admitted into the record as evidence. Steven contends that Maria's monthly maintenance award in Year Four was conditioned upon her being employed for at least thirty-two hours per week. Contending that her weekly work hours for Year Four were not established by properly admitted documents, Steven argues that he should not be held responsible for paying the amount of Maria's maintenance award attributed to this period. We disagree.

Based on the family court's findings, which were apparently based on the records produced by Maria's supervisor, Maria was employed for at least thirty-two hours per week during the fourth year of her maintenance schedule, entitling her to a maintenance award of \$2,000 per month. While he contends that the family court did not admit these documents into the record and, thus, could not use them as a basis of its decision, Steven has failed to cite to the record where he objected to the family court's use of these records. Because a party must bring an error to the family court's attention to preserve an issue for appeal, this issue will not be reviewed. *Baker v. Weinberg*, 266 S.W.3d 827, 835 (Ky.App. 2008).

Steven next argues that the family court miscalculated the amount of his maintenance payment to Maria following the sale of the marital residence. He contends that Maria's attorney received \$5,000 from the proceeds of the sale of the marital residence but that he was not credited with his share of this equity, which all was forwarded to Maria as a maintenance payment. We agree.

Maria's attorney possessed an attorney's lien against the parties' marital residence in the amount of \$5,000, which was solely Maria's debt. We note that the decree of dissolution did not require Steven to pay for Maria's attorney's fees, which included the lien of \$5,000. Maria received the entire \$56,904.52 of net proceeds from the sale of the parties' residence, which amount had been reduced by Steven's home equity loan (\$40,016.76), Maria's attorney's lien (\$5,000), and closing costs. Ideally, each parties' debt should have been paid by the liable party after each party received their share of the marital equity. Because the home equity loan and attorney's lien were paid from the parties' marital equity, the family court simply returned these two amounts to the realized marital equity, which totaled a sum of \$101,921.28. This amount, \$101,921.28, represented the parties' real marital equity following the sale of their residence, and the family court awarded each party a fifty-percent share of this amount or \$50,960.64. Steven's own share, \$50,960.64, would then be reduced by the amount of his equity loan of \$40,016.76, resulting in a total remaining balance of \$10,943.88. Because all of Steven's share of the equity was given to Maria for maintenance, he must be credited with giving her \$10,943.88.

Accordingly, we modify the amount of Steven's outstanding maintenance obligation to the extent of properly reflecting his credit for his lost share of equity resulting from the deduction of Maria's legal debt from the proceeds of the sale of the parties' marital residence. As a result of this credit, Steven's outstanding maintenance obligation is reduced to \$58,956.12.

For the foregoing reasons, the order of the Campbell Family Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Chris Markus
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BRIEF FOR APPELLEE:

James R. Kruer
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