RENDERED: JANUARY 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000238-MR;
NO. 2008-CA-001998-ME;
NO. 2008-CA-002410-ME;
and
NO. 2009-CA-001406-ME

MICHAEL COX — APPELLANT

v.

APPEALS FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY PHILPOT, JUDGE
ACTION NO. 03-CI-02061

SHANNON GOINS CLAY (f/k/a Cox) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,[1] SENIOR JUDGE.

WHITE, SENIOR JUDGE: This consolidated appeal arises out of a Fayette Family Court dissolution of the marriage between Michael Cox and Shannon Goins Cox Clay. Michael appeals from Fayette Family Court orders entered on

[1] Senior Judge White 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.

April 25, 2005, May 4, 2005, November 30, 2006, December 27, 2006, August 5, 2008, September 12, 2008, November 26, 2008. Michael raises numerous issues regarding the trial court's denial of Michael's motions relating to: (1) disqualification; (2) timesharing; (3) child support; and (4) the division of marital property. We will discuss each issue in turn.

I. Factual Background

Since the trial court issued its findings of facts and conclusions of law in the parties divorce, Michael has filed a total of five appeals. His first appeal was rendered by our Court on September 21, 2007. While that appeal was pending, Michael filed his second appeal. During its pendency, Michael filed his third, fourth, and fifth appeals which have all been consolidated into this action.

Michael and Shannon were married on November 10, 2001, and separated in February 2003. On September 15, 2003, Shannon gave birth to the couple's only child Andrew. The couple separated thereafter. On February 1 and 3, 2005, and March 24 and 28, 2005, the trial court held a contested final hearing in this case. The majority of the disputed issues related to child custody and care, marital property, maintenance, and attorneys fees. On April 26, 2005, the trial court issued its findings of fact and conclusions of law.[2]

In its order, the court granted Michael and Shannon joint custody of Andrew but did not name a primary residential custody. The order also detailed the parties' timesharing arrangement. Each week Michael cared for Andrew three

[2] The trial court entered the decree of dissolution on May 4, 2005.

nights and one full weekend day.[3] The court appointed Dr. Dianna Hartley to serve as a parenting coordinator and to resolve disputes over Andrew's care. The parties were responsible for her fee.[4]

Michael appealed the April 26, 2005, order and contested most of the findings and conclusions entered by the trial court.[5] While the appeal was pending, Michael moved the court to increase his timesharing and requested that the court be disqualified. Subsequently, Michael filed various motions concerning disqualification, the division of assets, child support, and timesharing. We will discuss these motions as needed herein.

II. Disqualification

Michael claims that the trial court should have disqualified itself following two *ex parte* communications with Dr. Hartley. Michael argues that the trial erred by refusing to disclose the topics discussed with Dr. Hartley and by interfering with confidential negotiations of Dr. Hartley, who acted as a mediator. Michael also contends that if the trial court intended to communicate with Dr. Hartley, it should have provided counsel notice and an opportunity to be present.

Michael heavily relies on a Fayette County local rule requiring confidentiality in the mediation process, Rules of Fayette Circuit Court 29. Our

[3] Michael was to care for Andrew each Monday from 3:00 PM until each Tuesday at 9:00AM, each Wednesday at 3:00 PM until each Thursday at 9:00 AM; each Saturday from 9:00 AM until each Sunday at 9:00 AM. According to the April 26, 2005, order, this schedule was contingent upon Shannon's ability to be a stay-at-home mother. Later orders do not indicate that the a contingency remained in effect.

[4] The trial court ordered Michael to pay 75% of Dr. Hartley's coordinating fees.

[5] The appeal resulted in an unpublished opinion. 2005-CA-001163-MR

primary concern, however, is whether the trial court independently investigated a disputed fact. KRS 26A.015 (2) clearly provides that a judge may not investigate disputed facts. This applies to all disputed facts not only facts discussed in mediation.

In its December 27, 2006 order, the trial court defended the communication by relying upon Judicial Ethics Cannon 3 (7) (a). Cannon 3 (7) (a) provides that a trial court may consult with court personnel and staff members to carry out adjudicative responsibilities. However, this rule does not give trial courts the authority to question anyone, including court personnel, about disputed evidence outside the presence of the parties.

The first *ex parte* communication occurred following a November 20, 2006 hearing. During the hearing, both parties claimed the other was not cooperating with Dr. Hartley. The court informed the parties that it would contact Dr. Hartley concerning these allegations. At that time, neither party objected to the communication or requested to be present. Michael only objected to the communications after the court issued its order. Under the contemporaneous objection rule, parties must preserve error prior to the court's ruling in order to avoid judicial mistake. R.Cr. 9.22; *Delahanty v. Com. Ex rel. Maze*, 295 S.W.3d 136, 143 (Ky. 2009). Therefore, we conclude that Michael failed to properly preserve this issue.

Michael also argues that the trial court should have provided counsel with the opportunity to cross-examine Dr. Hartley. Although the court refused to

hold a separate hearing, we see nothing in the record that prevented Michael from deposing Dr. Hartley. While the trial court's phone call to Dr. Hartley was an *ex parte* communication, Michael's failure to object and to present evidence of prejudice leaves him without recourse.

The second *ex parte* communication occurred in 2008. Following a disagreement about timesharing, the trial court notified the parties that it was attempting to contact Dr. Hartley. Once again neither party objected nor attempted to depose Dr. Hartley concerning the allegation. Therefore, we are left to conclude that Michael failed to properly preserve this issue. His objection following the last *ex parte* communication was insufficient.

III. Timesharing

Michael claims that that the trial court erred in denying his motions for increased timesharing on April 26, 2005, and August 5, 2008. When reviewing a motion for increased timesharing, the trial court must question whether the increase is in the best interest of the child. *Pennington v. Marcum*, 266 S.W.3d 759, 965 (Ky. 2008). We must review this determination under a clearly erroneous standard. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. *Wells v. Wells*, 412 S.W.2d 568, 570 (Ky. 1967).

With regard to the court's 2005 order denying Michael's motion for 50-50 timesharing, the court found that additional time would be in Andrews's best

interest.[6] However, the court ordered the additional time should be taken from Andrew's time in day care rather than the time he spent with Shannon. Michael argues that the trial court allowed its personal disdain for day care to interfere with its judgment. While the record undoubtedly reflects the trial courts dislike for daycare, we are not convinced that the court's order was arbitrary.

When Michael moved for timesharing, he was able to care for Andrew three nights per week and one entire day each weekend. We recognize that it may be difficult for Michael to consistently carve out time during his work day to spend with Andrew. However, the trial court must base its determination on the best interest of Andrew rather than the best interest of Michael. Michael failed to present evidence that it is in Andrew's best interest to reduce the time he spends with Shannon in order to increase time spent with Michael. Without this showing, we conclude that the trial court's decision was reasonable.

With regard to the court's 2008 denial of Michael's timesharing motion, Michael argues that the trial court refused to comply with the previous opinion by our Court. Our review indicates that Michael misconstrued our Court's previous opinion. Whether Michael was entitled to a certain timesharing schedule was not an issue in his previous appeal. Instead, Michael claimed that the trial court abused its discretion by failing to provide equal timesharing. Our Court simply affirmed the trial court's denial of Michael's motion for equal timesharing.

[6] It is not lost on our Court that Andrew is no longer in day care but attends school. However, we chose to review this claim because the record reflects that Andrew attends after school care. Therefore, the issue is still ripe albeit on a smaller scale.

Further, the trial court found that Michael chose to abandon the three night schedule. The court's order, entered on August 5, 2008, stated:

> [Michael] currently has timesharing overnight twice a week (every Tuesday overnight and every weekend overnight, either on a Friday night or a Saturday night alternatively). The Court's original order granted three nights per week to [Michael], but for reasons that are still unclear to the Court, [Michael] chose to continue the original timesharing agreement of two nights per week.

In this order, the trial court based its denial upon evidence that Andrew functioned well under the arrangement that was in place. Andrew's well being was certainly a reasonable basis for the court's decision. Therefore, we conclude that the trial court's refusal to increase Michael's timesharing was not erroneous.

IV. Child Support

Michael also claims that the trial court order erred by denying his request to modify his child support obligation. Kentucky law clearly places the establishment, modification, and enforcement of child support obligations within the sound discretion of the trial court. KRS 403.211 – KRS 403.213; *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky.App. 2000). Nonetheless, the court's discretion is not unlimited. *Keplinger v. Keplinger*, 839 S.W.2d 566, 568 (Ky.App. 1992). It must be fair, reasonable, and supported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky.App. 2001).

The parties' child care costs decreased when Andrew began school in 2008. Based upon that change, Michael and Shannon agreed to review the child support obligation. The trial court found that Michael, a partner in a medium-sized Lexington law firm, earned $104, 254.56 in 2008 $63,525.00 in 2007, and $47,754.00 in 2006. Thus, Michael's average income for the three years prior to the review was $71,844.19, or $5,987.01 per month. The court found that Shannon, a paralegal, earned $56, 087.00 in 2008.

Michael argues the trial court incorrectly calculated his income. He claims that his average income should have been computed as $70,243.35. There is a $1,600.84 difference between the trial court's income assessment and the amount Michael now seeks. This difference is not substantial. However, Michael argued before the trial court that his average income should have been $65, 752.00. Due to Michael's inconsistent arguments and the small amount of discrepancy, we find no error in the trial court's assessment.

Michael also claims that the trial court misapplied the child support guidelines and arbitrarily applied a 20% reduction to his obligation. Following the support order, Michael filed a motion for more specific findings as to the trial court's decision to reduce child support payments by 20%.

In response to Michael's motion, the trial court explained that the 20% reduction was an effort to compensate Michael for the expenses of shared custody. The court provided,

> The Court finds that the 20% set off Ordered previously is not arbitrary but is in fact the most equitable way to compensate the Father for the amount of time that the child spends with him above the typical guideline visitation.

Under CR 52.02, Michael properly made a motion for more specific findings. The trial court described a formula used to derive the 20% figure. Instead, the court simply stated that the reduction was a fair way to compensate Michael. Although Michael argues that the percentage should correlate with the percent of time Andrew spends with Michael, there is no requirement that child support must be reduced in proportion to timesharing. We conclude that this finding was soundly within the court's discretion and specifically justified as a means to compensate Michael for timesharing.

Michael further claims that the trial court's application of the child support guidelines was unfair because the guidelines do not contemplate a shared custody plan. Citing *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007), Michael argues that, "requiring [Michael] to pay child support according to the guidelines was *per se* an abuse of discretion under circumstances similar to the present case." We strongly disagree.

In *Plattner*, our Court did not state that any child support decision was a *per se* abuse of discretion. Conversely, our Court stressed the importance of flexibility in child support determination. *Id*. at 579, 580. We provided,

> While Kentucky's child support guidelines do not contemplate such a shared custody arrangement, they do reflect the equal duty of both parents to contribute to the

> support of their children in proportion to their respective net incomes. They also provide a measure of flexibility that is particularly relevant to this case.

Id. at 579.

In *Plattner*, the Father and Mother had equal timesharing and bore almost identical responsibility for the child's day to day expenses. Both parents made virtually the same income. Under these circumstances, our Court found that a strict application of the guidelines was an abuse of discretion.

The facts of this case are drastically differ from *Plattner*. Despite earning significantly less than Michael, Shannon claimed that she provided all of Andrew's child care costs, the majority of his clothing and shoes, and health insurance costs. To support her claims, Shannon provided the court with her W-2 statement, health insurance documentation, after school care documentation, and her 2008 wage statement.

The facts of this case appear to be more similar to those found in *Downey v. Rogers*, 847 S.W.2d 63 (Ky. App. 1993).

> In *Downey v. Rogers*, (citations omitted), we declined to conclude that a trial court had abused its discretion by awarding child support where the parties shared legal custody and shared equal or almost equal physical custody of their children. However, our conclusion was based, in part, upon the fact that the children's father had agreed to pay a portion of his child support obligation to the children's mother. We also noted that the children's father earned twice as much annually as did their mother; thus her share of the children's expenses was proportionately more cumbersome.

Plattner, at 579-580.

Due to Shannon's greater financial responsibilities and lesser income, we find no error in the court's award of child support.

Similarly, we disagree with Michael's contentions that both he and Shannon should owe child support to one another. As previously mentioned, trial courts must retain flexibility in applying the child support guidelines. The record reflects ample evidence that Shannon provides many financial resources for Andrew. In light of these expenses, we find no error in the court's refusal to use Shannon's income as a factor to reduce Michael's child support obligation.

IV. Division of Marital Assets

In Michael's prior appeal, he claimed that the trial court abused its discretion concerning issues of property valuation, property division, and allocation of marital debt. During the course of Shannon and Michael's divorce, Shannon claimed that she could quit her job and stay home with Andrew if she received her martial property award of $35,000. In its findings of facts and conclusions of law, entered in April 2005, the trial court made the timesharing arrangement contingent upon Shannon leaving her employment. Our Court affirmed the trial court in part, but reversed the trial court's child support calculation and its valuation of marital property in light of Shannon's employment status. Regarding the latter, our Court concluded,

> [t]he status of property as either marital or non-marital is not based on the economic status of either party, but on the nature of the property. Therefore, the family court's

> consideration of Shannon's employment status in determining the extent of the marital estate is not appropriate and we must reverse the family court on this issue.
> 2005-CA-1163.

Michael now claims that the trial court did not properly apply our ruling concerning his retirement account, year-end wage payment, marital debts, dissipation of marital assets, and the overall property division. Our Court did not specifically address those issues. Although we remanded the case to the trial court for a re-evaluation of the marital property division, we did so only with respect to the trial court's consideration of Shannon's employment status. Our opinion provided:

> On remand, the family court shall determine the value of the marital property absent any consideration of Shannon's employment. The family court shall then divide the marital property in two ways, one absent any consideration of Shannon's employment status and the other taking into consideration Shannon's employment status.

In this appeal, Michael does not argue that the trial court refused to divide marital property absent consideration of Shannon's employment. Instead, he simply re-litigates issues that he raised or should have raised in his previous appeal. Therefore, we decline to review those issues for error.

Accordingly, we affirm the aforementioned Fayette Family Court orders.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Susan B. Jones
Lexington, Kentucky

BRIEFS FOR APPELLEE:

Debra Ann Doss
Lexington, Kentucky