

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001608-MR

JOSEPH CECIL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 11-CI-500417

WINDY CECIL, NOW EVERETT

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, LAMBERT, J., AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Jefferson Circuit Court, Family Division, pursuant to a divorce action. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Appellant, Joseph Cecil, and Appellee, Windy Cecil, now Everett, were married in Bullitt County, Kentucky, in September of 2000. During most of their marriage, they resided in Jefferson County, Kentucky, with Joseph working at the Toyota plant in Georgetown, Kentucky. Windy was a bank teller and customer service representative at Fifth Third Bank.

At the time of her marriage to Joseph, Windy had two children. She and Joseph also had a child together, J.N.C., who was born in May of 2001 and was a minor at the time of their divorce.

In December of 2010, Windy vacated the marital residence she shared with Joseph and in February of 2011, Joseph filed for divorce. A limited Decree of Dissolution was entered on December 6, 2012, after issues of custody, parenting time and child support were addressed at a trial. After Findings of Fact and Conclusions of Law were entered by the trial court, Joseph asked the trial court to alter, amend or vacate its judgment, or for a new trial. The trial court denied Joseph's motion. That order was not appealed. A subsequent trial was held on June 13, 2013, on the issues pertaining to classification and division of property and debts and attorney's fees. The trial court entered its order and findings on July 11, 2013, and Joseph filed a motion to alter, amend or vacate its judgment or for a new trial. The motion was denied and Joseph filed this appeal.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[f]indings 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 judgment is not “clearly erroneous” if it is “supported by substantial evidence.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id. Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). With these standards in mind, we review the decision of the trial court.

DISCUSSION

Joseph begins his arguments on appeal with assertions that there were procedural issues throughout the proceeding. Specifically, he argues that the trial court failed to follow the Kentucky Rules of Civil Procedure, erred in failing to grant his Motion in Limine for Production of Documents; failed to grant his Motion in Limine to reschedule the trial and that the trial court judge interrupted him and made comments during his closing argument.

Joseph proceeded to trial without counsel. While he had procured the services of attorneys prior to the trial, he was not represented by counsel at trial. The procedural issues of which Joseph first complained are attempts by the trial judge to allow him to represent himself and to accommodate his *pro se* status. When Joseph asked the trial court for a continuance due to the hiring of new counsel, Joseph admitted to the trial court that he had hired Sarah Almy to assist

him in the trial, but that he would be acting as his own counsel. Thus, we find Joseph has not set forth instances in which the trial court erred in failing to follow the rules of civil procedure.

Joseph next argues that the trial court violated the provisions of Kentucky Revised Statutes (KRS) 403.213(1) when it failed to determine the modification of his child support obligation retroactive to the date the motion was filed. On April 25, 2011, the trial court entered an order for child support based upon Windy's motion retroactive to April 18, 2011. That order provided that Joseph would pay \$562.00 per month in child support.

In its post-trial Order of December 6, 2012, the trial court found that based on the Child Support Guidelines, Joseph would owe \$549.00 per month in child support. The trial court decided to deviate from the Guidelines based on *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007) (citing *Brown v. Brown*, 952 S.W.2d 707 (Ky. App. 1997)), and *Downey v. Rogers*, 847 S.W.2d 63 (Ky. App. 1993). These cases allow for a determination of child support to be based on equal division of physical custody. The trial court determined that child support in the amount of \$90 would be due by Joseph. After the entry of this Order, Joseph filed a Motion to Alter, Amend, or Vacate asking the trial court to make the award of child support retroactive. On January 29, 2013, the trial court denied Joseph's motion.

Joseph is correct that KRS 403.213(1) requires modification of child support be retroactive to the date of the filing of the modification request. In this

case, however, we have no jurisdiction over that issue since it was final in the January 29, 2013 order. Thus, we cannot address Joseph's appeal on this issue.

Joseph also asserts that the trial court was prejudiced against him and abused its discretion when it failed to rely on the expert testimony of Barbara Albert regarding his 401(k) retirement account at Toyota. The trial court, however, set forth in its denial of Joseph's motion for a new trial that it considered the testimony as well as applicable Kentucky law regarding the tracing of nonmarital assets. The trial court stated that it was not persuaded by Ms. Albert's testimony. The trial court divided the 401(k) as it did based on the fact that there had been loans taken from it during the marriage and that marital funds had been used to pay back those loans.

Pursuant to *Kleet v. Kleet*, 264 S.W.3d 610 (Ky. App. 2007), the "source of funds" rule should be applied in determining marital versus nonmarital property. The trial court determined that Joseph had liquidated the funds he originally deposited into the 401(k) account that were nonmarital and had replaced them with funds which were marital. We do not find this to be an abuse of the trial court's discretion.

Joseph also argues that the trial court erred in its division of the debts of the parties. He contends that he was assigned the majority of the debts from the marriage, whether he participated in accruing the debt or not. Joseph does not, however, offer specific arguments regarding specific debts that he is contesting.

Instead, he provides a general statement of discontent with the trial court's division. We, therefore, affirm the trial court's division of debts.

Finally, Joseph contends that the trial court erred in its award of attorney fees and had a bias against him during the trial. As to the latter assertion, Joseph does not set forth with specificity what the trial court did to warrant this argument. Thus, we deny his appeal on the matter of bias. As to the attorney fees, the trial court made a finding that, due to the disparity in income and the factors set forth in case law from the Kentucky Supreme Court in *Sexton v. Sexton*, 125 S.W.3d 258, 272-73 (Ky. 2004), an award to Windy of \$5,000.00 in attorney fees was warranted. We find nothing in Joseph's argument to interpret this award as an abuse of discretion.

For the reasons set forth above, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sarah S. Almy
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BRIEF FOR APPELLEE:

Thomas V. Haile
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