RENDERED: March 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-0322-MR

SUNEEL S. TALWAR APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 93-FD-3105

BARBARA M. TALWAR APPELLEE

and

NO. 96-CA-0447-MR

BARBARA M. EBEL CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
V. HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 93-FD-3105

SUNEEL S. TALWAR CROSS-APPELLEE

OPINION
AFFIRMING IN PART,
VACATING AND REMANDING IN PART

* * * * * *

BEFORE: BUCKINGHAM, COMBS, and GARDNER, Judges.

COMBS, JUDGE: This action involves an appeal and cross-appeal from the order the Jefferson Circuit Court entered in a dissolution proceeding between Suneel Talwar (Talwar) and Barbara

Talwar (now Ebel). Talwar argues on appeal that the court erred in awarding Ebel sole custody of the parties' two minor children. Ebel cross-appeals from the common-law judgment for $30,000.00 in favor of Talwar and alleges that the court erred in its valuation of her medical practice.

On September 8, 1994, the Jefferson Circuit Court entered a decree dissolving the parties' twenty-year marriage of which two minor children were born. The court reserved the other issues related to the dissolution and entered a supplemental decree on November 20, 1995, disposing of the issues regarding child custody, child support, maintenance, and the division of marital property. Ebel was awarded sole custody of the two minor children. Noting the contentious behavior of the parties throughout the proceedings, the court found that joint custody was not a viable option. Additionally, the court stated that Ebel's medical practice did not have a value since Ebel had no ownership interest in Medical Center Anesthesiologists, her employer.

On December 11, 1995, Talwar filed a motion to amend, vacate, and set aside the court's supplemental decree. He alleged that the court had erred in failing to assess the value of Ebel's medical practice, which he claimed constituted marital property that was subject to division. He also argued that court had improperly failed to award him joint custody of the children.

Accordingly, on January 17, 1996, the court entered an order amending the supplemental decree of November 20, 1995. The

court re-affirmed its decision awarding Barbara sole custody of the two minor children but agreed that it had erred in finding that Ebel's medical practice had no value. The court held that Ebel's practice was worth $71,400.00 and awarded Talwar a common-law judgment against Ebel in the sum of $30,000.00. The court made other additional findings of fact not relevant to the appeals before this Court.

Talwar filed an appeal from the court's order, appealing only the court's findings as to the custody of the parties' two children. Ebel filed a motion to alter, amend, or vacate the court's order entered January 17, 1996. The court entered an order denying her motion on February 7, 1996; this order also addressed the issue of the amount and security necessary for a supersedeas bond for the common-law judgment of $30,000.00. Ebel filed a cross-appeal, challenging as error the court's finding which had assessed a value to her "medical practice."

We will address the custody issue first. Pursuant to KRS 403.270, the court "shall determine custody in accordance with the best interests of the child". The court is required to consider six relevant factors:

> (1) the wishes of the child's parent or parents;
> (2) the wishes of the child;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community;

> (5) the mental and physical health of all individuals involved; and
> (6) information, records, and evidence of domestic violence as defined in KRS 403.720.

KRS 403.270(1). The court must give each parent equal consideration; and if it finds that it is in the best interest of the child, joint custody may be granted. KRS 403.270(4). A trial court has broad discretion in deciding what constitutes the best interest of the child when making a custody determination. Krug v. Krug, Ky., 647 S.W.2d 790 (1983). On appellate review, the trial court's findings of fact regarding custody cannot be overturned unless clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986).

Courts cannot show a preference for sole custody over joint custody: "the parties are entitled to an individualized determination of whether joint custody or sole custody serves the child's best interest." Squires v. Squires, Ky., 854 S.W.2d 765, 770. Squires, supra, sets forth the relevant test to be applied to the selection process and notes that the analysis for joint and sole custody is the same:

> We see no significant difference between the analysis required with respect to joint custody than the analysis required when the court grants sole custody. In either case the court must consider all relevant factors and formulate a result which is in the best interest of the child whose custody is at issue. Legislative authorization of joint custody merely gives the trial court another alternative if such appears to be appropriate.

Squires, supra at 768. In sum, the court cannot show preference for joint or sole custody; they enjoy parity with one another with neither being accorded superior status.

Talwar alleges that the court's decision to award Ebel sole custody was erroneous as it was contrary to the evidence. He maintains that he was the parent primarily responsible for the care of the children and that the court should have awarded him joint custody of the children. In support, he cites the many witnesses who testified favorably as to his relationship and devotion to his children. However, an examination of the record shows that Ebel also introduced numerous witnesses who testified that she was the primary caretaker of the children. It is within the discretion of the trial court to weigh the credibility of the witnesses and to choose which evidence it finds more persuasive and credible.

The court found that Ebel was the parent primarily responsible for the care of the children and awarded her sole custody, stating that joint custody was not an option in light of the parties' hostility toward each other. In reaching this determination, the court also relied upon the report of Dr. Berry, a licensed clinical psychologist. Upon the request of the court, Dr. Berry performed psychological evaluations of the parties and their children. Dr. Berry stated in her report that traditional joint custody did not appear workable in this case, citing the parties' lack of interpersonal skills for joint problem-solving and their anger and distrust of each other. In

its amended order of January 19, 1996, the court candidly (and bluntly) declared its reason for not awarding joint custody:

> In the best of all possible worlds the Court normally presumes that joint custody is best for children. However, in this situation joint custody was not an option. Time and again during the course of this extended litigation, these parties have shown that they are not able to communicate with each other in the interest of their children or to put the interests of their children first and foremost above their own petty egos.

It is clear that the court engaged in a careful analysis as to which custody arrangement would be in the best interest of the children. The court also made detailed findings to support its decision to award Ebel sole custody of the children. There is no evidence that the court did not give each of the parties equal consideration; nor is there any proof that the court failed to consider the six relevant factors set forth in KRS 430.270. We have no basis for interfering with the court's exercise of its sound discretion, and we hold that the court's findings with regard to the custody of the parties' minor children were not clearly erroneous.

We now turn our attention to the issue raised by Ebel's appeal: whether the court erred in finding that her medical practice had a value of $71,400.00 and awarding Talwar a common-law judgment of $30,000.00. During the marriage, Ebel attended the University of Louisville, attaining an undergraduate degree. She then enrolled in medical school and received a medical degree and her license to practice. In June, 1992, Ebel accepted employment with Medical Center Anesthesiologist, Inc. (MCA). Her

status is that of an employee with MCA. She owns no equity interest in the corporation; at most, she enjoys a "hope" of being invited (at an unascertained future date) to become a stockholder in MCA. When she made a request for stockholder status in 1995, she was denied.

Ebel argues that the court erroneously found her that employment had a property value which was subject to division as a marital asset. She contends that maintenance is a more equitable way of dealing with the disparity in the parties' incomes.[1] Conversely, Talwar argues that the court properly found that Ebel's medical practice had a value and that it correctly awarded him a judgment of $30,000. He also contends that he is entitled to a percentage of her practice as he had made financial and emotional contributions toward Ebel's attainment of a medical degree and license -- even making sacrifices as to his own career.

It is clear from the record that Ebel does not have a "medical practice." She does not have an equitable interest in MCA -- nor does she have a practice outside of her employment with MCA. She is, quite simply, an employee of MCA. The circumstances of this case are clearly distinguishable from cases in which one spouse has his own practice or enjoys an interest in a professional practice or service corporation. Essentially, this case raises the "diploma dilemma": the problem of how

[1]The court found that Talwar's annual income was approximately $58,000 and that Ebel's was $238,000.

courts are to treat a professional degree attained by one spouse but resulting from sacrifices and efforts expended by both.

In this jurisdiction, a professional degree may not be treated as marital property. Inman v. Inman, Ky., 648 S.W.2d 847 (1982). (Inman II). McGowan v. McGowan, Ky. App., 663 S.W.2d 219 (1983). However, the fact that professional degrees do not constitute marital property does not mean that "the efforts and economic sacrifices of one spouse who has put the other spouse through school should go unrecognized and uncompensated if they later divorce." McGowan, supra at 223. In Lovett v. Lovett, Ky., 688 S.W.2d 329 (1985), the Supreme Court of Kentucky set forth the analysis to apply to the "diploma dilemma":

> It is our opinion that the problem is best served by application of our existing statutory and case law and treating the professional degree and license as relevant factors to be considered in the standard of living established during the marriage, awarding maintenance based thereon. . . . We do not intend to sentence the professional spouse to servitude or award the non-contributing spouse with a meal ticket. As maintenance, the award may be modified in cases of unconscionability.
>
> It is the holding of this court that a professional degree and a license to practice are relevant factors to be considered by the trial court in its determination of the standard of living established during the marriage, both as this standard relates to the ability of the non-professional spouse to support himself/herself and as it relates to the amount and period of time of the maintenance. . . .

Thus, pursuant to KRS 403.200, the court can properly consider the fact that the divorcing couple may have begun to enjoy an

increased standard of living as a result of the professional degree attained by one spouse and the impact of a divorce on the non-professional spouse's standard of living. McGowan, supra.

In this case, Ebel was an employee of MCA who had no equitable interest in the corporation. In holding that Ebel's "medical practice" had a value, the circuit court erroneously assigned a value to her medical degree and license. The fact that Ebel may in the future acquire an interest in MCA is not a property interest susceptible of division. Thus we find that the court was clearly erroneous in holding that Ebel's medical "degree" had a value. We vacate that portion of the court's order as to its finding that Ebel had a medical practice which could be valued and the common-law judgment of $30,000.00 in favor of Talwar. Upon remand, we instruct the circuit court to enter findings of fact consistent with this opinion regarding the "diploma dilemma."

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court awarding sole custody to Ebel. We vacate and remand the court's order as to Ebel's medical practice with instructions to make findings of fact consistent with our opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE SUNEEL S. TALWAR:

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