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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001410-MR
AND
NO. 1998-CA-001448-MR

RICHARD M. OSBORNE — APPELLANT/CROSS-APPELLEE

v.

APPEALS FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 95-CI-00370

DEBRA ANN OSBORNE — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART AND REVERSING AND REMANDING
IN PART ON APPEAL AND ON CROSS-APPEAL
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Richard Osborne has appealed, and Debra Ann Osborne has cross-appealed from the judgment of the Hardin Circuit Court resolving various issues of property division, child custody, and visitation arising from the dissolution of their marriage. We believe that both parties have raised meritorious issues and therefore, we affirm in part, reverse in part, and remand the matter for further proceedings.

Richard and Debra were married in California in 1981. Both are college graduates. Debra is a registered nurse. For

most of the marriage, Richard was employed as the general manager of his family's automobile dealership, Osborne Motors Corporation. He also served as the corporation's president. The parties have three children: Ryan, born on May 21, 1983, was 14 years old at the time of the final judgment; Sean, born on June 26, 1985, was 12 years old when the judgment was entered; and, Kortney, born August 30, 1992, was five years old.

Richard and Debra separated in January 1995, and Debra filed a petition for dissolution of the marriage on March 1, 1995. In June of 1995, the parties entered into an agreed order which provided that they would share joint custody of the children, pendente lite. It was further agreed that Debra would be the primary physical custodian of the two younger children, Sean and Kortney, and that Richard would have primary physical custody of Ryan. Each parent was to have visitation with all three children every other weekend. Richard agreed to pay child support of $838 per month, and Debra was allowed to remain in the marital residence until it was sold. Since neither party could afford the $2000 per month mortgage payment, it was agreed that the marital residence would be sold, either by a realtor, by a private auction, or as a last resort, by the commissioner. It was further agreed that until the marriage was dissolved, the children would not go around Dr. Paul Garner, Debra's paramour who she later married.[1] On August 29, 1995, a decree was entered

[1]Garner had previously been charged with the crime of wanton endangerment after allegedly threatening Richard with a gun in the parking lot of a Kroger store. The disposition of the criminal charges is not contained in the record on appeal.

dissolving the marriage with all other issues reserved for further adjudication.

A full evidentiary hearing was conducted before the Domestic Relations Commissioner on several days in October 1996, and January 1997. After the trial, but before the judgment was finally entered on February 5, 1998,[2] several events transpired which impacted the judgment and which bear on the issues raised in this appeal and cross-appeal. On April 9, 1997, Richard lost his employment at Osborne Motors and relinquished his stock in the corporation to his parents. Richard also remarried and problems arose between his son, Ryan, and his new wife.

In the final judgment, entered February 5, 1998, the trial court divided the liquid assets, the proceeds of the sale of the marital residence, and Richard's 401K retirement account, in equal proportions. It awarded Richard certain items of specific personalty and otherwise awarded the remaining personalty to the party in possession of the property. Although Richard had sought custody of the two boys and Debra had desired

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[2]After the trial before Commissioner John Seldomridge which ended in January 1997, the parties submitted simultaneous briefs and proposed findings of fact in March 1997. In October 1997, no report having been rendered by the Commissioner, Debra moved the trial court to transfer the matter to another commissioner, or to take the case under submission itself. At that time the trial court stated that there was no other commissioner to which the case could be transferred and that it was about to commence a capital murder case and could not expedite the case sub judice on its docket. The trial judge advised that he would suspend ruling on the motion to transfer for thirty days to give the Commissioner time to complete his report. On January 1998, Debra renewed her motion to recuse Commissioner Seldomridge. The trial court committed itself to read the parties' briefs and determine whether to take the case under submission or to refer it to the newly appointed commissioner. The trial court finally decided the case itself.

sole custody of all three children, the trial court split custody of the children according to the recommendation made by the expert psychologist: Richard was awarded sole custody of Ryan, and Debra was awarded sole custody of Sean and Kortney. The trial court found that the parties could not share joint custody as both demonstrated "a deep personal bitterness and animosity toward the other" evidenced by "continuing accusations and recrimination against the other."

Because Debra was working part time and Richard was unemployed, child support was set by imputing income to both parents, $30,000 a year to Debra and $40,000 a year to Richard. Finally, the trial court found that there was no imbalance in the financial resources of the parties that would warrant an award to either party of attorney's fees and costs. Debra filed a motion to alter, amend or vacate on February 13, 1997, which was granted in part in the trial court's order of May 8, 1998. This appeal and cross-appeal follow. Other facts pertinent to the issues before this Court will be recited as necessary.

In his appeal, Richard argues that the trial court erred in its division of his 401K retirement account. Specifically, although he does not quarrel with the trial court's finding of the plan's value on the date of dissolution, or the manner in which the 401K account was divided, Richard contends that the trial court erred in awarding Debra the increase in value of the 401K plan after the dissolution as it relates to her share of the plan. Clearly, there was no error in this regard.

The trial court found that Richard's 401K plan had a value of $95,714.94 on the date of dissolution. From that sum, the trial court subtracted the value of Debra's pension account, $3,708.00, and the value of her retirement account at Hardin Memorial Hospital, $5,182.19, and the remaining figure, $86,824, was divided equally between the parties. The record indicates that Richard did not have sufficient non-marital funds to pay Debra a lump-sum amount for her half interest in the 401K plan, nor were there other marital funds sufficient to offset Debra's share of this asset. Because Debra's enjoyment of this asset was required to be deferred, the trial court ordered that Debra was entitled to a qualified domestic relations order to protect her interest in the 401K plan. In her motion to alter, amend or vacate the judgment, Debra requested that the trial court amend its order to provide that she also be entitled to any appreciation of her share of the asset. In its final order of May 8, 1998, the trial court concluded that Debra was entitled to share in any increase in the value of the pension attributable to the sum she was awarded.

Richard argues that allowing Debra any of the increase in value of the deferred income plan offends the principle that all assets must be valued and divided at the time of the dissolution. He states that "post-divorce appreciation is not marital property, and therefore, not subject to division." The fallacy in Richard's argument is obvious. Although the 401K plan remains in his name, $43,812 in that fund was awarded to Debra in lieu of a lump sum payment. She is entitled to treat that

property as her own, including providing for its testamentary disposition.[3] Debra is certainly entitled to the appreciation attributable to her share. Under these circumstances, there is clearly no violation of the law in Stallings v. Stallings[4] as argued by Richard.[5]

Next, Richard argues that the trial court erred in its division of the household furnishings. Richard points to the Commissioner's report of September 18, 1995, in which the Commissioner "noted" that the practice in the Hardin Circuit Court was to divide personalty by the "list" method, whereby one party lists the property on two lists and the other chooses the list he desires, or the "alternate selection" method, that is, a method in which one party chooses an item, the other party then chooses an item, and the rotation continues until all the property is divided. However, when Debra moved from the marital residence, she took many of the household goods and furnishings with her and left other items in the house for Richard.

Nevertheless, at the trial conducted before the Commissioner, the parties litigated the issue concerning the appropriate division of the household goods and furniture. Debra produced a list of the marital personalty which included the identity of the party having possession of each item. The trial

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[3]Brosick v. Brosick, Ky.App., 974 S.W.2d 498, 504 (1998).

[4]Ky., 606 S.W.2d 163 (1980) (holding that marital property subject to division must be valued as of the date of dissolution).

[5]See generally, Graham and Keller, Kentucky Practice § 1528 (1997).

court ordered that Richard be given a rug, a desk, and a grandfather's clock in Debra's possession, and that "[a]ll other household goods and furnishings [be] awarded to the party possessing said items." Richard insists that this has resulted in a "lopsided" division. However, our review of the list, which shows that Debra had several items of furniture which were being used by the parties' children, does not reflect any abuse of discretion that would necessitate our disturbance of the trial court's disposition of this property.

We do, however, find merit in Richard's final allegation of error, that is, that the trial court abused its discretion in its resolution of the issue of visitation. In its judgment, the trial court essentially continued the same custody arrangement as the parties had agreed to in 1995, except that each party was awarded sole custody of the child(ren) in his or her possession instead of joint custody. Although the trial court determined that each party was capable of being the custodial parent of at least one of the children, it declined to provide visitation with the child(ren) not in his or her possession. Based on the report filed by Dr. Edward P. Berla, a clinical psychologist, the trial court found that the parties had "caused mental and emotional harm to the children," and that there was "a very strained relationship between each child and the non-custodial parent and between the children." The trial court concluded that in was not in the best interest of the children

> to be exposed to the arguments, accusations and recriminations from each parent and their

> continuing hostility toward each other. Visitation should be carried out because of a loving relationship and in an enjoyable and pleasant environment. It if cannot, then such visitation is not in the best interest of the child. The Court will not force these children into visitation that is harmful to them. Therefore, at the present time, the Court shall not grant either parent the right of visitation with the child or children living with the other parent. The child or children may upon their own elect to visit with the other parent.

Richard argues that his visitation rights are "absolute and not dependent upon a finding that visitation is in the child's best interest." He further contends that children should not "have the final say-so on the exercise of visitation rights," and that "[t]here is no practical nor legal justification to permit young children to decide when and if they will visit with their noncustodial parent - especially when that same parent has been joint custodian of the same children for almost three years." Debra insists that the trial court's ruling that allowed the children to decide when and if they would visit with their father was "perhaps the wisest decision rendered by the trial court in this entire unpleasant dispute," and suggests that the decision was not an abuse of discretion.[6] We agree with Richard that the judgment in this regard does constitute an abuse of discretion, but for reasons somewhat different than those advanced by Richard.

[6]While at the time the judgment was entered the ruling affected Debra's rights to visitation with Ryan, by the time this issue was briefed in this Court, all three children were living with Debra. Thus, the issue of visitation only affects Richard's rights.

In this jurisdiction there is a statutory presumption "that visitation is in the child's best interest for the obvious reason that a child needs and deserves the affection and companionship of both [] parents"[emphasis original].[7] We disagree with Richard's argument that he has an "absolute" right to visitation, although he is correct that the standard for restricting visitation is more stringent that the best interest standard.[8] The evidence of record supports the trial court's finding that the children have been harmed by both parties' inability to control their behavior and their failure to appreciate the effect that their conduct and open animosity for one another have on their children.

While this evidence would be sufficient to support an order restricting visitation in some manner, for example, requiring the parties to undergo counseling, or even requiring supervised visitation, there was no evidence that would support the trial court's denial of visitation by either parent with the child or children residing with the other, or which permit visitation only at the whim of the child(ren). The denial of a noncustodial parent's visitation with his or her child should occur in only the most compelling of circumstances, and when

[7]Smith v. Smith, Ky.App., 869 S.W.2d 55, 56 (1994).

[8]Kentucky Revised Statutes (KRS) 403.320 provides that a noncustodial parent "is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health."

other alternatives have failed.[9] This was recognized by the expert upon whom the trial court relied. Indeed, the trial court's ruling in this regard is contrary to Dr. Berla's recommendation that the children have visitation with their non-custodial parent, a recommendation with which Debra testified she agreed. In this Court's opinion, having reviewed the record, the trial court's refusal to provide Richard with visitation was unreasonable and a clear abuse of discretion.

While we are reluctant to criticize the trial court in its handling of this very frustrating situation, we are particularly disturbed by the trial court's ruling which puts the onus on each of the children to determine whether there will be visitation. As is often the result in a bitter divorce, the record indicates that the parties' children have suffered emotional trauma as a result of their parents' efforts to get the children to "take sides" with one or the other. It is apparent to this Court that the trial court was very concerned with how it could best accomplish a reconciliation between the children and their non-custodial parent. While we appreciate the trial court's dilemma in attempting to balance the parents' rights to visitation with the need to protect the child(ren) from further emotional or psychological harm, in our opinion, putting the responsibility for visitation on the children has the potential to exacerbate the anxiety, stress and insecurity experienced by the children, particularly the younger ones, and places them in a

[9] Smith, supra.

position inherently conducive to an increase in the pressure to divide their loyalties between the parents.

Considering the length of time since the hearing in this matter, the trial court may, on remand, hear further proof to determine the appropriate orders that should be entered concerning visitation between Richard and the children, and to determine whether supervision, or other restrictions are necessary to protect the children. In no event should the issues concerning visitation be delegated to the children.

In her cross-appeal, Debra first argues that the trial court erred in failing to allow her to discover evidence relevant to the value of Richard's shares of stock in Osborne Motors, a subchapter-S corporation founded by Richard's parents. At the time of the dissolution, Richard owned approximately 40% of the stock of Osborne Motors, which he estimated on financial statements to be worth $440,000. Debra attempted to discover evidence from Richard and/or Osborne Motors, which would rebut Richard's claim that his ownership interest in the corporation was non-marital in nature as either having been acquired prior to the marriage and/or gifted solely to him during the marriage without consideration. In June 1996, Debra's attorney attempted to depose Richard and a representative of Osborne Motors and to obtain the documents that would evince when, and for what consideration, if any, Richard was transferred the shares of stock by his parents. No one from Osborne Motors appeared at the deposition scheduled for June 4, 1996, or answered the subpoena duces tecum issued for the same day. Debra moved to compel the

discovery and Osborne Motors moved for a protective order. The trial court referred both motions to the Commissioner. At the time of trial later that year, the discovery-related motions were still pending and all the issues concerning the stock, including its nature as marital or non-marital, its value, and the proper division of the marital component, if any, were reserved.

As stated earlier, in April 1997, before a judgment had been entered, Richard was terminated from his position and employment at Osborne Motors. At his deposition taken in July 1997, Richard testified that on the day that his mother fired him, he voluntarily returned his shares in the corporation to his parents. Nevertheless, Richard later filed a lawsuit against his parents seeking the return of the stock. In its final judgment, the trial court determined that any issue concerning Debra's entitlement to any portion of this asset would continue to be "reserved" until "ownership of that stock is adjudicated," in the litigation between Richard and his parents.

In her motion to alter, amend or vacate the judgment, Debra asked the trial court to determine the value of the stock at the time of the dissolution and to award her a sum equal to one-half of its value. The trial court denied this request as follows:

> Osborne Motors, Inc., one of the three Ford dealerships in this county, is a closely held corporation that was begun by the father of [Richard] many years ago. [Richard] spent only a limited period of time with this company. His employment with the company has been terminated and there are presently lawsuits in the state and federal courts over [Richard's] ownership, if any, of stock in Osborne Motors, Inc. The Court continues to

> find that the division of any stock in Osborne Motors, Inc., if any, and if it should be classified as marital or non-marital is reserved pending adjudications in those lawsuits. As set forth in Graham/Keller the value of a closely held corporation may be difficult to determine.

We agree with Debra that the trial court abused its discretion in postponing any resolution of the issues of the stock's value at the time of the dissolution, and its characterization as marital or non-marital, until Richard and his parents have litigated their disputes in state and/or federal courts. There is no question that Richard owned a large percentage of stock in the family corporation at the time of the parties' dissolution. The fact that he gave it away or lost it after the dissolution, is of no relevance to the issues arising between Richard and Debra in their dissolution action.[10] Stated differently, whether Richard ever recoups the stock from his parents has no bearing on the issues of the nature of the stock as marital or non-marital property, and how it should be divided. If there is a marital component subject to division, Richard would have to account to Debra for her share of the asset regardless of the outcome Richard's litigation with his parent. Further, the fact that it may be difficult to arrive at the stock's value in 1996, and to determine its marital component, if any, does not absolve the trial court of its responsibility to resolve the matter. Thus, we hold that the matter be remanded with instructions that Debra be allowed to conduct the discovery she requested and for the trial court to address the merits of

[10]See Stallings v. Stallings, supra.

her claim that there is a marital component to this asset and for its proper division, if appropriate.

Debra next argues that the trial court erred in failing to award her sole custody of Ryan. After the trial was conducted before the Commissioner, but before the court's judgment which was entered on February 5, 1998, awarding sole custody of Ryan to Richard, an incident took place in which Richard's new wife called the police to their home after having an altercation with Ryan. Debra argued in her motion to alter, amend or vacate that, based on this incident, the trial court should change its custody decision and award her sole custody of Ryan. The trial court rejected Debra's argument, denied her motion to alter its original judgment in this regard, and concluded that "any modification of custody should be by proceedings before the Domestic Relations Commissioner where parties and witnesses may be heard."[11]

Clearly, a motion pursuant to CR[12] 59 is not a vehicle to request a modification based on circumstances and evidence that has arisen since the hearing. If Debra wanted the trial court to base its custody decision on the evidence of the altercation between Ryan and Richard's new wife, the proper procedure for her to have followed was to have moved to supplement her proof before the final judgment. Instead of

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[11]Debra was given temporary possession/custody of Ryan on March 3, 1998, pending further orders of the court and while Richard was allowed to have visitation with Ryan, the court ordered that "under no circumstances [was] Ryan [] permitted in the presence of Kelly Ann Dougherty Osborne [Richard's wife]."

[12]Kentucky Rules of Civil Procedure.

making such a motion, Debra waited to see if she would get a favorable ruling and then attempted to have the court consider the "new" evidence in her motion to alter, amend or vacate. We discern no abuse in the trial court's discretion in denying Debra's motion which was an attempt to supplement her request for sole custody after the judgment.

Alternatively, Debra argues that the proof at the original hearing indicates that the trial court erred in awarding custody of Ryan to Richard in the first instance. She states that

> [Richard's] irresponsible, selfish conduct, immature judgments, and reckless disregard for Ryan's welfare leaves no room to doubt that it is in Ryan's best interest for his sole custody to be awarded to his mother. The environment at Richard's house is hostile and volatile and exposed the boy to physical violence, verbal abuse, profanity and intoxicated adults. On the other hand, Ryan has been integrated successfully into the home of his mother and her husband, Paul Garner, M.D., where he now resides peacefully with his siblings and baby half brothers.

The trial court has considerable discretion in determining custody of minor children.[13] It is the trial court that is in the best position to weigh the evidence and as a reviewing court, we may not substitute our opinion for that of the trial court.[14] Having reviewed this record, it is apparent that the evidence is more than sufficient to support the trial court's award of sole custody of Ryan to Richard, not the least

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[13]Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983).

[14]CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

of which was Dr. Berla's testimony that he believed Ryan's best interests would be served if he were allowed to continue to live in Richard's household, and the fact that Ryan primarily resided with Richard for three years while this case was being litigated. Accordingly, we will not disturb the trial court's ruling in this regard, and hold that any modification in Ryan's custody must be presented to the trial court and resolved pursuant to the standards and procedures contained in KRS 403.340.

In her next argument, Debra insists that the trial court erred in failing to impute more than $40,000 per year as income for Richard for the purposes of setting child support. Debra contends that the amount of income imputed should be predicated on his "recent work history," which she argued was substantially more than $40,000 per year [emphasis original]. Debra asks that this Court examine the parties' income tax returns for the years 1992 though 1995, which show that Richard had an average annual income in excess of $100,000. She also points to evidence of the many benefits that Richard had by virtue of his employment at Osborne Motors that were not reflected on the income tax returns, including the payment of automobile insurance, free gasoline, and the services of a housekeeper.

Debra recognizes that Richard lost his employment at his family's business. Yet, she insists that KRS 403.212(2)(a) and the case of Keplinger v. Keplinger,[15] require that his support obligation be based on his earning history. Indeed, the

[15]Ky.App., 839 S.W.2d 566 (1992).

child support guidelines require that the determination of the "potential income" of an voluntarily unemployed or underemployed parent be "based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community."[16]

Again, however, we find no abuse of the trial court's discretion in this regard. It is true that Richard's income tax returns indicate that he earned more than $40,000 during the last years of the marriage. However, unlike the facts in Keplinger, where there was no evidence that the support obligor's future earnings "were likely to vary significantly" from his recent earnings, there was considerable evidence in this case that Richard's reported earnings on his income tax returns were not truly indicative of his actual income and that his earnings would not approach previously reported amounts in the foreseeable future.[17] Much of the income reported from 1992 to 1995 was comprised of distributions of income earned by the shareholders of Osborne Motors which Richard testified were not paid to him, but which were actually returned to the corporation as working capital.[18] It is apparent to us, as it was to the trial court, that Richard's previous earnings were artificially enhanced because of his familial relationship to the majority stockholders of Osborne Motors. Accordingly, we find no error in the trial

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[16]KRS 403.212(2)(d).

[17]Keplinger, 839 S.W.2d at 569.

[18]For example, in 1995, Richard reported earnings of $124,212, including $48,200 in actual wages, and $67,022 in corporate distributions, the latter amount he did not receive.

court's setting of child support by imputing income to Richard of the more realistic amount of $40,000 a year, and not the higher amount requested by Debra.

Finally, Debra argues that the trial court erred in failing to award her any sum for her attorney's fees. Again, we find no abuse of discretion. Having reviewed the record, we are not convinced that there is any great disparity in the parties' financial resources that warrants a reversal of the trial court's determination that each party should be responsible for their own fees and costs.[19]

Accordingly, the judgment of the Hardin Circuit Court is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

BUCKINGHAM, JUDGE CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Douglas E. Miller Radcliff, KY	Diana L. Skaggs Louisville, KY

[19]Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975); Lampton v. Lampton, Ky.App., 721 S.W.2d 736 (1986); KRS 403.220.