

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001493-MR

JOE R. ROWE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 99-CI-00299

LORI ROWE

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal in a domestic case from those portions of a judgment and post-judgment order determining custody, child support and dividing the parties' marital assets. We affirm on all issues except as to the court's awarding appellee her marital share of appellant's police retirement benefits already received during the marriage and before separation. On this issue, we reverse and remand for a redistribution of said funds.

Appellant, Joe Rowe, and appellee, Lori Rowe, were married in 1993 and separated on March 8, 1999. One child was born of the marriage, Samantha Rowe, born April 24, 1994. On

March 18, 1999, Lori filed the petition for dissolution of marriage herein. The decree of dissolution was entered on November 22, 1999, reserving issues of custody, child support and division of marital and nonmarital assets.

At the time of the divorce, Lori was employed as a school teacher, earning \$2,519.19 a month, while Joe was retired from the Kentucky State Police and had begun earning \$3,273.50 a month from his police retirement account in April of 1998. After retiring from the State Police in April of 1998, Joe began working for the Commonwealth of Kentucky, Department of Insurance, earning \$3,931.52 a month. He was terminated from said job in December of 1999 for unauthorized travel and usage of state vehicles, discrepancies in time and attendance reporting, insubordination, difficulty in relating to staff, and inappropriate requests for expense reimbursement. There was post-judgment evidence presented that in December of 1999, Joe had become self-employed as a private investigator, earning \$60 an hour.

On March 15, 2000, the court entered its findings of fact, conclusions of law, and order determining the issues of custody, child support, and distribution of marital property. The court found both parents fit to have custody and thus awarded joint custody of the minor child, with Lori being designated the primary residential custodian. Joe was to have visitation of the child every other weekend and on Thursday evenings.

In its determination of child support, the court found that Joe was voluntarily unemployed or underemployed due to his

termination from the job at the Department of Insurance for reasons involving "poor decision-making and poor communication." Hence, the court imputed a gross monthly income to Joe of \$5,273.50 per month, which represented the \$3,273 a month from his State Police retirement, plus \$2,000 a month as the amount Joe was capable of earning. Using these figures, the court calculated Joe's child support obligation to be \$615.55 a month.

As to the parties' property, the court awarded Lori the marital residence valued at \$104,500, but found that each party had a one-half interest in the equity therein of \$22,024.66. Lori was to be responsible for the remaining debt on the property.

Joe's retirement benefits from the Department of Insurance amounting to \$5,173.27 were awarded to Joe free and clear. Lori's retirement benefits from her teaching position totaling \$18,503.61 were awarded to Lori free and clear. As for Joe's retirement benefits from the State Police, at the time he retired, they totaled \$87,878.51. Of that value, \$40,806.03 was earned during the marriage. From the time he began receiving said benefits in April of 1998 until March of 2000, Joe had already received \$67,951.37 of those benefits. The court calculated Lori's marital interest in those benefits to be \$9,356.90.¹ In awarding this amount to Lori, the court offset the amount, plus \$1,800 in marital interest in one of the parties' vehicles, from the \$11,012.33 Joe was awarded as his

¹From our review of the record, we could not discern how the court arrived at this figure. However, neither party raises that issue as error on appeal.

share of the equity in the marital residence. As for Joe's future earnings from the police retirement account, the court awarded Lori 13.77% of any future disbursements thereof.

The court awarded Lori the deferred compensation from her teaching job in the amount of \$12,757.56. Likewise, Joe was awarded his deferred compensation in the amount of \$11,642.69 from his state police job.

On March 24, 2000 (nine days after the aforementioned judgment was entered), Lori and Joe engaged in a telephone conversation which was recorded by Lori in which Joe repeatedly threatened to kill Lori. Consequently, Lori obtained an emergency protective order (which was thereafter converted to a domestic violence order) against Joe and filed a terroristic threatening charge against him. On March 27, 2000, Lori filed a motion to alter, amend or vacate the court's order of March 15, 2000. Citing Joe's threats to her kill her and the resulting domestic violence order, Lori asked that the award of joint custody be vacated and that she be awarded sole custody of the parties' child. Further, she moved the court to suspend all visitation by Joe. Joe also moved the court to alter, amend or vacate the judgment of March 15, 2000, citing various errors in the division of marital property and the computation of child support.

On June 13, 2000, the court entered an order granting Lori's motion to award her sole custody and suspend Joe's visitation with the child. The court stated:

Events took place between the parties subsequent to the hearing which gave rise to

an emergency protective order and to criminal charges being placed by Ms. Rowe against Mr. Rowe. That incident and the attendant circumstances give the Court reason to grant Ms. Rowe's motion and to award her sole custody and to suspend overnight visitations by Mr. Rowe.

The court denied all of Joe's requests in his motion to alter, amend or vacate except for one which is not at issue in this appeal related to child support. From the orders of March 15 and June 13, 2000, Joe now appeals.

We will first address Joe's argument that the court erred in changing the joint custody order to sole custody in Lori. Although the audiotape of the conversation between Joe and Lori is not in the record, Joe does not dispute that he repeatedly threatened to kill Lori in that conversation. Joe merely argues that these threats against Lori had no effect on his daughter or on his relationship with his daughter and, thus, should not have been considered by the court pursuant to KRS 403.270(3) in determining custody.

KRS 403.270(2) sets out the factors to be considered by the court in determining the best interests of the child with regard to custody. One of the factors is "[t]he mental and physical health of all individuals involved." Another of the factors is "[i]nformation, records, and evidence of domestic violence as defined in KRS 403.720." KRS 403.270(2)(f). KRS 403.720(1) define "domestic violence and abuse" as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical

injury, sexual abuse, or assault between family members or members of an unmarried couple." KRS 403.270(3) provides:

The court shall not consider conduct of a proposed custodian that does not affect his relationship with the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

In our view, the court's finding that Joe's threats to kill Lori warranted an award of sole custody to Lori was not in error. The court must consider "the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents." KRS 403.270(3). We do not see how Joe can seriously contend that threats to kill one of the child's parents would not directly or indirectly affect the child and child's relationship to both parents. We have all learned that threats of domestic violence must be taken seriously. If the parent is capable of killing the other parent, which we must presume, we question the safety and welfare of the child in the offending parent's custody. Moreover, if the parent followed through and actually did harm or kill the other parent, that would undeniably and irrevocably damage the child and the parent's relationship with the child. At the very least, such threats call into question the mental stability of the threatening parent and demonstrate excessive hostility toward the other parent, to which it would be unhealthy to expose a child. Accordingly, we affirm the court's decision to award sole custody to Lori.

Joe's next argument is that the court erred in finding him voluntarily unemployed or underemployed for purposes of

computing child support. At the time of the divorce, litigation was pending wherein Joe was contesting his termination from the Department of Insurance job. Joe argues that since his termination from the Department of Insurance was not voluntary or justified, and certainly was not for the purpose of avoiding his child support obligation, the court should not have found him voluntarily unemployed or underemployed based on this job. KRS 403.212(d) provides:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, . . . Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

A trial court's findings regarding child support will not be overturned unless they are clearly erroneous, i.e. unsupported by substantial evidence. Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980). The court found that Joe brought about his termination from the Department of Insurance job due to misconduct which was within his control. There was evidence of said misconduct introduced at the hearing in this matter. Hence, this finding was not clearly erroneous. The court did not find, and was not required to find per the above statute, that Joe got fired from this job for the purpose of avoiding or reducing his child support obligation. Whether the firing was justified or not, we do not believe the court erred in imputing income to Joe

based on his salary at the Department of Insurance, as that job would at least have been an indication of his probable earnings level. Joe did not allege that he could not seek other comparable employment after his termination from the Department of Insurance. In fact, there was post-judgment evidence in the record that in December of 1999, Joe had become employed as a private investigator, earning \$60 an hour (although he maintained at the time of the hearing that he was unemployed). Accordingly, we cannot say the trial court erred in finding Joe voluntarily unemployed or underemployed and thereby calculating his potential income based on the Department of Insurance job.

Finally, Joe argues that the trial court inequitably divided the parties' marital assets. In particular, Joe argues that under KRS 403.190(4), the court erred in awarding Lori her teaching retirement benefits free and clear pursuant to KRS 161.700(2) without exempting an equal portion of Joe's retirement benefits from his insurance and police retirement accounts from marital division. As stated earlier, the court awarded Joe his insurance retirement benefits free and clear, but divided the marital portion of his police retirement benefit. In reviewing the record, we see that the first time Joe made the argument that he was entitled to an equal portion of Lori's teaching retirement benefits was in his motion to alter, amend or vacate. In the order on this motion, the court stated as follows:

The reason that Mr. Rowe was not awarded a marital interest in her retirement account was that no calculations concerning the marital interest in that account was available to the Court. In addition, Mr.

Rowe's proposed findings did not ask for a share of her retirement.

Accordingly, this argument was not preserved for our review. See Payne v. Hall, Ky., 423 S.W.2d 530 (1968).

Joe also argues that the court should not have awarded Lori her marital portion of the amount he received from his police retirement account during the time the parties were still married and living together because it was household income already spent by both parties during the marriage. Joe began receiving his police retirement in April of 1998, and it is undisputed that the parties separated in March of 1999. Although the court did not specifically find that Joe dissipated the funds he received from his police retirement account during this time, the court impliedly so found when it required Joe to pay Lori her marital share of these funds which were received during the marriage. "The court may find dissipation when the marital property is expended (1)during a period when there is a separation or dissolution impending; and (2) where is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property." Brosick v. Brosick, Ky. App., 974 S.W.2d 498 (1998), quoting Robinette v. Robinette, Ky. App., 736 S.W.2d 351, 354 (1987). The parties were not separated during the period in question and the divorce was not filed until March 18, 1999. Joe maintains that said funds were used by both parties as household income during this time. Lori did not present any evidence that Joe did anything with the police retirement funds received during this time demonstrating an intent to deprive her of her marital share thereof, such as

depositing it in a separate account or spending it for a nonmarital purpose. Unless Lori could trace the funds to such an account or expenditure, we must presume that the funds received during the marriage and before separation were co-mingled with other marital funds and spent by or on behalf of both parties just as any other income would have been. Accordingly, we reverse that portion of the court's order requiring Joe to pay Lori her marital share of the police retirement funds received during the marriage prior to separation and remand for a redistribution of these funds consistent with this opinion.

Joe's remaining argument is that the court erred in considering the amount he receives from his police retirement account in calculating child support. KRS 403.212(2)(b) specifically includes retirement benefits in the definition of "gross income" for purposes of computing child support. Accordingly, this argument is without merit.

For the reasons stated above, we affirm in part and reverse and remand in part for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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