

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002878-MR

SILAS DAVID BRUMFIELD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 98-CI-00131

LYNN MARIE BRUMFIELD

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, MILLER AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Silas David Brumfield (David) appeals from a divorce decree entered by the Fayette Circuit Court on October 11, 2000. We affirm.

David and Lynn Marie Brumfield (Lynn) were married on April 11, 1987. They have two children, Corey, age 6, and April, age 5. Lynn left the marital residence with the children on December 10, 1997, and began divorce proceedings shortly thereafter. Lynn was given temporary sole custody of the children and David was granted visitation pursuant to timesharing guidelines set by the trial court.

A review of the record shows that the divorce proceedings were very contentious. The parties ultimately agreed to share joint custody of the children, but David requested that no primary custodian be designated. Aside from the custody issues, the parties also disagreed on division of the marital assets and debt. Specifically relevant to this appeal were issues surrounding division of (1) equity in the marital residence; (2) David's pension and savings plan with his employer; and (3) certain items of marital debt.

On October 11, 2000, the trial court entered its decree of dissolution. In regard to the children, the trial court ordered the parties to share joint custody with Lynn acting as primary residential custodian. The decree also stated:

Wife agrees and therefore it shall be ordered that the minor children shall not be left alone in the care of her mother . . . for greater than a thirty (30) minute time frame.

David was once again given visitation with the children pursuant to timesharing guidelines set by the trial court. In regard to the marital residence, the trial court set its value at \$91,000, found the amount of equity in the residence to be \$35,171.23, and ordered that the equity be divided equally between the parties. The trial court also ordered that David's pension plan and 401-K plan through his employer be divided equally, and that the value of each account be determined as of the date of the divorce decree. As to the marital debt, David was assigned responsibility for all indebtedness related to the parties' joint credit card. He was also assigned responsibility for payment of a loan he obtained from his employment savings plan. Following

denial of his motion to alter, amend or vacate, David filed this appeal from the divorce decree.

I. DID THE TRIAL COURT ERR IN DENYING DAVID
EQUAL CUSTODY OR SUBSTANTIAL TIMESHARING
WITH THE PARTIES' CHILDREN?

At trial, David maintained that he had developed a close relationship with the children since the parties separated. Evidence presented to the trial court showed that David had volunteered at the childrens' daycare. When he worked second shift he would spent time with the children at their daycare. Now that he works on the day shift he is home a short time after Cory gets home from kindergarten.

During the hearing, David proposed that his mother pick up the children from school and daycare. He would then pick up the children from her house and keep them until Lynn gets off work, when they would return to her residence. In David's opinion, this would be better than having the children remain in daycare until Lynn gets off work. David also asked the trial court not to designate a primary custodian so that each parent would have "true joint custody."

Lynn strenuously objected to David's proposal. She maintained that David did not develop a relationship with the children until after the separation. Lynn argued that David's proposal would result in him having the children from 3:00 to 8:00 Monday through Thursday, which would give her little quality time with them. She further argued that this arrangement would disrupt the childrens' schedule. Finally, a custodial evaluation

prepared by Dr. David Feinburg recommended that Lynn be designated primary custodian of the children.

David maintains that the designation of Lynn as primary custodian forces the children to remain in daycare instead of with him and was clearly erroneous. We disagree.

As Lynn points out in her brief on appeal, the purpose of joint custody is to give each parent an equal say in the decision-making process regarding their children, not to divide the time each parent spends with the children equally. "Joint custody is an arrangement in which both parents equally share decision-making authority concerning major areas of their child's upbringing. . . . [It] does not require an equal division of physical residence between the parents[.]" Aton v. Aton, Ky. App., 911 S.W.2d 612, 614 (1995) (Emphasis in original).

The trial court heard a great deal of evidence in regard to how the children have been cared for since the parties' separation in 1997. The record shows that Lynn did not work and stayed home with the children when the parties were married, and that the children remained with her after the separation. They are doing well in their school programs. After an evaluation of the parties and the children, Dr. Feinburg recommended that Lynn be the primary custodian. Based on its review of the record, the trial court found that it was in the childrens' best interest to continue in their established routine. After reviewing the record on appeal, we do not believe the trial court's decision was clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

II. DID THE TRIAL COURT ERR IN ALLOWING LYNN
TO LEAVE THE CHILDREN ALONE WITH HER MOTHER
FOR A PERIOD NOT TO EXCEED THIRTY MINUTES?

Prior to the hearing, David presented evidence to the trial court regarding the removal of foster children from the care of Lynn's mother because of abuse. The trial court entered an order on May 18, 1999, stating that the children were not to be left alone with Lynn's mother pending further review. The trial court later obtained records of the investigation of Lynn's mother from the Department of Social Services and reviewed them in camera.

During the hearing, Lynn agreed not to leave the children alone with her mother. David maintains that had Lynn not made this agreement, he would have called a witness to testify regarding events related to Lynn's mother's care of the foster children.

When counsel for the parties met with the trial court to discuss the terms of the divorce decree, Lynn's attorney argued that Lynn should be permitted to leave the children alone with her mother for "reasonable" periods of time. Although David's attorney strongly objected to the request, the trial court provided in the decree that the children were not to be left alone with Lynn's mother for more than thirty minutes at a time.

David maintains that the trial court erred in its decision to allow the children to remain alone with Lynn's mother for limited periods of time after Lynn agreed at the hearing not to leave them alone with her mother. We disagree.

Case law makes it clear that any agreement between the parties to a divorce regarding their children is not binding on the trial court, which must make its decision based on the best interest of the children. See Atwood v. Atwood, Ky., 550 S.W.2d 465 (1976); Wells v. Wells, Ky., 412 S.W.2d 568 (1967). The trial court considered this issue on two separate occasions; once prior to entering the order on May 18, 1999, and again in entering the divorce decree. It also had the opportunity to conduct an in camera review of records from the investigation of Lynn's mother. Having considered the evidence contained in the record, we do not believe that the trial court's decision on this issue is clearly erroneous.

III. DID THE TRIAL COURT ERR IN ITS DIVISION
OF DAVID'S PENSION AND SAVINGS PLANS?

During the course of the marriage and separation, David was employed by General Electric and participated in its pension and savings plan. David continued to make contributions to the pension plan while the parties were separated, but stopped contributing to the savings plan in April 1998. Both accounts continued to grow during the separation. David testified at trial that although he stopped contributing to the savings plan, he continued to manage it in a way that contributed to its further growth. Lynn made no contributions to the accounts after the parties separated. In the decree, the trial court ordered that the pension and savings plan be divided equally between the parties. In so holding, the trial court ordered that the plans be divided based on their value as of the date of the divorce decree.

David maintains that the plans should have been divided based on their value as of the date the parties separated. We disagree. Pension and employment-related savings plans are to be divided as of the date of the divorce decree. Clark v. Clark, Ky. App., 782 S.W.2d 56, 62 (1990). "It is the pension, not the benefits, which is the marital asset which is divided by the court." Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 503 (1998).

IV. DID THE TRIAL COURT ERR IN DIVIDING THE EQUITY IN THE MARITAL RESIDENCE EQUALLY BETWEEN THE PARTIES?

When the parties separated, Lynn moved out of the marital residence. David continued to reside in the marital residence and made all of the mortgage payments from the date of separation. David maintains that at the time the parties separated, the mortgage balance was \$58,356.51, and that as of June 2000 the balance was \$55,828.77. At trial, David asked the trial court to grant him additional equity in the marital residence to account for the reduction in the mortgage balance since the date of the parties' separation. The trial court refused to do so, finding that although David made the mortgage payments during the separation he also was able to stay in the residence as opposed to Lynn, who had to pay rent. Furthermore, as all the payments came from David's income from his employment, they were made with marital assets, thus he had no ground to claim a non-marital interest in the home. The trial court then ordered that the equity in the marital residence be divided equally between the parties.

David maintains that because Lynn paid nothing on the mortgage after they separated, he should have been given an extra \$2,527.74 from the equity in the marital residence representing payments he made on the mortgage between the date of separation and the date of the divorce decree. We disagree.

Under KRS 403.190(1), the trial court is directed to divide marital assets "in just proportions considering all relevant factors[.]" David correctly states that one of the factors to be considered is the "[c]ontribution of each spouse to acquisition of the marital property[.]" KRS 403.190(1)(a). However, another factor to be considered is the "[e]conomic circumstances of each spouse when the division of property is to become effective[.]" KRS 403.190(1)(d). No one can argue that while both David and Lynn were employed during the course of their separation, David earned substantially more than Lynn and was better able to make the mortgage payments. As the trial court found, in exchange for making these payments, David was able to reside in the marital residence while Lynn had to pay rent. It is also clear that the disparity in income continued at the date of the divorce decree and thereafter. After considering all of the relevant facts of KRS 403.190(1), the trial court divided the equity equally between the parties. Based on our review of the record, we are not persuaded that this constituted an abuse of discretion on behalf of the trial court. Garrett v. Garrett, Ky. App., 766 S.W.2d 634, 636 (1989).

V. DID THE TRIAL COURT ERR IN ASSIGNING SOLE
RESPONSIBILITY FOR THE EMPLOYMENT SAVINGS
PLAN LOAN AND JOINT CREDIT CARD TO DAVID?

David testified that prior to the parties' separation, he borrowed money from his employment savings plan to purchase a heat pump for the marital residence, and at the time of separation the balance of that loan was \$1,776. David stated that he paid off the loan following the parties' separation and argued that he should receive credit for half of this debt which was owed as of the date of the parties' separation.

In regard to the joint credit card, the record shows that it was used to purchase a computer in November 1997 shortly before the parties separated. Following the parties' separation, David retained the computer, which was ultimately awarded to him in the division of the marital property. David also continued to charge online services to the joint credit card after the separation, and also used it to obtain a \$500 cash advance to retain an attorney shortly after the parties separated. David made payments on the joint credit card debt until he was unable to do so, and it appears that the credit card debt became the subject of a collection suit against David and subsequent wage garnishment. In relation to the collection suit, David paid \$769 to the law firm representing the creditor. David asked that he receive credit for the \$769 payment and that the remainder be divided equally between the parties. The trial court refused, and assigned responsibility for payment of the joint credit card debt to David.

In regard to the heat pump loan, David maintains that Lynn will benefit from the heat pump when the house is sold but he will be solely responsible for the debt stemming from its

purchase. David makes no specific argument in regard to the joint credit card debt, aside from arguing that Lynn received half of the marital assets but none of the marital debt.

We do not believe that the trial court's division of marital debt in regard to these two issues amounts to an abuse of discretion. Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994). The computer purchased with the joint credit card remains in David's possession and he continued using the credit card after the separation for his own benefit, thus there is nothing erroneous in ordering him to pay those charges. In regard to the employment savings plan loan, aside from David's testimony there is no documentation in the record to show what the loan was used for, and when or if it was paid off.

Having considered the parties' arguments on appeal, the divorce decree entered by the Fayette Circuit Court on October 11, 2000, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan S. Kennedy
Lexington, KY

BRIEF FOR APPELLEE:

Michael Davidson
Suzanne Van De Kieft
Lexington, KY