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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001163-MR

MICHAEL COX — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 03-CI-02061

SHANNON GOINS COX — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: DIXON, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: This appeal arises from the dissolution of the marriage between Michael Cox (Michael) and Shannon Goins Cox (Shannon). Michael appeals the Fayette Family Court's findings regarding timesharing of the couple's minor child, the amount of child support awarded, and the computation of and division of marital property, which Michael argues was simply a poorly veiled award of maintenance. Michael also appeals from the family court's award of "parenting coordinator expenses"; the family court's

denial of Michael's motion in limine regarding expert testimony offered by Shannon; the family court's order of a *de novo* review of child support after one year; and the trial court's denial of Michael's motion to alter, amend, and to make additional findings. For the reasons set forth below, we affirm in part, reverse in part, and remand.

FACTS

Shannon and Michael began dating approximately one year before their November 10, 2001, wedding. Both parties were employed full-time at the time of the marriage, Michael as a partner in a law firm and Shannon as a paralegal in the Governor's office. Both parties had property and debt that they brought to the marriage, and both parties acquired additional property and debt during the course of the marriage.

In February of 2003, the parties separated, and on September 15, 2003, Shannon gave birth to the couple's son, Andrew. Since his birth, Andrew has resided primarily with Shannon; however, Michael has obtained increased timesharing, and, at the time of the trial, had Andrew for two overnight visits and one evening visit per week with the option to take Andrew from daycare at any time to spend time with him during the day. Additionally, Michael had "right of first refusal" for any time that Shannon could not spend with Andrew because of work or other commitments.

Several months before the wedding, Michael purchased a house with the intent that it would become the marital home. Since their separation, Michael has remained living in the marital home, while Shannon has rented an apartment. Prior to the separation, Shannon and Michael shared equally in household expenses such as

mortgage payments and utility bills; however, since the separation, Michael has paid substantially all of the expenses related to the marital home while Shannon has paid all of her expenses.[1]

The parties agreed to joint custody of Andrew; however, they have not agreed to much else. During the course of litigation, the parties sought orders from the family court on matters regarding the child's name, whether Michael could be present at the child's birth, whether Shannon could have timesharing of the child on Easter of 2004, whether Michael should pay Shannon maintenance while she was off work giving birth, the timesharing that should be allocated to Michael, and the amount of child support due. Some of these issues the parties resolved through mediation, others they did not.

On February 1, 2005, the parties began presenting evidence in what would ultimately turn out to be a four-day trial that ended on March 28, 2005. At trial, the parties both testified and presented testimony from expert and lay witnesses. That testimony will be summarized as necessary as it relates to each issue. Following the trial, the family court issued findings of fact and conclusions of law finding that: (1) the parties would continue to share joint custody and, in the event they could not agree regarding any non-emergent issues, Dr. Dianna Hartley would act as a "parenting coordinator" to help resolve such issues, with Michael to be responsible for 75% of the cost of Dr. Hartley's services; (2) Andrew would be with Michael from 3:00 p.m.

[1] We note that, for several months before the marriage, the couple resided in the house and equally shared expenses during that time period. During all the time the couple lived together, Michael calculated what Shannon's share of the expenses was each month and presented her with an "invoice." Shannon then paid Michael the amount due on the invoice.

Monday to 9:00 a.m. Tuesday, from 3:00 p.m. Wednesday to 9:00 a.m. Thursday, and from 9:00 a.m. Saturday to 9:00 a.m. Sunday; (3) Michael owed Shannon $592.00 per month in child support and an additional $205.00 per month for health insurance for a total of $797.00; (4) neither party was entitled to maintenance or attorney fees; (5) the marital home increased in value due primarily to "inflationary factors" and that 25% of the total increase should be designated marital property; (6) there was no reason why the marital property should not be divided equally, and to equalize the property assigned to each, Michael owed Shannon $35,000; (7) each party would be responsible for his or her credit card debt; and (8) temporary child support and timesharing would remain in effect until June 1, 2005. Additionally, and of most concern to this Court, the family court stated that:

> [t]he Petitioner/Mother has declared her intention to quit her job in Frankfort, which means the timesharing orders of this Court, as well as other orders of the Court, are contingent upon her decision to <u>not</u> work for at least the next year during the critical years for this child bonding with his parents. The Court understands that her decision is contingent upon receipt of sufficient liquid marital assets to support herself and the child for at least one year. (Emphasis in original.)

On May 4, 2005, the family court issued a Decree of Dissolution of Marriage adopting the preceding findings of fact and conclusions of law. Michael filed a motion to alter, amend, and make additional findings of fact, which the family court granted in part on June 2, 2005. However, we note that the changes the family court made were minor in nature and do not have any direct impact on this appeal. It is from

the family court's findings of fact and conclusions of law as amended by its June 2, 2005, order that Michael appeals.

TESTIMONY OF SUSAN SMITH

During the trial and at a pre-trial hearing, Shannon offered testimony from Susan Smith, Ph.D., regarding the issue of timesharing. Dr. Smith testified that Andrew is primarily attached to Shannon and that he was spending too much time away from her. According to Dr. Smith, absence from Shannon interfered with Andrew's attachment to Shannon and could result in Andrew developing social problems later in life.

Michael filed a motion in limine to keep Dr. Smith from testifying at trial and objected to her testimony at trial. In attacking the admissibility of Dr. Smith's testimony, Michael argued that she lacked the necessary training and experience to testify regarding timesharing and that she had served as Shannon's private counselor before rendering her opinion regarding timesharing. The family court denied Michael's motion and overruled his objection. On appeal, Michael argues that the family court improperly admitted Dr. Smith's testimony.

Regarding the admissibility of an expert opinion, the standard of review is whether the trial court abused its discretion. *Smith v. Commonwealth*, 181 S.W.3d 53, 59 (Ky.App. 2005). To determine if expert testimony is admissible, a trial court must consider four factors: (1) whether the witness is qualified to render an opinion on the subject; (2) whether the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); (3)

whether the subject matter satisfies the test of relevancy in KRE 401, subject to the balancing requirement of KRE 403; and (4) whether the opinion will assist the trier of fact pursuant to KRE 702. *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997), *cert. denied*, 523 U.S. 1052, 118 S.Ct. 1374, 140 L.Ed.2d 522 (1998). The only *Stringer* factor Michael takes issue with is the first, Dr. Smith's qualifications. Therefore, that is the only *Stringer* factor we will address.

Having reviewed Dr. Smith's resume and her testimony at both the pre-trial hearing and the trial, and granting the family court its due deference, we do not discern any error on the part of the family court in admitting Dr. Smith's testimony. In so holding, we note that Dr. Smith has training and experience in psychotherapy for children and that she has performed evaluations related to child custody, albeit limited in number. As to whether Dr. Smith could render an opinion regarding timesharing when she had treated Shannon, that is not one of the *Stringer* factors and goes to the weight to be afforded Dr. Smith's testimony, not to its admissibility. Finally, we note, as did Michael in his brief, that it appears Dr. Smith's testimony had little, if any, impact on the family court's ruling. Therefore, we affirm the family court as to the admissibility of Dr. Smith's testimony.

PARENTING COORDINATOR EXPENSES

Michael objects to the family court's order requiring him to pay 75% of any cost associated with post-dissolution use of a parenting coordinator. It appears that Michael's objection is based on his perception that the family court did not give sufficient

reasoning to support its order. Michael did not cite any statutory or case law to support his position and Shannon cited to *Scott v. Scott*, 433 S.W.2d 631 (Ky. 1968), a case regarding assessment of witness fees to an opposing party,

Having discovered no statutes, case law, or regulations precisely on point, we believe that KRS 403.220 is instructive on this issue. KRS 403.220 provides, in pertinent part, that:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost of the other party of maintaining . . . any proceeding . . . including . . . costs incurred prior to the commencement of the proceeding or after entry of judgment.

Taking the preceding into consideration, we hold that parenting coordinator fees are similar to costs and thus subject to apportionment by the family court.

To determine if the family court properly apportioned the parenting coordinator fees herein, we will use the standard for reviewing an award of costs under KRS 403.220. As noted by the court in *Wilhoit v. Wilhoit,* 521 S.W.2d 512, 514 (Ky. 1975):

> If there had ever been any doubt regarding the discretionary authority of the trial court to allocate court costs and award an attorney's fee, KRS 403.220 laid that doubt to rest once and for all. As matters now stand, an allocation of court costs and an award of an attorney's fee are entirely within the discretion of the court.

With the above standard in mind, we hold that the family court did not abuse its discretion when it apportioned parenting coordinator fees as it did. In so

holding, we note that the family court did not specify why it apportioned the parenting coordinator fees as it did; however, the family court did note in its findings of fact and conclusions of law the disparity of income between the parties and the different economic circumstances of the parties. Although the apportionment of any parenting coordinator fees does not mirror the parties' incomes, it is not so detached from reality as to be an abuse of discretion. Therefore, we hold that the family court properly apportioned parenting coordinator fees.

TIMESHARING

Since the birth of his son, Michael has sought increased timesharing. Prior to trial and at trial, Michael asked the family court to award him equal time with Andrew. In support of his position, Michael offered his testimony as well as testimony from his brother, his sister-in-law, several daycare workers, and Dr. David Feinberg. All testified as to the positive nature of the relationship between Michael and Andrew. Furthermore, Dr. Feinberg testified that it is important for Andrew to develop an attachment with Michael at an early age and that it is important for Andrew to spend time with Michael.

On the other hand, Shannon offered her testimony and testimony from Dr. Smith and several daycare workers. As noted above, Dr. Smith testified about the primary attachment theory and how important it was for Andrew to spend as much time as possible with Shannon in order to develop that attachment. Shannon testified that Andrew was having difficulty making the transition from Michael's care to hers and that Andrew had become increasingly "fussy" since Michael had started keeping Andrew

overnight. The daycare workers testified that Andrew had been increasingly fussy in the month before the trial began, and that he had been, at times, inconsolable.

Michael argues, in part, that the family court judge was biased against him because of the judge's personal dislike of daycare. The family court expressed on several occasions a personal dislike for daycare, at least in this case. The family court encouraged Michael to increase the time he spent with Andrew by rearranging his work schedule and taking Andrew out of daycare. However, the family court also indicated that Shannon could decrease the amount of time Andrew spent in daycare by quitting her job in Frankfort and finding a job in the Lexington/Fayette County area. Michael cites the following as evidence of the family court's bias against him and daycare:

> It is not in the best interest of Andrew to be in daycare every day when both parents are professional people who are capable of providing sufficient income to support themselves and the child without sending Andrew to daycare on a daily basis. Alternative working arrangements would be in Andrew's best interests. . . . This child's best interest is served by arranging more time with both parents, not with just trying to equalize the time between Petitioner/Mother and Respondent/Father. Indeed, if the current arrangement continues, this child would have what could be easily called a "parent deficit disorder." (Emphasis in original.)

Michael argues before this Court that, as an equal custodial parent, he and Shannon are entitled to equal timesharing. He notes that neither he nor Shannon has been appointed the primary residential custodian or caregiver and argues that the family court improperly gave preference to Shannon based on her status as Andrew's mother. Shannon counters that the timesharing arrangement imposed by the family court is more

generous than the timesharing schedule the parties had agreed to just five months before trial. Furthermore, Shannon argues that Michael could have increased his timesharing if he had simply followed the family court's suggestion and re-arranged his work schedule so that he could spend time with Andrew during the day rather than keeping Andrew in daycare.

At the outset of our analysis of this issue, we note that Michael is correct that the family court did not appoint either party as the primary residential custodian. While we believe that it is the better practice for the family court, if the parties cannot agree, to designate one parent as primary residential custodian, "it is possible to proceed with joint custody with no primary residential custodian designated." *Brockman v. Craig,* 205 S.W.3d 244, 248 (Ky.App. 2006). However, we disagree with Michael's assertion that an award of joint custody, absent a designation of one parent as primary residential custodian, means that the parties should automatically start with equal timesharing. As noted by the Supreme Court of Kentucky in *Fenwick v. Fenwick,* 114 S.W.3d 767, 777 (Ky. 2003), joint custody "contemplates shared decision-making rather than delineating exactly equal physical time with each parent." Custody should be shared in such "a way that assures the child frequent and substantial contact with each parent under the circumstances." *Id.* at 778. Although this case does not fall directly under the purview of KRS 403.320, the visitation statute, we believe that the same standard of review applies. Therefore, we must examine the family court's order of timesharing to

determine if the family court abused its discretion. *Drury v. Drury*, 32 S.W.3d 521 (Ky.App. 2000).

As noted by Michael, the family court stated that both parties are capable parents and can provide a caring and loving environment for Andrew. Our review of the evidence indicates that Andrew has developed a close bond with both parents under the timesharing schedule to which they agreed prior to the trial. While the expert witnesses disagreed somewhat regarding the amount of time Andrew should spend with each parent, they both agreed that Andrew did not appear to be significantly disadvantaged by the timesharing schedule then in effect. Finally, although Michael complains that the family court attempted to "browbeat" him "into not working," our review of the record reveals that the family court's discussion of alternative work schedules was aimed at both parties, not just Michael. While the family court may have referred to Michael more often when attempting to get the parties to rearrange their work schedules, the court also referred to Shannon. Therefore, we discern no particular impropriety with regard to the family court's statements in that regard or with the timesharing schedule imposed by the family court.

For the foregoing reasons, we affirm the family court's findings with regard to timesharing.

MARITAL PROPERTY/CHILD SUPPORT

Michael argues that the family court improperly determined the value of the marital estate and, when dividing the marital estate, essentially made an award of

maintenance. As to child support, Michael primarily argues that the family court did not take into consideration the timesharing arrangement when calculating child support. Shannon argues that the family court's calculation of marital property and division of same is correct and that the child support award was based on and supported by the facts before the family court. For the reasons set forth below, we reverse the family court with regard to its award of marital property and child support.

The parties testified at length regarding their financial activities prior to and during the course of their short-lived marriage. Furthermore, the parties filed voluminous exhibits to support their various arguments regarding those activities. Based on his review of the testimony and documents, the family court judge determined that marital property consisted of the following: (1) Shannon's 401k worth $7,500; (2) 25% of the increased equity in the marital home in the amount of $4,500; (3) Michael's 401k worth $24,000; (4) Michael's 2003 year end bonus worth $48,000; and (5) personal automobiles and personal property that the parties had agreed to divide. Furthermore, the family court found that each party was responsible for their own credit card debts and those debts would not be included as part of the marital estate. In order to equalize the distribution of marital property, which the family court apportioned equally as of the date of the beginning of the trial, the court ordered Michael to pay Shannon the amount of $35,000. As noted above, the court made this payment contingent upon Shannon quitting her full-time job.

In terms of child support, the family court ordered Michael to pay $797.00 per month, with $592.00 representing "child support" and $205.00 representing "insurance premiums." Again, as with the award of marital property, the family court made this child support award contingent on Shannon quitting her job.

KRS 403.190 provides that:

> (1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:
>
> > (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
> >
> > (b) Value of the property set apart to each spouse;
> >
> > (c) Duration of the marriage; and
> >
> > (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.
>
> (2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> > (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant

activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;

(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation;

(d) Property excluded by valid agreement of the parties; and

(e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

(4) If the retirement benefits of one spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be. However, the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse. Retirement benefits, for the purposes of this subsection shall include retirement or disability allowances, accumulated contributions, or any other benefit of a retirement system or plan regulated by the Employees Retirement Income Security Act of 1974, or of a public retirement system administered by an agency of a state

> or local government, including deferred compensation plans created pursuant to KRS 18A.230 to 18A.275 or defined contribution or money purchase plans qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended. (Footnotes omitted.)

It is presumed that all property acquired during the course of a marriage is marital property, unless the party claiming to the contrary can show that the property originated in one of the excepted ways outlined in KRS 403.190(2). *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002). The trial court must determine the proportional contribution each party made to acquiring an asset, *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky.App. 1981), keeping in mind the general principles of tracing non-marital property into currently owned property. *Chenault v. Chenault*, 799 S.W.2d 575, 579 (Ky. 1990). The division of property in a dissolution proceeding "requires a three-step process: (1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties." *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001).

We note that the "[t]rial court's valuation [of marital property] in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence." *Underwood v. Underwood,* 836 S.W.2d 439, 444 (Ky.App. 1992).

With the above in mind, we note that there are two issues with regard to the marital property: its value and how it should be distributed. As set forth in the statute, a court may take into consideration the economic circumstances of each spouse when

dividing marital property. Therefore, the family court's consideration of Shannon's work status at the time of distribution is not *per se* improper. However, based on the court's conclusions of law, specifically the court's statement that "other orders of the Court, are contingent upon [Shannon's] decision to not work for at least the next year" (emphasis in original), the family court's determination of the value of the marital property is improper. The status of property as either marital or nonmarital is not based on the economic status of either party, but on the nature of the property. Therefore, the family court's consideration of Shannon's employment status in determining the extent of the marital estate is not appropriate and we must reverse the family court on this issue.

As to child support, the family court erred with regard to the amount Michael was ordered to pay toward health insurance. Shannon testified that the cost for Andrew's health insurance under her plan was approximately $53.00 per month. Therefore, the additional $152.00 in "child support" toward health insurance must be for some coverage other than Andrew's. Based on the testimony at trial, it appears that the additional amount would be payment to cover, in part, Shannon and her child from another relationship. However, the increased amount could be based on some other consideration that is not clear to us. Without any explanation from the family court for this increased award, we cannot determine if the award was an abuse of discretion. Therefore, we remand this matter to the family court for additional findings regarding the child support award or a recalculation of that award.

Finally, as with the family court's valuation of marital property, we cannot discern from the court's order the basis for the amount of child support ordered. KRS 403.211(2) provides that "[c]ourts may deviate from the guidelines where their application would be unjust or inappropriate." However, "[a]ny deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation." Therefore, the family court was free to deviate from the guidelines; however, it was required to state its reasons for doing so. Based on our review of the record it is unclear whether the child support award is based on the parties' timesharing, income, work-status, a combination thereof, or some other factor or factors. Therefore, we remand this matter to the family court for additional findings regarding the court's reasoning for departing from the child support guidelines.[2]

DE NOVO REVIEW AND MOTION TO ALTER, AMEND AND MAKE ADDITIONAL FINDINGS

Michael argues that the family court improperly ordered the parties to return for a review of child support one year from the date of the decree of dissolution. Since more than one year has passed since that decree, this issue is now moot.

Michael argues that the family court erred when it overruled his motion to alter, amend and make additional findings. Based on the above, this issue is also now moot.

[2] Having reviewed this record as well as the video of the trial, we note that the family court judge attempted to make the best of a difficult situation. While we have found some fault with his ultimate findings, we do not find any fault with how he conducted these proceedings.

CONCLUSION

For the reasons set forth above, we affirm in part, reverse in part, and remand. On remand, the family court shall determine the value of the marital property absent any consideration of Shannon's employment status. The family court shall then divide the marital property in two ways, one absent any consideration of Shannon's employment status and the other taking into consideration Shannon's employment status. Finally, the family court shall calculate child support again in two ways, one assuming Shannon remains employed and the other assuming Shannon is not employed. With regard to any award of support based on health insurance, the family court shall determine the cost to insure Andrew under Shannon's plan and award that amount, giving Michael the option to insure Andrew under his plan if he so chooses.

ALL CONCUR.

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