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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000310-MR

KRISTOPHER LEE MAYNARD — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 04-CI-01129

EVELYN MICHELLE MAYNARD — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

NICKELL, JUDGE: Kristopher Lee Maynard ("Kris") appeals the findings of fact, conclusions of law and decree of dissolution of marriage entered by the Franklin Circuit Court on December 1, 2006. He also appeals an order entered by

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

the same court on January 24, 2007, partially overruling a CR 59.05[2] motion. Kris claims the trial court erred by: entering a timesharing order that differed from both the agreement reached by the parties and the recommendation of a child custody evaluation performed by Feinberg & Associates ("Feinberg"); miscalculating the monthly child support amount Kris was ordered to pay; and delaying for eight years Kris's recovery of nearly $20,000.00 in non-marital property associated with improvements his family made to the marital residence. We affirm in part, reverse in part and remand for further proceedings consistent with this Opinion.

Kris and Evelyn Michelle Maynard ("Michelle") lived together for several years before marrying in 1997. Prior to their marriage, Kris purchased a house and lot in Frankfort, Kentucky, which became the marital home. The house needed extensive repairs which Kris could not afford so his family provided nearly $20,000.00 to him in materials and supplies to improve the home.

Michelle delivered the couple's first son in 2001 and their second son in 2002. Kris worked in heating and air conditioning and Michelle, by agreement of the parties, became a stay-at-home mother.

Kris and Michelle separated on July 30, 2004. On August 13, 2004, Kris petitioned the Franklin Family Court to dissolve the marriage. Both Kris and Michelle sought joint custody of their two sons. Kris asked the court to order

[2] Pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, Kris moved the trial court to alter, amend or vacate its findings of fact, conclusions of law and decree of dissolution.

timesharing and Michelle agreed, but also asked that she be designated the primary residential custodian. Kris later moved for temporary primary custody of the boys. On September 21, 2004, the court temporarily ordered Kris and Michelle to share custody jointly. Kris was granted visitation with the children on alternate weekends and every Tuesday and Thursday evening.

On November 9, 2004, Kris asked the court to order the parties to undergo a custody evaluation by Feinberg. The court ordered the evaluation which revealed Kris and Michelle were long-term substance abusers and the ability of either of them to provide a safe environment for their children was questionable. After monitoring Kris and Michelle for nearly a year, Feinberg issued its final report. By that time, both parents had become more stable and it was recommended the court permanently award joint custody with equal timesharing. Before the final hearing, Kris and Michelle voluntarily followed the Feinberg recommendation.

Kris changed jobs several times after petitioning the court to dissolve the marriage. He claimed these changes allowed him to be closer to his children and to care for them while they were in his custody. However, each job change brought a reduction in his pay. Initially, Kris worked in Shelbyville, Kentucky, where he earned about $20.00 an hour plus overtime. Due to shift changes, Kris quit that job and took a position in Lexington, Kentucky, where he earned $17.00 an hour but received no retirement benefits, paid vacation or sick leave. In July

2006, his monthly take home pay was $1,790.56. Kris believed this job interfered with his parenting responsibilities so in January 2007 he took a maintenance job with state government in Frankfort, Kentucky, earning $15.82 an hour plus benefits. Kris also receives irregular payments from a discretionary trust created by his grandfather.

Michelle did not resume working outside the home until after Kris petitioned the court to dissolve the marriage. She briefly worked as a cashier at a convenience store earning $100.00 a month. At the time of the final hearing, she had just been hired as a counselor by Kentucky Alternatives of Frankfort where she anticipated earning $16,000.00 a year or about $7.70 per hour. After taking the full-time position she considered continuing to work at the convenience store on alternate Saturdays but ultimately did not. Upon completing a probationary period she received an hourly increase of fifty cents.

At the direction of the trial court, both parties filed proposed findings of fact and conclusions of law. After reviewing the pleadings, the trial court issued its own findings of fact, conclusions of law and decree of dissolution of marriage. Of relevance to this appeal, the court found it was in the best interest of the minor children for Kris and Michelle to share joint custody and for Michelle to be designated as the primary residential custodian. Consistent with Michelle's proposed findings, the trial court determined Kris would have the children every other weekend from Friday afternoon until Sunday at 8:00 p.m. and for one thirty-

six hour period during the week. In contrast, Kris had proposed he and Michelle transfer custody of the two boys on a weekly basis and alternate overnight Wednesday visits.

Consistent with Michelle's proposal and the worksheet she submitted, the circuit court ordered Kris to pay child support in the amount of $699.88 per month, as well as one-half of all child care costs, the children's medical insurance, and any uncovered medical, dental or prescription medicine expenses. Kris had proposed his monthly child support obligation be just $50.50.

The trial court found Kris had purchased the marital home prior to the marriage. While the home had no equity when the couple married, the fair market value of the property at the time of the final hearing was $98,000.00 with an existing mortgage of $60,829.00. Despite Michelle's assertion that Kris had not traced the canceled checks his stepfather wrote to Lowe's to specific items used to renovate the marital home, the trial court found Kris's family had given him $19,976.00 in materials and supplies to improve the residence and assigned that amount to him as non-marital property.

Pursuant to her request, the court allowed Michelle and the children to remain in the marital home for eight years and made her solely responsible for the mortgage payments during that time. The court ordered that at the end of the eight years, the marital home would be sold, $19,976.00 in non-marital property would be restored to Kris, and the remaining proceeds would be divided equally.

Michelle's request for $500.00 in monthly maintenance[3] for three years was denied.

Kris filed a motion to alter, amend or vacate. As requested in the motion, the trial court required Michelle to contribute $100.00 to each child's medical expenses, specified the years in which each parent would claim the children as a tax exemption and allowed Kris to offset the portion of his retirement account he owed Michelle against any amount she owed him. Kris's three other requests, that the court order timesharing in conformity with the Feinberg recommendation; recalculate the child support award to reduce Kris's monthly obligation from $699.88 to $29.41;[4] and, allow Kris to immediately recover nearly $20,000.00 in non-marital property, were denied. This appeal followed.

We review a circuit court's determination on a motion to alter, amend or vacate an order for abuse of discretion. *See Bickel v. Bickel,* 95 S.W.3d 925, 927-28 (Ky.App. 2002). We will not substitute our judgment for the circuit court's so long as the trial court's order is supported by substantial evidence. *Id.*

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[3] In its findings of fact, the trial court stated neither party asked for maintenance. However, in the proposed findings of fact Michelle submitted at the direction of the trial court she included a maintenance award of $500.00 per month for three years.

[4] In their proposed findings of fact, Kris calculated his monthly child support obligation to be $50.50, but Michelle calculated it to be $699.88. The court ordered Kris to pay $699.88 monthly. In Kris's motion to alter, amend or vacate, he argued his monthly child support obligation should be reduced from $699.88 to $29.41 because his new job paid less, Michelle received an hourly raise upon successfully completing a probationary period of employment, and he alleged she was still working as a part-time cashier. Michelle's attorney clarified Michelle was no longer working as a cashier and her hourly raise upon completing probation was fifty cents, not $2.00 as Kris alleged.

at 928. We will not set aside a circuit court's factual findings unless they are clearly erroneous. *See Wheeler v. Wheeler,* 154 S.W.3d 291, 296 & n. 16 (Ky.App. 2004).

Kris's first contention is that the trial court abused its discretion in ordering timesharing on a different schedule than the one Kris and Michelle voluntarily followed after receiving the Feinberg recommendation. Feinberg suggested timesharing be split "50-50." Kris proposed he and Michelle alternate custody on a weekly basis with a midweek overnight visit every other Wednesday. In contrast, Michelle proposed the children be with Kris every other weekend from Friday at 5:15 p.m. until Sunday at 8:30 p.m. and for one thirty-six hour period during the week. Ultimately, the court designated Michelle as the primary residential custodian and ordered Kris to exercise "time-sharing every other weekend by picking the boys up from daycare on Friday until Sunday at 8:00 p.m. and for one thirty-six (36) hour period during the week." In his motion to alter, amend or vacate, Kris urged the court to allow him to keep the children through Monday morning rather than requiring him to return them on Sunday evening. The trial court rejected that request and we affirm that portion of the order.

Timesharing is within the trial court's discretion and will be disturbed only upon a showing of abuse or clear error under the facts and circumstances of the case. *Drury v. Drury,* 32 S.W.3d 521, 525 (Ky.App. 2000) (citing *Wilhelm v. Wilhelm,* 504 S.W.2d 699, 700 (Ky. 1973)). While KRS 403.290(2) allows a court

to order psychological testing of a child and parents to assist the court in determining custody, nothing requires the court to follow the evaluator's recommendation or a timesharing schedule created by the parents. The conclusions of a professional custody evaluator "are merely expert testimony, or evidence to be considered by the courts. . . ." *Chalupa v. Chalupa*, 830 S.W.2d 391, 392 (Ky.App. 1992). In the end, the court is the final arbiter and as such may consider and either accept or reject, in whole or in part, any suggestions made by the parties, therapists, parenting coordinators and custody evaluators. Contrary to Kris's argument, the trial court did not abuse its discretion by ordering a timesharing schedule that differed from the one suggested by Feinberg and voluntarily followed by Kris and Michelle.

Kris has cited no authority requiring the trial court to explain its decision to deviate from a recommendation proposed by a custody evaluator or voluntarily followed by the parents. There being no indication the trial court's custody determination was arbitrary, unreasonable, unfair or unsupported by the evidence, we will not disturb it.

The second contention we address is Kris's claim that the trial court miscalculated the amount of child support he was ordered to pay. The court ordered Kris to pay $699.88 a month which conformed to the child support worksheet submitted by Michelle. However, Kris claims the court did not use current salary information for either himself or for Michelle. He also claims the

court should have used a "split custody" formula found in KRS 403.212(2) rather than the child support guidelines expressed in KRS 403.212(7). While we affirm the court's use of the guidelines rather than the split custody formula urged by Kris, it appears the trial court erred in calculating Kris's gross income which may require a reduction in his monthly child support obligation.

> As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court. KRS 403.211-KRS 403.213; *Wilhoit v. Wilhoit*, Ky., 521 S.W.2d 512 (1975). This discretion is far from unlimited. *Price v. Price*, Ky., 912 S.W.2d 44 (1995); *Keplinger v. Keplinger*, Ky.App., 839 S.W.2d 566 (1992). But generally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings. *Bradley v. Bradley*, Ky., 473 S.W.2d 117 (1971).

Van Meter v. Smith, 14 S.W.3d 569, 572 (Ky.App. 2000).

There are two initial matters we must address. First, we reject Kris's contention that the trial court should have calculated child support under a split custody arrangement. KRS 403.212(2)(h) defines such an arrangement as one in which "each parent is the residential custodian for one (1) or more children for whom the parents share a joint legal responsibility." Since Michelle was designated as the primary residential custodian for both children, there was no foundation upon which the trial court could have calculated child support based

upon a split custody arrangement. See 16 Louise Everett Graham and James E. Keller, Kentucky Practice – Domestic Relations Law § 24:30 (2008) (split custody arrangement "applies only to 'split custody' cases."). Thus, the trial court did not err in this regard.

Second, Michelle strongly hinted Kris is underemployed because he has accepted a succession of jobs since filing for dissolution, each paying less than his prior position. However, the trial court did not make a finding under KRS 403.212(2)(d) that Kris is in fact underemployed.[5] Absent such a finding, Kris's child support obligation should not be based upon potential earnings income, but rather upon his actual gross income. KRS 403.212(2)(a).

As for the actual calculation of child support, the trial court used the worksheet Michelle submitted with her proposed findings of fact. However, Michelle's calculation and the numbers on which it is based are suspect. Three days before the final hearing, Kris submitted a mandatory case disclosure listing his total monthly income as $2,720.00. Michelle did not use that figure in developing her child support worksheet, even though she recited it in the proposed findings she submitted to the court in August 2006. Instead, she combined Kris's earnings from 2001 ($44,590.00), 2002 ($49,299.00), and 2003 ($41,178.00), divided this figure by three to determine a three-year average, and then divided that number by twelve to arrive at a monthly income of $3,751.86. This is the

[5] Michelle did not request such a finding nor did she file a cross-appeal on this issue.

figure she listed as Kris's adjusted monthly income and the figure the court used in calculating Kris's monthly child support obligation.

When supported by substantial evidence, a trial court's findings will not be disturbed on appeal. *Gossett v. Gossett,* 32 S.W.3d 109, 111 (Ky.App. 2000). Without explanation, the trial court imputed to Kris a monthly income of $3,751.86. That amount is $1,031.86 more than Kris was earning on July 15, 2006, as established by his pay stub. When Kris filed his motion to alter, amend or vacate in December 2006, he had changed jobs again and was earning just $15.82 per hour or $2,742.13 per month. Because the evidence of record does not support the income imputed to Kris, this matter is reversed and remanded to the trial court for further proceedings consistent with this Opinion.[6]

Kris's third and final contention is that the trial court has unfairly denied him use of $19,976.00 in non-marital property he could use to purchase a home for himself and his children. He also argues that although the court made Michelle responsible for the mortgage payments during this time, his name remains on the mortgage, he is not earning interest[7] on his non-marital property, and he cannot spend the money for his own needs. In contrast, Michelle contends

[6] Since the trial court will be reviewing Kris's actual income on remand, the court may also wish to review Michelle's monthly income as she received a raise of fifty cents per hour upon completing her probationary period of employment with Kentucky Alternatives.

[7] Kris has not argued he is entitled to interest nor has he requested he be awarded interest.

the court divided the marital estate into "just proportions" and KRS 403.190 requires nothing more. We agree with Michelle.

In his proposed findings of fact and conclusions of law, Kris suggested he be allowed to buy Michelle's one-half of the equity in the marital home ($17,095.00) and keep the residence, or alternatively, that the home be sold immediately. In contrast, Michelle asked that she be allowed to remain in the home for eight years at which time the property would be sold and the marital equity divided equally.[8] As requested by Michelle, the court awarded Michelle exclusive use of the marital home with the two minor children for eight years.

Kris acknowledges KRS 403.190(1)(d) allows a custodial parent to remain in the family home with the minor children for a reasonable period of time. However, he argues that statute does not apply in this case because the value of the marital home contains nearly $20,000.00 in *non-marital property* belonging to him and it is unjust to make him wait eight years to recover it. Michelle cites *Cochran v. Cochran*, 746 S.W.2d 568, 569-570 (Ky.App. 1988) for the proposition that a trial court may defer recovery of property to a spouse. In *Cochran*, the mother of a minor child was permitted to remain in the marital home until the child reached the age of majority. *Cochran,* however, is not on point because it deferred recovery of only marital, rather than non-marital, property.

[8] We are not told why eight years was chosen instead of another period of time. In eight years, one child will be entering the sixth grade and the other will be entering the eighth grade.

Kris and Michelle do not have adequate assets to keep the marital residence and immediately restore nearly $20,000.00 in non-marital property to Kris.

In a dissolution case, the trial court must "assign each spouse's property to him." KRS 403.190(1). Here, the trial court did just that. It found Kris's family had given him $19,976.00 in home renovation supplies and directed that this amount be restored to him as non-marital property. However, close inspection of KRS 403.190 reveals no timetable by which non-marital property must be restored to a party. Thus, deferral of the recovery of non-marital property is not statutorily prohibited.

Kris cites us to *Ping v. Denton*, 562 S.W.2d 314 (Ky. 1978), but that case is not on point either. The question in *Ping* was whether a divorced wife may collect insurance proceeds upon the death of her former husband where the decree of dissolution did not address disposition of the insurance policy. *Ping* has no bearing on the case *sub judice* other than to reiterate the requirement that the property of each spouse must be returned to him/her.

Having been cited no authority requiring immediate recovery of non-marital property, we are unwilling to say the trial court abused its discretion by permitting Michelle to remain in the marital home for eight years and delaying Kris's ability to immediately recover $19,976.00 in non-marital property until the marital residence is sold. Thus, we affirm this aspect of the trial court's order.

For the foregoing reasons, the order of the trial court is affirmed in all respects except for the calculation of the child support obligation. That portion of the Opinion dealing with child support is reversed and remanded to the trial court for further proceedings consistent with this Opinion.

ALL CONCUR.

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