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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001897-MR

CRYSTAL GAYLE HOWARD

APPELLANT

v. APPEAL FROM GREENUP FAMILY COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 06-CI-00310

MARK ANTHONY HOWARD

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE AND VANMETER JUDGES; HENRY, SENIOR JUDGE.

ACREE, JUDGE: Crystal Howard appeals from a decree issued by the Greenup Family Court which dissolved her marriage to Mark Howard, awarded the parties joint custody with Mark as the primary residential custodian, and divided marital property between the parties. The case was decided after a seven-day evidentiary

hearing, and the family court issued exhaustive factual findings. After reviewing the family court's order and the evidence, we affirm.

The parties were married in 1996 and separated after almost ten years. Crystal filed for divorce on May 16, 2006. At that time, the parties' two children were five and three. Crystal was awarded temporary custody of the children with visitation rights awarded to Mark. Thereafter, the parties experienced difficulty during visitation exchanges and were repeatedly in court. Each parent made allegations reflecting on the other parent's suitability to have custody of their children. Several days' worth of deposition testimony was taken from both parents and a court-ordered custodial evaluator. The evidentiary trial in this matter lasted seven days, spread out over the course of several months, and each party was permitted to call numerous witnesses. The family court entered an order, dated August 27, 2007, awarding the parties joint custody, with Mark designated as primary residential custodian and Crystal receiving standard visitation with the children. The family court's order also divided marital property and debts between the parties. This appeal followed.

Crystal first argues that the family court abused its discretion by naming Mark primary residential custodian. The statute governing custody awards is KRS 403.270(2), and its applicable sections read as follows:

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent[.] The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents . . . as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720[.]

The standard for reviewing a family court's factual determinations in awarding custody is whether or not the findings are clearly erroneous. Kentucky Rule of Civil Procedure (CR) 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Subsections (a) and (b) of the statute have little bearing on our review of this case since both parents expressed unequivocally their desire for custody, and the children were too young to be interviewed regarding their wishes.

In determining which custody arrangement would be in the best interests of the parties' children, the family court gave due consideration to the children's interaction with each other, their parents, and other relatives. KRS 403.270(2)(c). During the pendency of this action, each parent obtained a court-ordered custody evaluation. Both of the experts consulted expressed the opinion that either Mark or Crystal would be a suitable custodian for the children. Further,

the family court noted that the children were close to both parents, as well as to the grandparents and other relatives on both sides of their family.

KRS 403.270(2)(d) directs the family court to consider the children's adjustment to their home, school and community. This factor weighed slightly more in Mark's favor. Although Crystal is originally from Ohio and her extended family members still live there, the parties resided in Greenup County for the entire decade of their marriage. Both children were born in Greenup County, where Mark has a large network of extended family, and the parties had previously intended that their children would attend Grey's Branch Elementary.

After the parties separated in May 2006, Crystal briefly moved in with her parents, taking the children to live in Minford, Ohio without obtaining Mark's input. She also enrolled their son in kindergarten there without informing Mark or even listing him as a parent on school forms. Mark further testified that Crystal's decision to move resulted in the termination of their son's participation in sports activities.

The family court noted that the children appeared to be happy in either home. One of the experts who performed a custodial evaluation actually recommended a split custody arrangement; the children to spend alternating weeks with each parent. Crystal, however, was completely opposed to this suggestion, thereby compelling the family court to decide.

Finally, the statute directs the family court to consider the mental and physical health of everyone involved, as well as any acts of domestic violence.

KRS 270.403(2)(e) and (f). On appeal, Crystal argues that the family court erred in finding that these factors supported designating Mark as primary residential custodian. The family court found no evidence of domestic violence, but expressed some concern about Crystal's judgment based on some of the incidents alleged by Mark. The allegations made by these parties against each other are salacious in nature. We have familiarized ourselves with the specific behaviors alleged and reviewed the evidence in the record, including the parties' deposition testimony and the transcript of the seven-day evidentiary proceeding, and have concluded that the allegations need not be detailed here.

With regard to the family court's finding that there was no evidence of domestic violence, we note that KRS 403.270(2)(f) refers to the definition of that term found in KRS 403.720. Applying that definition, the family court correctly determined that there was no evidence of domestic violence between these parties or toward their children. Moreover, eyewitness testimony to every alleged violent act ranged from affirming the allegations to flatly denying they occurred. CR 52.01 states that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The Kentucky Supreme Court has found this rule to apply in child custody disputes. *Reichle*, 719 S.W.2d at 444.

Crystal takes issue with the family court's concern regarding "her judgment involving her children when it comes to sexual behavior" – a concern apparently factored into the family court's analysis under KRS 403.270(2)(e). She argues that the family court misjudged the credibility of the witnesses whose

testimony supported allegations that she had behaved improperly. As previously noted, this Court is not permitted to lightly dismiss a trial court's assessment of witness credibility. Further, even if we determined that the family court's factual finding on one element of the statute was clearly erroneous, Crystal would not be entitled to a reversal of the custody decision. KRS 403.270(2) instructs the family court to give consideration to "all relevant factors" in determining which custody arrangement will promote the children's best interest, including the nine factors listed in subsections (2)(a)-(i)(emphasis supplied). Thus, the family court is clearly permitted to consider other factors bearing on the children's best interests. Since the family court's overall factual determination regarding the children's best interests is not clearly erroneous, the custody award must be affirmed.

Crystal's second claim is that the family court abused its discretion in its distribution of marital property and debts of the parties. KRS 403.190 governs the disposition of property in a divorce action. The family court is required to divide the property in just proportions and without regard to marital misconduct, unless that misconduct involves improper dissipation of marital assets. *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky.App. 2007). Crystal contends that Mark dissipated marital assets when he closed the gas station and convenience store owned by the parties in May 2006. Dissipation may be found "when marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property." *Brosick v. Brosick*, 974 S.W.2d

498, 500 (Ky.App. 1998). Dissipation requires proof by a preponderance of the evidence. *Id.* at 502.

The family court heard conflicting testimony from multiple witnesses regarding the financial condition of the business owned by the parties during their marriage and known as Route 7 Quick Stop. It is unnecessary to refer to all of the testimony here. However, the omission of any portion of the evidence regarding the Route 7 Quick Stop should not be taken as an indication that this Court is unaware of all of the evidence before the family court. Crystal's testimony generally painted a rosy picture of the business. She described it as sufficiently profitable to support the lifestyle of the parties' family and to provide frequent loans to members of the extended Howard clan. According to Crystal, she had no notice that Mark intended to close the business before he did so on Mother's Day 2006. She was surprised to arrive at the store that evening to find about twenty people emptying the store of inventory, fixtures, and equipment. Crystal also testified that Mark sold these items for far less than their value. Finally, she denied any knowledge of the whereabouts of the business's records.

Mark, on the other hand, testified that the store was unable to turn a profit. At one point, he was contacted while working out of town by a store employee because Route 7 Quick Stop's accounts were over \$40,000.00 in the negative. He introduced checks for significant sums of money from another business in which he had part ownership, claiming that these cash infusions were keeping Route 7 Quick Stop afloat. The family court also heard testimony that the

business's actual bank deposits frequently totaled less than the amount reflected on the deposit tickets. According to Mark, he and Crystal discussed closing the store and she indicated a lack of interest in Route 7 Quick Stop's future. Mark told the family court that he decided to close the store on a Sunday because it was scheduled to receive a delivery of gas the following day, and there was no money to pay for it. He also denied any knowledge as to the location of the business's records.

The family court found the business had \$90,000.00 in equity and entered an order allowing ten days for either party to buy the other's share for \$45,000.00. If neither party chose that option, then the property would be sold and the proceeds remaining after paying off any indebtedness would be split equally. The family court considered the issue of dissipation and expressed its concern with the evidence introduced by the parties.

The most confusing part of the testimony that was given had to do with the way the store was run Neither party had the store appraised by an expert. The testimony was that the inventory in January 2006 was about \$50,000. It was guessed that it would be about the same at the time of closing. There was testimony that Mark Howard took items out of the store and that some of the inventory as well as the fixtures were sold. However, there was testimony that Mrs. Howard would take money from deposit tickets and the exact amount of that is unknown. There was testimony that Mr. Howard put money from [his other business] into the accounts and he wants an offset of the money put into the store for items that were sold. With out [sic] anymore [sic] definite testimony than what was presented at the hearing herein in regards to this matter, the Court can do nothing [more] than to come to the conclusion that neither party

shall be entitled to anything more from the inventory or fixtures of the store [than] what they have already received.

(Order entered August 27, 2007). Crystal has not demonstrated that the family court committed clear error in finding that she did not adequately prove dissipation of marital assets. Thus, the finding must be upheld on appeal. CR 52.01.

Finally, Crystal argues that the family court erred in finding that she and Mark owed debts to two of his family members – Mark’s brother, Scott, (\$37,000), and Mark’s nephew, Jason Sipple, (\$6,000). Crystal disputed the validity of these debts, claiming that Mark was seeking to diminish the parties’ marital assets to the benefit of his family members.

The family court heard evidence that the parties had borrowed various sums of money from Scott over the years. Further, there was testimony that some of that money was borrowed at Crystal’s behest. Once the debt grew large enough, Scott became concerned about protecting his right to recover the money, and the parties signed a note acknowledging the debt to Scott. Mark transferred some equipment to Scott who accepted it in partial satisfaction of the debt. The brothers agreed that the equipment was worth \$30,000.00, and the family court ordered Mark to pay the remaining \$7,000.00. Crystal denied any knowledge of this debt, but Mark and Scott testified that she knew about it. The family court was faced with a credibility contest, and CR 52.01 directs this Court to respect the family court’s determination, and we do so.

Crystal also challenged the propriety of a \$6,000.00 check written to Mark's nephew when the Route 7 Quick Stop closed. Both Mark and Jason testified that Jason had done electrical repair work necessary to the store's operation. Moreover, Jason was present on the night Mark closed the store and assisted in the actual closing. Jason testified that, prior to the store's closure, he had been content to wait for his uncle to pay him for the electrical work because he did not immediately need the money. Once again, the determination of which witness gave the more credible testimony was properly made by the family court. We have further determined that the family court's factual findings regarding the entity known as Multiple Restoration, Inc. and the farms in Kentucky and Ohio were not clearly erroneous.

Because we find none of the determinations by the Greenup Family Court to be clearly erroneous or an abuse of that court's considerable discretion, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marie Moraleja Hoover
Portsmouth, Ohio

BRIEF FOR APPELLEE:

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