

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001458-MR

E. H.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 05-CI-504774

G. H. (NOW T.); HONORABLE
SAMMY DEEB; HONORABLE ROBERT
STALLINGS; HONORABLE JAMES
MCCROCKLIN; AND HONORABLE
JAMES M. GREEN

APPELLEES

OPINION AFFIRMING IN PART
AND REVERSING IN PART

** ** *

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: E.H. (hereinafter Father) appeals the findings of fact and conclusions of law entered by the Jefferson Circuit court pertaining to his divorce

¹ Senior Judge Michael L. Henry, 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.

from G.H. (hereinafter Mother). After careful review, we affirm in part and reverse in part.

E.H. and G.H. were married in February 1988, and were divorced by decree entered May 16, 2006. They have four children, all of whom are minors: N.H. (hereinafter Child 1), K.H. (hereinafter Child 2), E.H. (hereinafter Child 3), and J.H. (hereinafter Child 4). At the time the order at issue in the appeal was entered, the children were ages 15, 14, 12, and 10, with Child 1 being the oldest and Child 4 being the youngest.

The parties separated on July 1, 2005, and Father filed for divorced on December 29, 2005. Prior to the divorce, the parties attempted to resolve their marital conflicts with a counselor, who last saw them in December 2004. The parties had apparently been sexually separated since 2002. Father claims that the parties decided to separate while living in Alexandria, Virginia, and that they moved to Louisville, Kentucky, to be closer to family during the pendency of the divorce. Mother claims she did not know the divorce was going to occur until the parties returned to Louisville and that after the move, she was blindsided with the divorce.

Father is a forty-nine year old retired United States Marine. In the summer of 2004 he began working for Sphere Communications with a base salary of \$95,000 plus commission. His 2005 W-2 reflects income of \$116,430.00. Father also receives disability pay in the amount of \$1,303.00 per month from the Veterans Administration because of a 70 percent disability rating. This amount is

nontaxable income. Father also receives retirement pay from the United States Marine Corp in the amount of \$2,935.84 per month, which is taxable income. Father testified that his disability income is based in part on a surgical mishap occurring in 2000, and in part for his diabetes and several other health factors, including his degenerative disc disease.

When the parties met, Mother was a registered nurse working in hospitals in Louisville, Kentucky. Shortly after the parties were married, they moved to Philadelphia, Pennsylvania, where Mother obtained her nursing license and worked at Methodist Hospital. Mother continued to work when the parties moved to Virginia, working at the Potomac Hospital and as a nurse for home health services. Mother also worked at Port Smith Navy Hospital. In 1993, Mother stopped working because of the birth of her first child, and thereafter ceased working and was a stay-at-home mother for some time. Apparently, she began working again as a nurse at camps when her children would go to camps in the summer. She also worked as a staff nurse for the Fairfax County, Virginia, school district on a part-time basis. Overall, Mother was licensed as a nurse in South Carolina, Kentucky, California, Pennsylvania, and Virginia before the parties' marriage, and after the marriage she was licensed in Pennsylvania and Virginia. Mother's pay stubs from 2005 indicate that she was making \$20.57 per hour at her job with Pediatric Associates of Alexandria, Virginia, and she worked there until May 2005. In the years 2003 through 2005, Mother earned \$12,499.00

while working at Alexandria Pediatric Associates and was working in a part-time capacity.

Upon their return to Kentucky, Mother did not reinstate her nursing license, nor has she done so since the divorce proceedings began in December 2005. She claims that she is unable to work, due to the depression and anxiety she has experienced from the divorce and subsequent proceedings. She also claims that she worked very little prior to the move and was completely involved in raising her four children prior to the divorce. Father claims that the parties anticipated Mother obtaining another nursing job when she arrived in Louisville and that she has instead failed to reinstate her license.

Mother and Father both testified about the procedure that Mother could have used to reinstate her license with the Kentucky Board of Nursing when she returned to Kentucky in July 2005. According to the Kentucky Government website, Mother could have reactivated her license upon her return to Kentucky since she was licensed in the state of Virginia and had been employed for 500 or more hours as a nurse for the five years prior to the reinstatement application. A fee of \$120.00 for the reinstatement was also required. Father testified that Mother had previously obtained her nursing license in other states when the parties moved because of Father's military career. Father testified that there were numerous nursing jobs available in Louisville, Kentucky, and that Mother would have been able to work had she sought out the opportunity.

At the time of the filing of the divorce petition, Mother and children resided at what the court termed the Lake Forest home. Father lived in an apartment pending the divorce. The Lake Forest home was close to the children's school and was purchased from the proceeds of the sale of the parties' Virginia home, which sold for \$895,000.00. Upon the sale of the Virginia house, the parties paid off all debts, leaving them with no credit card debts, no car payments, no doctor bills, and essentially zero debt upon their return to Louisville, Kentucky. Out of the remaining equity of the Virginia home, Mother received \$15,000.00 cash and father received \$10,000.00. Father claims that out of his share, he purchased a \$1,400.00 television for the benefit of the children and used the rest for the children's private school tuition for the upcoming school year.

Shortly after Mother moved to the Lake Forest property, she moved to another home in Owl Creek subdivision, which the court refers to as the Owl Creek property. The sale of the Lake Forest home cost the parties another \$23,000.00 in realtor's commission and fix up repairs. Father claims that he should receive some money in exchange for what he lost in equity as a result of the sale of this property, because Mother decided to move. Mother claims that she decided to sell the property when she realized Father was pursuing a divorce because the house was too big for just her and the children. She claims the agreement to sell and the subsequent documents should be upheld and that Father is not entitled to any more money from the proceeds of this sale. Father also paid half of the moving expenses for Mother to move from the Lake Forest property to the Owl Creek

home, in addition to paying the marital debts and obligations on the Lake Forest home and paying Mother \$2,000.00 per month for bills and \$1,900.00 per month for child support.

In an order dated July 11, 2006, the parties agreed that because some of the Father's retirement was nonmarital property, Mother was to receive 36.5 percent of Father's retirement account. Once this amount was received, it was to be deducted from the maintenance obligation of Father. This amount has not been deducted from the maintenance obligations established in the order at issue in this appeal. Mother claims that this was a temporary agreement and that the court's current order should stand.

Father claims that Mother's actions toward him were hostile and that she has interfered with him seeing the children. He has a restraining order against Mother, because she came to his apartment while he was moving and threw a plant at his window, kicked him, and screamed at him. She was later arrested for domestic violence and the restraining order followed.

Because custody of the children was at issue in this matter, the trial court referred the parties to Dr. Jennifer Cebe for an evaluation. The evaluation revealed that Mother had issues parenting Child 3, a son, who has problems associated with ADHD and has been diagnosed with Intermittent Explosive Disorder, Oppositional Defiant Disorder, Mood Disturbance, Depression, and Bi Polar Disorder. The evaluation suggested that Mother was more focused on medicating the child and Father was better at addressing Child 3's issues through

behavior control, etc. Dr. Cebe also noted that Child 1 has more issues than the other children with the divorce, and with Father's new relationship since the divorce. Child 1 exhibited a desire to remain with Mother and Mother did not want to force Child 1 to visit Father. Child 2 and Child 4 appeared to have good bonds with both parents and were better adjusted to the divorce. Dr. Cebe appeared to find Father as the more stable of the two parents, noting that Mother had a history of depressive and anxious symptoms, along with a history of sexual abuse. Dr. Cebe noted that Mother's "appreciable personality dysfunction" likely negatively impacts her co-parenting relationship and limits her insights into how her negative behaviors affect others, including her children. Dr. Cebe found that Mother had been the primary caretaker for the children, but that Father had been involved and that the children looked to the father for definite qualities such as thoroughness, money management, etc.

Dr. Cebe recommended that the parties share joint custody of all children with no designation of primary residential parent and that they maintain their current visitation schedule with Father of every other weekend from Thursday until Monday morning and alternate Monday evenings. Dr. Cebe also recommended that Mother remain in treatment with her psychiatrists and that the parents reinstitute medication management regarding Child 3 with a previous doctor and that neither should access additional medical providers for the child without written consent of both parties and notice to the doctor.

Subsequent to the parties' splitting up, Mother incurred several debts. She incurred \$7,300.00 on a MasterCard; \$5,200.00 on a Visa card; a dental bill for cosmetic dental work; a Macy's bill for the purchase of a couch; a Bowles Mattress bill for the purchase of five mattresses; and an Ethan Allen furniture debt. This debt was incurred despite the \$2,000.00 in maintenance and \$1,900.00 in child support she was receiving.

This matter came before the court for trial on August 15, 2006, October 2, 2006, and October 4, 2006. In its order dated March 24, 2007, the court made findings of fact and conclusions of law pertaining to child custody, child support, maintenance, debts, attorney fees, and other various issues.

Regarding maintenance, the trial court found that Father was a high ranking official in the Marines when he retired and that the parties moved fourteen times during the marriage. The court also found that Mother was the primary caretaker of the children during the marriage and that she worked part time sporadically throughout the marriage after the children were born. The court found that Mother was surprised by the divorce despite the parties being sexually separated since 2002 and in counseling until 2004. Further, the court found that Mother does not currently have a nursing license in the state of Kentucky and may not be eligible for one due to pending criminal domestic violence charges.

The court then found that it was unreasonable to expect Mother to relocate to Louisville, discover she was being divorced, set up a new household, accommodate the needs of four children, and resume a career she had largely

abandoned. The court said it was reasonable for her to apply for her nursing license once the pending criminal charges were resolved and the divorce issues final. The court also found that because of her depression and divorce related issues, Mother's ability to work was affected and she was only capable of working part time. She would be capable of working full time once the divorce proceedings were over and her license was secured. Accordingly, the court imputed Mother with an income of \$20,000.00 for purposes of maintenance for the next two years and \$40,000.00 income thereafter. The court did not impute any income from Mother's rental property because it found that there was not any clear gain from the property.

The court found that Father's gross monthly income was \$13,941.34 and did not include any income from his rental property for the same reasons it did not include Mother's. The court found that Mother lacked sufficient property, including marital property, to provide for her reasonable needs, and that she is currently unable to support herself through appropriate employment. The court found that Father was capable of providing for himself while simultaneously providing some maintenance to Mother and instructed him to pay Mother \$2,700.00 monthly for two years and thereafter \$2,000.00 monthly for ten years. The maintenance should not terminate in the event of Father's death or Mother's remarriage and should only terminate at Mother's death or in the event of substantial and continued changed circumstances. Furthermore, Father shall

maintain life and disability insurance in an amount sufficient to secure his maintenance obligation to Mother.

Regarding custody, the court reviewed the custody evaluation and found that it was in Child 3's best interest to reside primarily with his father and therefore Father is to have responsibility for making medical decisions for the child. The court found that Child 1's strained relationship with Father rendered it best for her to reside primarily with Mother. Child 1 is to continue to go to counseling to repair her relationship with Father. The court found that Child 2 and Child 4 have a strong bond with both parents and would do well in a shared parenting situation and ordered that until the end of the school year, Child 1, Child 2, and Child 4 were to remain primarily with Mother. Child 3 was to remain primarily with Father. At the end of the school year, Child 2 and Child 4 would spend equal time with both parents. All other parenting issues, including a specific parenting schedule and school enrollment decisions were referred to mediation.

The court then found that the combined parental gross income exceeds the Kentucky Child support guidelines and the custody arrangements in this case were uncommon, so a deviation from the guidelines was appropriate. It then ordered Father to pay Mother \$2,000.00 monthly child support until the end of the 2006-2007 school year and thereafter, \$1200.00 monthly.

The court then divided the debts of the parties and ordered Mother to pay all debts associated with the Owl Creek Residence, totaling approximately \$9,000.00. The court also ordered Mother to pay her dental debts, her Macy's bill,

the Ethan Allen furniture bill, and a personal loan from her parents. Mother was to pay any additional debts incurred since the filing of the divorce on any of these accounts. The court then ordered Father to pay Mother's MasterCard and Visa bill, Mother's attorney fees totaling almost \$10,736.40, and various other bills. If the amounts of any of these debts increased after the trial, Father was not responsible for paying such increases. The court denied Father's motion for Mother to pay him one-half of the realtor's commission fees on the Lake Forest house and gave Father the tax deduction on that mortgage.

Father now appeals the above mentioned findings of fact and conclusions of law. We review a trial court's findings of fact for an abuse of discretion.

Father argues that the trial court erred in not awarding custody to him, claiming that the factors provided in Kentucky Revised Statutes (KRS) 403.270(2) should have led the court to award custody to him and that Dr. Cebe's report indicated that he was the more stable and appropriate parent. Father specifically points out that KRS 403.270(2) requires the court to look at incidents of domestic violence, such as the one Mother has been accused of in the instant case.

We agree with Father that the court must consider the instance of domestic violence and Dr. Cebe's report. However, Dr. Cebe's report also stated that custody should be shared between both parents. The trial court essentially awarded joint custody of the children by placing Child 1 with Mother, Child 3 with Father and instructing that Child 2 and Child 4 were to spend equal time with both

parents. Dr. Cebe's evaluations indicated that Child 1 had issues with Father, Mother had issues with Child 3, and that Child 2 and Child 4 were equally bonded with both parents. Thus, we find it appropriate that the court followed Dr. Cebe's recommendations and established a custody and visitation schedule allowing the parties to accommodate the children's needs. While Father's concerns over domestic violence are valid, nothing in the record indicated that any violence occurred in front of the children, nor was it directed at any of the children. It is reasonable that the court determined this was an isolated incident that occurred because emotional and stress levels were high. We do not find that the trial court abused its discretion in establishing custody of the children. It appears that the court heard the testimony of the parties, testimony of the children, reviewed the evaluation completed by the custodial evaluator and considered orders regarding the children prior to trial and thus, its decision was supported by substantial evidence.

Regarding child support, Father argues that the court failed to impute the proper income to Mother and failed to include income from her rental property in its child support calculations. Father argues that under KRS 403.212(2) Mother is underemployed and that Mother should be attributed with \$60,000.00 yearly income, for a monthly income of \$5,000.00. Further, he argues that maintenance in the amount of \$2,000.00 should be included, for a monthly total income of \$7,000.00 for Mother. Father then argues that he would owe Mother \$1,658.00 for

two children and that she would owe him \$972.00 for two children, for a net amount of \$686.00 that he would owe her as child support.

Mother argues that the trial court properly determined child support because the combined monthly income exceeded the child support guideline charts. Further, she argues that the court properly established that she was not capable of working full time and properly imputed her with an income of \$20,000.00. That monthly income of \$1,667.00 plus \$2,000.00 per month maintenance rendered her with a monthly income of \$3,667.00 per month, which combined with Father's income of \$11,941.00 per month (\$13,941.00 minus \$2,000.00 maintenance), rendered the total combined income \$15,608.00, which exceeds the uppermost levels of the guidelines.

Mother argues that under Father's analysis of using the uppermost figure on the chart, base monthly support would be \$2,630, of which Father would be responsible for 76.51 percent (\$2,012.00) and Mother would be responsible for 23.49 percent (\$618.00). Thus, Father would have paid Mother \$1,394.00 per month, which would be more than the court imposed \$1,200.00 per month.

While we agree that Mother is perhaps underemployed, the court made a finding that she is not capable of working full time at this point. The court is in the best position to judge the weight of the evidence, and accordingly, we must defer to their finding in this instance. We also agree that because the combined monthly income falls outside the guidelines, the issue of child support is within the trial court's discretion. Because the evidence establishes that the father

is able to pay the child support established by the court, we do not feel that the amount of \$1,200.00 imposed by the court was an abuse of discretion and accordingly affirm this portion of the court's order.

An award of maintenance is subject to the sound discretion of the trial court and may only be disturbed if clearly erroneous. *Powell v. Powell*, 107 S.W.2d 222 (Ky. 2003), citing *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992) and *Browning v. Browning*, 551 S.W.2d 823 (Ky.App. 1977). An award of maintenance shall not be disturbed absent an abuse of discretion. *Gomez v. Gomez*, 168 S.W.3d 51 (Ky.App. 2005).

In *Gomez*, this Court held that the trial court must consider the factors in KRS 403.200, which include: (a) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently; (b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (c) the standard of living established during the marriage; (d) the duration of the marriage; (e) the age, and the physical and emotional condition of the spouse seeking maintenance; and (f) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

A careful review of the record reveals that the trial court considered these factors. The court attributed Mother with a part-time salary for two years in order to enable her to come to terms with the divorce, take care of any pending criminal charges, and obtain her nursing license. After that, the court found that

she should be earning a full-time salary as a nurse and attributed her with such. It was not an abuse of discretion to award maintenance for a fixed period, nor to require more maintenance to be paid until Mother can find full-time employment.

Regarding the terms of the maintenance payments, this court does agree that it is somewhat uncommon that maintenance should continue if Mother remarries or Father dies. But, the trial court awarded maintenance for a fixed period of ten years, and thus it is not an abuse of discretion to require Father to pay if Mother remarries or in the event of his death. Were the maintenance open-ended and permanent, this would be an entirely different story.

Father next argues that the trial court erred in not reimbursing him equity from the sale of the parties' Lake Forest home, claiming that it was Mother's decision to sell the home to obtain a lower mortgage payment. He states that the parties split the equity in the home but that Mother should reimburse him half of the realtor's commission for the sale, because it was her decision to sell the house. We agree with Mother that Father is now estopped from any claim to the realtor's commission because he agreed to sell the home in the Partial Property Settlement Agreement and knew at the closing that a realtor's fee was involved. The trial court did not abuse its discretion in not awarding him repayment of any realtor's fees.

Father argues that the trial court improperly assigned debts to him, specifically in assigning debts that Mother incurred after he filed for divorce. Father was paying maintenance, child support, was paying the mortgage on

Mother's residence, and had paid off all prior debts after selling the couple's house in Virginia. We agree that the court improperly allocated Mother's debt incurred after the separation to Father. This amounts to an abuse of discretion. Thus, we reverse the portion of the order instructing Father to pay for the Sears MasterCard (\$7,366.04), the Visa (\$5,287.65), the AFBA Life Insurance (\$54.00), and Dr. Terry Hagan's bill (\$650.00), and order that the Mother pay the debts incurred by her after the filing for divorce.

Finally, Father argues that the court erred in requiring him to pay for Mother's attorney's fees. We agree. While the trial court does have discretion under KRS 403.020 to order a party to pay for reasonable costs of the other party, the court may not abuse its discretion in making such a ruling. Here, Father and Mother received equity from the sale of their home in Virginia, of which Mother received \$15,000 and Father \$10,000. The parties initially agreed that this was so that Mother could hire an attorney for the upcoming divorce. Furthermore, Father was paying maintenance, child support, and the mortgage payments on the Lake Forest home. Essentially, Mother was not contributing anything financially to support herself. Furthermore, the parties split up the children's college fund and Mother used part of this to pay her attorney's fees. We find that given the payments of all bills by Father, the maintenance and child support payments, as well as the division of various marital properties, Mother could pay her own attorney's fees. We further agree that Father should not be required to pay for five different attorneys, especially where it appears that things were drawn out for long

periods of time due to heated emotions. Thus, we find the court's ruling that Father pay \$10,736.40 for Mr. Deeb's attorney fees and the fees of the other attorneys involved in the case to be an abuse of discretion, and we reverse this portion of the order accordingly.

For the foregoing reasons, the findings of fact and conclusions of law of the Jefferson Circuit court are reversed in part and affirmed in part.

NICKELL, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While with the benefit of hindsight it might appear to us that the attorney fee award in this case was somewhat excessive, the test we are required to employ is whether or not the trial court abused its discretion. I cannot agree that there was an abuse of discretion in the award of fees in this case, and I would therefore affirm the trial court on that issue. In all other respects I concur with the majority opinion.

BRIEF FOR APPELLANT:

Harold Storment
Louisville, Kentucky

BRIEF FOR APPELLEE, G. H.
(NOW T.):

Elmer J. George
Lebanon, Kentucky