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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001115-MR

HOWARD THOMAS CREASY

APPELLANT

APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 05-CI-00549

DIANA RILEY CREASY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

*** * * * *

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.
GUIDUGLI, SENIOR JUDGE: Howard Thomas Creasy appeals from a decree of dissolution of marriage. He raises various issues involving child support, maintenance, nonmarital contribution to the marital residence, and the allocation of marital debt. We affirm in part, vacate in part, and remand.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Howard Creasy and Diana Riley Creasy were married in 1984 in Harlan County, Kentucky. Two children, Howard Samuel Creasy and James Harrison Creasy, were born of the marriage. Mr. Creasy filed a petition for dissolution of marriage on August 4, 2005. Both parties filed various motions and the trial court held a hearing on October 4, 2005. The trial court entered a temporary order that the parties would share joint custody with Mrs. Creasy acting as primary residential custodian. The court further ordered that Mr. Creasy would pay \$473.00 a month in child support and that he must pay Mrs. Creasy for his share of the health insurance premium. Because of the trial judge's illness and other facts, the final hearing was not held until April 13, 2006. The decree of dissolution of marriage was entered on May 16, 2007. This appeal followed.

Mr. Creasy first argues that the trial court erred in its determination of the amount and duration of temporary child support. He argues that there was insufficient evidence to impute to him a salary of \$25,000.00 and that the duration of temporary support should have commenced on September 16, 2005, when Mrs. Creasy and the children left the marital residence. The trial court ordered that the child support obligation commenced on August 1, 2005. The petition for dissolution was filed on August 4, 2005, and the petition for temporary support was filed on August 30, 2005. The explanation for the retroactive order is not clear from the record. Nevertheless, this issue was not presented to the attention of the trial court. Therefore, we will only address Mr. Creasy's argument regarding the September 16th date.

Kentucky Revised Statutes (KRS) 403.211(2) states:

At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

KRS 403.211(5) further provides:

When a party has defaulted or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs of the child or the previous standard of living of the child, whichever is greater. An order entered by default or due to insufficient evidence to determine gross income may be modified upward and arrearages awarded from the date of the original order if evidence of gross income is presented within (2) years which would have established a higher amount of child support pursuant to the child support guidelines set forth in KRS 403.212.

We have reviewed the hearing on the motion for temporary custody and support.

The parties presented insufficient evidence to determine gross income.

Additionally, the mere fact that the temporary order extended for a longer period of time than was originally foreseen is not a reason to adjust the order. We are not directed to any authority that compels a different result. We cannot conclude that the trial court abused its discretion.

Mr. Creasy next argues that the trial court erred in its determination of the amount and duration of permanent child support. The trial court set permanent

child support for the two children in the amount of \$265.00 per month. The award was based on Mr. Creasy's imputed income of \$18,000.00 and Mrs. Creasy's gross income of \$48,982.38. Mr. Creasy does not dispute the trial court's finding of either party's gross income. However, Mr. Creasy points to a discrepancy between the trial court's finding of the \$265.00 amount of child support owed per month and the child support worksheet that was attached to the judgment. The child support worksheet attached to the judgment stated a monthly child support obligation of \$207.00. Additionally, Mr. Creasy directs this Court to a third worksheet attached in the appendix to his brief that reflects an obligation of \$197.00 per month. We cannot locate nor are we directed to this worksheet in the record. This Court cannot discern the basis for the discrepancy between the trial court's finding and the worksheet attached to the judgment. We further find that this issue involves a possible calculation or clerical error and is not an issue of the sufficiency of the evidence. The evidentiary basis for the child support obligation is the gross income of the parties and this is not disputed. The possible error in the calculation was not brought to the attention of the trial court. The issue is unpreserved for appellate review. However, Mrs. Creasy concedes that the child support obligation of Mr. Creasy should be reduced to reflect that only one child is to be supported by an award of child support after the eldest child had graduated from high school. Therefore, we vacate this portion of the judgment and remand to the trial court to determine the appropriate reduction of Mr. Creasy's child support obligation relating to the parties' eldest child.

Mr. Creasy next argues that the trial court erred by failing to restore his nonmarital contribution to the marital residence. Mr. Creasy used the \$4,500.00 proceeds from a nonmarital asset as a down payment of the parties' first marital residence. He claims that he is entitled to the \$4,500.00 contribution.

KRS 403.190 provides in part:

(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;

(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.

“In the context of tracing nonmarital property, ‘[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset.’”

Sexton v. Sexton, 125 S.W.3d 258, 266 (Ky. 2004). The party claiming a nonmarital interest in property acquired after the marriage bears the burden of proof. *Id.*

Mr. Creasy testified that he owned a Corvette prior to the marriage and that he used the \$4,500.00 proceeds of its sale as a down payment on the parties’ first residence acquired after their marriage. He also testified that the equity of the first residence was then used as a down payment on the parties’ second and current marital residence. From the basis of this evidence, we cannot conclude that the trial court clearly erred in finding that Mr. Creasy had not

sufficiently traced his nonmarital contribution as it was not provided with any further documentation regarding any of the transactions.

In his fourth argument, Mr. Creasy asserts that the trial court erred in failing to award him maintenance. KRS 403.200 sets forth the factors governing the award of maintenance. The decision to grant or deny maintenance is within the discretion of the trial court. *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999). The trial court found that Mr. Creasy could be gainfully employed and that he did not lack sufficient property under the decree. These findings are supported by substantial evidence in the record. The trial court did not abuse its discretion.

Next, Mr. Creasy argues that the trial court erred by apportioning all of the unsecured marital debt to him. In dissolution of marriage actions, trial courts assign debt as a matter of common law rather than statutory law. *Niedlinger v. Niedlinger*, 52 S.W.3d 513, 522 (Ky. 2001).

Debts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation; whether the debt was incurred to purchase assets designated as marital property; and whether the debt was necessary to provide for the maintenance and support of the family. Another factor, of course, is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. Nor is there any presumption that debts must be divided equally or in the same proportions as the marital property.

Id. (internal citations omitted). The assignment of debt is within the sound discretion of the trial court. *Id.*

The trial court assigned to Mrs. Creasy the debt on her vehicle. The court assigned the remaining debt to Mr. Creasy. Mr. Creasy's debts included payments on the tools he used for his business and credit cards related to business expenses. Mr. Creasy also owed a debt to his mother. Based upon our review of the record, we cannot conclude that the trial court abused its discretion.

Next, Mr. Creasy argues that the trial court erred by failing to award him credit for post-separation mortgage payments. Mr. Creasy remained in the marital residence after separation and was awarded the option to purchase it in the decree. He received the benefit of his payments. We can discern no abuse of discretion.

Finally, Mr. Creasy argues that the trial court erred by failing to award him a tax exemption for the minor child. The trial court held that Mrs. Creasy shall claim the child as a dependent deduction. Trial courts have a broad discretion in allocating the tax exemption between the parties and the court's allocation should maximize the benefit of the exemption. *Marksberry v. Riley*, 889 S.W.2d 47, 48 (Ky. App. 1994). We are not persuaded that the trial court abused its discretion.

Accordingly, the judgment of the Whitley Circuit Court is affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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