

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000727-MR
AND
NO. 2009-CA-000789-MR

PATRICIA DERMODY

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 07-CI-502406

ROBERT DERMODY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE, SENIOR JUDGE.¹

THOMPSON, JUDGE: Patricia Dermody appeals the Jefferson Family Court's judgment dividing marital property, awarding child custody, denying her maintenance, and granting her partial attorney's fees. Robert Dermody cross-

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

appeals the Jefferson Family Court's judgment regarding substantially the same issues as Patricia. In both appeals, we affirm in part, reverse in part, and remand.

On April 13, 1985, Robert and Patricia were married in Jefferson County, Kentucky. The parties have four minor children, J.D., P.D., P.D., and D.D. On May 15, 2004, Patricia filed a Domestic Violence Petition alleging that Robert assaulted her in their vehicle in the presence of their children. On May 19, 2004, Patricia filed another Domestic Violence Petition alleging that Robert threatened her with serious physical injury. Thereafter, on May 24, 2004, the family court granted the two petitions and issued a domestic violence order against Robert. The family court further awarded temporary custody of the parties' four children to Patricia. Later, the parties reconciled and Robert moved back into the marital residence.

Several years later, Patricia filed a motion to amend the May 24, 2004, domestic violence order. On June 28, 2007, the family court issued an order extending the domestic violence and temporary custody order. On the same day, Robert filed a petition for dissolution of marriage wherein he requested sole custody of the parties' four children. Patricia then filed a response seeking sole custody of the children. On February 14, 2008, the family court issued a bifurcated divorce decree reserving the parties' remaining issues for trial.

During a three-day trial concluding on July 11, 2008, the family court heard extensive evidence regarding child custody and the division of the parties' marital property. On January 6, 2009, the family court issued its findings of fact,

conclusions of law, and judgment granting the parties joint custody of their children. Robert was designated the children's primary residential parent during the school year, and Patricia was awarded the same designation during the summer.

Both parties then filed motions to reconsider the family court's judgment regarding child custody, division of marital property, maintenance, taxes, and other issues. The family court issued an order denying in part and granting in part the parties' motions for reconsideration. This appeal follows. We set forth additional facts below as necessary to address the issues raised.

Before reviewing the merits of the parties' allegations of error, we observe that the parties have litigated this appeal *pro se* and have filed extensive briefs regarding their issues in the family court. The history of the breakdown of the parties' marriage and the history of domestic violence add further complication to this appeal. This Court has endeavored to thoroughly review each of the parties' claims but some of the allegations of error are incomplete or unclear. With this background established, we review Patricia's allegations of error.

Patricia argues that she was entitled to sole custody of the parties' four children due to Robert's history of domestic violence. She contends that Robert's long history of subjecting her to abuse would not provide a suitable environment for the children.

When reviewing a child custody determination, an appellate court cannot set aside a family court's findings of fact unless they are clearly erroneous.

Allen v. Devine, 178 S.W.3d 517, 523-24 (Ky.App. 2005). Factual findings are not clearly erroneous if they are supported by substantial evidence, which constitutes evidence having the fitness to induce conviction in the minds of reasonable people.

Rivers v. Howell, 276 S.W.3d 279, 281 (Ky.App. 2008). Because the family court's findings of facts are uncontested, we accept them as conclusive.

If the family court's findings of fact are not clearly erroneous, our task is limited to determining whether the family court abused its broad discretion in deciding child custody. *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky.App. 2010). A family court abuses its discretion only when it issues a ruling which is arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Aesthetics in Jewelry, Inc. v. Brown, ex rel. coexecutors*, 339 S.W.3d 489, 496 (Ky.App. 2011).

When ruling in a child custody case, a family court must determine what custodial arrangement is in the best interest of the child. *Gates v. Gates*, 412 S.W.2d 223, 224-25 (Ky. 1967). KRS 403.270(2) sets out the factors that a family court must consider in making an award. In pertinent part, KRS 403.270(2) provides the following:

- (a) The wishes of the child's parent or parents, and any de facto custodian, 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; [and]

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720[.]

In this case, the family court found that the parties' children desired to reside with Robert. The family court further noted the recommendation of Dr. Ed Berla, the custodial evaluator, that Robert receive sole custody. However, Dr. Berla testified that both parents were capable of providing a stable home to the children. The family court further noted the guardian *ad litem*'s recommendation that Robert receive sole custody due to Patricia's poor parenting skills. The guardian *ad litem* cited occurrences where Patricia disparaged Robert to the children. The guardian *ad litem*'s reports indicate that the children were well-adjusted academically and socially and prefer to live with Robert who they claim was more involved with their activities and interests than their mother.

The family court further found that the parties' children were not afraid of either parent and have significant bonds with each parent. The family court noted the one exception was the estranged relationship between Patricia and her oldest child who have little contact with each other. However, the family court noted that there was evidence that the estranged relationship was not immutable. The family court further found that the children were recently spending significant time with Robert following his job loss and Patricia's increased work hours. Based

on these facts and emphasizing the mental and physical health of all of the parties, the family court awarded Robert and Patricia joint custody with timesharing.

While Patricia highlights the multiple domestic violence orders issued against Robert in support of her request for sole custody, a family court must review all relevant factors in determining the children's best interests. *B.C. v. B.T.*, 182 S.W.3d 213, 221 (Ky.App. 2005). Specifically, KRS 403.270(3) provides that a court must determine the extent to which any alleged domestic violence and abuse has affected the child and the child and parent's relationship.

The family court's findings of fact provided that the "parties have a documented history of domestic violence." The family court then recited some of the parties' history of domestic violence and observed that it was taking judicial "notice of all prior, and pending, domestic violence related judicial action pertaining to these parties." Despite the parties' history, the family court noted the bond the children have with both parents and their preference to reside with Robert. The family court further noted the desire of the children to remain in the same schools with their friends and to remain in the same stable environment.

Based on these facts and the applicable law, we conclude that the family court did not abuse its discretion by awarding the parties joint custody. Although the parties have a history of domestic violence, the record demonstrates that the children were well-adjusted in school and in both parents' homes. The children have a strong bond with each parent and each parent can provide a stable home. Being mindful that an appellate court's task is not to determine if it would

have decided the custody decision differently but whether the decision was reasonable and nonarbitrary, we conclude the family court's joint custody award was not erroneous. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

Due to the impact of domestic violence and the interplay such conduct has on child custody matters, we write further to emphasize that a proposed custodian's commission of domestic violence can affect a child custody award. If such misconduct negatively affects or is likely to negatively affect a child, a family court should consider the adverse impact of such conduct on the child's best interests. *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). See *Dillard v. Dillard*, 859 S.W.2d 134 (Ky.App. 1993) (trial court found child adversely affected by father's conduct). The record in this case does not indicate such negative affect.

Patricia contends that Robert dissipated marital funds during the pendency of the parties' divorce proceedings for nonmarital purposes. She further argues that Robert failed to provide a sufficient accounting of his expenditure of these funds at the hearing and, therefore, she contends that she should be reimbursed for her marital share of the funds that Robert dissipated.

Dissipation of marital assets occurs when a spouse expends marital funds for nonmarital purposes. *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky.App. 1987). The funds must have been expended during a period when there was a separation or dissolution impending. *Id.* There must be a clear showing that the expenditures were made with the intent to deprive one's spouse of their share of the marital property. *Heskett v. Heskett*, 245 S.W.3d 222, 227 (Ky.App. 2008).

The family court heard testimony from Robert that he liquidated the Akzo 401K account and used the funds to pay family bills for maintaining the parties' two homes and private school tuition and related costs. The family court noted that Robert had spent a significant portion of the liquidated funds but did not produce a documentary accounting of the receipt and expenditure of the funds. Although noting Robert's lack of accounting, the family court found that Robert's use of the funds was not intended to deprive Patricia of her share of the marital assets. Thus, the family court ruled that Robert did not dissipate marital funds.

Specifically, the family court wrote the following:

The Court does not find that the funds were dissipated, as [Patricia] has failed to prove the elements of dissipation. However, the Court does conclude that the funds received by [Robert] were marital in nature and [Patricia] is entitled to her interest in the same. Each party is entitled to one-half (1/2) of the funds received, less the amount [Robert] paid for [their oldest child's] school tuition, book fees and uniform costs, as well as any other documented expenses associated with [their oldest child's] attendance at [private school].

The family court further ordered that Robert pay Patricia her share of these funds from the sale of the marital residence or, if the residence is not sold, to pay Patricia her share within ten months of the issuance of the family court's judgment.

Based on this record, it appears that the family court issued a dissipation ruling despite its use of some language to the contrary. The family court's ruling clearly requires Robert to reimburse Patricia one-half of the funds received from the Akzo 401K after deducting for education-related costs. At the

prescribed time, Patricia should move the family court to enforce its ruling, which necessarily includes an accounting of the receipts and expenditures of the 401K. Accordingly, we conclude that Patricia has presented no error for review.

Patricia contends that the family court erred by requiring her to pay for the consumer debt that Robert incurred during the parties' separation. She further argues that it was unfair for the family court to order her to pay one-half of Robert's debts because it would negate the benefit of her award of child support and maintenance. Thus, she contends that the family court abused its discretion.

Questions regarding the determination of marital and nonmarital debt and its equitable division are left to the sound discretion of the family court. *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011). There is no presumption that debt must be divided equally or in the same proportions as the parties' marital property. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). A family court's debt decision will not be reversed absent abuse of discretion. *Rice*, 336 S.W.3d at 68.

After hearing testimony, the family court found that some of the parties' debts were not put into contention by the parties. In a footnote, the family court noted that the parties disagreed on the liability and division of a "Fidelity 401(K) loan and two Chase Mastercard accounts." Ultimately, the family court found that the contested debt was marital in nature and was incurred for the benefit of the family unit and the maintenance of two households for the children. Thus, the family court wrote that "...all debt balances, as they existed as of the date of trial, shall be divided equally by the parties[.]"

During the parties' divorce proceedings, Robert expended money to maintain a home for him and the children and was ordered to pay the mortgage and utilities for the marital residence occupied by Patricia. At some point during this period, Robert became unemployed and began to have physical custody of the children a majority of the time. Robert testified that the debts he incurred were to pay for these expenses before the property division. Patricia argues that the debts belong to Robert and that he cannot be credited with paying maintenance and child support if the debts are divided equally.

While we will not interfere with the majority of the family court's discretion regarding the allocation of the debts, we believe the family court erred by not requiring Robert to prove that his debt was not incurred for the purpose of paying his court-ordered maintenance and child support to Patricia. Alternatively, the family court was required to deduct the amount of the debt used to pay Patricia child support and maintenance from the total debt before dividing the debt equally between the parties. Otherwise, Robert would receive a windfall if Patricia was ordered to pay one-half of the debt incurred arising from Robert's payments of child support and maintenance to her. Put simply, Patricia would be returning one-half of the child support and maintenance payments that she received from Robert. *Allison v. Allison*, 246 S.W.3d 898, 908 (Ky.App. 2008) (marital debt cannot be assigned in a manner that alters past court-ordered obligations during a divorce).

Accordingly, we remand this matter to the family court to determine what part of the parties' loan and credit card debt should be assigned to Robert as his personal obligation to pay child support and maintenance to Patricia. *Id.*

Patricia argues that the family court erred by not ordering Robert to pay \$20,000 toward the cost of her attorney's fees. She contends that Robert has a much higher earning potential than her and that his unnecessary actions increased her attorney's fees, including his unsuccessful appeal of a contempt order.

When making an award of attorney's fees, family courts must consider the financial resources of the litigating parties. *Rearden v. Rearden*, 296 S.W.3d 438, 444 (Ky.App. 2009). "If their resources are substantially equal, each spouse will be required to pay his or her own attorneys' fees; if their resources are grossly disproportionate, the court may award attorneys' fees to the party with fewer resources." *Id.* Additionally, a family court has broad discretion in making an award of attorney's fees. *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky.App. 1982).

The family court ordered Robert to pay \$5,000 toward Patricia's attorney's fees before the final hearing. At the final hearing, Patricia moved to increase her prior award by \$15,000. The family court found that there was little disparity between the parties' incomes, Patricia's actual income and Robert's projected income based on his potential employment as stated at the hearing. While rejecting most of her request due to their near income equality, the family court ordered Robert to pay an additional \$2,500, totaling \$7,500, because Robert failed to comply with a prior order of the court and, thus, created greater legal expense.

While Patricia contends that Robert was capable of earning a greater income than found by the family court, we conclude that the family court did not abuse its discretion in only partially granting Patricia's request. At the time of the hearing, Robert was unemployed but testified that he had a job almost secured.

Understanding the difficult economy, the family court imputed an income for Robert based on his projected income despite it being less than he received from his prior employment. Based on these facts, we conclude that Patricia's award of attorney's fees was not error.

Patricia contends that the family court erred by failing to award her maintenance in the amount of \$3,000 a month for a period of five years. Patricia argues that she is unable to support herself and lacks sufficient property to provide for her reasonable needs as a result of the divorce. She further argues that Robert was capable of earning \$110,000 or more and that his income provided a standard of living during the parties' marriage that she cannot obtain from her income.

An award of maintenance is within the sound discretion of the family court and cannot be disturbed absent a showing of an abuse of discretion. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). In deciding if a maintenance award should be made, a family court must decide whether the moving former spouse has sufficient property and appropriate employment to provide for his or her reasonable needs. *Gripshover v. Gripshover*, 246 S.W.3d 460, 469 (Ky. 2008).

While Patricia focuses on Robert's employment during the parties' marriage when he earned over \$100,000, Robert no longer is employed in this job

and he had been unemployed since November 2007 as of the date of the hearing.

Further, Patricia earned over \$60,000 a year as of the date of the hearing.

According to Robert, he was in the process of accepting employment for \$75,000 a year. Thus, the parties' post-dissolution income would not be grossly disproportionate. The family court also noted that Patricia was in good health and suffered no disability. Accordingly, we conclude that the family court's decision was not erroneous.

Patricia contends that the family court should be required to order the liquidation of Robert's Prudential 401K account. She contends that Robert would be able to re-accumulate these funds due to his higher earning capacity.²

Notwithstanding Patricia's contention, we cannot review her claim of error because she has not cited where she preserved the issue in the family court. *Baker v. Weinberg*, 266 S.W.3d 827, 835 (Ky.App. 2008). "It is well-settled that a [family] court must be given the opportunity to rule in order for an issue to be considered on appeal, and the failure of a litigant to bring an alleged error to the [family] court's attention is fatal to that argument on appeal." *Id.*

Patricia argues that she should be entitled to ownership of the parties' Toyota Sienna and be awarded half of the proceeds from the parties' 2007 joint federal tax refund and stimulus check. Initially, we observe that the family court's order provided that Patricia shall "retain the van as her sole property free and clear of any claim by [Robert]." As to the rest of her allegation, Patricia failed to cite

² We note that the family court ordered that Robert's Prudential 401K be equally divided between the parties pursuant to a Qualified Domestic Relations Order (QDRO).

where the tax issue was presented to and addressed by the family court. Therefore, we conclude that the federal tax issues are not preserved for review. *Id.*

Having addressed the issues presented in Patricia's appeal, we now turn to the issues raised in Robert's appeal.

Robert contends that the family court erred by not awarding him sole custody of the parties' four children. He argues that Patricia "vindictively" sought domestic violence orders against him and posted disparaging flyers about him. Robert further argues that all of the children desired to reside with him. He further argues that his relationship with the children was described as strong by Dr. Lee Epstein, the children's therapist, and that the children excelled under his care.

We have previously stated the standard that a family court must employ when deciding on child custody and that we review for abuse of discretion. *Miller*, 320 S.W.3d at 141. Having already reviewed the record, we conclude that the family court did not err by awarding the parties joint custody of the children. Both parents have been a significant part of their children's lives, and the children love and desire to be involved with each parent. While the parties' oldest child and Patricia have had relationship difficulties, each has expressed an openness to work out these issues. We conclude that the family court's child custody determination was not an abuse of discretion.

Robert contends that the family court erred by not awarding him child support for the care of the parties' oldest child. He argues that the child has resided full-time with him since May 2007. However, Robert did not provide any

other information regarding his allegation of error. Further, he did not cite where he moved the family court to award him child support for the child. We conclude that Robert is not entitled to any relief. *Baker*, 266 S.W.3d at 835.

Robert argues that the family court erred by not releasing the parties' oldest child from compulsory attendance at joint therapy sessions with Patricia. He contends that it is not in the child's best interest to be forced to attend counseling with her mother because of their troubled relationship.

From our review of the record, the family court wrote that "[Patricia] shall not have any contact with [her daughter] that is not approved by [daughter's] therapist." The family court ordered that the parties comply with daughter's therapist's recommendations regarding future counseling sessions with Patricia.

While Robert seeks to prevent Patricia from attending therapy sessions with their daughter if recommended by her therapist, the family court's order was based on its award of joint custody and KRS 403.270(2)(c) and (e). KRS 403.270(2)(c) and (e) provide that the interrelationship and the mental health of the children and parents must be considered when awarding child custody. The family court's order contains relatively extensive findings regarding daughter's mental well-being and her interrelationship with her mother.

Based on its observations, the family court believed that both parties' joint custody was in the children's best interests. When a family court issues a decision, it has the inherent authority to enforce its own orders. *Boland–Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 688 (Ky.App. 2009). In particular,

KRS 23A.110(1) charges family courts with the task of strengthening and preserving the integrity of the family and familial relationships. Here, the family court placed the manner of future counseling sessions in the hands of daughter's therapist. This placement will ensure that Patricia and daughter's relationship will be monitored and will only proceed in a manner that is mentally healthy for daughter. Therefore, we conclude that the family court did not abuse its discretion on this issue.

Robert contends that the family court erred regarding Patricia's mental assessment by a qualified mental health expert. However, it is unclear what Robert believes was error and how the alleged error shall be remedied.

Additionally, he failed to cite to the record where he preserved the issue. We, therefore, conclude that Robert is not entitled to relief. *Brock v. Pilot Corp.*, 234 S.W.3d 381, 383 (Ky.App. 2007) (errors must be preserved and cited for review).

Robert contends that the family court erred by inequitably awarding Patricia timesharing and depriving him of significant time with the children. He argues that Patricia's award of physical custody of the children during summer break was inequitable and dramatically deprives him of time with the children.

The family court designated Robert as the children's primary custodial parent during the school year. Patricia was designated as the children's primary custodial parent when the children are out of school for the summer. The family court further ordered the following:

The party who is not providing the primary residence for the children shall have parenting time every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. and every Wednesday evening from 5:00 p.m. until 8:00 p.m.

The family court also issued a holiday timesharing schedule.

When there is a joint custody award, the period in which a custodian exercises physical custody of a child is called “timesharing.” *Pennington v. Marcum*, 266 S.W.3d 759, 764-65 (Ky. 2008). When determining a custody or timesharing matter, a family court exercises broad discretion. *Id.* at 769. A review of the family court’s timesharing schedule clearly demonstrates that Robert did not receive an inequitable amount of time with the children. In fact, he was awarded the majority of the time by virtue of having the children during the school year. Therefore, the family court’s timesharing schedule was not an abuse of discretion.

Robert contends that the family court erred by ordering him to reimburse Patricia utility payments. Specifically, he contends that the family court improperly reimbursed Patricia for the payment of three utility bills.

During the period of the parties’ separation, Robert was ordered to pay expenses related to the parties’ marital residence where Patricia resided. After Robert moved for financial relief, the family court ordered Patricia to begin paying the utilities at the marital residence on July 7, 2008. In its order upon the parties’ motions to reconsider, the family court issued an order reimbursing Patricia for utility expenses she paid prior to the financial relief order of July 7, 2008.

The first reimbursement that Robert alleges was improper was Patricia's \$271.78 payment of the marital home's electric bill, which was paid by a check dated September 22, 2008. He contends that the utility bill was incurred after the date which Patricia became responsible and, thus, could not be reimbursed. Based on the utility bill in the record, there was a zero balance on the account as of September 15, 2008, before a new billing cycle became due. Thus, any payment after the zero balance would clearly be Patricia's responsibility based on the financial relief order of July 7, 2008. Accordingly, it was erroneous to grant Patricia's request for reimbursement for this utility bill.

The second reimbursement that Robert alleges was improper was Patricia's \$114.37 payment of the marital home's water bill. He contends that Patricia's payment of the water bill on August 15, 2008, was after the date when the family court ordered Patricia to be responsible for paying her own utilities. However, the water bill indicates that the payment was made for services received during the months of May, June, and July of 2008. Thus, the water bill covered the period when Robert was responsible for paying the utilities. Therefore, the family court's allowance of Patricia's reimbursement for this bill was not erroneous.

The third reimbursement that Robert alleges was improper was Patricia's purported \$139.52 payment of an electric bill dated June 2, 2008. Although Patricia introduced a receipt for the payment, Robert argues that he in fact made the payment by check. However, Robert has failed to cite where he

informed the family court of this information or where he produced a copy of his check. Therefore, we will not review his allegation. *Brock*, 234 S.W.3d at 383.

Accordingly, Patricia's reimbursement award of \$1,218.55 is reduced by \$271.78 due to her improper reimbursement for the September electric bill. In all other respects, the family court committed no error.

Robert argues that the family court erred in its division of the parties' personal property because he did not receive the items he requested. In its findings of fact, conclusions of law, and judgment, the family court found that the parties had the opportunity to inspect each other's property and inform each other of the items that each desired to own. Finding that it had no reason to believe the inspections and exchanges had not occurred, the family court ruled that each party should retain all of the personal items in their own possession.

From a review of the record, the family court ordered the parties to inspect each other's property to determine what personal property each desired. The parties were ordered to equitably exchange the items and present any noncompliance to the family court. In this case, Robert did not complain of noncompliance to the family court regarding the exchange of personal property.

Regarding Robert's claim in his motion for reconsideration, the family court noted that Robert's objection regarding personalty was unclear. The family court further noted that Robert merely complained about several pieces of furniture, including furniture belonging to the children. The family court modified its prior order to the extent that the children's belongings should be located at their

primary residence. From the record, we conclude that the family court did not abuse its discretion in dividing the parties' personal property.

Robert contends that the family court erred by awarding Patricia partial attorney's fees. We have previously addressed this issue in Patricia's direct appeal regarding attorney's fees. Under the same standard, we conclude that the partial award of attorney's fees was not an abuse of discretion.

For the foregoing reasons, the Jefferson Family Court's findings of fact, conclusions of law, and judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

Patricia L. Dermody, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE/ CROSS-
APPELLANT:

Robert E. Dermody, *pro se*
Louisville, Kentucky