

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001534-MR

GARY CHAD AFTERKIRK

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 02-CI-00514

CINDY RAE BLAIR

APPELLEE

OPINION
AFFIRMING IN PART AND
VACATING AND REMANDING IN PART

** ** * ** * ** *

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: Gary Chad Afterkirk (Afterkirk) appeals from the family court's findings of fact, conclusions of law, and order setting time-sharing and dividing the parties' marital property and debt.¹ On appeal, Afterkirk argues that the issue of time-sharing was not before the family court; the family court divided

¹ In his brief, Afterkirk argued that the family court erred in setting child support and assessing a child support arrearage. However, the parties have agreed that any issues related to child support have been resolved. Therefore, we do not address that argument by Afterkirk.

his retirement funds without considering whether a portion of those funds were non-marital; and the family court did not equitably address the division of debt and other property. Cindy Rae Blair (Blair) argues that the issue of time-sharing was properly before the family court; that the family court equitably divided the parties' property and debt; and that any error in dividing Afterkirk's retirement funds was *de minimus*. Having reviewed the record, we affirm in part and vacate and remand in part.

FACTS

As both parties noted, the procedural record is complicated, not because of what it contains, but, as explained below, because of what it lacks.² Therefore, we summarize the procedural record in more detail than might otherwise be necessary.

Afterkirk and Blair married in 1995 and separated in 2002. Two children were born of the marriage, one is now fifteen years of age and the other is eleven. In October 2002, Blair filed for dissolution of the parties' marriage. Thereafter the parties filed numerous motions regarding property, time-sharing, custody, and what schools the children should attend. Because the motions regarding time-sharing are the only motions that have a bearing on this appeal, we address only those motions.

The first motion regarding time-sharing we can find in the record was filed by Afterkirk on April 15, 2003. In that motion, Afterkirk asked the court to

² We note that the shortcomings in this record occurred before the family court judge became involved, and she did the best anyone could have to sort through those shortcomings.

put in place a set time-sharing schedule. On May 21, 2003, before the court could rule on his April 15, 2003, motion, Afterkirk filed a motion asking the court to set a summer time-sharing schedule. The domestic relations commissioner (DRC) made recommended findings regarding a summer time-sharing schedule, which the circuit court adopted on June 5, 2003. There is no order or DRC recommendation directly addressing Afterkirk's April 15, 2003, time-sharing motion.

On September 3, 2003, Blair filed the first of a number of motions asking the court to modify time-sharing. On October 22, 2003, the court entered an order adopting the DRC's recommendation that Afterkirk receive the following time-sharing: from 4:45 p.m. to 8:30 p.m. on Tuesday with both children; from 4:45 p.m. to 8:30 p.m. on Thursday evenings with the younger child only; every other weekend with both children from 4:45 p.m. on Friday to 8:00 p.m. on Sunday; and every Tuesday and Thursday evening and every other weekend with both children in the summer.

On March 12, 2004, the DRC entered a "Pre-Trial Conference Agenda" indicating that custody and time-sharing were issues to be resolved. Four days later, Afterkirk filed a motion seeking overnight time-sharing. On June 2, 2004, apparently forgetting the court's October 22, 2003, order, Afterkirk filed a motion to set a summer time-sharing schedule. There is no order of record directly addressing either the March 12 or June 2, 2004, motions that Afterkirk filed.

The docket sheet dated July 21, 2004, contains handwritten notes indicating that the parties have joint custody with no primary residential custodian

and time-sharing alternating every two days. It is unclear if these handwritten notes reflect an agreement of the parties or a recommendation by the DRC. However, it does appear that the parties followed the time-sharing schedule reflected in the notes and counsel for Afterkirk stated during a hearing in December 2007 that the notes reflected an agreement by the parties.

On November 18, 2004, Blair filed a motion asking the court to order supervised visitation for Afterkirk. It does not appear that the DRC or the court directly addressed this motion. On January 31, 2005, the court adopted the DRC's report indicating that the parties had acted as if they had joint custody and time-sharing alternating every two days. The court admitted that it could not find an order directly stating as much; however, the court stated that it would not disturb the status quo and that the time-sharing schedule would continue through the end of the school year.

On July 13, 2005, in connection with a motion or motions on other issues, the court adopted the DRC's recommendations indicating that joint custody and equal time-sharing had been awarded. However, we note that the court did not state when that award had been made, and it did not reference where in the record that award is to be found.

On September 16, 2005, and July 19, 2006, Blair filed motions to modify time-sharing. It does not appear that the DRC made any recommendations regarding these motions or that the court ever entered an order addressing them. We note that the November 6, 2006, docket sheet contains several handwritten

notes ostensibly from the DRC, but the notes are illegible and the sheet is not signed.

In September 2007, counsel for Blair requested a final hearing, noting that the contested issues involved: "permanent custody of the children, their primary residence and their schools, child support, current and arrearage, the division of marital equity in the residence and the parties' 401(k) and pension accounts."

In his pre-hearing memorandum, Afterkirk stated that any issues with regard to child custody, time-sharing, and school attendance had been resolved by prior court order. However, the court "orders" regarding custody and visitation to which Afterkirk refers appear to be recommendations or handwritten notes by the DRC, not orders of the court.

In her pre-hearing statement, Blair stated that "[t]here may be no objection to joint custody" and that the parties had agreed on time-sharing. However, she noted that the parties had difficulty in the past settling "major issues" and that there had been no agreement with regard to "primary residence."

On December 7, 2007, the family court held a hearing to address the issues raised by the parties. The hearing resembled a status conference more than a formal hearing, with both counsel expressing their opinions regarding what the evidence either was or would be and both parties making somewhat random comments throughout.³ We note that there was little testimony or discussion aimed

³ The family court judge in this matter did not swear in either party until forty-five minutes into the hearing. At that point, it is clear that the judge swore in Blair, but it is not clear if she swore in Afterkirk. Furthermore, some of the evidence relied on by the judge is from statements by the

directly at the issue of time-sharing. However, the parties agreed that they had been following a week-to-week schedule and had been flexible with that schedule to meet the needs and the wishes of the children.

At the end of the hearing, the court stated that it believed prior judges/DRC's had indicated that the children should remain in Scott County schools so that the parties could continue week-to-week time-sharing. The court indicated that it would not be inclined to disturb that time-sharing arrangement during the school year and that Blair should file a motion to adjust time-sharing if she wanted a change.

During the hearing, the parties, the court, and counsel also discussed the parties' claims to personal property, the debt incurred by the parties, and the parties' income. The parties presented a significant amount of testimony regarding tools and other personal property Afterkirk had stored in a barn by the marital home. However, since Afterkirk had not raised any issue regarding that personal property on appeal, we do not summarize that evidence herein.

As to debt, the parties and their attorneys testified/stated that Afterkirk had accessed and used funds from a home equity line of credit after they had separated. Blair testified/stated that she was aware of Afterkirk's use of some funds from that line of credit. However, she indicated that she was not aware of and did not approve of the other amounts Afterkirk used from that line of credit. Afterkirk testified/stated that he used the money from the line of credit to pay for

parties before she swore in either of them and from statements from counsel, thus we refer to what the parties and their attorneys said as the parties' "testimony/statements."

living expenses because he was not working. Those expenses and their attendant debt were marital according to Afterkirk because the money was used to support the family and to pay the mortgage on the marital home.

As to the marital home, the parties presented confusing explanations regarding what portion of the property was marital and what part was non-marital. The parties agreed that Afterkirk purchased the property before they married; however, they gave conflicting statements/testimony regarding how Afterkirk acquired the property.

Afterkirk and his mother testified that Afterkirk received \$10,000.00 from his father as part of a property settlement agreement between his parents. According to Afterkirk, the money was for improvements to the marital home. However, Blair and her father testified that Afterkirk's father gave the money to both of them in order to defray medical expenses for the younger daughter.

As to Afterkirk's pension, the parties agreed that a portion is non-marital.

In their closing statements, Blair and Afterkirk made arguments related to the division of debt, property, pensions, and 401(k) plans. However, neither argued the issue of time-sharing.

After the parties filed their closing statements, but before the family court entered its findings of fact, conclusions of law, and order, Blair filed yet another motion regarding time-sharing. Afterkirk filed a response to Blair's motion and both parties filed affidavits setting forth their positions. Blair's motion asked

the court to order the younger child to attend Fayette County schools, the older child to attend Scott County schools, and to adjust time-sharing accordingly. The affidavits attached to the parties' pleadings set forth the reasons why each child would be better off attending one school system or the other.

On July 2, 2008, the family court entered its findings of fact, conclusions of law, and order. In its findings, the court noted that the issues in controversy "included division of marital equity in the marital residence, Petitioner's alleged dissipation of Respondent's tools, division of 401(k) and pension accounts, division of marital vehicles, and child support and custody." As to the child custody issue, the court found that Blair was not working outside the home, had been actively involved in the children's school activities, and was in a better position to transport the children and help them with their school work. Applying the factors in Kentucky Revised Statute (KRS) 403.270(2) to the preceding facts, the court determined that the parties should have joint custody with Blair designated as primary residential custodian.

As to time-sharing, the court stated that the children should be with Afterkirk every Wednesday from 6:00 p.m. to 8:30 p.m. and every other weekend. Furthermore, the family court ordered that the children should be enrolled in the Fayette County schools.

As to the marital home, the family court found that Afterkirk purchased it for \$64,500.00; that Afterkirk had contributed \$20,000.00 in non-marital funds on improvements; and that it had an appraised value of \$155,000.00.

Subtracting Afterkirk's \$84,500.00 in non-marital contributions to the home, the court determined that the parties had \$70,500.00 in marital equity, which the court divided equally between them, \$35,250.00 to Afterkirk and \$35,250.00 to Blair.

Regarding debt, the court noted that the parties had an equity line of credit related to the marital residence. The court found that Afterkirk had used \$17,100.00 of that line of credit with Blair's knowledge, if not with her approval, and divided responsibility for that debt equally between the parties. The court also found that Afterkirk had used \$23,000.00 of the credit line without Blair's knowledge or approval and found that Afterkirk was solely responsible for that debt.

Finally, the court found that Afterkirk's pension was "100% marital," which it equally divided between the parties.

On July 8, 2008, Afterkirk filed a motion to alter, amend, or vacate under Kentucky Rule of Civil Procedure (CR) 59. In pertinent part, Afterkirk stated in his motion that time-sharing had previously been decided as acknowledged by the court's order entered on July 26, 2005. He also stated that time-sharing had not been listed by Blair in her pre-hearing statement nor argued in her closing statement. Furthermore, Afterkirk argued that the court miscalculated the marital interest in the home and in his pension and that the court miscalculated the amount of marital debt.

In her response, Blair argued that the court had not previously made any determination regarding permanent custody or time-sharing. Furthermore,

Blair argued that she had raised the issue of custody in her pre-hearing statement and that time-sharing had been an ongoing issue for the parties. As to the valuation of the marital home, Blair indicated that the court had not correctly taken into consideration debt against the home, which, if correctly done, would have resulted in a marital share of \$76,500.00, rather than \$70,500.00. Blair also argued that the court incorrectly determined the amount of marital debt through the equity line of credit.

On December 23, 2008, the court overruled Afterkirk's motion, except with regard to child support issues. Thereafter, the parties continued to raise issues with regard to child support, issues that are not before us.

STANDARD OF REVIEW

We review the family court's orders on visitation matters for abuse of discretion. *Wireman v. Perkins*, 229 S.W.3d 919 (Ky. App. 2007). Valuing and dividing property in a dissolution are within the sound discretion of the trial court, which we also review for abuse of discretion. *Cochran v. Cochran*, 746 S.W.2d 568, 569-70 (Ky. App. 1988).

ANALYSIS

With the above standards in mind, we separately address each of the issues raised by Afterkirk.

1. Time-Sharing

Afterkirk argues that the family court improperly addressed time-sharing because that issue was not before it. In support of his argument, Afterkirk

states that the parties did not address the issue in their pre-hearing or closing statements. However, we disagree that the issue was not properly before the court. At the end of the hearing, the court advised the parties if they had any issues with regard to time-sharing they should raise those issues at a later date. Blair followed the court's direction and raised the issue by separate motion following the hearing, Afterkirk responded to that motion, and both parties filed affidavits supporting their positions. Afterkirk now claims that, if he had known the court was going to address time-sharing, he would have presented additional evidence. However, Afterkirk did not ask the court to hold a hearing on Blair's motion and did not file any evidence other than the affidavit attached to his response. Therefore, his complaint that the court acted precipitously is without merit.

Having determined that the issue was properly before the court, we must address whether the court's time-sharing award amounted to an abuse of discretion. Based on the record before us, we hold that it did not.

As noted above, the court made findings regarding the parties' living arrangements, the children's school activities, and the parties' involvement in the children's school activities. The court then applied the factors in KRS 403.270(2) to those facts and made a determination. While Afterkirk may not be happy with that determination, we cannot say that the court abused its discretion in making it.

Furthermore, despite Afterkirk's statement to the contrary, we are not certain from this record that any permanent judgment regarding time-sharing had been made. There is what appears to be an order on the July 21, 2004, docket

sheet; however, it appears to have been signed by the DRC, not the judge.

Furthermore, at the December 2007 hearing, Afterkirk's counsel indicated that the 2004 docket sheet "order" reflected an agreement between the parties, not a judgment by the court.

The court apparently recognized the July 2004 "order" in July 2005; however, the court noted that the parties' living conditions had changed and that it was being called upon to address where the children would attend school. The court made the decision regarding school attendance in order to protect the equal time-sharing it believed it had previously ordered. However, it did not otherwise specifically address time-sharing, and Blair subsequently raised the school issue, with the attendant time-sharing problem.

Faced with this confusing at best record, we hold that the trial court appropriately addressed the issue of time-sharing.

2. Division of Debt

The parties agree that the balance on the home equity loan amounted to \$40,100.00. Afterkirk testified/stated during the final hearing that he used all but \$11,000.00 of that amount to support the family before the parties finally separated and that all of the money went to benefit the family. However, Afterkirk offered little by way of testimony or other evidence specifically delineating how he spent the money. Blair testified/stated that she was only aware of, and that the family only benefitted from, Afterkirk's use of a portion of that money. As noted

above, the court believed Blair, determined that only \$17,100.00 was marital debt, and assigned the remaining \$23,000.00 in debt to Afterkirk.

Debts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation, *Van Bussum v. Van Bussum, supra, O'Neill v. O'Neill, supra, Bodie v. Bodie, supra, Inman v. Inman*, Ky.App., 578 S.W.2d 266, 270 (1979); whether the debt was incurred to purchase assets designated as marital property, *Daniels v. Daniels, supra*; and whether the debt was necessary to provide for the maintenance and support of the family, *Gipson v. Gipson, supra*. Another factor, of course, is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. To the extent that *Daniels v. Daniels, supra*, and *Underwood v. Underwood, supra*, hold that there is a presumption with respect to debts incurred during a marriage, they are overruled. Nor is there any presumption that debts must be divided equally or in the same proportions as the marital property. *Cf. Herron v. Herron, supra; McGowan v. McGowan*, Ky.App., 663 S.W.2d 219 (1983).

Neidlinger v. Neidlinger, 52 S.W.3d 513, 523 (Ky. 2001). We review the distribution of debt for abuse of discretion. *Id.*

Based on the testimony/statements of the parties and the documents they filed, we discern no abuse of discretion in the court's distribution of debt. As is often the case, the court was faced with two disparate stories and the obligation to choose which to believe. The court, after considering whether Blair knew of or benefited from \$23,000.00 of the home equity debt, determined that she did not. Making that choice is within the court's discretion, and we cannot say that the court erred when it did so.

3. Marital Home

The parties agree that Afterkirk purchased the marital home before they married. Furthermore, they agree that there were significant improvements made to the marital home. The court found that Afterkirk had paid \$64,500.00 for the property and made \$20,000.00 in improvements with non-marital funds. The court then subtracted the total of Afterkirk's non-marital contributions (\$84,500.00) from the appraised value of \$155,000.00 and determined that the parties had a combined equitable interest of \$70,500.00, which the court divided equally. As we understand it, Afterkirk argues on appeal that the court erred because it determined all of the increase in value of the property was marital. According to Afterkirk, the court should have used the *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. App. 1981) formula to determine the marital and non-marital shares, which would have resulted in marital equity of \$23,256.50. Blair argues that, if the court had correctly used the *Brandenburg* formula, it would have determined that her share of the marital home would have been greater than what the court awarded her.

Initially, we note that this Court specifically stated in *Brandenburg* that the formula set forth therein was not exclusive and that this Court will "approve other procedures utilized by the lower courts in arriving at an equitable division of property as long as the relationship between the contributions of the parties is established." *Id.* at 873. Although the formula used by the judge may not be strictly in conformity with *Brandenburg*, it does establish the contributions of the parties.

(Ky. 2001):

When the property acquired during the marriage includes an increase in the value of an asset containing both marital and nonmarital components, trial courts must determine from the evidence “*why* the increase in value occurred” because “where the value of [non-marital] property increases after marriage due to general economic conditions, such increase is not marital property, but the opposite is true when the increase in value is a result of the joint efforts of the parties.” KRS 304.190(3), however, creates a presumption that any such increase in value is marital property, and, therefore, a party asserting that he or she should receive appreciation upon a nonmarital contribution as his or her nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution. By virtue of the KRS 403.190(3) presumption, the failure to do so will result in the increase being characterized as marital property.

(Footnotes omitted).

The parties testified/stated that they had made significant improvements to the marital home, improvements which would have increased its value. Afterkirk, who bore the burden of proof, did not put on any evidence to otherwise explain the increase in value. Therefore, we discern no error in the trial court's computation of the marital and non-marital values of the marital home.

4. Afterkirk's Retirement Account

Afterkirk testified/stated that he worked at Toyota for five years before the parties married and for several years thereafter. During that time, Afterkirk accrued pension benefits through his employment. Blair did not dispute this testimony. Despite this evidence, the court determined that all of Afterkirk's

pension benefits were marital. As noted above, we grant the trial court a great deal of discretion with regard to the valuation and division of property; however, that discretion is not limitless. As set forth in KRS 403.190(1), the family court must assign to each party his/her non-marital property before dividing marital property. Herein, the family court failed to assign to Afterkirk his non-marital share in his retirement account before it divided that account. Therefore, we must vacate that portion of the family court's judgment dealing with Afterkirk's retirement account and remand for additional findings regarding what portion is marital and what portion is non-marital.

CONCLUSION

Having reviewed the record and the arguments of the parties, we affirm the family court's determinations regarding time-sharing, division of debt, and division of the equity in the marital home. However, because the family court incorrectly characterized all of Afterkirk's pension as marital, we vacate the court's judgment regarding the characterization and division of Afterkirk's pension and remand for additional findings on that issue.

ALL CONCUR.

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