

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-001450-MR

WILLIAM MERRICK

APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT  
HONORABLE JOHN DAVID MYLES, JUDGE  
ACTION NO. 08-CI-00705

TAMMY MERRICK

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER, JUDGES.

CLAYTON, JUDGE: William Merrick appeals from an order of the Shelby Family Court based on the reasons that it erred in its award of maintenance and improperly allocated the dependency tax exemption. After careful review, we affirm.

William and Tammy Merrick were married on May 19, 1992, and separated on October 13, 2007. William works as a pharmacist at PCA, Inc., and

Tammy is employed at General Electric. William's gross income is approximately \$10,176 per month; Tammy's gross income is approximately \$1,720 per month. The parties have three minor children with whom they share joint custody with equal and split parenting time. The parenting time is devised so that each parent cares for all three children on an every-other-week basis.

On April 14, 2011, a hearing was held on the remaining contested issues. Then, on June 8, 2011, the family court entered findings of fact, conclusions of law, and a decision regarding the issues of maintenance, attorney fees, the amount of child support, and the allocation of the tax dependency exemption. Next, a partial separation and property settlement agreement that resolved most of the remaining issues was executed by the parties and entered on July 6, 2011. Lastly, the family court entered the decree of dissolution on July 15, 2011. On appeal, William contends that the family court erred in its award of maintenance and its allocation of the tax dependency exemption.

First, we address the issue of maintenance. An award of maintenance is governed by Kentucky Revised Statutes (KRS) 403.200, which states in relevant part:

(1) [T]he court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment[.]

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance . . . ;

(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.

Besides the statutory constraints, the amount and duration of a maintenance award is within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990). On appellate review, this Court will not disturb the lower court's decision unless its findings were clearly erroneous or it committed an abuse of discretion. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992).

William argues that the family court merely recited the standard in KRS 403.200 rather than setting forth specific factual findings to support an award of maintenance. He then makes several suggestions as to findings that the family court should have made. William's recommended findings for the court, however,

do not obviate his responsibility to make a motion for additional findings. It is well-established that a final judgment shall not be set aside because of the failure of the family court to make a finding of fact on an issue essential to the judgment unless the failure is brought to the attention of the trial court by a written motion. *See* Kentucky Rules of Civil Procedure (CR) 52.04. If William wanted more specific findings of fact with regard to maintenance, then he should have requested additional findings pursuant to CR 52.02. This Court may not reverse the family court because of its failure to make a specific finding of fact on this issue since William made no request for such a finding. CR 52.04.

Notwithstanding that William had to make a motion for additional findings, we note that here the family court did make sufficient findings to support an award of maintenance. In making its findings, while the family court did not follow the statute specifically, it did note the discrepancy in the parties' incomes, their monthly incomes, the allocation of the income from the sale of the marital home and the distribution of the vehicles, and the amount of child support. Interestingly, William takes issue with the court for failing to follow the statutory strictures of KRS 403.200, and then, when the court uses the language required by KRS 403.200, William also complains.

Nevertheless, the family court in its conclusions of law finds that Tammy lacked sufficient property and was unable to support herself through appropriate employment. And, the family court notes that it also considered the standard of living during the marriage and the duration of the marriage. The

family court then ordered that William pay maintenance in the amount of \$1,000 per month for thirty-six months. Given the standard of review that guides this Court, we will not disturb this award of maintenance since the findings supporting it were not clearly erroneous and not an abuse of discretion.

Second, William claims that the family court erred in allocating the dependency tax exemption by allowing the parents to claim one child one year and two children the next year, and then to alternate this allocation in the subsequent year. In essence, the family court was equally dividing the dependency tax exemption between the parties. The family court explicitly designated that for 2011, William was to have one exemption, and Tammy was to have two exemptions. This allocation would alternate the next year and continue this rotation in the ensuing years. Hence, over time, the parties equally share the tax dependency exemption.

The family court herein cited to *Marksberry v. Riley*, 889 S.W.2d 47 (Ky. App. 1994), as guiding its decision regarding the allocation of the dependency tax exemption. Therein, the Court held that a trial court has the authority to allocate the tax exemption between parties, and it is to do so by maximizing the benefit of the exemption. *Id.* at 48. Moreover, the Court stated that the trial court has broad discretion to make this allocation. *Id.*

In fact, the federal tax guidelines for dependency tax exemption in 26 U.S.C. § 152(e) (2008) create a presumption in favor of awarding the exemption to the custodial parent. Here, the family court equally split the exemption between

two parents with joint custody and equal parenting time. Therefore, the family court followed the presumption found in the federal tax code. Certainly, as stated in *Hart v. Hart*, 774 S.W.2d 455, 457 (Ky. App. 1989), the language in 26 U.S.C. § 152(e) does not prohibit a state court from allocating a tax exemption between a custodial and non-custodial parent. Still, in the case at hand, where the parties equally share the children, the family court's equal allocation of the tax exemption is not only reasonable but meets the federal statutory proviso. Moreover, as alluded to in William's brief, Tammy stated that, provided with a dependency tax exemption, she could utilize the earned income tax credit.

In conclusion, as observed in *Marksberry*, 889 S.W.2d 47, trial courts have a broad discretion in allocating the tax exemption and should do so by maximizing the benefit of the exemption. To resolve the issue, a court may be guided by "balancing the equities between parties[.]" *Brausch v. Brausch*, 265 S.W.3d 837, 842 (Ky. App. 2008). Here, we are not persuaded that the family court abused its discretion. Clearly, the family court could have reasonably determined that both William and Tammy were capable of utilizing the tax exemptions for the benefit of the children. Further, since it was joint custody and parenting time was both equal and split, the family court could ascertain that by equally allocating the dependency exemption that each parent would have the custodial opportunity to use the exemption for the benefit of the children. Furthermore, an equal division of the dependency exemptions and, consequently,

the benefits conferred, is equitable. Hence, the equal division of the tax benefits in the instant case was not an abuse of discretion.

Based on the foregoing reasons, the order of the Shelby Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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