

RENDERED: DECEMBER 6, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001578-MR

RANCIE WAYNE HANNAH

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE JANIE MCKENZIE-WELLS, JUDGE  
ACTION NO. 09-CI-00381

ANGELA REBECCA HANNAH

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Rancie Hannah appeals from a judgment and decree of dissolution of marriage. He claims that the trial court erred in making Angela Hannah the primary custodian of the parties' minor children, that the trial court erred in the distribution of the marital estate, that the trial court erred in the award of child support, that the trial court erred in the award of maintenance, that the trial

court erred in the allocation of a marital bank account, and that the trial court erred in requiring Mr. Hannah to be responsible for the debt on two credit cards. We find that the trial court erred in some respects in its judgment; therefore, we affirm in part, reverse in part, and remand for further proceedings.

The parties were married on September 28, 1991, and separated on or about April 27, 2009. At the time of the filing of the petition for dissolution of marriage, the parties were both 33 years old. There were four children born of the marriage, but only two were still minors at the time of the dissolution. Mr. Hannah was employed as a doctor and Ms. Hannah was a homemaker.

A final hearing was held in this case on January 30 and 31, 2012. A number of issues had been resolved prior to the hearing. Ultimately, the trial court awarded the parties joint custody of the minor children, with Ms. Hannah being named the primary residential parent. Mr. Hannah received timesharing according to the Greenup Circuit Guidelines, but was also given one additional weekend per month. The court also ordered Mr. Hannah to pay \$4,192 per month in child support and \$4,000 per month in maintenance for a period of five years. In addition, the court ordered that the marital residence be sold, with Mr. Hannah continuing to pay the mortgage, taxes, and insurance. Ms. Hannah and the children were allowed to remain in the home until it was sold. The court awarded Ms. Hannah \$26,900 as her marital interest in Mr. Hannah's medical practice. The court also ordered Mr. Hannah to pay off the debts on two credit cards. Finally, the trial court found that at the time of separation, Mr. Hannah had around \$39,000

in a bank account that only he had access to. The court awarded Ms. Hannah \$19,834.70 as her marital interest in the account. This appeal followed.

Mr. Hannah's first argument on appeal is that the trial court abused its discretion in making Ms. Hannah the primary residential parent of the minor children. Mr. Hannah argues the court should have awarded the parties equal timesharing.

In reviewing the trial court's decision, we must determine whether it abused its discretion by awarding custody of the children to [the parent at issue]. An abuse of discretion occurs when a trial court enters a decision that is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We will not substitute our own findings of fact unless those of the trial court are "clearly erroneous." *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Further, with regard to custody matters, "the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion." *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *see also Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

*Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010).

The factors the trial court considers when awarding custody can be found in KRS 403.270(2). KRS 403.270(2) states:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(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;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

In the case at hand, Mr. Hannah does not argue the court erred in awarding joint custody. His claim is that he and Ms. Hannah should have been given equal parenting time. We find no error.

For our purposes, only KRS 403.270(2)(a) through (d) applies. There was no evidence presented at the hearing that relates to the other factors. As to 403.270(2)(a), the trial court found that Ms. Hannah wanted primary custody with Mr. Hannah receiving the timesharing allowed by the Greenup Circuit Guidelines,

and Mr. Hannah wanted equal parenting time. As to 403.270(2)(b), the court found that the children liked having Ms. Hannah as the primary residential parent and Mr. Hannah having visitation.<sup>1</sup> As to 403.270(2)(c), the court found that both parents were involved with the children. Finally, as to 403.270(2)(d), the court did not make specific findings as to this factor, but allowed Ms. Hannah and the children to remain in the marital home until it was sold. We find the trial court did not abuse its discretion. The court made sufficient findings of fact and found it would be in the children's best interest for Mr. Hannah to receive timesharing and Ms. Hannah to be the primary residential parent. We cannot say that the court abused its discretion.

Mr. Hannah's next argument on appeal is that the trial court erred in the distribution of the marital estate. Mr. Hannah claims that when the marital residence is sold, it will most likely be sold at a loss. The evidence presented established that as of July of 2010, the parties owned two parcels of land that made up the marital residence: the actual marital home and a smaller parcel used as rental property. The combined appraisal value of the two parcels was \$326,000 and as of July, 2010, the combined mortgage of the properties was \$366,495. This means that the property was about \$40,000 underwater. Mr. Hannah argues that the court erred in awarding Ms. Hannah half the value of his medical practice, but not also making her share the burden of any debt that may be realized once the marital residence is sold.

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<sup>1</sup> The trial court interviewed three of the parties' children.

KRS 403.190(1) states that the trial court will divide the marital property in “just proportions”, which does not mean equally. *Stipp v. St. Charles*, 291 S.W.3d 720, 726 (Ky. App. 2009). The division of marital assets is within the broad discretion of the trial court. *Id.* We agree in part with Mr. Hannah on this issue. The trial court did not err in awarding Ms. Hannah half of the value of Mr. Hannah’s practice. The trial court used the calculations presented by Mr. Hannah’s expert and Mr. Hannah does not find fault with the trial court’s decision as to that division. Where he does find fault, however, is that the trial court did not state what was to be done with any debt that may come from the selling of the marital residence. He assumes that he will be required to pay off any remaining debt on the residence; however, there is no guarantee the mortgage will still be underwater when the property is sold. Any anticipated debt is too speculative at this point. We are not reversing the award of \$26,900 to Ms. Hannah as her marital interest in Mr. Hannah’s practice, but the trial court will have to revisit the issue of any remaining mortgage debt at the time the residence is sold.

Mr. Hannah also claims on appeal that the trial court erred in the award of child support. We agree and find that reversal is necessary. In this case, the adjusted parental gross income exceeded the child support guideline table. When that happens, KRS 403.212(5) applies and the trial court sets child support using its discretion. “As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the

sound discretion of the trial court. This discretion is far from unlimited.” *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000)(citations omitted).

Here, the trial court awarded \$4,192 per month in child support. The trial court did not make any findings supporting that figure. The court only attached a child support calculation worksheet which set forth that amount. We believe that the case of *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001), is directly on point. In that case, the adjusted parental gross income exceeded the uppermost level of the child support guideline table. A previous panel of this Court stated:

The child support guidelines set out in KRS 403.212 serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines only upon making a specific finding that application of the guidelines would be unjust or inappropriate. However, KRS 403.211(3)(e) specifically designates that “combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines” is a valid basis for deviating from the child support table. Furthermore, the trial court may use its judicial discretion to determine child support in circumstances where combined adjusted parental gross income exceeds the uppermost level of the guidelines table. The child support table ends at the \$15,000.00 per month level, so deviation from the guidelines is clearly appropriate in this case.

Kentucky trial courts have been given broad discretion in considering a parent’s assets and setting correspondingly appropriate child support. A reviewing court should defer to the lower court’s discretion in child support matters whenever possible. As long as the trial court’s discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court’s ruling in this regard. However, a trial court’s discretion is not unlimited. The

test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

*Id.* at 454 (citations and footnotes omitted).

In *Downing*, the Domestic Relations Commissioner and trial court projected what the child support guidelines table would indicate would be a reasonable amount of child support for parents whose income exceeded the uppermost levels. It then used this mathematical extrapolation to set a child support amount. The previous panel of this Court stated:

We reject this approach and have great difficulty with using a projection of the child support guidelines as the primary basis for calculating child support. An increase in child support above the child's reasonable needs primarily accrues to the benefit of the custodial parent rather than the children. In addition, this approach effectively transfers most of the discretionary spending on children to the custodial parent. Furthermore, a strict reliance on linear extrapolation could result in vast increases in child support unwarranted by the children's actual needs. Beyond a certain point, additional child support serves no purpose but to provide extravagance and an unwarranted transfer of wealth. While to some degree children have a right to share in each parent's standard of living, child support must be set in an amount which is reasonably and rationally related to the realistic needs of the children. This is sometimes referred to as the "Three Pony Rule." That is, no child, no matter how wealthy the parents, needs to be provided more than three ponies.

*Id.* at 455-456. The Court rejected the method of awarding child support based on a mathematical calculation without supporting said amount by making specific findings as to how that amount will meet the reasonable needs of the children. In



the case *sub judice*, the trial court used a mathematical calculation to award child support, but made no findings to support its determination. We therefore reverse and remand on this issue.

Next, Mr. Hannah argues that the trial court erred in the award of maintenance. Specifically, Mr. Hannah claims that the trial court did not make specific findings regarding the award of maintenance and that the court did not take into account that Ms. Hannah is employable. He also takes issue with the court awarding maintenance for a period of five years. We find no error.

KRS 403.200 states:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the 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 or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(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, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a

child living with the party includes a sum for that party as custodian;

(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.

The trial court must find that the spouse seeking maintenance meets the factors listed in both KRS 403.200(1) and (2). As to KRS 403.200(1), the trial court found that Ms. Hannah would not be awarded enough financial resources to support herself and was not currently employed outside the home, nor employed during the pendency of the action. Further, the court found that Ms. Hannah was a homemaker during the marriage with only a high school education and less than one year of college credit. As to KRS 403.200(2), the court found that Ms. Hannah would not be awarded enough financial resources as a result of the division of the marital estate to support herself, that Ms. Hannah is a candidate for additional education and training to enhance her employment<sup>2</sup>, that the court had taken into consideration the standard of living of the parties established during the marriage,

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<sup>2</sup> The court stated that Ms. Hannah was seeking maintenance to help cover her attendance at nursing school for the next five years.

the duration of the marriage (about 20 years), and the age and physical and emotional condition of the parties. Finally, the court considered Mr. Hannah's ability to pay maintenance.

As to the duration of the maintenance, Mr. Hannah argues that five years is too long. Ms. Hannah claimed she needed five years to complete nursing school, but Mr. Hannah argues she should have begun her education at the time of separation. Had she done so, she would have already had three years of education. Mr. Hannah requests a shorter duration in maintenance.

The award of maintenance is reviewed for an abuse of discretion. *Brosnan v. Brosnan*, 359 S.W.3d 480, 485 (Ky. App. 2012). The trial court's findings stated that it considered all the required factors in awarding Ms. Hannah maintenance. It further stated that she was a good candidate for further education in order to become employable in the nursing field. As for awarding Ms. Hannah maintenance for five years, Ms. Hannah was specifically asked during the final hearing why she did not begin school earlier. Her response was that she was unable to afford it and that was one reason she was seeking maintenance. This is a reasonable answer and justifies the five year duration for maintenance. There was no abuse of discretion.<sup>3</sup>

Mr. Hannah also argues on appeal that the trial court erred in the allocation of a bank account. At the time of separation, the bank account contained \$39,669.34. Mr. Hannah claims it was an account used to pay the parties' tax

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<sup>3</sup> We should note that once the marital residence is sold, should there be a debt still owed on the mortgage, the issue of maintenance may need to be revisited.

obligations, that the money in the account was not wasted, and that it was an abuse of discretion to award Ms. Hannah half the amount at time of separation instead of half the amount at the time of divorce. We find no error.

As with all issues pertaining to the division of marital property, we review looking for an abuse of discretion. This was clearly a marital asset. Only Mr. Hannah had access to this account during the marriage and the money in the account was from Mr. Hannah's income. Mr. Hannah testified that after he moved out of the marital home, he used the account as his primary checking account. He used the funds for his own living expenses. The trial court did not abuse its discretion in awarding Ms. Hannah half the funds in the account at the time of separation.

Mr. Hannah's final argument on appeal is that the trial court erred in requiring Mr. Hannah to pay off two credit card debts. Mr. Hannah was required to pay off a J.C. Penny credit card with a balance of \$900 and a Sears Card with a balance of \$2,700.<sup>4</sup> Mr. Hannah argues that there was no evidence as to the purpose of these charges and claims they were nonmarital debts incurred by Ms. Hannah. He also claims he should not be solely responsible for these debts should we find them to be marital. We find no abuse of discretion.

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

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<sup>4</sup> The Sears card was not a card that could only be used at Sears, but a regular credit card that was sponsored by Sears.

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.

*Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001)(citations omitted). Here, Ms. Hannah testified that the balance on the J.C. Penny card was due to her buying bedroom furniture for the children. She also testified that the balance on the Sears card was primarily for medical expenses, medical expenses that Mr. Hannah had been ordered to pay by a previous order of the trial court. These debts were marital debts. The trial court specifically took into consideration the income disparity between the parties when assigning the debts solely to Mr. Hannah. This was not an abuse of discretion.

Based on the foregoing, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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