RENDERED: MAY 15, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000350-MR

JOHN PETER RADEMACHER — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 12-CI-01307

JOANNE MARIE RADEMACHER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES AND VANMETER, JUDGES.

JONES, JUDGE: This appeal arises out of a decree of dissolution and order granting in part and overruling in part a motion to alter, vacate, or amend the decree entered by the Kenton Circuit Court, Family Division. On appeal, Peter John Rademacher asserts that the family court erred in calculating his income, awarding, maintenance to his former wife, Joanne Marie Rademacher, and in

relying on a court-appointed appraiser to establish the equity in the marital residence before he was given an opportunity to cross-examine the appraiser. For the reasons set forth below, we AFFIRM.

I. BACKGROUND

Peter and Joanne were married in Kenton. Three children were born to them during the marriage; all three are still minors. In May 21, 2012, Peter filed a petition for dissolution of marriage in Kenton Circuit Court.

On November 9, 2012, the parties filed joint stipulations. The stipulations resolved a number of issues regarding child custody and property division. That same day, the family court conducted an evidentiary to resolve the disputed issues that remained: 1) Peter's income; 2) the value of the marital home; 3) the amount and duration of maintenance, if any, Joanne should receive from Peter; and 4) the amount of child support.[1]

Three weeks later, the family court entered its findings of fact and conclusions of law. Therein, the family court found: (1) Peter's earning capacity is $80,000 per year; (2) the value of the marital home is $125,000 making the parties' net equity in the home $15,411.74; (3) Joanne is entitled to maintenance of $600 per month for 60 months; and (4) Peter shall pay Joanne $451.68 per month in child support.

[1] Issues related to the exact visitation schedule and the award of the kitchen table and chairs were also disputed and submitted to the family court for a decision. Those issues are not part of the present appeal. Accordingly, they will not be discussed in our opinion.

Peter filed a motion to alter, amend or vacate and for additional findings of fact. The family court overruled Peter's motion except to correct a misstatement regarding Joanne's health insurance.

This appeal followed.

II. Analysis

A. Peter's Income

Peter's first assignment of error concerns the family court's finding regarding his income. Peter claims that the family court should have found him to have an annual income of $58,323.20, instead of $80,000. Peter claims the lower amount was supported by his testimony wherein he explained to the family court that while he had made around $80,000 in the past, he recently took a position within the company that paid more an hour, but would result in fewer overtime hours. He testified that he was scheduled to commence the new position beginning in December 2012. Peter testified that the new position was a higher rank than his prior position and would allow him to spend more time at home with his children because it would not involve as much nighttime and weekend work as before. Peter also testified that he decided to close his landscaping business after the parties separated to allow him to spend more time with the children in the summers.

The family court's determination of Peter's earning capacity for the purposes of calculating child support involves a finding of fact, which we will not

disturb unless clearly erroneous. *Maclean v. Middleton*, 419 S.W.3d 755, 775 (Ky. App. 2014).

Child support is calculated based on each parent's income. The child support statutes define income as "the actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." KRS 403.212(2)(a). "KRS 403.212(2)(a) must be read as creating a presumption that future income will be on a par with the worker's most recent experience." *Keplinger v. Keplinger*, 839 S.W.2d 566, 569 (Ky. App. 1992). "The party who wants the trial court to use a different income level in applying the child support guidelines bears the burden of presenting evidence which would support the requested finding." *Id.*

Moreover, a court may find a parent is "voluntarily unemployed or underemployed." KRS 403.212(2)(d). In such a case, "child support shall be calculated based on a determination of potential income . . . Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community." *Id.*

With respect to Peter's income, the family court made the following findings of fact and conclusions:

> The husband works for Proctor and Gamble as an operator technician. His pay has been averaging around $80,000.00 per year. Effective December 1, he has changed his work arrangements to go on the first shift. He says that this arrangement is actually a promotion.

> However, it will result in a large drop in pay. His pay salary will now be $58,000.00 per year. He indicates that he has done this in order to spend more time with his children. He also made it clear that he does not want to pay child support in this case. He even went to the extent of saying he would pay 100% of the unreimbursed medical expenses and the extracurricular expenses, to avoid paying child support. This Court finds it curious that all during the marriage there was no issue about his work schedule, but now there is, as he faces a request for child support. In this case the earning potential between the parties is vastly different. It is admirable that the husband now would want to spend more time with the children; however, he needs to find a way to do that without creating a major financial disruption. This Court concludes that the husband is more motivated by his desire not to pay his soon to be ex-wife child support and finds that his earning capacity is $80,000.00. The husband also referees basketball and earns $100 per week during the basketball season, which is approximately from mid November to the end of February. He also earlier had a landscaping business but he closed that business. Under his new work arrangement he will have 8 hours overtime every two weeks. All are factors as to the earning capacity.

The family court went on to make the following, additional findings in its order granting in part and overruling in part Peter's motion to alter, amend or vacate and for findings:

> The Petitioner takes issue with the child support order and the finding of earning capacity. This Court reviewed the DVD regarding the testimony about income. The Petitioner admitted that in 2010 he earned between $65-70,000.00. In 2011, he earned $80,000.00. Pursuant to exhibit #13 (his paycheck through week 45), he had earned $71,143.00 to date in 2012. Annualizing that, his earnings for 2012 should be $82,210.00. The Petitioner admitted that he voluntarily gave up this position to take a "promotion." He testified that he still may receive some overtime pay post promotion on Saturday or

> Sunday but does not believe the overtime will be as extensive as it was in his old position. The shift differential also changes from $1.46 to $.18. This Court made its finding of earning capacity based on Petitioner's history of earning over the last three years. The issue is "earning capacity". It appears that at the same time that the Petitioner is going through this divorce, he has chosen to accept a "promotion" which results in a significant pay cut which will reduce his pay to around $58,000.00 per year. This is a pay reduction of a least $22,000.00. This Court does not think this is a good decision on Petitioner's part or fair to the Respondent. It seems unfair to take the position that the Petitioner's unilateral decision to take a lower paying job is the right thing to do in this case. . . . Therefore, this Court believes that its findings as to Petitioner's earning capacity are the right ones.

We believe the family court's findings with respect to Peter's income were supported by substantial evidence. Furthermore, we do not agree with Peter that the family court was required to accept his testimony regarding his prospective income reduction where he offered no proof of the alleged reduction other than his testimony concerning his new base and his speculation as to some, but, less overtime in the new position.

The evidence presented at trial was that Peter averaged a gross annual salary of approximately $80,000 from his job at Proctor and Gamble over the last three years. This sum did not include the extra income he earned refereeing basketball games or from his landscaping business. While Peter testified that his salary would decrease in 2013, he did not indicate exactly how much the decrease would be because he was uncertain how much overtime he would be able to work in his new position, although he believed it would be less than before.

Given the evidence, we believe the family court was correct in determining that Peter's actual gross income *at the time of the hearing* was $80,000 per year. Moreover, we believe that the family court was in a superior position to determine whether any prospective reduction in Peter's income was undertaken such that he was voluntarily working below his earning capacity to avoid paying child support. We likewise agree with the family that Peter's past employment is the best evidence of his earning capacity in the future. We are hard pressed to understand how Peter can claim that his earning capacity is less now when the reduction in his annual salary was occasioned by a job Peter sought out instead of one that he was required to take. Had Peter not sought the "promotion," it appears that his salary would be closer in line to previous years.

In short, we find no error on the family court's part in finding Peter's income to be $80,000, and basing its child support calculation off of that amount.

B. Maintenance

Peter's second assignment of error concerns the family court's maintenance award to Joanne. The family court awarded Joanne maintenance of $600 per month for five years.[2] Peter contends that both the amount and duration of the award are excessive because Joanne will be finished with her additional education in two years.

In maintenance awards, the family court is afforded a wide range of discretion, which is reviewed under an abuse of discretion standard. *See Platt v.*

[2] Peter incorrectly states in his brief that the award was for six years. The award was actually for *sixty* months which equals five years.

Platt, 728 S.W.2d 542, 543 (Ky. App. 1987). "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." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). This Court will not disturb the family court's findings of fact unless clearly erroneous. "Findings of fact are not clearly erroneous if supported by substantial evidence." *Janakakis–Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999). Substantial evidence is that evidence, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable people. *Id.*

A family court may award maintenance pursuant to KRS 403.200(1) if it finds that the spouse seeking the maintenance: (a) lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs; and (b) is unable to support herself through appropriate employment. The award "shall be in such amounts and for such periods of time as the court deems just" and in making such finding the court must consider the following factors:

> (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.

KRS 403.200(2)(a)-(f).

With respect to maintenance, the family court made the following findings:

> The wife previously worked as a nanny and then as an administrative assistant at Great American Insurance Company. After the parties had their second child she was a stay at home mom. She did at one time do child care out of her home. Since the parties split up the wife has been in tough financial straits. She qualified for a program through North Key to help subsidize her rent for one year. She has also received SNAP food benefits. She has received no maintenance or child support during this case. This husband did assist with her car insurance and her cell phone for a while. The wife is now in school at Gateway seeking a degree in early childhood education. It is her goal to be a teacher. In the meantime, as indicated in the earlier findings, she works as a teacher's aide making a little over $22,000.00 a year. Because of this, this Court concludes that her monthly budget is understated.
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> . . .
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> This is a marriage of 13 years. The wife by mutual agreement became a full time mother and housewife after the birth of their second child. She gave up being in the competitive workforce and was forced back into the workforce only after the parties separated. With her lack of experience and years of working or education she finds herself only able to do unskilled labor at this time.

> Therefore the requirement of KRS 403.200 regarding maintenance have been satisfied and after considering all of the factors presented this Court believes than an award of maintenance is appropriate. The Court believes that a maintenance award in this matter for five years is appropriate to assist the wife in completing her education, obtaining employment in early childhood education and making adjustments in her life financially. The parties did not have a lavish lifestyle at any time. Based on this Court's finding of earning capacity husband has the capability of paying maintenance. Therefore this Court orders that the husband pay the wife $600.00 per month maintenance for a period of 60 months.

The family court went on to make the following, additional findings in its order granting in part and overruling in part Peter's motion to alter, amend or vacate and for findings:

> The Petitioner argues that the amount of maintenance awarded is excessive and suggested at motion docket that it should be for about two years at $300 per month. This Court has taken into account all of the factors of the statute, the length of the marriage, the different financial and vocational positions of the parties. This Court took into account the budgets of both the parties and the ability to pay. In this situation, the Respondent is entitled to a reasonable time to obtain her education, find employment, get some longevity in her job and get her financial affairs in order. This Court believes that 60 months or five years is the right amount of time to accomplish that.

Having reviewed the record, we are satisfied that the family court conducted a proper analysis pursuant to KRS 403.200(2)(a)-(f). The family court observed in other portions of its opinion that since the parties separated, Joanne was forced to seek a housing subsidy and rely on SNAP benefits to supplement her food expenses. The family court also noted that after the decree, Joanne would

incur additional expenses that Peter had been covering including cell phone, car insurance and health insurance. The family court considered the fairly large disparity in the parties' income and the fact that Joanne had been out of the competitive work force for a number of years. The equity Joanne received from the home was not substantial and she would not have access to the marital retirement funds for some time.

Additionally, we do not believe that the family court's award was excessive as to either duration or amount. The amount was well within the realm of reason necessary for Joanne to meet her modest living expenses. Furthermore, while there was not a great deal of excess, as found by the family court, Peter is able to afford the monthly maintenance. Likewise, while Joanne only had two years left on her schooling, as permitted by statute, the family court appropriately considered that she will need to find suitable employment and acquire some longevity in that employment prior to an end of maintenance.

We find no error with respect to the family court's maintenance award in favor of Joanne.

C. Appraisal

Peter's third assignment of error concerns the family court's reliance on a court-appointed expert whom he did not have the opportunity to cross-examine to establish the value of the home. Peter argues that the family court's use of the appraisal without his ability to cross-examine the appraiser on her methodology violates his due process rights.

At the end of the hearing, the family court announced to counsel and the parties that it was going to appoint Lisa Keaton to appraise the property and report back to the court. The family court was clear that it would render an opinion after receiving the appraisal. Peter did not object, request an opportunity to cross-examine Ms. Keaton, or otherwise indicate that he wanted an opportunity to respond further to her appraisal.

After the family court rendered its decree, Peter, acting with new counsel, objected on the basis that he should have been permitted to question Ms. Keaton before the family court rendered its opinion. The family court stated as follows:

> The petitioner has objected to the appraisal of Lisa Keaton. No evidence was presented by either party of an appraisal of the value of the real estate. A report regarding value provided by a real estate agent who has a close family connection to the Petitioner was received. That was not considered evidence of value. The house is the one significant marital asset and there was equity in the house. Therefore this Court appointed its own expert. Under the Family Court rules a written opinion of an expert appointed by the Court is admissible and that is how this Court proceeded. There was no objection at the close of the trial when this Court announced that procedure would be utilized as to Ms. Keaton. There was no request received to have an opportunity to cross-examine Ms. Keaton. The report of Ms. Keaton is in the record and she used generally accepted appraisal methods to arrive at her opinion of value.

Family Court Rule of Procedure and Practice ("FRCPP") 4(a) provides: "A court-appointed expert's report shall be in lieu of live testimony,

unless either party subpoenas the expert to testify or unless the court orders otherwise." This Rule is clear that a party may waive his right to cross-examine an expert witness appointed by the family court. Moreover, the Rule is clear that the family court is entitled to rely on the written expert opinion without the witness appearing at an in-court proceeding.

Peter was present with the assistance of counsel at the conclusion of the hearing when the family court announced that it was going to appoint an expert to assist in valuing the marital residence. Moreover, the family court was clear that its planned course of action was to issue a ruling shortly after receiving the report. If Peter wanted an opportunity to examine the expert before the family court ruled, it was incumbent on him to act promptly at the hearing to reserve his right to do so. Peter did nothing. Instead, he acquiesced to the family court's proposed procedure. It was only after the family court rendered its opinion and with assistance of new counsel that Peter attempted to object because he was not permitted to cross-examine the appraiser.

We believe that Peter waived his right to cross-examine Ms. Keaton when the family court proposed its course of action after the November 2012 hearing. The family court was clear regarding its inclination to rely on the written appraisal report without the benefit of further proceedings. Peter sat silently and indicated that this procedure was fine with him. This amounts to a waiver of his right to subpoena the witness at a hearing.

For this reason, we find no error on the part of the family court. Moreover, we note that the appraisal in the record appears to have been properly conducted. Under the circumstances, the family court's reliance on it was appropriate.

IV. Conclusion

For the reasons set forth above, we AFFIRM the Kenton Circuit Court, Family Division.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carl E. Knochelmann Jr.
Covington, Kentucky

BRIEF FOR APPELLEE:

Brandie M. Ingalls
Covington, Kentucky