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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000919-ME
AND
NO. 2016-CA-000954-ME

MICHAEL G. ANDREWS APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM OLDHAM CIRCUIT COURT
FAMILY COURT DIVISION
v. HON. STEPHEN M. GEORGE, SPECIAL JUDGE
ACTION NO. 13-CI-00515

KIMBERLY D. ANDREWS APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
APPEAL NOS. 2016-CA-000919-ME AND 2016-CA-000954-ME

** ** ** ** **

BEFORE: COMBS, CLAYTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Michael G. Andrews brings Appeal No. 2016-CA-000919-ME and Kimberly D. Andrews brings Cross-Appeal No. 2016-CA-000954-ME from an April 8, 2016, Findings of Fact, Conclusions of Law, Judgment, and Decree of Dissolution and a May 24, 2016, Order of the Oldham Circuit Court,

Family Court Division (family court). We affirm Appeal Nos. 2016-CA-000919-MR and 2016-CA-000954-ME.

Michael and Kimberly Andrews were married on September 17, 1999. Two children were born during the marriage; M.A. in 2004, and C.A. in 2006. Kimberly filed a petition for dissolution of marriage in the family court on August 2, 2013. After an unsuccessful attempt to reconcile, the parties reached a partial property settlement agreement. Then, on February 17, 2016, a bench trial was conducted upon the unresolved issues.

On April 8, 2016, Findings of Fact, Conclusions of Law, Judgment and Decree of Dissolution of Marriage (Decree) were entered by the family court. The Decree incorporated the partial property settlement agreement. The family court awarded the parties joint custody of the children and designated Kimberly as the primary residential parent; Michael was awarded time-sharing. Specifically, Michael was awarded time-sharing every other weekend, overnight on Wednesday during the school year, and overnight on Wednesday and Thursday during the summer. The family court also awarded Kimberly child support, maintenance, and attorney's fees. These appeals follow.

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Michael contends the family court erred by designating Kimberly as the primary residential parent instead of awarding the parties equal time-sharing

with the children. Michael specifically asserts the family court's decision to deny his request for equal time-sharing was not sufficiently supported by the evidence.

The issue of visitation/time-sharing in a joint custody situation was addressed by the Kentucky Supreme Court in *Pennington v. Marcum,* 266 S.W.3d 759 (Ky. 2008). In *Pennington*, the Court identified a subset of joint custody, referred to as "shared custody." *Id.* at 764. In a shared custody arrangement, the parents have joint legal custody, but one parent is designated the primary residential parent and the other parent typically exercises time-sharing every other weekend. *Id.* The *Pennington* Court emphasized that designation of a primary residential parent merely involves "where and to what extent the child spends time." *Id.* at 769. Therefore, a primary residential parent designation is an issue of time-sharing/visitation and is not a custody determination. *Id.* at 769. Our review of a family court's award of visitation/time-sharing will not be disturbed on appeal unless the findings of fact are clearly erroneous or the decision constitutes an abuse of discretion. *Hudson v. Cole*, 463 S.W.3d 346 (Ky. 2015) (citing *Drury v. Drury,* 32 S.W.3d 521 (Ky. App. 2000)).

In the case *sub judice,* Michael and Kimberly stipulated that both parents were "fit and proper persons to be joint custodians." Findings of Fact, Conclusions of Law, Judgment, and Decree of Dissolution at 10. And, the parties agreed that each parent was actively involved in the children's life and daily

routine. Michael and Kimberly were both employed outside of the home. Kimberly's work was close to the parties' marital residence while Michael's work involved a substantial commute. Kimberly testified she would have the ability to work from home if necessary. Michael testified his work schedule was flexible; Kimberly disputed that testimony. Kimberly was also concerned that Michael's work schedule would not be conducive to being home for the children before and after school. Regardless, by all accounts, both parties were capable of parenting the children. Considering the record as a whole, we believe the family court's decision to designate Kimberly as primary residential parent and to grant Michael time-sharing was supported by substantial evidence. And, we cannot say the family court abused its discretion by designating Kimberly the primary residential parent and by granting Michael time-sharing. As a consequence, the family court's designation of Kimberly as the primary residential parent and the award of time-sharing to Michael does not constitute reversible error.

Michael also asserts that the family court erred by including the cost of Kimberly's employment-related child care as part of his child support obligation.[1] Michael specifically asserts that Kimberly failed to "substantiate the amount" of the child care costs she incurs to support her claim. Appellant's Brief

[1] Michael G. Andrews additionally argues that if he had been awarded equal parenting time, child support would need to be recalculated. As we have affirmed the family court's designation of Kimberly D. Andrews as the primary residential parent, we believe this issue is now moot.

at 10. Alternatively, Michael argues that if the cost of employment-related child care is allowed, he should be permitted to pay the child care provider directly.

Child support is governed by Kentucky Revised Statutes (KRS) 403.211, and the cost of employment-related child care is specifically addressed by subsection (6) which reads:

> The court shall allocate between the parents, in proportion to their combined monthly adjusted parental gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in addition to the amount ordered under the child support guidelines.

KRS 403.211(6). KRS 403.211(6) clearly provides that the reasonable and necessary cost of child care incurred by a parent as a result of employment shall be allocated in proportion to the parents' combined monthly adjusted gross income. Employment-related child care costs are "in addition" to the amount of child support ordered pursuant to the guidelines. *Olson v. Olson*, 108 S.W.3d 650 (Ky. App. 2003). And, an award for the cost of employment-related child care will not be disturbed where there is "sufficient evidence to prove" that the cost is being incurred. *McIntosh v. Landrum*, 377 S.W.3d 574, 577 (Ky. App. 2012).

At the hearing, Kimberly testified that she incurs child care costs related to her employment in the amount of $589 per month. Kimberly also introduced a letter from a child care provider that she utilizes when the children are out of school. In the letter, the child care provider stated she charged $60 per day

or $330 per week. Upon the whole, we conclude that sufficient evidence exists to support the family court's award of $589 per month in child care costs.[2] Moreover, we cannot say the family court abused its discretion by ordering the child care costs be paid directly to Kimberly. *See McIntosh v. Landrum*, 377 S.W.3d 574.

Michael also contends the family court erred by ordering him to pay Kimberly maintenance of $750 per month for three years. Michael specifically argues that the family court's findings of fact supporting the award of maintenance were deficient under KRS 403.200.

In a dissolution proceeding, the decision to award maintenance is within the sound discretion of the circuit court. *Browning v. Browning*, 551 S.W.2d 823 (Ky. App. 1977); *Brenzel v. Brenzel*, 244 S.W.3d 121 (Ky. App. 2008). It is well-established that an award of maintenance must satisfy the elements of KRS 403.200(1). *Drake v. Drake*, 721 S.W.2d 728 (Ky. App. 1986). Pursuant to KRS 403.200(1), an award of maintenance is proper where the family court finds the spouse seeking maintenance lacks sufficient property, including the marital property apportioned to her, to provide for her reasonable needs and is unable to support herself through appropriate employment.

[2] In the family court's order on the parties respective Kentucky Rules of Civil Procedure 59.05 motions, the court included the child care costs as part of the total monthly child support obligation awarded to Kimberly in the amount of $1,540.51 per month.

In the case *sub judice*, the family court identified the parties' marital assets and determined the parties' marital share of each asset. Essentially, Kimberly was awarded one-half of the equity in the sale of the parties' marital residence after it sold, one-half of the proceeds from the sale of the parties' commercial property, and one-half of the marital portion of Michael's North American Stainless Steel Savings Plan. There was also evidence presented regarding each parties' income from employment. The family court found that Kimberly's gross monthly income was $6,000 while Michael's was $13,593.[3] The court further found that Kimberly's net monthly income was $4,460 while her reasonable living expenses were $5,193. Michael, on the other hand, had net income of $5,824 and his reasonable living expenses were computed at $5,095 by the court. Kimberly testified that while the children were young, she did not pursue advancing her career so as to work from home or close to home for the benefit of the children. In light of the evidence presented, we cannot say that the family court abused its discretion by awarding Kimberly maintenance of $750 per month for three years to provide her the time opportunity to rehabilitate her income.

Michael finally contends the family court erred in its award of $5,000 in attorney's fees to Kimberly. Michael asserts that Kimberly's salary combined

[3] Michael's income includes a gross monthly salary of approximately $10,500 per month plus an annual bonus from his employer which was $38,204 in 2015.

with the marital property allocated to her were sufficient to preclude an award of attorney's fees.

An award of attorney's fees in a dissolution action is governed by KRS 403.220, which provides:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

Pursuant to KRS 403.220, the family court may order one party to pay a "reasonable amount" toward the attorney's fees of the other party where there is a financial disparity in the parties' incomes. *Bootes v. Bootes*, 470 S.W.3d 351, 356 (Ky. App. 2015) (quoting *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004)). If there is a disparity in the parties' incomes, the decision to award attorney's fees and the amount of such an award is within the sound discretion of the family court. *Id.* And, an award of attorney's fees is reversed only upon a showing of an abuse of discretion. *Id.*

In this case, there was evidence presented to the family court upon the income of both parties and their reasonable living expenses. The evidence presented demonstrated that Michael earned a yearly salary of approximately

$163,000 while Kimberly earned $70,000. Even after the division of marital assets, given the vast disparity between the parties' respective incomes, we cannot say that an award of $5,000 in attorney's fees to Kimberly was an abuse of discretion.

CROSS-APPEAL NO. 2016-CA-000954-ME

Kimberly contends that the family court erred by restoring 800 shares of Acerinox[4] stock to Michael as his nonmarital property. Specifically, Kimberly asserts that Michael did not rebut the presumption of KRS 403.190 that the Acerinox stock was marital property.

KRS 403.190 controls disposition of property in a dissolution of marriage proceeding and provides, in relevant part:

> (3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

And, the burden of proving a nonmarital interest in property is upon the party making the claim. *Smith v. Smith*, 450 S.W.3d 729 (Ky. App. 2014). The party must prove the nonmarital claim by clear and convincing evidence. *Id.*

[4] Acerinox is a Spanish company that owns North American Stainless. North American Stainless is Michael G. Andrews' employer.

In the case *sub judice*, Michael testified that the Acerinox stock was purchased prior to the parties' marriage. Michael asserted that as an employee of North American Stainless, he was offered the opportunity to purchase the Acerinox stock at a discounted price. Michael stated he purchased the Acerinox stock in two installments of 100 shares each and that both purchases were made before the marriage. Kimberly testified that she believed additional stock was purchased during the marriage. Michael testified after his initial purchases of 200 shares there was subsequently a 4 to 1 stock split. The split resulted in Michael owning 800 shares of Acerinox stock having a value of $7,447.

As the burden of proving the nonmarital interest was upon Michael and as the family court was in the best position to judge the credibility of the witnesses' testimony, we will not disturb the family court's decision to restore the Acerinox stock to Michael as his nonmarital property.

Kimberly next asserts that the family court erred in its allocation of the parties' debt. Kimberly specifically asserts "[t]he family court found that the [$30,894 credit card] debt paid by Kim was **marital** . . . but refused to allocate to her any additional amounts from the division of the marital estate to account for her payment of the same." (Emphasis added.) Kimberly's Brief at 13.

In this case, the evidence presented revealed that during the pendency of the action the parties sold a piece of commercial real estate. The proceeds from

the sale were divided equally and each party received approximately $142,000. Kimberly testified that she utilized a portion of her proceeds to pay $30,894 in credit card debt that she accumulated during the marriage. Despite Kimberly's assertion to the contrary, the family court explicitly found that the credit card debt of $30,894 was not a marital debt.[5] Kimberly also raised this argument in her CR 59.05 motion, and, in the order denying Kimberly relief, the family court specifically stated:

> In her CR 59.05 motion [Kimberly] states that the Court found the debt to be marital but then failed to allocate it accordingly. [Kimberly] however misread the Findings. This Court specifically found that the debt, of which [Kimberly] offered no proof, was **not marital** and declined to apportion it between the parties. The Court therefore affirms its finding as to this debt. (Emphasis added.)

May 24, 2016, Order at 4.

Given the family court's finding that the credit card debt was not a marital debt, we believe the family court properly refused to allocate the debt between the parties. This conclusion is consistent with Kentucky law. *Neidlinger*

[5] In Kimberly's brief filed with this Court, p. 13 thereof, Kimberly states:

> The family court found that the debt paid by Kim was marital under *Neidlinger* but refused to allocate to her any additional amounts from the division of the marital estate . . . .

This statement is a misrepresentation by counsel of the record below which may be a violation of Civil Rule 11 of the Kentucky Rules of Civil Procedure and clearly violates Rule 3.3 of the Kentucky Rules of Professional Conduct as set out in Supreme Court Rule 3.130.

v. Neidlinger, 52 S.W.3d 513 (Ky. 2001); *Bodie v. Bodie*, 590 S.W.2d 895 (Ky. App. 1979).

Kimberly also contends that the family court erred by awarding her maintenance of $750 per month for a period of only three years. Kimberly does not contest the amount of maintenance award; rather, she asserts that the maintenance award should have been for a longer term.

If an award of maintenance is deemed proper pursuant to KRS 403.200(1), the family court must consider the factors under KRS 403.200(2)(a)-(f) as to the amount and duration of the maintenance award.

> (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.

It is axiomatic that the duration of an award of maintenance is within the sound discretion of the family court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). Thus, an award of maintenance may only be reversed where there is a clear abuse of discretion. *Combs v. Combs*, 622 S.W.2d 679 (Ky. App. 1981). An award of maintenance is considered rehabilitative in this Commonwealth and, thus, usually limited in duration. *Leitsch v. Leitsch*, 839 S.W.2d 287 (Ky. App. 1992). The duration of an award of maintenance is dependent upon two factors: (1) the time period during which the need exists, and (2) the ability of the paying spouse to pay the maintenance. *Combs*, 622 S.W.2d 679.

In the case *sub judice*, the evidence indicated that Kimberly and Michael were both 45 years of age and had been married for sixteen years. Kimberly testified that after the birth of their second child, she accepted a position that permitted her to work from home. Kimberly stated that working from home allowed her to be the primary caregiver for the children while they were young. In 2012, Kimberly's employer offered her a job in the Cincinnati area, but Kimberly did not agree to relocate. Kimberly subsequently took other jobs in close

proximity of the parties' home and children. At the time of the hearing, Kimberly was working close to home for Rawlings Group in LaGrange, Kentucky. Kimberly's annual income was $70,000. Michael, on the other hand, had been employed with North American Stainless during the parties' entire marriage. North American Stainless is located in Ghent, Kentucky, and required a substantial commute each day. Michael's annual income was approximately $163,000. Given that Kimberly has a bachelor's degree and has always worked full time during the marriage, we believe that the award of maintenance for a term of three years should allow sufficient time for Kimberly to rehabilitate her income and, thus, was not an abuse of discretion.

Kimberly also asserts that the family court erred in the amount of the award of attorney's fees to her. Kimberly specifically contends that the award of $5,000 toward her attorney's fees was not sufficient based on the parties' resources.

As previously discussed above in Appeal No. 2016-CA-000913-MR, an award of attorney's fees in a dissolution action is within the sound discretion of the family court. *Bootes*, 470 S.W.3d 351. Kimberly has not demonstrated that the $5,000 award of attorney's fees was an abuse of discretion. We, thus, cannot conclude that the circuit court erred by its $5,000 award of attorney's fees.

For the foregoing reasons, the Findings of Fact, Conclusions of Law, Judgment and Dissolution of Marriage entered April 8, 2016, by the Oldham Circuit Court, Family Court Division, in Appeal No. 2016-CA-000919-ME is affirmed and we further affirm same in Appeal No. 2016-CA-000954-ME.

ALL CONCUR.

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