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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001173-ME

JACOB KITTS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 16-CI-01460

TONYA KITTS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

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

CLAYTON, CHIEF JUDGE: Jacob Kitts appeals from the Kenton Circuit Court's order dissolving his and Tonya Kitts' marriage, dividing marital debt, and awarding sole custody of the parties' two minor children to Tonya. We affirm.

BACKGROUND

The parties were married in March 2011 and had two children. Jacob filed a petition for dissolution of marriage in September 2016, and following a two-day evidentiary hearing, the trial court entered its findings of fact, conclusions of law, and decree of dissolution on June 26, 2017.

In the divorce decree, all marital debts were assigned to Jacob. The trial court found that it was undisputed that Jacob placed all the debt in his name, including a mortgage that was at that time in default, and he was in control of all the marital finances. The court indicated that Jacob did not comply with discovery deadlines, and that obtaining any information from Jacob at all was extremely difficult. Therefore, because of the lack of information provided by Jacob regarding the marital debts and the level of control exercised by Jacob over the parties' finances during the marriage, the court found that Jacob was responsible for all the marital debt aside from a student loan incurred by Tonya.

The divorce decree also dealt with the custody of the parties' two minor children, and the trial court detailed several instances of alleged physical assaults by Jacob against Tonya resulting in bruising. Tonya testified that the examples of abuse included grabbing her by the throat multiple times, dragging her into a bedroom, and throwing her on the floor while she was pregnant. Tonya further testified that during one of these occurrences she was holding one of the

children and the other child was knocked over while on the floor. At that time, Tonya testified that Jacob also told her she was going to “die right here and now.”

At the time of the decree of dissolution, Tonya had a “no contact” order issued against Jacob, in which Jacob was to stay 500 feet away from Tonya and their marital residence. Neither party had a domestic violence order, although Jacob had been ordered to enroll in and complete a domestic abuse treatment program but had not yet completed the program as of the time of the hearing.

Various other acts by Jacob, including his refusal to make disclosures to the court, requiring all property to be in his name and controlling all the finances, tracking Tonya via spyware, GPS, and cameras installed around the marital residence, and barricading himself in the marital residence in defiance of a court order to vacate, led the trial court to conclude that his behaviors were indicative of a domestic violence perpetrator who sought control at all times. The trial court found that the evidence in the case was overwhelming as to the degree of dominance and control that Jacob had attempted to exercise over Tonya.

Moreover, the trial court found that Tonya had been the primary, and oftentimes sole, caretaker for the children during Jacob’s long deployments out of the country. The trial court acknowledged that Tonya had testified that she could be in a joint custody relationship with Jacob, but that this answer was indicative of the state she was in as the victim of multiple acts of domestic abuse and

domination. The trial court concluded that there would never be equality in the relationship and that Jacob would always attempt to dominate Tonya. Therefore, due to the evidence of domestic abuse, Jacob's need for domination and control, and evidence that Tonya was the primary caregiver, the trial court found that it was in the best interests of the children for Tonya to have sole custody.

Further, the trial court found that Tonya could relocate with the children to her hometown of Waco, Texas, where Tonya testified that she would initially live with her family until she could find acceptable employment and provide for her own housing. Tonya indicated that she had several family members in Waco to assist her in daycare and transporting the children, and that she had no connection to Northern Kentucky. Jacob testified that it was his desire for Tonya and the children to remain in Northern Kentucky and stay in the marital home, although Tonya testified that she could not make the mortgage payments alone, and the mortgage was already in default.

The trial court found that Tonya's earning capacity was at best minimum wage, and that at that time she was working two jobs in order to support herself and her children, as Jacob was then in arrears with his child support payments. Because of her lack of ties to the area, the trial court found that it was in the best interests of the children that Tonya be able to live in an area where she

had family support, could get daycare assistance from her family, and could obtain a job and housing.

The trial court granted visitation to Jacob whenever he chose, upon thirty days' notice to Tonya, such notice to be through a third party. The trial court also set up a holiday and vacation schedule, including granting visitation time to Jacob every Christmas season, every other Thanksgiving, every other Spring Break and six weeks of visitation with the children during the summer. Jacob filed a timely notice of appeal from the trial court's findings of fact, conclusions of law, and decree of dissolution.

ISSUES

On appeal, Jacob argues that (1) the trial court erred in assigning all the marital debt to Jacob, (2) the trial court erred in granting Tonya sole custody of the couple's two minor children because of its reliance on the domestic abuse allegation against Jacob and Tonya's testimony that she could be in a joint custody relationship with Jacob, and (3) the trial court erred in permitting Tonya to relocate the minor children to Texas.

ANALYSIS

As an initial matter, we note that the parties' briefs contain almost no citations to the record on appeal or any statement as to how the issues raised on appeal were preserved for review, despite the requirements of Kentucky Rule of

Civil Procedure (CR) 76.12. Pursuant to CR 76.12(8)(a), “[a] brief may be stricken for failure to comply with any substantial requirement of this Rule”

The exercise of an appellate court’s authority to strike a brief that does not comply with CR 76.12 is, however, discretionary, and we decline to do so in this case.

Simmons v. Commonwealth, 232 S.W.3d 531, 533 (Ky. App. 2007).

Jacob first argues that the trial court erred in assigning all the marital debt to Jacob. The standard of review regarding the trial court’s findings of fact is governed by CR 52.01, which states that factual findings “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01; *see also B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. *B.C.*, 182 S.W.3d at 219. Issues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001), *overruled on other grounds by Smith v. McGill*, ___ S.W.3d ___, 2018 WL 4627259 (Ky. 2018). An abuse of discretion occurs when a ruling 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).

Jacob argues that the trial court's decision was arbitrary because the trial court failed to elicit additional testimony regarding the marital debts and instead simply made a finding of fact that the information regarding the marital debts was unclear to the court. Moreover, Jacob argues that the trial court's decision was unfair because the marital assets were divided between the parties, while Jacob received all of the marital debts.

Unlike marital property, the Kentucky Supreme Court has noted that "there is no statutory authority for assigning debts" in a dissolution action, "[n]or is there a statutory presumption as to whether debts incurred during the marriage are marital or nonmarital in nature." *Neidlinger*, 52 S.W.3d at 523. Further, there is no presumption "that debts must be divided equally or in the same proportions as the marital property." *Id.* Rather, debts are generally "assigned on the basis of such factors as receipt of benefits and extent of participation" and the respective economic ability of the parties to assume the indebtedness. *Id.*

The circumstances in this case are similar to *Bodie v. Bodie*, 590 S.W.2d 895, 896 (Ky. App. 1979), in which a debt was incurred by the husband in his name only. The husband, who was the only party who knew the purpose of the debt, declined to answer questions regarding the loan or introduce any cancelled checks, bills or receipts. *Id.* The Court held that the burden of proof rested with the husband and, because he did not produce any evidence regarding the loan, the

court assigned the entire debt to him. A presumption that all debts incurred during the marriage are marital debts would have required the wife to prove that the debt was non-marital, which would have been difficult as the husband was the only party who could make available the appropriate evidence. *Id.*; *see also Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006) (where a husband pointed to nothing specific in the record to show that his wife was ever obligated to repay an amount, such as a promissory note signifying such obligation, the trial court did not abuse its discretion in finding that only the husband was required to pay the loan).

The trial court did not bear the burden of soliciting additional testimony or evidence regarding the debts. The debts allocated by the court to Jacob were under his name only and Jacob was the appropriate party to provide proof as to the nature of the debts, the date they were incurred, or their purpose. He failed to do so, or to point to any evidence in the record specifically regarding the debt, and we therefore cannot say that the trial court abused its discretion in assigning all the debt that was in Jacob's name to Jacob.

Jacob next argues that the trial court abused its discretion in awarding Tonya sole custody of the parties' minor children. In reviewing a child custody award, the appellate standard of review is again whether the factual findings of the family court are clearly erroneous. *B.C.*, 182 S.W.3d at 219-20. As stated by the Court in *B.C.*, "[i]f the findings of fact are supported by substantial evidence and if

the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion." *Id.* at 219.

Pursuant to Kentucky Revised Statute (KRS) 403.270, the trial court must "determine custody in accordance with the best interests of the child[.]" giving equal consideration to each parent. KRS 403.270(2). In making that determination, the statute requires that the court consider, in pertinent part, the interaction and interrelationship of the child with the parents, the mental and physical health of all involved, and any evidence of domestic violence to the extent it has an impact on the child and his relationship with the parents. *Id.* Regarding evidence of domestic violence, the court is required to "determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to each party, with due consideration given to efforts made by a party toward the completion of any domestic violence treatment, counseling, or program[.]" KRS 403.270(2)(g).

Jacob first argues that it was improper for the trial court to consider the domestic abuse allegations because, in a separate domestic violence order hearing, the trial court had found that there was insufficient evidence presented to indicate domestic violence committed by Jacob. As an initial matter, Jacob has provided no record of the hearing or copies of any pleadings or orders with respect to the domestic violence petition to which he refers other than a reference to a

Kenton Circuit Court case number. Therefore, we are left solely with the findings of fact of the trial court for custody purposes that there were instances of domestic violence in which Jacob was the perpetrator and Tonya the victim, including an occurrence in the presence of their children.

Moreover, child custody determinations are viewed under a different standard than the granting of a domestic violence order. As already discussed, the best interests of the child are the sole standard in any custody determination, and KRS 403.270(2)(g) requires consideration by the trial court of allegations of domestic violence and abuse that affect the children and their relationship to each party. Alternately, the standard for granting a domestic violence order is based upon “a preponderance of the evidence that domestic violence and abuse has occurred *and may again occur . . .*” KRS 403.740(1) (emphasis added); *see also Allen v. Gueltzow*, 535 S.W.3d 333, 335 (Ky. App. 2017).

Therefore, it was not only proper but statutorily required for the trial court to consider any allegations of domestic abuse by Jacob against Tonya, and the effect that alleged abuse may have on the children, in its overall determination of the best interests of the children. Here, the trial court made a specific finding that, based on the evidence before it, domestic violence and abuse had been inflicted on Tonya by Jacob.

We note that, although not argued by Jacob in his brief, under KRS 403.270(2)(g), the trial court is required to determine the extent to which the domestic violence has affected the children and their relationship with Jacob. Here, the trial court's findings focus on the domestic abuse as it pertains to Tonya and fails to discuss specifically the extent to which such abuse affected the children or their relationship with Jacob, other than to find that one instance of domestic abuse had occurred in front of the children.

However, CR 52.04 states:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

See also Crain v. Dean, 741 S.W.2d 655 (Ky. 1987) and *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982). In its findings of fact, the trial court clearly demonstrated that its finding of domestic abuse perpetrated by Jacob was essential to its award of sole custody to Tonya. No post-judgment request for additional findings of fact under CR 52.04 or post-judgment motion for amended or additional findings under CR 52.02 was filed, precluding appellate review pursuant to CR 52.04.

Additionally, the trial court found that, while Jacob had been ordered to enroll in and complete a domestic abuse treatment program, he had not completed such program as of the time of the trial, which is another consideration

under KRS 402.270(2)(g). In sum, we cannot say that the trial court abused its discretion in considering the alleged domestic violence in its best interest determination as one basis for an award of sole custody to Tonya.

Jacob additionally argues that, because Tonya testified that she could be in a joint custody relationship with Jacob, the trial court should have awarded Jacob joint custody. However, Tonya also testified that she was indeed seeking sole custody, and due to the domestic violence and the fact that Jacob would never treat her as an equal partner, Tonya would not be able to function as a joint custodian with Jacob. As stated by the Court in *Gertler v. Gertler*, “[a]ppellate courts are required by CR 52.01 to defer to the circuit court’s ability to judge witness credibility in proceedings where the circuit court acts as fact finder.” *Gertler v. Gertler*, 303 S.W.3d 131, 137 (Ky. App. 2010). The trial court was in the best position to determine the weight to be given Tonya’s conflicting testimony regarding joint custody, and its findings cannot be deemed clearly erroneous. *See id.*

As previously stated, when reviewing a trial court’s custody determination, the test is “not whether some other court may have reached a different decision, but rather, whether the circuit court abused its discretion[,]” and acted arbitrarily, unreasonably, or unfairly. *Id.* We find no error in the trial court’s determination of sole custody and, accordingly, affirm.

Finally, Jacob argues that the trial court erred in allowing the appellee to move to Texas with the minor children. Because this is an initial determination of custody, this Court must again apply KRS 403.270, with its best interest standard. In addition to the findings and conclusions of law that were previously cited as supporting the sole custody determination, there was additional evidence provided as to Tonya's inability to provide for the children in Northern Kentucky. The mortgage on the marital residence was in default, Jacob was in arrears with his child support payments, Tonya had no family in Northern Kentucky or any other ties to the area. Having found that Tonya should have sole custody of the children and after indicating that she would not be required to have any type of contact with Jacob, her ability to raise her children in Northern Kentucky would have been virtually impossible. Therefore, the trial court found that it was in the best interests of the children for Tonya to be able to live in an area where she had family support, could get childcare assistance from her family, and could obtain a job and housing. The trial court's findings of fact were not clearly erroneous, nor was its decision to permit Tonya to move to Texas an abuse of discretion.

CONCLUSION

For the foregoing reasons, we affirm.

ALL CONCUR.

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