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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001844-ME

BRANDON PROW APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 16-CI-00162

BRANDY D. PROW APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, NICKELL AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Brandon Prow appeals from a decree of dissolution of marriage entered by the Caldwell Circuit Court. Mr. Prow raises three arguments on appeal: that the trial court erred when it awarded sole custody of the parties' minor child to Brandy Prow, that the trial court erred when it found him to be voluntarily unemployed for purposes of child support, and that the trial court erred

in finding no nonmarital interest in property he owned prior to marriage. We find that the trial court erred as to the nonmarital property interest issue only; therefore, we affirm in part, reverse in part, and remand.

The parties were married on December 12, 2012. They have one minor child who was two years old during the divorce proceedings. Ms. Prow filed a petition for dissolution of marriage on October 11, 2016. A hearing on all relevant issues was held on July 24, 2017, and both parties testified. A final decree of dissolution of marriage was entered by the trial court on September 12, 2017.

As to the issues on appeal, the trial court found that, pursuant to Kentucky Revised Statute (KRS) 403.270(2), it would be in the child's best interests for Ms. Prow to be given sole custody. The court also found that Mr. Prow, despite his claim that he was physically injured and unable to return to his usual work, was voluntarily unemployed and imputed a monthly income to him in the amount of $4,369. Finally, the court held that, even though Mr. Prow owned a residence prior to the marriage, he waived his nonmarital interest in it when he transferred the title into the parties' names jointly and allowed Ms. Prow to pay off the mortgage. This appeal followed.

Mr. Prow's first argument on appeal is that the trial court erred when it awarded Ms. Prow sole custody of their minor child. Mr. Prow argues that the

court should have awarded joint custody. Ms. Prow argues that the award of sole custody was not an abuse of discretion.

Kentucky Rules of Civil Procedure (CR) 52.01 directs that "[f]indings of fact 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." A judgment "supported by substantial evidence" is not "clearly erroneous." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (quoting *O'Nan v. Ecklar Moore Express, Inc.*, 339 S.W.2d 466 (Ky. 1960).

> 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).

KRS 403.270(2) sets forth the factors a court is to consider when awarding custody. The relevant factors are: the wishes of the parents; the wishes of the child; the interaction and interrelationship of the child with the parents; the child's adjustment to home, school, and the community; the mental and physical health of the individuals involved; and any instances of domestic violence which could have affected the child. The trial court considered each of these factors in its decree. The trial court found the following:

> a. The wishes of the parents – Petitioner wants sole custody; Respondent wants joint custody.
> b. The child is too young to express her own wishes.
> c. The interaction and interrelationship of the child with parents and others – at two years old, the child is able to interact well with both parties.
> d. The child's adjustment to home, school, and community – Petitioner has been breastfeeding the child and has hopefully now been fully weaned. This should allow the child to adjust well in either household. At this time, Respondent does not have a permanent home himself and is living with various relatives. Without any income, he cannot afford to have a home of his own.
> e. The mental and physical health of the individuals involved – mental and physical health is not an issue from Petitioner's standpoint. Respondent's July 18, 2017, letter from his counselor states that Respondent has been undergoing Cognitive Behavior Therapy skills and relapse prevention skills since April, 2017. On July 18, 2017, the therapist did an alcohol/drug screening assessment and based upon Mr. Prow's reported nonuse of alcohol in the past year there was no recommendation about follow up. The counselor mentioned that Mr. Prow continues to be "extremely upset" about the alleged affair

> with his wife. Respondent will continue with anger management according to the therapist.
> f. Domestic violence – there has been domestic violence between the parties and some of it has been in the presence of this child and Petitioner's other children which would have a negative effect on them as witnesses even though they were not victims.

While the court stated that the child interacts well with both parents and would be able to adjust well in either household, the court had reservations about Mr. Prow's anger issues, living arrangements, and lack of income. The court also found that acts of domestic violence against Ms. Prow had occurred in which the child was present and that this could have a negative impact on the child. Furthermore, on pages five and six of the court's decree of dissolution, the court described instances where Mr. Prow would not cooperate with Ms. Prow concerning parenting decisions. The court also described questionable parenting choices made by Mr. Prow, his aggressive behavior, and his previous alcohol abuse. Since KRS 403.270(2) is not an exhaustive list, *Anderson v. Johnson*, 350 S.W.3d 453, 457 (Ky. 2011), these other facts set forth by the trial court are relevant.

We hold that the trial court's decision to grant sole custody to Ms. Prow was not an abuse of discretion. The trial court examined KRS 403.270(2), made extensive findings of fact, and the findings were supported by the evidence presented at the hearing.

Mr. Prow's next argument on appeal is that the trial court erred when it found him to be voluntarily unemployed. After finding him voluntarily unemployed, the trial court imputed a monthly income to Mr. Prow in the amount of $4,369 and calculated his monthly child support obligation to be $693. The trial court based this amount on past income. Mr. Prow alleged during the proceedings below that injuries to his knee and tibia would prohibit him from returning to his previous employment due to the physical nature of that employment. His injuries would also prohibit him from finding similar labor-intensive employment, which is the only employment he has ever held.

> If a parent is voluntarily unemployed or underemployed, 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.

KRS 403.212(2)(d). "'[W]hether a child support obligor is voluntarily underemployed [or unemployed] is a factual question for the [family] court to resolve.' Accordingly, we must defer to the family court's factual findings unless they are clearly erroneous – that is, not supported by substantial evidence." *Shafizadeh v. Shafizadeh*, 444 S.W.3d 437, 448 (Ky. App. 2012) (citations omitted).

Here, we find no error in the trial court's finding that Mr. Prow was voluntarily unemployed. The trial court indicated that it did not believe Mr. Prow was as severely injured as he alleged because he introduced no medical evidence to support his claims. In addition, the court found that Mr. Prow was able to drive, take vacations, walk without crutches, and remain gainfully employed until the final separation of the parties. Furthermore, the trial court specifically found as credible Ms. Prow's testimony that Mr. Prow had threatened to quit his job so he would not have to pay child support.

The court based its potential income amount on Mr. Prow's work history and the fact that he has only held manual labor type jobs. Mr. Prow argues that the trial court did not make a finding as to the prevailing job opportunities and earnings levels in the community as required by KRS 403.212(2)(d). While no specific evidence was presented as to job opportunities and earning levels in the community, the trial court specifically held that it believed Mr. Prow should have been able to maintain his prior employment.[1] This finding is sufficient to satisfy the "job opportunities" factor in KRS 403.212(2)(d).

The trial court was not clearly erroneous in its determination that Mr. Prow was voluntarily unemployed. The court believed Mr. Prow was not as injured as he alleged and that he most likely quit his job so he would not have to

[1] Mr. Prow lost his most recent job because he stopped showing up due to his alleged injuries.

pay child support. Further, we hold that the trial court sufficiently considered the KRS 403.212(2)(d) factors.

Mr. Prow's final argument on appeal is that the trial court erred in failing to award him his nonmarital interest in the residence he owned prior to marriage located on Diamond Green Road in Providence, Kentucky. It is undisputed that Mr. Prow owned this property prior to marriage. At the time of the marriage, the mortgage was in default and the existing mortgage payoff balance was $77,154.31. Mr. Prow then put Ms. Prow's name on the deed in order for her to take out a mortgage in her own name.[2] At that time, in anticipation of refinancing the mortgage, the property appraised at $149,000.

The trial court held that Mr. Prow "relinquished his right to claim a nonmarital interest in this property when he agreed to transfer the title (either individually or jointly) to [Ms. Prow]. He received valid consideration for this transfer in that his mortgage was paid in full." Mr. Prow argues that this holding of the trial court is in error because the appraisal value exceeded the new mortgage taken out by Ms. Prow.

"On appellate review of a trial court's ruling regarding the classification of marital property, we review *de novo* because the trial court's

[2] We will note that Ms. Prow took out a mortgage in the amount of $97,154.31, which was above the mortgage payoff amount.

classification of property as marital or non-marital is based on its application of KRS 403.190; thus, it is a question of law." *Heskett v. Heskett*, 245 S.W.3d 222, 226 (Ky. App. 2008). As to this issue, we find that the trial court did err in holding that Mr. Prow had no nonmarital interest in the property. The property was appraised at $149,000 and the mortgage payoff balance was only $77,154.31. This demonstrates a nonmarital interest remaining in the property after Ms. Prow obtained her mortgage. Accordingly, we reverse and remand with directions for the trial court to determine the appropriate amount of nonmarital interest in this property to be restored to Mr. Prow.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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