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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001592-ME

KEVIN ALLEN — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ANGELA JOHNSON, JUDGE
ACTION NO. 15-CI-503374

DELAINA AMOS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND SPALDING, JUDGES.

SPALDING, JUDGE: This appeal arises from the Jefferson Family Court, Division One's entry of findings of fact and conclusions of law ("Order"). Within its Order, the trial court made determinations regarding custody, visitation, and maintenance. The Order further provided for the division of debt amongst the parties and denied the appellant's request for attorney's fees.

Kevin Allen ("appellant" or "Kevin") and Delaina Amos ("appellee" or "Delaina") were married on March 1, 2003. Kevin asserts he primarily works as a part-time lifeguard, while Delaina is a professor of chemical engineering at the University of Louisville. The parties were separated on October 12, 2015 and were divorced via limited decree of dissolution on May 2, 2018. On October 4, 2018, a final decree of dissolution was entered. Born of the marriage were two minor children, aged 13 and 9 at the time of entry of the court's Order.

On October 21, 2015, Delaina filed a petition for dissolution of marriage. Within that petition, Delaina requested sole custody of the parties' children. In his response, Kevin requested sole custody, as well.

On June 13, 2017, the parties attended their first mediation. The mediation proved to be partially successful, and the parties signed an agreed order in which they agreed to appoint Dr. Kelli Marvin to conduct a custodial evaluation and prepare a report detailing the results derived therefrom. The parties additionally agreed to have the marital residence appraised by a mutually agreeable individual.

Subsequent to their separation, the parties continued to reside in the marital residence together. However, Dr. Marvin's report, dated March 28, 2018, set forth a number of recommendations, including that Delaina and Kevin

"residentially separate." Therefore, on March 20, 2018, Delaina, along with the parties' children, vacated the residence.

Trial was held on April 26, 2018. On October 4, 2018, the court entered the Order referenced above. The appellant now appeals, alleging the trial court's Order was erroneous insofar as it related to custody of the parties' children, visitation, division of the parties' debts, and the court's denial of the appellant's request for maintenance and attorney's fees. We address these claims of error below.

We first address the standard of review applicable to this matter. An appellate court is "foreclosed from vacating a trial court's findings in a divorce proceeding unless they are found to be 'clearly contrary to the weight of the evidence.'" *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky. App. 2007) (quoting *Clark v. Clark*, 782 S.W.2d 56, 58 (Ky. App. 1990)). Furthermore, "[t]he trial court has wide discretion in determining custody and, unless discretion is abused, it will not be interfered with." *Davis v. Davis*, 619 S.W.2d 727, 729 (Ky. App. 1981) (citing *Wilkey v. Glisson*, 303 S.W.2d 266 (Ky. 1957)). A trial court's abuse of discretion "generally 'implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" *Rice v. Rice*, 372 S.W.3d 449, 452 (Ky. App. 2012) (quoting *Kuprion v. Fitzgerald*, 888 S.W.2d

679, 684 (Ky. 1994)). The Court will review the matter at hand under these standards.

Where the issue of custody is concerned, the trial court found that it was in the best interest of the parties' two children, M.A. and K.A., that the appellee be awarded sole custody. This determination was based partially upon the custodial evaluation performed by Dr. Marvin, which also concluded that it was in the best interest of the children for the appellee to be awarded sole custody due to the appellant's psychological and behavioral issues, including a "rigid internalized agenda."

In its Order, the trial court comments that it "believes it saw an example of this internalized agenda in the video entered into evidence by the [appellee]" wherein "M.A. [was] admitted into the *hospital* and the [appellant] asks the child if he is telling the truth as to whether he is actually sick or if he was pretending." (Emphasis added.) After the child responded that he was telling the truth, the appellant "states that the child has lied in the past so it's hard to believe him and he needs to be able to trust him." In the court's words, "[t]he child then becomes visibly upset and the [appellant] states he believes the child but then reiterates that the child has lied in the past." The court's Order goes on to provide that this exchange continued, in much the same manner, for a period of *thirty minutes*.

It was the trial court's finding that this interaction constituted a "level of unacceptable harassment by the [appellant] nearly identical to what Dr. Marvin described in her report and in her testimony." Dr. Marvin's report was a very negative report concerning the appellant's ability to parent. Said report was submitted to the Cabinet for Child Protective Services ("CPS") by Dr. Marvin and, based upon the information contained therein, CPS "substantiated a finding of Emotional Injury and Risk of Harm of Neglect to Child by the [appellant] against M.A." Dr. Marvin's report also indicated a belief that the appellant "act[s] out angrily and aggressively both in private and in public" and was "psychologically abusive towards the [appellee] during the marriage."

Based on the foregoing, the trial court found that "the [appellant]'s actions and behavior present a mental and emotional danger to the children." The court, therefore, found that it was in the best interest of the children to award the appellee sole custody of the parties' two children.

KRS[1] 403.270 governs child custody determinations in the Commonwealth of Kentucky. The statute in effect in October of 2018 – the date on which the trial court entered the Order at issue – provided that a trial court "shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent . . . ." KRS 403.270(2). Further,

[1] Kentucky Revised Statutes.

"there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child." *Id.* "If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare." *Id.* The provision of a rebuttable presumption of equally shared parenting time became effective in July 2018. The decision of the trial court did not reference this issue. Instead, it appears to be based on the version in effect at the time of the hearing. The appellant in his brief does not assign that as error. Instead, he argues generally that the finding of sole custody was in error. "[A]ssignments of error not argued in an appellant's brief are waived.". *Commonwealth v. Bivins*, 740 S.W.2d 954, 956 (Ky. 1987). The Court will review the decision of the lower court based on the standard of whether substantial evidence existed for the trial court's decision. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

We hold that the lower court's findings, as outlined above, are supported by substantial evidence in the record. The testimony of Dr. Marvin and the observation of the appellant's filmed behavior and credibility in court supplies substantial evidence for the key findings made by the court in this matter. In making those findings, there was evidence to rebut the presumption contained in KRS 403.270(2) and support a finding, by a preponderance of evidence, that "joint

custody and equally shared parenting time" was not in the best interest of the children. Furthermore, Dr. Marvin's report reflected the fact that she is of the belief that the parties were unable to co-parent. Hence, the court had factual support to not only decline to grant equally shared parenting time, but joint custody as well. For the foregoing reasons, the trial court did not abuse its discretion in granting appellee sole custody of the parties' children.

The next issue we address concerns the court's visitation schedule. The schedule created by the lower court contemplated one day of supervised parenting time for the appellant every other weekend from 9:00 a.m. to 5:00 p.m. In addition, the court ordered that the appellant have joint therapy with the parties' children. The appellant urges that this schedule is "unfair and punitive."

KRS 403.320 provides, in pertinent part, as follows: "A parent not granted custody of the child and not awarded shared parenting time . . . is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(1). Consistent with that statute, here the court found that "it is in the best interest of the children to rebuild their relationship with their father, the [appellant]." The court then stated, as alluded to previously, that the appellant "shall have joint therapy with the children where they can focus on effective and appropriate communication and building their relationship" and that the "parties'

minor children shall also continue to attend therapy[.]" The court continued, ordering the appellant to "undergo a psychological evaluation and follow all treatment and recommendations." Additionally, and of significant note in this matter, is the finding by CPS of emotional neglect by the appellant.

The court's holding is not erroneous based upon the facts it found of what would be in the best interest of the children. The facts found in this matter support a conclusion that visitation would seriously endanger the childrens' mental and emotional health. Furthermore, the appellant has the ability, by following the recommendations set forth in the order or by filing a motion to modify visitation, to alter this visitation schedule at some point in the future. We find no error in the court's actions.

The appellant further takes issue with the lower court's denial of his request for a maintenance award. The court awarded the appellant $50,283.17 in the marital residence, a home valued at $275,000 with $109,614 in equity. The parties had two cars, a 2014 Toyota Camry and a 2013 Hyundai Santa Fe, each of which were worth approximately $13,000. The court awarded the appellee the Toyota and awarded the appellant the Hyundai. The parties additionally had various retirement accounts, which also were divided. In total, the court found that the appellant had been awarded a total value of $233,196.17 through the course of the dissolution proceedings, not including the Hyundai that he was awarded. The

court further accepted the appellant's purported monthly expenses at the sum of $2,838.71, as reflected by the appellant's final verified disclosure statement. Based on the foregoing, the court concluded that the appellant could support himself through proper employment, that he had more than enough to meet his needs based upon the division of marital property, and that he therefore was not entitled to maintenance. The appellant argues that the court erred in failing to award him maintenance because of the disparity in income. The appellee's income was approximately seven times that of the appellant's.

Maintenance is governed by KRS 403.200. That statute provides, in pertinent part, that a "court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance: (a) [l]acks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (b) [i]s 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." KRS 403.200(1).

Here, the court definitively found that neither subsection (a) nor subsection (b) of KRS 403.200(1) had been met. To the contrary, the court found that the appellant had been awarded a car and over $200,000 and that, due to his educational ability, was able to support himself through appropriate employment.

The appellant works part-time, has a college degree, and has side interests that are compensable. He also was not required to pay child support. The court found that the appellant had sufficient property to provide for his reasonable needs and had the ability to support himself through appropriate employment. Thus, the court's findings made the appellant statutorily ineligible for maintenance. The factors considered in KRS 403.200(2) are irrelevant to the court's determination in this matter, since those factors speak only to the amount of maintenance and length of time of maintenance in cases in which maintenance is awarded.

The findings made by the court are supported by substantial evidence. This is true despite appellant's contention that he may potentially have negative tax consequences as a result of the division of marital assets, a possibility he asserts that the trial court did not consider. However, assuming both of these assertions are true, the result here does not change. Whatever tax consequences result from the court's division of the parties' marital assets, said consequences go only to subsection (a) of KRS 403.200(1) ("sufficient property") and have no bearing on an analysis conducted under subsection (b) (ability to support oneself through appropriate employment). In other words, the appellant is still able to support himself through appropriate employment, regardless of the tax consequences flowing from his receipt of marital assets. KRS 403.200(1) requires the

satisfaction of *both* subsections (a) and (b) before a court may order an award of maintenance. The court did not err in denying the maintenance request.

The next issue on appeal concerns the parties' marital debt. The court found that the parties had approximately $13,000 in marital debt, including debt associated with a loan, a Visa card, and a Mastercard, all of which the court found was utilized to pay for household expenses. The court divided this debt equally amongst the parties. The appellant, relying upon *Guffey v. Guffey*, 323 S.W.3d 369 (Ky. App. 2010), argues that reversal is required here because, in *Guffey*, this Court held it to be an abuse of discretion to divide marital debt equally where one party made 81% of the parties' combined income. *Id.* at 373. He argues, given the seven-to-one disparity in income between the parties here, it likewise was an abuse of discretion on the part of the lower court to divide the marital debt equally.

While it is true that the disparity pointed out by the appellant was of concern to this Court in deciding to reverse the lower court's decision in *Guffey*, we also noted that the lower court had failed to consider any of the *Neidlinger* factors contained in the Kentucky Supreme Court case of *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522-23 (Ky. 2001), *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018). In the case at bar, however, the lower court explicitly noted the *Neidlinger* factors in a discussion that prefaced its decision to split the debt evenly. The court found that the parties had benefitted equally from

the debt, that all of the debt was incurred during the marriage, and that it was all utilized for marital purposes, namely, household and home expenses. Thus, the court's decision to find equal division was not an abuse of discretion, based on the evidence.

The final issue on appeal concerns attorney's fees. The court below denied the appellant's request for attorney's fees, stating that the appellant had failed to present evidence at trial in regard to attorney's fees and that, despite the appellant's argument below that financial records were in the court's file and that the court, thus, had all of the information it needed to make an award, such a method would not allow the appellee to confront the appellant regarding the fees. On appeal, the appellant argues that his "argument is clear" and "has been stated several times" that the parties' disparity in income mandates the imposition of an award of attorney's fees in favor of the appellant.

KRS 403.220 states that the court "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[.]" (Emphasis added.) *Neidlinger* states, however, that "even if a disparity exists, whether to make such an assignment and, if so, the amount to be assigned is within the discretion of the trial judge." 52 S.W.3d at 519. (citations omitted). In the court below, the appellant did not seamlessly nor

definitively explain why he was entitled to attorney's fees and to what attorney's fees he would be entitled. Therefore, the court below, based on the evidence entered regarding this issue, decided, in its discretion, to deny the appellant's request for attorney's fees. We find no abuse of discretion.

In sum, we find no error in the lower court's custody and visitation awards, nor do we find error in its equal division of debt. Furthermore, we do not find an abuse of discretion in the lower court's denial of the appellant's requests for maintenance and attorney's fees. Therefore, the judgment of the Jefferson Family Court is affirmed in its entirety.

ALL CONCUR.

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