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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000505-ME

HEIDI MARIE DURBIN — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 16-CI-01186

DEREK PRICE DURBIN — APPELLEE

OPINION
REVERSING IN PART,
AFFIRMING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON, AND JONES, JUDGES.

ACREE, JUDGE: Heidi Durbin (Mother) appeals the Hardin Family Court's January 24, 2018 Findings of Facts and Conclusions of Law and Decree of Dissolution ending her marriage to Derek Durbin (Father). She alleges the family court erred in: (1) calculating the child support obligation; (2) failing to distribute an asset; and (3) permitting Father to pay Mother her share of the marital estate in

installments without interest. Finding merit in Mother's first two arguments, we reverse in part, affirm in part, and remand.

BACKGROUND

The parties met while both were attending the University of Kentucky. Father was a first-year dental student and Mother was a junior undergraduate. In 1996, Mother graduated, passed the Certified Public Accountant exam, and began working as a staff accountant in Louisville earning $30,000 per year.[1] The parties married on September 19, 1997. In 1998, they lived in Elizabethtown, where Father had his own dental practice. Mother continued earning approximately the same salary, employed at a local insurance company.

It was not until Mother gave birth to the first of four children that she stopped working to focus on the family.[2] In 2005, she began performing work for Father's dental practice. Over the next decade, they established three successful businesses – Durbin Dental, Dent Properties, and Cosmo Properties.

In 2016, after eighteen years of marriage, they separated and initiated divorce proceedings. They resolved many issues amicably, admirably emphasizing the children's best interests. However, child support, maintenance, and some

[1] Mother has both a bachelor's degree and a master's degree in accounting.

[2] At the time of the trial, the children ranged in age from 9 to 17. The oldest child is now emancipated. All children excel in extracurricular activities and academics.

property distribution issues remained unresolved. A final hearing was scheduled for October 18, 2017.

Two months before the hearing, and in anticipation of the dissolution, Mother began working at a local investor's office earning $49,000 a year. Still, Father made substantially more. He testified to making "no less than $29,608.25 a month," but his actual income fluctuated. He also testified that just before the final hearing he had $64,000 in cash in an envelope he did not want to give to Mother.

The parties' high combined monthly income necessitated deviation from the child support guidelines. The family court factored the equal timesharing and determined the child support obligation, which we discuss in detail below.

The family court identified a disparity in the distribution of marital assets, primarily the businesses, to the tune of $349,376.50. The court ordered Father to make twelve consecutive quarterly payments of $29,114.71 to Mother.

Mother moved the family court to amend the decree to recalculate child support, to account for the $64,000 in cash withheld by Father from the stipulated division of liquid assets, and to reconsider adding interest to the quarterly payments. The court denied the motion and this appeal followed.

STANDARD OF REVIEW

Under Kentucky Rule of Civil Procedure (CR) 52.01, a family court's findings of fact shall not be set aside unless clearly erroneous. We review the

family court's legal conclusions under a *de novo* standard. *Carpenter-Moore v. Carpenter*, 323 S.W.3d 11, 14 (Ky. App. 2010).

ANALYSIS

Child Support

Like Mother, this Court has a problem with the child support award. Certainly, the family court ordered Father to pay child support. However, we are uncertain what amount was ordered because there are three different amounts identified, with little to justify them. That makes appellate review a challenge.

One part of the order says the family court used "its judicial discretion to find that [Father] should pay [Mother] $834.00 per month in child support." (Record (R.) at 225). A few sentences later, the family court said that amount "is not sufficient to meet the reasonable needs of the parties' minor children and shall order that [Father] pay to [Mother] the monthly sum of $921.18 as child support. ($1,775.50 - $854.41 = $921.18)[.]"[3] (*Id.*). In the section of the order entitled "Conclusions of Law," in what, perhaps, is an attempt to clarify its holding, the family court reiterated "[Father's] child support obligation is $834.00 per month in accordance with KRS[4] 403.212." *Id*. at 226. But whatever clarity that reiteration

[3] Our review of the calculations indicates the result should be $921.09. This does not change our analysis herein.

[4] Kentucky Revised Statutes.

may have brought was lost in the section of the order captioned "Judgment and Decree," where the family court states, "due to the shared custody arrangement and the parties having the children in their possession on an equal time-sharing basis, [Father] shall pay [Mother] $460.59 per month in child support." *Id.* at 229.

Mother's argument is that "it is not possible to know which of those three (3) amounts of support are the level intended by the trial court for [Father] to pay to [Mother]." (Appellant's brief, p. 12). We agree to some extent.

Not surprisingly, Father says the final, lowest dollar amount is what the family court intended. And that may be so. However, we cannot discern how the family court arrived at that amount.

Nothing is clear to this Court except that the figure of $460.59 in the Judgment and Decree section is exactly one-half the earlier figure of $921.18. Beyond that, we cannot tell what factfinding undergirds any of the figures or what legal principles were applied to reach them.

No one in this case disputes the propriety of deviating from the child support guidelines pursuant to KRS 403.211(3)(e). But how can this Court avoid saying the award is arbitrary if we do not understand the family court's numbers, calculations, or rationale? It has been said:

> A reviewing court should defer to the lower court's discretion in child support matters whenever possible. As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in

> writing, this Court will not disturb the trial court's ruling in this regard. 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) (citations omitted). The fundamental requirement then is an adequate written justification for deviating from the guidelines. Without that, the reviewing court cannot apply the "test for abuse of discretion." This decree lacks that adequate written justification.

Adequate written justification establishing a support award that deviates from the guidelines in accordance with KRS 403.211(3)(e) requires the family court: (1) to identify the findings of fact supporting the award; and (2) to articulate the legal principles applied. If those findings of fact are not clearly erroneous, and if those legal principles are not unsound, a reviewing court is bound to find the family court did not abuse its discretion and will affirm the award.

The record before this Court may justify one of these three award amounts ($834 or $921.18 or $460.59). But independent, undirected scouring of the record is not the role of this Court. *See Koester v. Koester*, 569 S.W.3d 412, 415 (Ky. App. 2019) (The Court does not "scour the record on appeal to ensure that an issue has been preserved."); *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006) (We do not "search the record to find where it may provide support for [a party's] contentions."). Furthermore, a party has a right to know the family court's

reasoning for the award and not have to seek that reasoning in this Court. That is why the duty of an adequate written justification is placed upon the family court.

Therefore, we reverse the award of child support and remand to the family court to make and explain a child support determination that complies with KRS 403.211, previous case law, and this opinion.[5]

Distribution of Assets

Mother argues the family court erred by failing to distribute the $64,000 Father withheld from his dental practice in anticipation of divorce. Father contends that amount is accounted for in the business valuation. However, he does not direct this Court to where the record supports this assertion. The expert who valued the businesses estimated that only about $10,000 in cash failed to make its way to a bank each year. That valuation report dates to 2012 and might account for about $50,000. The disparity is not accounted for in the decree. Therefore, upon remand, the family court shall address, and if not already accounted for elsewhere, divide the $64,000 as a marital asset.

Interest on Periodic Payments

As recently as 2017, this Court repeated the rule that it is within a trial court's discretion to award post-judgment interest. *Hazel Enterprises, LLC v.*

[5] We are aware circumstances may have changed that warrant a recalculation of child support, in particular the emancipation of at least one of the children.

Mitchuson, 524 S.W.3d 495, 499 (Ky. App. 2017) ("[P]ost-judgment interest, pursuant to KRS 360.040, was something the trial court could award, reduce, or deny at its discretion." (citation omitted)). We said:

> Kentucky Courts have repeatedly reached the same conclusion as we reach in reading KRS 360.040 to permit a trial court discretion over the imposition of post-judgment interest. *See Ensor v. Ensor*, 431 S.W.3d 462, 477 (Ky. App. 2014) ("[T]he trial court may find that the statutory interest rate is not appropriate given the equities of the particular case and may deny post-judgment interest altogether.") (citing *Courtenay v. Wilhoit*, 655 S.W.2d 41, 42 (Ky. App. 1983)). . . . *Young v. Young*, 479 S.W.2d 20, 22 (Ky. 1972) and *Guthrie v Guthrie*, 429 S.W.2d 32, 36 (Ky. 1968).

Hazel Enterprises, LLC v. Ray, 510 S.W.3d 840, 844 (Ky. App. 2017) (some citations omitted). This discretion applies to decrees dissolving marriages equally as well as to other judgments. In fact, this rule of discretion "developed in the family law context . . . ." *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 584 n.22 (Ky. 2009) (citing *Guthrie v. Guthrie*, 429 S.W.2d 32, 34 (Ky. 1968)).

Mother does not argue that the family court abused its discretion. Rather she argues clear error and cites *Johnson v. Johnson*, 564 S.W.2d 221 (Ky. App. 1978). Her argument is unpersuasive.

First, *Johnson* does not conflict with the notion that an award of post-judgment interest is discretionary with the court. That court had already awarded interest. The error was that the trial court ordered "interest . . . from the date due

[of each installment] until paid, rather than ordering interest to run from the date of judgment." *Id.* at 223. The interest accrual date was the error, not the failure to award interest itself.

Second, "clear error and abuse of discretion are separate standards of review. Clear error applies to a review of a trial court's findings of fact; abuse of discretion applies in other situations where, for example, a court is empowered to make a decision – of *its* choosing – that falls within a range of permissible decisions." *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004) (citation and internal quotation marks omitted).

In determining the rate of interest, if any, a family court must look at the unique facts of each case. In this case, the family court decided not to award interest after Mother clearly brought the issue to the court's attention. Mother was awarded $2,000,000 in marital property, $4,000 a month in maintenance, and was awarded no debt. The valuation of the businesses accounted for the long-term growth rate and future earnings of the dental practice and the estimated future earnings. Given these circumstances, this Court cannot say the family court's denial of post-decree interest on the quarterly payments was outside the range of permissible decisions. Denying interest was not an abuse of discretion.

CONCLUSION

Based on the foregoing, we reverse in part, affirm in part, and remand the Hardin Family Court's January 24, 2018 Findings of Facts and Conclusions of Law and Decree of Dissolution.

ALL CONCUR.

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