

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000328-ME

STEVEN M. SCHERDIN

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE JOSEPH W. O'REILLY, JUDGE  
ACTION NO. 03-CI-503374

JOYCE D. SCHERDIN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; HENRY AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from those portions of a decree of dissolution dividing the parties' credit card debt, awarding the wife maintenance, designating the wife primary residential custodian of the parties' two children and setting the parenting schedule. Upon review of these arguments, the record, and the applicable law, we adjudge that the family court's findings of fact on these issues were not clearly

erroneous and there were no abuses of discretion. Accordingly, we affirm.

Steve and Joyce Scherdin were married in April 1996. They separated in October 2002, and Steve filed for dissolution in September 2003. Two children were born of the marriage - Rachel, who was five at the time of the divorce, and Jack, who was two at the time of the divorce. Joyce also had a son from a prior relationship, age eighteen, who lived with the parties in the marital home.

Steve was thirty-three years old when the parties married and has a bachelor of science in electrical engineering from MIT and an MBA from the University of Louisville. During the marriage, Steve had several jobs and was laid off certain jobs because of downturns in the technology industry. He worked for nine months at Quilogy, a consulting firm in the technology field, and in September 2003, he worked at Brown and Williamson in a contract position for a short time. Steve also taught classes part-time at Bellarmine College and started his own consulting business, Scherdin Consulting, from which, at the time of the divorce, he earned \$1,000 a year. In October of 2003, Steve began working as a project manager for Humana, earning \$80,000 a year. At the time of the dissolution hearing in this case, Steve was forty-one years old and was still employed at Humana.

Joyce was thirty-nine years old when the parties married and has a GED and paralegal certificate she earned in 1988 from Southeastern Paralegal Institute. Prior to the marriage, Joyce worked as a paralegal for a risk management firm for several years and supported herself and her son. Joyce's last full-time employment was in 1995. Shortly before the marriage, Joyce started her own business as an independent consultant for Beauty Control, Inc. After Joyce became pregnant with Rachel, she did not work outside the home until Steve filed for divorce. According to Joyce, both parties agreed that Joyce would stay at home to raise the children. When Steve filed for divorce, Joyce obtained a job at the Gap earning \$6.50 an hour. At the time of the hearing in this case, Joyce was forty-seven years of age, and was working part-time as a manager of a convenience mart earning \$10 per hour plus \$50 per week. Joyce presented evidence that she had tried to find work as a paralegal and had gone on interviews, but was not hired because she was no longer considered qualified.

The parties had essentially only one asset of value, the marital residence which had equity of \$47,656. The court found, and Joyce does not dispute, that Steve's non-marital interest in the home was \$35,290. The joint marital equity was \$12,366, which the court divided equally between the parties.

The parties had marital credit card debt in the amount of \$33,151 on four different credit cards. Joyce testified that Steve controlled the parties' finances and frequently transferred the balances on the cards to different lower interest rate cards without her input. The court allocated \$25,856 of the debt, which was on three cards to Steve, and assigned Joyce \$7,844.89 of the debt that was on a BellSouth Visa. The court then ordered Steve to pay Joyce \$549 to equalize the debt division. After the hearing, but prior to the entry of the decree of dissolution, Steve transferred the balance on the BellSouth Visa to one of the credit cards for which he was ultimately assigned responsibility. Steve filed a CR 59 motion requesting that the court substitute Joyce's debt obligation on the BellSouth card with the debt on a First USA Visa which had a balance of \$7,780. The court denied Steve's motion, effectively leaving Steve with 100% of the marital debt.

The court determined that Steve's monthly income was \$6,688 and that his reasonable monthly expenses were \$3,791. The court imputed \$1,733 in monthly income to Joyce, finding that she could potentially earn more than she is currently earning based on her experience as a paralegal. The court found that Joyce's reasonable monthly expenses were \$3,183, leaving her with a shortfall of \$1,450. The court therefore awarded Joyce maintenance of \$1,000 a month for two years.

As for custody, the parties agreed that they would share joint custody of the children. However, they could not agree on who would be primary residential custodian or on the parenting schedule. The court appointed Dr. Edward Berlá to perform a custodial evaluation. The court found that it was in the best interests of the children that Joyce be primary residential custodian because Joyce had been the primary caregiver of and had stayed home with the children since birth. As for the parenting schedule, the court set Steve's parenting time with the children at every other weekend from Friday night to Monday morning and every Wednesday night overnight, plus specified holidays. Steve's child support obligation was determined to be \$947 a month, plus 69% of daycare expenses.

Steve now appeals those portions of the decree awarding maintenance, dividing the credit card debt, naming Joyce primary residential custodian, and setting the parenting schedule. We shall first address Steve's argument that the family court erred in awarding Joyce maintenance under the facts of the case. Under KRS 403.200(1), the court may award maintenance if it finds that the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
- (b) Is 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.

Steve maintains that Joyce could support herself through appropriate employment and thus was not entitled to receive maintenance. Steve makes the point that Joyce was able to support herself and her older son prior to the marriage, so she should be able to support herself now. However, that was prior to the parties' marriage and before Joyce had the other two children with whom she stayed home until the separation. Joyce, now forty-seven, has been out of the work force for eight years and presented evidence that she could not find a job as a paralegal. Steve also contends that Joyce could earn more than she is currently earning if she sought full-time employment and that it is her choice to work part-time. As the family court observed, even with the \$20,796 salary imputed to her from the court's finding that she was voluntarily underemployed, Joyce could not meet her reasonable yearly expenses of \$38,196. A trial court's findings of fact regarding maintenance will be upheld unless they are clearly erroneous; i.e., not supported by substantial evidence. Cable v. Cable, 730 S.W.2d 947 (Ky.App. 1987). The decision of whether to award maintenance is a matter within the discretion of the trial court. Browning v. Browning, 551 S.W.2d 823 (Ky.App. 1977). From our review of the evidence, the family court's findings regarding maintenance were not

clearly erroneous and the court did not abuse its discretion in awarding Joyce maintenance.

Steve next challenges the amount and duration of maintenance awarded to Joyce. Joyce was awarded \$1,000 a month for two years. Pursuant to KRS 403.200(2), courts should consider all relevant factors, including the following in determining the amount and duration of maintenance:

- (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.

In looking at the disparity of the parties' financial resources, the ability of Steve to meet his needs while paying maintenance, the age of Joyce and the fact that she has been out of the job market for several years, the expenses of the parties, and the standard of living during the marriage, we

cannot say that the family court abused its discretion in awarding Joyce \$1,000 a month for just two years. Contrary to Steve's assertion, the family court specifically considered Steve's ability to meet his needs while paying maintenance.

The next issue we shall address is the assignment of all the parties' credit card debt to Steve. As stated earlier, the court did assign \$7,296 of the \$33,151 in credit card debt to Joyce by assigning her one specific credit card obligation. However, Steve transferred the balance of that card to another card for which he was assigned the responsibility. Steve argues that the family court erred in failing to grant his motion to alter or amend to assign Joyce the debt on a different credit card. The division of marital debt is another matter within the discretion of the trial court. Neidlinger v. Neidlinger, 52 S.W.3d 513, 523 (Ky. 2001). Debts incurred during the marriage should be assigned on the basis of factors such as receipt of benefits, extent of participation, whether the debt was for the purchase of marital property or for support of the family, and the abilities of the respective parties to assume the debt. Id. There is no rule that debts must be divided equally or in the same proportion as the marital property. Id.

The court specifically found that \$21,561 in marital debt was for two credit cards of which Steve had exclusive use. In allocating the debt, the court also looked at Steve's higher

income and net worth, specifically, the equity he was awarded in the home. As noted earlier, Joyce testified that Steve had control of the parties' finances and frequently unilaterally transferred the balances on the cards without her input. In our view, we cannot say that the family court abused its discretion in not redistributing the debt after the decree was entered when he was in a financially better position to pay off the debt and it was Steve's own actions that resulted in his being assigned the entire debt.

The final assignment of error before us is with regard to the designation of Joyce as primary residential custodian and the parenting schedule. Steve argues that there should have been no primary residential custodian in their case, and that the court should have divided physical custody equally between him and Joyce. Steve contends that the recommendations of Dr. Berlá, the court-appointed psychologist, supported such a division.

It is Joyce's position that the children need the stability of having a primary residential custodian and that the court properly awarded her that role because she had been primary caregiver of the children since birth and her work schedule was more flexible to be available to the children. Joyce maintains that Dr. Berlá's custody evaluation advocated such a custody arrangement.

Based on his interviews, test results, and observations of Steve and Joyce, Dr. Berlá concluded that both parents were loving and caring parents and both were capable of rearing the children. As for his recommendations regarding the parenting schedule, Dr. Berlá stated as follows:

Mr. Scherdin's work schedule indicates some flexibility, but by his own account, he does not typically return from work until between 6:30 and 7 PM each evening. Since the children are quite young and typically have bedtime between 8 and 8:30 it does not give him much time in the evening to interact with them, although getting them ready for bed in (sic) an important activity. On the other hand, Mrs. Scherdin's work schedule is in flux and it is unclear as of the date of this evaluation what her work schedule will be. In recommending a visitation schedule to the court, the parents' work schedules become very important. If Mrs. Scherdin were able to return home significantly earlier than Mr. Scherdin, it would be in the children's best interests to be with her during the week. However, it is quite clear that these parents should share as near equal time with their children as is reasonably possible. Surely they can alternate weekends and Mr. Scherdin should be able to have the children stay overnight with him on weekends. However, it is difficult to make a recommendation about overnight visitation without knowing Mrs. Scherdin's work schedule.

At the hearing in this case, Joyce testified that her work schedule was still flexible such that she could pick up both children after daycare and school and care for them in the evenings. Steve testified at the hearing that he generally

works 9:00 to 5:00, but he has the flexibility with his work schedule to leave work early to pick up the children from daycare and school.

The family court found that it was in the children's best interest that their primary residential custodian be Joyce for the sole reason that Joyce has stayed home with them and been their primary caretaker since birth. The court further found it was in the children's best interest that Steve have them every other weekend and one weeknight. Relative to Steve's request to have a shared parenting schedule, the court stated:

While Petitioner was seeking a shared parenting schedule, the Court finds it is in the children's best interest that the parties maintain a schedule with the least amount of transition possible, while still allowing each party significant time with the children. The Court feels that this schedule accomplishes both objectives without requiring an excessive amount of shuffling between the parties or disruption to the children's schedule.

KRS 403.270(5) provides that "[t]he court may grant joint custody to the child's parents . . . if it is in the best interest of the child." Of the factors in KRS 403.270(2) the court is to consider in determining custody, the following are relevant to this case: "[t]he wishes of the child's parent or parents"; "[t]he interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests"; "[t]he

child's adjustment to his home, school, and community"; and "[t]he mental and physical health of all individuals involved." The trial court has broad discretion in determining what is in the best interests of the children in deciding custody. Krug v. Krug, 647 S.W.2d 790, 793 (Ky. 1983); Williams v. Phelps, 961 S.W.2d 40 (Ky.App. 1998).

Since the evidence established that Joyce has been the primary caregiver of the children since birth, we believe the court properly designated Joyce primary residential custodian given the significant attachment the children have to her. However, as to the parenting schedule in this case, we question how the parent/child bond can be maintained between Steve and the children when he sees them only once a week every other week (during the weeks he does not have the children for the weekend) under the current schedule. We recognize that children need stability and a routine, but those needs must be balanced against the children's need to maintain the bond with the other parent. Nevertheless, given the family court's broad discretion and the fact that the lower court had the opportunity to observe the parties and is the most familiar with the case, we are not prepared to say that the trial court abused its discretion in designating Joyce primary residential custodian and setting the parenting schedule.

For the reasons stated above, the judgment of the  
Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melanie Straw-Boone  
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BRIEF FOR APPELLEE:

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