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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002101-MR
AND
NO. 2012-CA-002141-MR

STEPHEN D'EUFEMIA — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 09-CI-00516

THERESE KEELING D'EUFEMIA (NOW LAND) — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, Stephen D'Eufemia, appeals from a judgment of the Oldham Family Court dividing property, awarding maintenance, and setting a parenting schedule in the parties' divorce action. Appellee, Therese D'Eufemia (now Land) has cross-appealed the family court's award of maintenance to

Stephen. For the reasons set forth herein, we affirm in part, reverse in part, and remand to the family court for further proceedings.

The parties herein were married in March 1994. Therese is a board-certified psychiatrist who has spent the majority of her career employed with the Kentucky Department of Corrections treating mentally ill inmates. Stephen has worked on and off during the marriage but has been unemployed since 2010. Three children were born during the marriage, namely Angela, age 17, Elise, age 13, and Maria, age 10.[1] On May 29, 2009, Therese filed a petition for Dissolution of Marriage in the Oldham Family Court. The family court entered a limited decree dissolving the parties' marriage in December 2010, and thereafter held a bench trial resolving all other issues in March 2012. The issues at trial concerned the restoration of non-marital property, division of the marital property, maintenance, child custody and parenting schedule, and payment of attorney's fees. The family court entered its findings of fact and conclusions of law on August 2, 2012. Following the denial of their motions to alter, amend or vacate, both parties appeal to this Court as a matter of right. Additional facts are set forth herein as necessary.

Our review of the findings of fact of a family court is limited to the determination of whether they are clearly erroneous. CR 52.01; *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004). Findings of fact are clearly erroneous only where they are manifestly against the weight of the evidence. *Bennett v. Horton*, 592

[1] The children's respective ages at the time of the trial in this matter.

S.W.2d 460 (Ky. 1979). However, rulings with respect to questions of law are subject to *de novo* review. With that standard of review in mind, we now turn to the issues presented herein.

PNC Investment Account

The family court found that the parties' investment account, valued at over $700,000, was initially funded by Therese with monies she received as an inheritance from her mother's estate:

> The Court rejects Steve's claim that the PNC accounts are marital in nature. Simply put, the only source for the accounts was inherited funds. Therese testified that the holdings were originally with her Mother's broker at Am Ex Financial Advisors. Subsequent to that, they were transferred to Hilliard Lyons and ultimately to PNC Bank. No additional funds were added. Transferring from one broker to another does not change the nature of the funds.

As a result, the family court characterized the investment account in its entirety as Therese's nonmarital property.

On appeal, Stephen argues that the PNC investment account originated with four accounts opened by the parties at American Express Financial Advisors ("AEFA") in 1994. The AEFA statements indicate that three additional accounts were set up sometime between November 1996 and December 2001, after which time all seven accounts were transferred into one investment account at Stifel Nicholaus (last four digits "0404"), having a value of approximately $121,000. The Stifel Nicholaus account was subsequently closed in September 2003 and transferred to PNC, where it became the investment account at issue. During her

testimony, Therese conceded that the value of the accounts prior to the distribution from her mother's estate was over $103,000. Thus, Stephen argues that the family court erred in failing to find that at least a portion of the PNC investment account was marital property. We must agree.

KRS 403.190(1) provides that "the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors[,]" and there is a presumption that "[a]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property[.]" KRS 403.190(3). However, this presumption may be overcome by showing that the property at issue was acquired in a method enumerated in KRS 403.190(2), including "[p]roperty acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom[.]" KRS 403.190(2)(a).

In *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004), our Supreme Court extensively addressed the classification and division of property. The Court explained that "[u]nder KRS 403.190, a trial court utilizes a three-step process to divide the parties' property: '(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties.'" *Id.* at 264–65 (footnote omitted). A

particular item of property might consist of both marital and non-marital components, which would require the court to "determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court." *Id.* at 265 (footnote omitted). In order to do this, the court must apply the "source of funds" rule to characterize the property or the parties' interests in it as marital or non-marital. *Id.* (Footnote omitted.) The *Sexton* Court emphasized that "[n]either title nor the form in which property is held determines the parties' interests in the property[.]" *Id.*

With respect to the concept of tracing as it applies to the determination of whether property, or some portion of it, is marital or non-marital, the *Sexton* Court explained:

> "Tracing" is defined as "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present." . . . . The concept of tracing is judicially created and arises from KRS 403.190(3)'s presumption that all property acquired after the marriage is marital property unless shown to come within one of KRS 403.190(2)'s exceptions. A party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof.

Sexton, 125 S.W.3d at 266 (footnotes omitted).

There is no question that Therese received a sizeable inheritance from her mother. However, the inheritance distribution came after the four original AEFA accounts were opened. While Therese claims that the entirety of the PNC account originated from the funds she received as inheritance and gifts, we must agree with Stephen that such is simply not supported by substantial evidence in the record.

Exacerbating the problem is the fact that the family court failed to make any specific findings as to the amount of inheritance that Therese deposited into the parties' joint investment account or the balance that already existed in that account at that time. As such, we must remand this matter to the family court to enter more specific findings of fact as to these questions.

Visitation

Prior to the family court making any rulings with respect to custody and/or visitation, the parties had worked out a schedule whereby Elise and Maria were spending Mondays and Tuesdays with Stephen; Wednesdays and Thursdays with Therese; and alternating weekends between the parents. At that time, Angela and Stephen had little to no contact. Subsequently, in an interim order entered in June 2011, the family court modified the schedule so that Elise would have one overnight visit with Stephen during the week on Monday, Tuesday or Wednesday, and would also visit on the same alternating weekends as Maria.

In its final August 2012 judgment, the family court concluded that it was in the best interest of the children for the parties to share joint custody. With all in agreement, no specific parenting schedule was set for Angela, given her age and tenuous relationship with her father. With respect to Elise, the family court "[e]ncourage[d] [her] to spend significant time with her father, and to visit overnight at least twice per month, preferably in conjunction with her younger sister's visits." Finally, the family court ordered that Maria "shall remain primarily with her mother and have at a minimum one overnight visit per week with her

father." Stephen thereafter filed a motion to alter, amend or vacate, wherein he requested that the family court make additional findings to establish a more definitive parenting schedule. Although Therese did not object, the motion was denied.

On appeal, Stephen argues that KRS 403.320 required the family court to set a specific parenting schedule. Stephen complains that as it stands, the schedule for Elise and Maria is not sufficiently definitive as it does not establish whether Elise is required, or merely encouraged, to spend two nights per month with Stephen; which night per week Maria is to stay with him; or any holiday or summer schedule. Therese responds that KRS 403.420 does not apply in this case as the parties were granted joint custody. We disagree.

KRS 403.320(1) provides in relevant part:

> A parent not granted custody of the child 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. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

While the term "visitation" is typically associated with a sole custody arrangement, the Kentucky Supreme Court in *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008), noted that "in practice, the terms visitation and timesharing are used interchangeably" and that under certain joint custody arrangements, the parenting

schedule for the non-residential custodian approximates the visitation schedule implemented under a sole custody arrangement.

In *Drury v. Drury*, 32 S.W.3d 521 (Ky. App. 2000), a panel of this Court applied the "reasonable visitation" standard set forth in KRS 403.320(1) to evaluate timesharing orders in shared custody cases. Therein, the panel explained:

> What constitutes "reasonable visitation" is a matter that must be decided based upon the circumstances of each parent and the children, rather than any set formula. When the trial court decides to award joint custody, an individualized determination of reasonable visitation is even more important. A joint custody award envisions shared decision-making and extensive parental involvement in the child's upbringing, and in general serves the child's best interest. *Squires v. Squires*, Ky., 854 S.W.2d 765, 769 (1993). Thus, both parents are considered to be the "custodial" parent, although the trial court may designate where the child shall usually reside. *Aton v. Aton*, Ky.App., 911 S.W.2d 612 (1995). The "residential" parent does not have superior authority to determine how the child will be raised, and major decisions concerning the child's upbringing must be made by both parents. *Burchell v. Burchell*, Ky.App., 684 S.W.2d 296, 299 (1984). A visitation schedule should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances.

Id. at 524. Significantly, the *Drury* Court specifically held that when either party requests specific findings regarding visitation, the trial court must make a *de novo* determination of what amount of visitation is appropriate, and enter a visitation order accordingly. *Id.* at 525.

We must conclude that the family court erred in denying Stephen's motion for a more specific parenting schedule. While we certainly recognize that in

custody proceedings it is seldom possible for a family court to craft a visitation schedule which makes both parties happy, the ambiguity in the family court's current schedule can only lead to further discord between the parties. Stephen is entitled to a parenting schedule that is more specific as to frequency, timing duration, and holidays. As such, we remand for further proceedings on this issue.

Imputation of Income

For the purposes of computing child support, the family court imputed $60,000 in yearly income to Stephen. In explaining how it reached that figure, the family court explained:

> At the time of the marriage, Steve was employed as a project manager at Law Environmental. He claimed to have been "downsized" from this and other positions. However, under cross-examination, Steve admitted that he has routinely been fired for cause. At trial, he claimed to have been working for a number of years on the farm inherited by Therese. His work on the farm included having it placed in a governmental program for the land not [to] be used for active farming. Steve planted native grass on one or two occasions. His accomplishment on the property actually generated less income than when it was farmed. Further, the actions of Steve have now resulted in the Parties being investigated by the United States Department of Agriculture. Since the Parties' separation, Steve has not secured regular employment. He has inherited money from his family and purchased a home with the proceeds. Despite being the executor of his mother's estate, he claimed to know little of the value of the estate or life insurance policies. Steve has been living upon inheritances and this Court's award of temporary maintenance. Therese has continued to pay

> his health insurance premium. Steve has made little effort to obtain suitable employment although he has shown no reason why he could not do so. The Court finds that Steve has the ability to support himself and that given his college degree and work experience he should be capable of earning $60,000 per year.

On appeal, Stephen argues that the family court's decision was not in accordance with KRS 403.212(2)(d) because there was no evidence introduced to show the "strength or nature of prevailing job opportunities in the community or the expected earnings levels." *Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky. App. 2012).

A family court has "broad discretion in considering a parent's assets and setting correspondingly appropriate child support. 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); *see also Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975).

KRS 403.212(2)(d), provides:

> (2) For the purposes of the child support guidelines:
>
> (d) If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. 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. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

We find Stephen's reliance on *Hempel* misplaced. Although the appellant in *Hempel* was working, the trial court nevertheless found that he was underemployed and imputed to him the ability to earn the same income as the appellee. On appeal, a panel of this Court reversed the trial court, finding,

> In this case, there was no evidence introduced to show the strength or nature of prevailing job opportunities in the community or the expected earnings levels. Nevertheless, the family court concluded that Daniel could be expected "to earn income at the same level as [Karen]." Order at 5. The court gave no explanation as to how it reached this conclusion. Without adequate factual findings, we are unable to conduct a meaningful review of that decision.

Id. 553.

Ironically, the appellant in *Hempel*, unlike Stephen, had introduced evidence at trial showing that the economic downturn had adversely affected his ability to find suitable employment and had "explained that he ha[d] a long history of working hard to provide for his family and that he had 'every reason to be motivated to continue to provide financial security for his family' . . . ." *Id.* at 552. Stephen, on the other hand, maintains that "Therese earned ample income to support the entire family during the marriage, so there was never a need for [him] to pursue remunerative employment."

A review of the record herein indicates that the trial court was presented with substantial evidence as to what Stephen had earned at the various times he chose to be employed. As Therese points out, Stephen was earning a minimum of $30,000 fifteen years ago. The trial court simply concluded that he was more than capable of returning to the workforce but chose not to do so. We find this to be a much different situation than *Hempel* where the appellant was working but claimed that he could not find employment at the level he had previously obtained. Stephen appears not to want to work at all. We conclude that the trial court did not err in finding that given Stephen's college education and computer training, he has the ability to earn an income of $60,000 and imputing such to him for the purposes of calculating child support.

Maintenance

In its findings of fact and conclusions of law, the family court found as follows:

> On November 18, 2010 the Court ordered Ms. Keeling to pay to Mr. D'Eufemia temporary spousal maintenance of $2,000 per month. That amount was modified to $1,750.00 per month by Order entered May 11, 2011. In the interim Ms. Keeling has continued to work at a high paying state professional position, while Mr. D'Eufemia has made little progress in finding gainful employment despite having a college degree from the University of Delaware and significant work experience. The Court recognizes the disparity of income between the parties, and also recognizes that each has received significant non-marital assets through inheritances from their respective mothers. The Court orders spousal maintenance to continue in the amount of $1,750.00 per month from the date of this order for 24 months. That period should be sufficient opportunity for Mr.

> D'Eufemia to sort out his current finances and obligations; to have the QDROs prepared in accordance with this Court order securing a regular retirement; and to pursue gainful employment.

On appeal, Therese argues that the trial court abused its discretion in awarding Stephen maintenance. Therese contends that Stephen failed to establish that he had insufficient means to support himself. She points out that although the family court noted that Stephen inherited significant non-marital assets, it failed to take this source of income into consideration when considering maintenance. In fact, the trial court even pointed out that despite being the executor of his mother's estate, Stephen was not able to state how much money he received.

The determination of questions regarding maintenance is a matter which has traditionally been delegated to the sound and broad discretion of the trial court, and an appellate court will not disturb the trial court absent an abuse of discretion. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). An appellate court is not authorized to substitute its own judgment for that of the trial court where the trial court's decision is supported by substantial evidence. *Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990). In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion. *Perrine,* 833 S.W.2d at 826.

KRS 403.200 provides, in relevant part:

> (1) In a proceeding for dissolution of marriage . . . the court may grant a maintenance order for either spouse only 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 . . . .
>
> (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently . . . ;
>
> (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.

Kentucky law is clear that in order for an award of maintenance to be proper, the elements of both KRS 403.200(1)(a) and (b) must be established. *Drake v. Drake*, 721 S.W.2d 728 (Ky. App. 1986). In other words, there must first be a finding that the spouse seeking maintenance lacks sufficient property,

including marital property, to provide for his reasonable needs. Second, the family court must find that the spouse is unable to support himself through appropriate employment according to the standard of living established during the marriage. *Lovett v. Lovett*, 688 S.W.2d 329, 332 (Ky. 1985). It is only after the family court has determined that an award of maintenance is appropriate that the factors listed in KRS 403.200 bear upon the amount and duration of maintenance. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990).

A family court is required to make specific findings with respect to whether maintenance is warranted under KRS 403.200(1)(a) and (b) so that an appellate court can determine the propriety of the award. *See Qualls v. Qualls*, 384 S.W.2d 326 (Ky. 1964). In *Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky. App. 1988), a panel of this Court vacated and remanded a maintenance award where the trial court failed to make the specific findings required by KRS 403.200(1)(a) and (b):

> [W]e remand the issue of maintenance to the trial court for it to reconsider whether maintenance should be awarded after making a finding on the question of appellee's ability to support herself through appropriate employment under KRS 403.200(1)(b). The court failed to make this statutorily required finding. The court shall decide after hearing all relevant evidence whether the property of the appellee and her ability to support herself, taken together, properly call for an award of maintenance.

Although the family court herein did issue findings of fact and conclusions of law, any reference to the requirements of KRS 403.200 is notably

absent. The family court did not make a specific finding that Stephen lacked sufficient property to provide for his needs, and indeed even noted that Stephen had received a substantial, albeit unknown, inheritance from his mother. There is also no evidence of record as to whether Stephen has any extraordinary expenses or debts. Moreover, the family court failed to find that Stephen was unable to support himself through appropriate employment. Not only does Stephen have a college degree and computer experience, but the family court apparently did not believe that Stephen was in need of any additional skill training. To the contrary, it is apparent that Stephen has the ability to work but chooses not to. Even he does not argue this notion, but merely contends that Therese "has sufficient means to provide for herself and contribute to [his] needs." The fact that a spouse allegedly refuses to obtain employment is a factor to be considered under KRS 403.200(1)(b). *Owens v. Owens*, 672 S.W.2d 67, 70 (Ky. App. 1984).

Absent the specific findings required by KRS 403.200(1)(a) and (b), we are compelled to remand to the family court for reconsideration of whether maintenance should be awarded in light of such statutorily required findings. Should the trial court then conclude that an award of maintenance is still appropriate, it shall reconsider the amount of maintenance according to KRS 403.200(2).

For the reasons set forth herein, we remand this matter to the Oldham Family Court for further proceedings consistent with this opinion.

ALL CONCUR.

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