

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001759-ME

FREDERICK LAWRENCE DUFF

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT FAMILY COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 14-CI-503285

KAREN DILLMAN DUFF

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, D. LAMBERT, AND J. LAMBERT, JUDGES.

JOHNSON, JUDGE: Frederick Lawrence Duff (“Fred”) brings this appeal from the August 1, 2016 Findings of Fact, Conclusions of Law, Judgment and Decree of the Jefferson Circuit Family Court. Fred asserts that the family court erred when it granted him joint custody but did not significantly increase his parenting time, incorrectly determined his child support obligations, unfairly divided the assets of

the parties, and failed to award him attorney fees. After reviewing the record in conjunction with the applicable legal authorities, we affirm the Jefferson Circuit Family Court.

BACKGROUND

Karen Dillman Duff (“Karen”) and Fred were married in July 1998, and two children were born of the marriage. The parties separated and in October 2014, Karen filed a Petition for Dissolution of Marriage. The parties participated in court-ordered mediation and resolved some issues but failed to agree on most issues pertaining to the dissolution. In April 2016, the family court held a two-day hearing and on August 1, 2016, entered its final order. The family court awarded joint custody of the minor children to the parties and granted Fred one additional overnight stay with the children; awarded Karen child support; divided the parties’ retirement accounts, property, and debts; and denied both parties’ request for attorney fees.

On August 11, 2016, Fred filed a Motion to Alter, Amend or Vacate the order of the family court, which the family court denied on October 24, 2016.

This appeal follows.

ANALYSIS

Fred appeals the court’s August 2016 order, stating that he wants joint custody of the children and increased parenting time. The family court, in reliance on Kentucky Revised Statutes (“KRS”) 403.270, determined that “an award of joint

custody is in the best interest of the children at this time.” The family court did make changes to the parenting schedule, but Fred argues that the family court did not grant him enough parenting time.

On appeal, we will reverse a family court’s determination as to parenting time only if the family court’s decision constitutes a manifest abuse of discretion or is clearly erroneous in light of the facts and circumstance of the case. We review the law as applied to the facts *de novo*. *Hudson v. Cole*, 463 S.W.3d 346, 350 (Ky. App. 2015) (citing *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000)).

In its order of August 2016, the family court followed the standards set out in KRS 403.270, basing its decision on the best interests of the children. The family court followed the recommendations of both the children’s therapist and the court-appointed custodial evaluator who agreed that a joint custody arrangement would be in the children’s best interests. The children’s therapist testified that he had seen improvement in the manner which both parties were interacting with the children. The court-appointed evaluator specifically recommended a joint custody arrangement based upon her concerns that awarding sole custody to either parent would be emotionally harmful to the children.

In establishing the parenting time schedule, the family court recounted the testimony of several witnesses. Those witnesses testified that Fred had exhibited inappropriate behavior at school, sporting events, and other outings, and

that such behaviors negatively impacted the children. While the family court granted Fred one additional overnight stay each week by the children, it kept the same basic schedule previously in effect. We find that the family court based its decision on the best interests of the children, considering each party equally, in conjunction with all relevant factors. We find no abuse of discretion or error in the family court's ruling.

Fred next raises concerns about the family court's imputing income to him to calculate child support. We review a family court's decision concerning child support for an abuse of discretion. An abuse of discretion will be found only when a family court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Bootes v. Bootes*, 470 S.W.3d 351, 354 (Ky. App. 2015) (citations omitted).

Since Fred's earnings had been disrupted after the divorce, the family court found that Fred had been voluntarily underemployed and followed the requirements of KRS 403.212(d).

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).

To determine Fred's potential income the family court looked at Fred's last regular yearly earnings in 2014, prior to the divorce, and his income for his most recent three-months pay. Using those numbers, the family court determined Fred's potential income for the year 2016. The family court found that Fred's potential income, which was based upon employment potential, probable earning level using his recent work history, occupational qualifications, and prevailing job opportunities, should be \$72,000. The family court recognized that Fred had been underemployed, and correctly applied the statute to determine Fred's potential income. We find no error or abuse in the family court's ruling.

Fred next claims error in the family court's determination concerning the division of marital assets. We review a family court's division and award of marital property for an abuse of discretion. *Kleet v. Kleet*, 264 S.W.3d 610, 618 (Ky. App. 2007). Specifically, we review a family court's factual findings concerning the division of marital property as we would any issue tried outside the presence of a jury, setting them aside only if they are clearly erroneous. Kentucky Rules of Civil Procedure ("CR") 52.01.

Fred argues that the family court wrongly determined that his Merrill-Lynch, PNC, and Scottrade accounts were marital in nature. The family court found that each of the three stocks were liquidated by Fred during the period of separation but found no evidence regarding how the funds were utilized. Because Fred is claiming the assets were non-marital property, he carries the burden of

proof. *Kleet*, 264 S.W.3d at 614. Fred offered no evidence concerning why the family court erred in its determination, simply stating that Karen had misrepresented herself and depleted his marital funds in preparation of the divorce. While Fred alleges that “some” of these funds were non-marital in nature, the record shows that he offered no such proof at trial. Therefore, the family court considered them to be marital in nature and divided the liquidated funds equally between the parties, ordering Fred to reimburse Karen one-half of the cashed-out amount. We find no abuse in the family court’s classification of these assets as marital property.

Finally, Fred argues that the family court erred when it failed to grant him attorney fees. An award of attorney fees is authorized by KRS 403.220 only when it is supported by an imbalance in the financial resources of the respective parties. *Miller v. McGinty*, 234 S.W.3d 371, 374 (Ky. App. 2007) (citing *Lampton v. Lampton*, 721 S.W.2d 736, 739 (Ky. App. 1986)). The family court’s order stated, “The disparity in incomes is not significant enough to afford either party to contribute to the legal fees of the other.” This was based upon the family court’s finding that Fred’s potential income was \$72,000.00 and Karen’s actual income was \$85,000.00. A trial court’s ruling on attorney fees is subject to review only for an abuse of discretion. *Bootes*, 470 S.W.3d at 356. The family court correctly considered Fred’s potential income under the statute as compared to Karen’s actual

income, and we find no abuse in the family court's determination with respect to the award of attorneys' fees.

CONCLUSION

Based upon the foregoing, we affirm the August 1, 2016 Order of the Jefferson Circuit Family Court.

ALL CONCUR.

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