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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000779-ME

CHRISTOPHER E. SHARP — APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE M. BRENT HALL, JUDGE
ACTION NO. 15-CI-01411

SHANIKQUA SHARP — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, SPALDING, AND L. THOMPSON, JUDGES.

SPALDING, JUDGE: The appellant, Christopher E. Sharp ("Christopher" or "appellant"), and the appellee, Shanikqua Sharp ("Shanikqua" or "appellee"), were married on April 29, 2005. The appellee filed for divorce in 2015. Although the parties resolved their differences as to custody, parenting time, child support,

childcare costs, and related concerns by way of an agreed order entered on March 21, 2017, remaining issues required judicial resolution.

On July 6, 2017, the family court held a hearing on these issues. At the hearing, the issue of unpaid childcare expenses was discussed but not decided. On October 24, 2017, the appellee filed a motion for contempt regarding the appellant's alleged failure to comply with the March 21, 2017 agreed order regarding childcare costs. After a series of delays and continuances, the hearing was scheduled the following year for January 9, 2018. However, it appears that on the day of the hearing counsel for the appellee failed to appear for court. An order denying the appellee's motion for contempt was entered. Thereafter, on January 15, 2018, the appellee filed a motion to reconsider and, by order entered on January 30, 2018, the family court sustained the appellee's motion, stating that the matter would be "continued generally." On March 12, 2018, an opinion and order resolving the outstanding issues between the parties was entered.

Of import to this appeal, the opinion and order held that the appellant was "responsible for paying the amount of $6,196.06 for past due child support and childcare as of June 22nd, 2017." The court also ordered the appellant to "reimburse the [appellee] for half the monies she paid on joint indebtedness up and until the time of divorce." Further, the order held that the parties had a joint savings account with Navy Federal Credit Union that, at some point, contained

$18,500.00. The family court found that the appellant had since liquidated that account but credited the appellee with $9,250.00 for her interest. Finally, the order allocated certain debts and divided the marital assets between the parties.

Christopher raises five (5) issues on appeal. First, he argues that the family court erred in ruling that he owed $6,196.06 in childcare arrears without first having held a hearing on the issue. Second, he contends that the family courts lack the authority to retroactively order the payment of marital debts. Third, Christopher asserts that the family court's decision to award Shanikqua $9,250.00 in the Navy Federal Credit Union account was erroneous. Fourth, Christopher argues that the family court erred in its division of marital property. Fifth, Christopher argues that the family court erred in its division of debts. We agree as to Christopher's first claim of error and remand for a resolution of same but affirm the Hardin Family Court in all other respects.

The first issue is the question of whether the family court properly held that Christopher owed childcare arrears. "Ordinarily, notice and an opportunity to be heard are the basic requirements of due process." *Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006). Indeed, "[t]he fundamental requirement of procedural due process is simply that all affected parties be given 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Hilltop Basic Res. Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005)

(citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976)).

Here, the record reflects that the appellant was not given a true opportunity to be heard prior to entry of the judgment regarding his childcare arrears. Although the issue was briefly addressed at the July 6, 2017 hearing, it was not substantively addressed by the parties and the family court provided at the end of the hearing that it was not going to rule on the issue at that time. It appears that a hearing was never held on the appellant's motion for contempt before the family court entered its March 12, 2018 opinion and order, in which the appellant was ordered to pay the $6,191.06 in past due childcare arrears. Since the contempt hearing was never held, the family court necessarily relied upon the July 6, 2017 testimony of the appellant regarding childcare arrearages. Therefore, we find that Christopher was deprived of the "opportunity to be heard" on the issue, and thus hold that he was deprived due process of law and is entitled to an opportunity to be heard on this issue.

Christopher next takes issue with the family court's order requiring him to "reimburse" the appellee for half of the amount paid on joint indebtedness up to the time of divorce. Specifically, the appellant argues that "most [o]rders entered in Family Court" are "prospective in nature," and, therefore, the family court's order here can have no retroactive application. In support of his argument,

Christopher points to Kentucky Revised Statutes ("KRS") 403.213(1), which provides as follows:

> The Kentucky child support guidelines may be used by the parent, custodian, or agency substantially contributing to the support of the child as the basis for periodic updates of child support obligations and for modification of child support orders for health care. The provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.

Christopher's argument seems to be that, because the legislature created an explicit statutory framework providing for the possibility of retroactive application of child support orders, but failed to provide a similar framework for orders regarding the payment of marital debt, then the possibility of orders requiring retroactive payment of marital debt has been foreclosed.

Besides the reliance on a child support statute, Christopher cites no law to support this proposition. Our review of applicable Kentucky statutory and case law has revealed no authority forbidding the family court's action in this regard. Thus, we are left to conclude that the family court did not abuse its discretion.

Christopher also argues that it was error to award the appellee $9,250.00 from the parties' Navy Federal Union account, which, in early 2015, had

a balance of $18,500. In support of this proposition, Christopher presents a two-fold argument. First, Christopher contends that ordinarily dissipation of marital assets cannot occur while married individuals are living as husband and wife, citing *Robinette v. Robinette*, 736 S.W.2d 351 (Ky. App. 1987).

Second, he argues that the court's award is inconsistent with the family court's findings contained on page five (5) of the March 12, 2018 opinion and order. On page five (5) of the order, it provides as follows: "The proceeds from the sale of the house in Florida and $18,500.00 of withdrawal are [the appellant's]." Later, on page six (6), the order states that $9,250.00 of the account belonged to the appellee. The contradiction between the finding of fact on the one hand, and conclusion of law on the other, the appellant contends, was error.

We see no indication in the opinion and order that the family court relied upon a conclusion that Christopher had dissipated marital assets in awarding $9,250.00 of the Navy Federal Credit Union account to the appellee. It simply noted that the asset had existed, was no longer in existence, but the appellee had an interest. It appears that the family court identified the monies in the account as marital property, valued them, and made an equitable division of the assets, a method consistent with Kentucky case law. "[I]n dissolution of marriage actions, a trial court's division of the parties' property requires a three-step process: (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." *Travis v. Travis*, 59 S.W.3d 904, 908-09 (Ky. 2001) (footnotes omitted). We do not find this division to be an abuse of discretion.

As to Christopher's second argument, we do not find the order to be irreconcilably inconsistent. The language contained within the findings of fact acknowledged the existence of the $18,500.00, whereas the language utilized by the court on page six (6) provided how the court intended on dividing the asset. We do not find the alleged inconsistency to be erroneous.

Next, the appellant claims that the family court committed reversible error in its division of marital property and debts. Where the division of marital property is concerned, Christopher contends that the appellee was awarded "81% more of the marital assets" than he was. To support this assertion, the appellant points to the award of two (2) vehicles – a 1998 Lexus and a 2004 Lexus, respectively – to the appellee, as well as "$20,000" in household furnishings.

KRS 403.190(1) provides that marital property is to be divided in just proportions. An "equitable" division of the parties' marital property in "just proportions" is not necessarily an *equal* division. *Cobane v. Cobane*, 544 S.W.3d 672, 684 (Ky. App. 2018); *Stipp v. St. Charles*, 291 S.W.3d 720, 726 (Ky. App. 2009); *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky. App. 2007); *Russell v. Russell*,

878 S.W.2d 24, 25 (Ky. App. 1994). "[T]he trial court has broad discretion to divide marital assets, and its determination of what constitutes a just division will not be disturbed absent an abuse of that discretion." *Cobane*, 544 S.W.3d at 684 (citing *Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky. App. 2012)). Likewise, "the division of marital property and debt is within the sound discretion of the trial court[.]" *McGregor v. McGregor*, 334 S.W.3d 113, 119 (Ky. App. 2011) (citing *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001)). We can only disturb the family court's factual findings if they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

Upon reviewing the record, this Court cannot say that the family court abused its discretion in its division of marital property. The award of marital property need only be "equitable" and in "just proportions," as noted above. This does not mean that the division must be equal. To the extent any alleged inequality does exist, it mostly stems from the values placed on the vehicles – $20,325 combined – and the household furnishings – $20,000 – awarded to the appellee. However, these items are tangible, depreciating, personal property that have no monetary value unless the appellee decides to sell them, in which case she loses the use of the property and absorbs the loss of depreciation in the process.

Furthermore, the family court was not required to believe the estimation placed on the value of the household furnishings of the appellant.

Lastly, it cannot be said that the family court abused its discretion in its allocation of the parties' debts. Unlike marital property, "[t]here is no statutory authority for assigning debts in an action for dissolution of marriage." *Neidlinger*, 52 S.W.3d at 522, *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018). And, unlike marital property, there is no presumption – statutory or otherwise – that a debt arising during the marriage is marital or nonmarital. *Allison v. Allison*, 246 S.W.3d 898, 907 (Ky. App. 2008); *Bodie v. Bodie*, 590 S.W.2d 895, 896 (Ky. App. 1979). Rather, in order to determine whether a debt is marital or nonmarital, a court must evaluate factors such as receipt of benefits, extent of participation, whether the debt was incurred to purchase assets designated as marital property, and whether the debt was necessary to provide for the maintenance and support of the family. *Allison*, 246 S.W.3d at 907-08 (citing *Neidlinger*, 52 S.W.3d at 523).

Here, the family court's order reflects that it considered the aforementioned factors in determining how to divide the parties' debt. On page three (3) of the order, it notes that the appellant had not "paid anything on the marital debts since he left the home" and that the appellee had paid all debts since the parties' separation. The family court further found the following: a USAA

American Express card had been opened and used during the marriage, and had a balance of $12,739.00; a Chase credit card had been opened in April of 2015, which the court found had been used for the parties to go on vacation, and had a balance of $9,493.98; a Wells Fargo Platinum card had been opened during the marriage, and had a balance of $1,055.00; a Sam's Club card had been opened during the marriage, and had a balance of $4,500.00; a USAA personal loan had been opened in the amount of $31,535.41; and that the appellee had used $29,000.00 of her separation pay to satisfy debts arising out of the appellant's previous marriage. Based on the above, the family court ordered the appellant pay the USAA personal loan, the Chase credit card balance, and his own American Express credit card balance. The appellee was ordered to pay the USAA American Express debt, the Wells Fargo Platinum debt, and the Sam's Club debt.

It is clear that the debt associated with the Chase credit card was incurred to the benefit of both parties, given the court's finding that they had utilized said line of credit to fund a vacation. Thus, they were clearly both in "receipt of the benefits" of the debt. By the same token, each party clearly had a significant amount of participation in incurring the debt, since, again, it was incurred for the purposes of going to vacation with one another, and according to testimony during the final hearing, it can be inferred that each party was apparently aware of and consented to incurring the debt for this purpose.

Additionally, although there was some dispute between the parties concerning the USAA personal loan, including whether the note was signed by both parties and which party received what portion of the proceeds, ultimately, the trial court concluded that certain portions of the appellant's testimony were less believable. The American Express debt was in the appellant's name alone. Based on the factors identified in *Allison*, we do not believe the allocation of the parties' debts was an abuse of discretion.

In sum, because we hold that Christopher was deprived of his right to be heard, we reverse the Hardin Family Court's judgment insofar as it relates to childcare arrearages and remand for a hearing upon same. The Hardin Family Court's judgment is affirmed in all other respects.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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