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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001153-ME

WILLIAM TROY DAY — APPELLANT

APPEAL FROM KENTON FAMILY COURT
v. HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 17-CI-01818

SHERI LYNN DAY — APPELLEE

AND

NO. 2018-CA-001251-ME

SHERI LYNN DAY — CROSS-APPELLANT

CROSS-APPEAL FROM KENTON FAMILY COURT
v. HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 17-CI-01818

WILLIAM TROY DAY — CROSS-APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING IN
APPEAL NO. 2018-CA-001153-ME;
AFFIRMING
IN CROSS-APPEAL NO. 2018-CA-001251-ME

** ** ** ** **

BEFORE: MAZE, NICKELL, AND K. THOMPSON, JUDGES.

MAZE, JUDGE: William Troy Day (Troy) and Sheri Lynn Day (Sheri) each appeal from findings of fact, conclusions of law and a decree of dissolution entered by the Kenton Family Court. Troy argues that the family court erred by allowing Sheri to relocate with the children and in its calculation of the parties' incomes for purposes of child support. Although the family court cited the wrong best-interests standard in its custody determination, we find that it considered all relevant factors and that its decision did not amount to an abuse of discretion. We also find that the family court properly considered Sheri's current income rather than her potential income upon relocation. However, we conclude that the family court erred in basing child support on Troy's current income without a finding that his recent overtime pay reflected his consistent earning capacity.

Sheri argues that the family court improperly included Troy's pre-marital debt in its division of the equity of the marital property. We find substantial evidence to support the family court's conclusion that the debt was used

for marital purposes even though Troy incurred the debt prior to the marriage. Hence, we affirm the family court's judgment and decree with respect to its award of custody and its division of marital property and debt, but we reverse its calculation of child support for additional findings regarding Troy's overtime pay.

I. Facts and Procedural History

Troy and Sheri were married in North Carolina in 2009. They have two children together, E.G.D., born in 2008, and E.L.D., born in 2009. Sheri was self-employed as an esthetician. She discontinued her salon around the time their first child was born but continued to work part-time for several years. In 2013, the family moved to Erlanger, Kentucky, and Troy took a position as an airplane mechanic. After the parties moved, they rented their former residence in North Carolina to Troy's brother and wife.

On January 1, 2017, the parties separated. Troy filed a petition for dissolution of the marriage shortly thereafter. The matter proceeded to a bench trial on June 4, 2018. Among other things, the contested issues concerned the characterization and division of the marital interest in the North Carolina property and Sheri's request to re-locate to North Carolina with the children.

On June 11, 2018, the family court entered findings of fact, conclusions of law and a separate decree of dissolution. With respect to the first issue, the court found that the proceeds from the sale of the North Carolina

property would be divided equally between the parties after payment of the outstanding mortgage balance and another loan used to improve the property. On the second issue, the family court found that it was in the best interests of the children to relocate to North Carolina where Sheri will be able to support herself through appropriate employment. Consequently, the court awarded joint custody of the children with Sheri designated as the primary residential custodian. Thereafter, both parties filed motions to alter, amend or vacate these findings. CR[1] 59.05. On July 16, 2018, the family court entered an order setting forth additional factual findings but otherwise denying both motions. This appeal and cross-appeal followed. Additional facts will be set forth below as necessary.

II. Troy's Appeal

A. Relocation

In his appeal, Troy first argues that the family court erred in allowing Sheri to relocate to North Carolina with the children. In granting Sheri's motion, the family court applied the best-interests test set forth in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). The issue of a parent's relocation in *Pennington* came before the court on a motion to modify custody or visitation pursuant to KRS[2] 403.340 and KRS 403.320, respectively. The Supreme Court pointed out

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Revised Statutes.

that, when the issue of relocation is raised prior to entry of the final custody decree, KRS 403.270 is the controlling statute. *Id.* at 765. Since the current case involves an issue of relocation raised prior to the entry of the final decree, the family court erred by applying the best-interests analysis of *Pennington* over the analysis set forth in KRS 403.270.

On the same day that *Pennington* came out, the Supreme Court also issued an opinion in *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). The issue in *Frances* concerned relocation issues arising prior to the issuance of the final custody decree. As in the current case, the parties shared joint custody with nearly equal parenting time under the temporary custody award, but the mother sought to relocate with the child out-of-state. After conducting an evidentiary hearing, the trial court in *Frances* concluded that relocation would not be in the child's best interests, citing the child's close relationship with her father and her community. The Supreme Court concluded that the trial court properly applied the best-interests test of KRS 403.270 and its findings were not clearly erroneous. *Id.* at 756-58.

Although the trial court in the current case applied the wrong best-interests analysis, the considerations are mostly the same, at least when the motion to modify custody is brought more than two years after entry of the decree. *Pennington*, 266 S.W.3d at 769. Furthermore, the family court's factual findings

"shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. Findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. *Frances*, 266 S.W.3d at 756. When an appellate court reviews the decision in a child custody case, the test is whether the findings of the family court were clearly erroneous or amounted to an abuse of its discretion. *Id.*

In making an initial custody determination, KRS 403.270(2) requires a court to consider "all relevant factors," including:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his or her custody;
> (b) The wishes of the child as to his or her custodian, with due consideration given to the influence a parent or de facto custodian may have over the child's wishes;
> (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests;
> (d) The motivation of the adults participating in the custody proceeding;
> (e) The child's adjustment and continuing proximity to his or her home, school, and community; [and]
> (f) The mental and physical health of all individuals involved; …[3]

In its factual findings, the family court noted that both children were doing well in their current school and community. However, the court concluded

[3] Subsection (g) addresses the consideration when there has been a finding of domestic violence or abuse, and subsections (h)-(k) address considerations when a *de facto* custodian is involved. The parties do not argue that any of these factors were relevant in this case.

that Sheri's relocation to North Carolina would be in their best interests. The court first found that Sheri has a good-faith reason to move back to North Carolina to pursue her career as an esthetician. The court accepted Sheri's testimony that she could not transfer her esthetics license from North Carolina to Kentucky without additional education and significant cost. The family court also found that Sheri would have an earning capacity of between $48,000 - $50,000 per year if she were to relocate to North Carolina.

The family court also found that, if Sheri were to relocate and the children remained in Kentucky, Troy's work schedule would require excessive child care and would create instability for the children. On the other hand, the court pointed out that Sheri's network of friends in North Carolina, her flexible work schedule as a business owner and her lack of day-care expenses would result in more stability for the children. Finally, the court noted that Troy has free flight privileges through his employer with access to multiple airports near Sheri's new residence.

Troy takes issue with these conclusions. However, we are constrained to find that the family court's findings were supported by substantial evidence. The more significant question is whether the family court considered all of the relevant factors under KRS 403.270. As discussed above, we are concerned that the family court did not specifically address the statutory factors but applied a

different best-interests analysis. However, this Court may affirm the decision of the family court for any reason sustainable under the record. *Brewick v. Brewick*, 121 S.W.3d 524, 527 (Ky. App. 2003). Based upon our reading of the family court's findings, we conclude that the court considered all of the factors which were relevant to the custody determination.

Troy focuses on the recent amendment to KRS 403.270(2), which provides:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. *Subject to KRS 403.315, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare.* (Emphasis added).

Troy contends that the highlighted language creates a presumption against allowing a custodial or residential parent to relocate with the child away from the other parent. As an initial matter, we note that this amendment became effective on July 14, 2018, which was after the family court made its decision regarding custody. Consequently, the statutory presumption does not apply in this

case.[4] In any event, we do not read the presumption as a blanket prohibition against relocation by a residential parent, but only as an additional factor to be weighed in the best-interests analysis.

We agree with the family court that, in a perfect world, parents would always live close to each other and relocations would not occur. However, we live in a mobile society and courts still will be called upon to determine the best interests of the children when one parent desires to relocate. Given the recent amendment to KRS 403.270(2), a parent seeking to relocate may bear a higher burden of proving that the move would be in the best interests of the child. But in this case, the family court was not bound by that presumption. After reviewing the record, we conclude that the family court's factual findings were supported by substantial evidence and it considered all relevant factors in making the custody determination. Therefore, the family court's decision was neither clearly erroneous nor an abuse of discretion.

B. Calculation of Income

Troy next argues that the family court erred in its assessment of child support. Although the court found that Sheri's earning capacity will increase to at

[4] While before the family court, Troy relied upon similar language set out in KRS 403.280. The amendment to that statute became effective on June 29, 2017. But as the family court correctly pointed out, the statutory presumption under KRS 403.280 applies only to temporary custody orders, not a final custody order at issue in this case.

least $4,000 per month upon her return to North Carolina, the court imputed her current earning capacity to be $2,492 per month. Similarly, Troy objects that the family court improperly attributed income of $6,186 per month to him. Troy contends that the trial court's calculation of the parties' respective incomes skewed its calculation of child support against him.

Child support is calculated based upon a parent's income, or "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." *See* KRS 403.211 and KRS 403.212(2)(a). In making child support determinations, courts must consider all income proven by substantial evidence, regardless of whether that income is documented. *Schoenbachler v. Minyard*, 110 S.W.3d 776, 778 (Ky. 2003). Here, Sheri has a potential to earn increased income upon her move to North Carolina, but she will need time to establish her business to reach that earning capacity. And as the family court noted, child support is subject to review should Sheri's income increase significantly.

With respect to Troy, we agree that it is generally not appropriate to impute additional income to a parent already working a full 40-hour week. *Gossett v. Gossett*, 32 S.W.3d 109, 112 (Ky. App. 2000). However, the issue is one of fact rather than law. *Id.* The family court should consider the parent's previous history of employment, the occupational qualification, the extent to which the parent may

be underemployed in the primary job, the health of the individual, the needs of the family, the rigors of the primary job and the overtime, and all other circumstances. *Id.*, citing *Cochran v. Cochran*, 14 Va. App. 827, 419 S.E.2d 419, 421 (1992).

In this case, the family court calculated Troy's income based upon his year-to-date income as of April 28, 2018. Troy testified that he had been called to work overtime at the beginning of the year, but the overtime and associated travel was not mandatory, could be declined and was not guaranteed. Troy's 2017 W-2 shows income of $55,921, and the parties' 2016 tax return reflects a combined income of $60,447. As a result, Troy argues that the recent increase in his income, based primarily on temporary overtime, did not reflect such a substantial increase in his overall earning capacity.

Because it is based upon the evidence presented, the court's calculation of income is a factual determination which will not be disturbed if based upon substantial evidence. *Id.* at 111. However, the increase in Troy's income was based almost entirely upon overtime pay that was not consistent with his prior income. And while Troy could seek a reduction in child support if he does not maintain this level of income, such a motion would be governed by the more stringent standard for modification set out in KRS 402.213(1). We conclude that the family court failed to make sufficient findings to support its conclusion that Troy can consistently earn $6,186 per month. Therefore, we must remand this

matter for additional findings concerning Troy's earning capacity and for a new calculation of his child-support obligation based upon those findings.

III. Sheri's Appeal

Sheri presents a single issue in her appeal – the calculation of the marital interest in the North Carolina property. The parties agreed that the residence would be sold and the proceeds would be equally divided after payment of the marital debt. The parties also agreed that the property was encumbered by a marital mortgage with an outstanding principal balance of $129,324. But prior to the marriage in 2009, Troy took out a loan from Truliant. He testified that he used the proceeds from that loan to improve the property and that the remaining balance on the loan was approximately $14,000. However, he was not able to provide any documentation regarding these improvements or when they were done. Nevertheless, the family court accepted his testimony and found that the debt is marital. Therefore, the court directed that the balance of the Truliant loan should be deducted from the sale proceeds prior to the division of the remaining equity.

Sheri argues that, since Troy incurred the debt prior to the marriage, it cannot be considered as a marital debt. However, there is no statutory presumption regarding characterization of debt as marital or non-marital. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001), *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018). Rather, debts should be characterized

based upon principals of equity, including receipt of benefits, the extent of participation by each party, and whether the debt was necessary to provide for the maintenance and support of the family. *Id.*

Although debts incurred during the marriage and prior to separation are more likely to meet this equitable test, we find no basis for a presumption that a debt incurred prior to the marriage is non-marital as a matter of law. Here, the trial court accepted Troy's testimony that he used the proceeds of the Truliant loan to refurbish the North Carolina residence. The trial court was not obligated to accept his testimony in the absence of documentation, but likewise, we cannot find that the trial court clearly erred by doing so. Because Troy used the Truliant loan proceeds to improve marital property, we conclude that the trial court did not err by deducting the outstanding balance of that loan from the sale proceeds to be divided.

IV. Conclusion

Therefore, in Appeal No. 2018-CA-001153-ME, we affirm the judgment of the Kenton Family Court with respect to the issues of custody and calculation of Sheri's income, but we reverse the family court's calculations of Troy's income and child support. We remand that matter for additional findings and a judgment in accord with this Opinion. In Cross-Appeal No. 2018-CA-001251-ME, we affirm the family court's allocation of debt in its entirety.

ALL CONCUR.

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