

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001056-MR

JOHN PETER VINCENT HOLLIS

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 99-CI-00152

CHERYL LEE HOLLIS

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. John Peter Vincent Hollis appeals from the Final Order entered by Woodford Circuit Court in a dissolution of marriage action. We affirm.

The parties, John Hollis (hereinafter "John") and Cheryl Hollis (hereinafter "Cheryl"), were married in August 1986, and were divorced on January 12, 2000. John and Cheryl had three children: Russell, born January 22, 1990, Geoffrey, born June 21, 1992, and Erin, born January 5, 1996. On June

11, 1999, Cheryl filed a petition for dissolution of marriage in the Woodford Circuit Court, where by order their marriage was dissolved on January 12, 2000.

The Woodford Circuit Court entered its findings of fact by Opinion and Order dated March 27, 2002, which we shall adopt and summarize as follows. First, the circuit court determined that the Domestic Relations Commissioner (hereinafter "DRC") erred in naming Cheryl as the primary residential custodian after deciding that the children would best be served by, and so ordering, a joint custody situation between John and Cheryl. Citing Aton v. Aton, Ky. App., 911 S.W.2d 612 (1995), the circuit court reasoned, "the inherent nature of joint custody prohibits the court from naming one party the primary custodian." In so holding, the circuit court simply deleted the word "primary" and ruled that Cheryl was the residential custodian, rather than the primary residential custodian.

The circuit court then upheld the DRC's recommendation concerning the distribution of contact time that John and Cheryl should have with the children. This custody schedule allocated to John 46.66% of the time with the children, and to Cheryl the remaining 53.34% of the time.

Next, the circuit court agreed with the DRC's recommendation concerning the calculation of child support owed by John. The DRC's recommendation reduced the amount of monthly

child support the appellant would have owed (from \$1,035.80 to \$700) based upon the child support guidelines. This deviation from the child support guidelines, as permitted by KRS 403.211(2), was due to, *inter alia*, the nearly equal amount of custodial time granted to each parent. Thereafter, John filed exceptions to the deviated child support calculation of \$700 arguing that the calculation set forth in KRS 403.212(6), which applies to split custody situations and would further reduce the child support obligation of the appellant, is the appropriate calculation. The circuit court disagreed with John and accepted the DRC's recommendation ruling that KRS 403.212(6) applies to split custody situations only.¹

The DRC next recommended that Cheryl receive the tax exemptions for the two older children, Russell and Geoffrey; and the John receive the tax exemption for the youngest child, Erin. John filed an exception, arguing he was entitled to all three tax exemptions. The circuit court disagreed with John's argument and accepted the DRC's recommendation regarding this issue.

During the trial, both parties submitted appraisals of the marital residence. Cheryl's appraisal set the value of the

¹KRS 403.212(2)(h) states, "[s]plit custody arrangement means a situation where each parent is the residential custodian for one (1) or more children for whom the parents share a joint legal responsibility."

residence at \$79,000, and John's appraisal set the value at \$85,000. The DRC decided to split the difference between the two appraisals, setting the value of the marital residence at \$82,000. John filed an exception to the DRC's recommendation, arguing that the DRC should have accepted his appraisal value of \$85,000. Again, the circuit court disagreed and accepted the DRC's recommendation regarding this issue.

The DRC then recommended that John reimburse Cheryl for 50% of the payments she made toward their children's private parochial school tuition. John filed exceptions to this recommendation arguing that this issue was not mentioned in any pretrial document and that there was no testimony proving an agreement between the parties existed regarding such payments. Again, the circuit court accepted the DRC's recommendation, and in so doing, required John to pay Cheryl half of the tuition payments.

Next, the circuit court agreed with the DRC's recommendation requiring John to reimburse Cheryl for half of the payments she made for Russell's and Geoffrey's piano lessons. The DRC concluded that this was a marital debt and that John should be required to pay Cheryl half of the payments made by her for the piano lessons. The circuit court ruled that the DRC heard the testimony concerning this issue and its decision should not be disturbed.

Next, the circuit court ordered, in accordance with the DRC's recommendation, that the cost of the custodial evaluation fee be divided in proportion to the parties' income, rather than 50/50. The DRC stated that he usually required the party who requested such an evaluation to pay the full cost. However, here, the DRC recommended that each party pay for the evaluation based on their proportional income because the evaluation was unusually helpful in determining the custody issue.

Last, the circuit court accepted the DRC's recommendation requiring John to pay a portion of a consolidation loan that Cheryl had paid in full. Prior to their separation they had obtained a consolidation loan. From that consolidation loan, \$2,000 was used to pay off the vehicle that John retained after the separation and divorce. Cheryl then paid off the consolidation loan, including the \$2,000 used for John's vehicle. Therefore, the DRC recommended, and the circuit court agreed, that John should pay 50% of the \$2,000 used to pay for his vehicle.

John raises the following issues: 1) whether the child support was calculated properly; 2) whether the tax exemptions were allocated appropriately; 3) whether the marital residence was fairly valued; 4) whether he should reimburse Cheryl for their children's private school tuition; 5) whether he should

reimburse Cheryl for payments made for their sons' piano lessons; 6) whether he should receive a partial reimbursement of money that he paid towards the consolidation loan; and 7) whether the DRC properly allocated the cost of the custodial evaluation fee during the divorce proceedings.

Child Support

John argues that the circuit court erred in calculating the monthly child support obligation at \$700.² It is his position that since the circuit court granted nearly an equal amount of contact time to each parent, a split custody calculation, as set forth in KRS 403.212(6) applied.

On the other hand, Cheryl argues that KRS 403.212(6) only applies to split custody situations, not situations that are near or similar to split custody. Cheryl posits that she is, as mandated by the circuit court order, the residential custodian of all three children, and therefore a split custody arrangement is not present.

Since the interpretation of a statute is a question of law, a trial court's interpretation thereof is subject to *de novo* review by the appellate court. Clary v. Clary, Ky. App., 54 S.W.3d 568, 571 (2001). KRS 403.212(6) specifically refers to child support obligations in a split custody arrangement.

²The circuit court already reduced the amount of child support John would owe pursuant to the child support guidelines from \$1,035.80 to \$700.

KRS 403.212(2)(h) offers the statutory definition of "split custody" as follows: "[s]plit custody arrangement means a situation where each parent is the residential custodian for one (1) or more children for whom the parents share a joint legal responsibility."

The circuit court addressed this issue when it held that the DRC erred when it gave Cheryl the title, "primary residential custodian," rather than just "residential custodian." The circuit court reasoned that because the amount of custody John and Cheryl were granted was nearly equal, naming Cheryl the "primary residential custodian" was inappropriate.³ Instead, the circuit court was clear in its intent by holding that Cheryl was a "residential custodian" and not a "primary residential custodian." The circuit court clearly defined Cheryl as the "residential custodian" of all three children, and gave John no such title. The custodial situation that was set forth by the circuit court's opinion is clear. John and Cheryl have joint custody of their children, with Cheryl being the residential custodian. Therefore, there is no "split custody" situation presented here. The statutory definition of "split custody," set forth in KRS 403.212(2)(h), clearly states that each parent must be a residential custodian of one or more of

³The circuit court allocated to Cheryl 53.34% of the time with the children, and to John the remaining 46.66% of the time.

the children. Since there is no split custody situation present, the calculation found in KRS 413.212(6) advanced by John is not applicable to this case.

Furthermore, we hold that the circuit court did not abuse its discretion in setting the amount of child support that John should pay at \$700. The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000). When the amount of support ordered by the trial court is reasonable in relation to the obligor's income and it falls within the guidelines of the Child Support Chart, the court has not abused its discretion. James v. James, Ky. App., 618 S.W.2d 187, 189 (1981). Here, the circuit court already deviated from the child support guidelines specifically because of the amount of time the children will spend with each party. Pursuant to KRS 403.211(2) the circuit court substantially reduced the amount of monthly child support John owes from \$1,035.80 to \$700. Since the circuit court reduced the amount set by the guidelines with respect to John's income to a lower amount, the court's decision was not arbitrary or unreasonable.

For the aforementioned reasons, the circuit court's calculation of child support will not be disturbed.

Allocation of Tax Exemptions

John argues that the circuit court improperly allocated the tax exemptions each party would obtain for the children. The circuit court ruled that Cheryl would receive the tax exemptions for the parties' two older children, Russell and Geoffrey, and John would receive the tax exemption for their youngest child, Erin. John argues that since his salary is higher than Cheryl's, it would maximize the amount of support and care for the children by allocating all three tax exemptions to him.

Cheryl points out that while John is asking for a further reduction in his monthly child support obligation, he is also simultaneously asking the court to extend him the benefit of all three tax exemptions for the children. Cheryl also argues that the circuit court exercised its discretion in a reasonable manner when it allocated the tax exemptions between the parties.

A trial court has broad discretion in allocating the tax exemptions between the parties so as to maximize the benefit of the exemption for the children. Hart v. Hart, Ky. App., 774 S.W.2d 455 (1989). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Goodyear Tire and Rubber Co., 11 S.W.3d at 581.

In the case at bar, the DRC and circuit court could have allowed Cheryl to claim all three tax exemptions because she has custody of the children for the greater part of the year. 26 USC § 152(e) (2003). However, the court granted John one of the three tax exemptions, rather than none. In addition, the circuit court allowed John to claim the youngest child, which would allow him to have a longer period of time in which he could claim the exemption. Therefore, John will have the benefit of the tax exemption for three years longer than Cheryl.

Furthermore, the difference in salaries between John and Cheryl is not significant enough to conclude that the circuit court was arbitrary or unreasonable in its conclusion. John generates 62% of the parties' adjusted parental gross income, and Cheryl the remaining 38%. The appellant cites Marksberry v. Riley, Ky. App., 889 S.W.2d 47 (1994), as support for his argument that the amount of income is a factor the court should consider when exercising its discretion to allocate tax exemptions in such a way that it will maximize the benefit of the children. Although we do not disagree with that proposition, we note that the mother in Marksberry was an unemployed full-time student, with no income at all. Id. at 48. In that case, the court held that the tax deduction for the parties' children, which allowed the father to claim the deduction in alternating years, was proper because, *inter alia*,

the mother was unemployed and without income. Id. In the case at bar, Cheryl is an employed nurse, generating a monthly income of \$3,166.80. Clearly, here the circuit court could have reasonably determined that Cheryl was capable of utilizing the tax exemptions for the benefit of the children.

The circuit court had the discretion to award Cheryl all three tax exemptions, but chose not to go that far. Instead, the circuit court granted John one of the three tax exemptions. In fact, John was granted the youngest child so as to make the duration of his tax exemption substantially longer than Cheryl's. For the above stated reasons, the circuit court's conclusion was neither arbitrary nor unreasonable. The court did not abuse its discretion by allocating two tax exemptions to Cheryl.

Valuation of the Marital Residence

John argues that the circuit court erred in setting the value of the marital residence at \$82,000. Each party submitted his or her respective appraisal to the court for purposes of setting an equitable value on the marital residence. The appraisal that Cheryl offered to the court, which was performed on October 27, 1999, set the value at \$79,000. However, John submitted an appraisal that was performed on March 10, 2000, which set the value of the residence at \$85,000. The DRC recommended, and the circuit court accepted, the difference

between the two appraisal values, or \$82,000 as the appropriate value to place on the residence. John argues that his appraisal should have been the appropriate value because the residence was purchased in 1994 for \$73,000 and a period of six years had elapsed making \$85,000 the more accurate appraisal value.

Cheryl disagrees, arguing that the circuit court's valuation of the marital residence was proper because accepting such a midpoint between the two offered appraisal values was appropriate and not an abuse of discretion.

An appellate court will not disturb the circuit court's valuation of marital property unless it is clearly contrary to the weight of the evidence. Heller v. Heller, Ky. App., 672 S.W.2d 945, 947 (1984). Here, it is plain from the record that the circuit court accepted both appraisal values and split the difference. There is nothing in the record, or in John's brief, to indicate that such a finding is clearly erroneous. John suggests that the difference between the purchase price in 1994 and his suggested appraisal value in 2000 would only yield a 3.2% yearly increase. However, this still does not establish that the value the circuit court placed on the property was clearly erroneous. In fact, the circuit court was given competent evidence to determine that the residence was worth only \$79,000, but it did not accept that figure either. Instead, the court held the value of the residence was the

midpoint of the two appraisals submitted into evidence. The circuit court's conclusion was supported by the evidence, and therefore, was not clearly erroneous. The circuit court's valuation of the marital residence at \$82,000 will not be disturbed.

Private Parochial School Tuition

John contends the circuit court erred when it ordered him to reimburse Cheryl for her payment of their children's private school tuition because it was not mentioned in any pre-trial document nor was there an agreement between the parties' resolving the issue. John suggests that Cheryl's explanation that notice was given to him by reference to paragraph 11(d) of the Joint Statement⁴ is lacking, and hence, insufficient.

Cheryl counters, with the argument that the circuit court was correct in its holding that the private school tuition is a marital debt, and therefore, should be equally divided. To support this argument, Cheryl points out that the parties' children have attended private parochial school at all times the parties were residing together, during the divorce proceedings, and through the date of the final hearing. Therefore, Cheryl argues that John was on notice that this was a marital debt that needed to be resolved in the litigation.

⁴11(d) of the Joint Statement states, "[m]arital debts and credit for payments made since date of separation."

"[I]ssues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard." Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 523 (2001). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Goodyear Tire and Rubber Co., 11 S.W.3d at 581. Here, the facts clearly indicate that John had actual knowledge that the children had been, and continue to be, attending a private school that requires tuition to be paid.

Further, as Cheryl points out, John's argument that since the tuition was not specifically cited in the pre-trial documentation, it should not have been litigated in the proceedings, is flawed based upon his own conduct in the litigation. John sought and obtained reimbursement of payments made by him for loans that were taken out against his retirement account that were not specifically mentioned in any pleadings of the record. The circuit court, by exercising its discretion, concluded that this debt, also not mentioned in any pre-trial documents, was also a marital debt. Therefore, John in essence, is disagreeing with the reasoning that conferred him a judgment in his favor.

Moreover, the DRC recommended, and the circuit court agreed, that John's obligation to contribute half of the

children's private school education only applied to the current school year of the litigation. In other words, John would not be responsible to pay any of the children's private school tuition for subsequent school years, unless he agrees to do so. Clearly, this demonstrates that the circuit court was being reasonable and equitable. John knew that his children had been, and were, attending private school, therefore, he should be responsible for half of the payments. However, if he does not subsequently agree to contribute to his children's private school education he does not have to.

We conclude that the circuit court's assignment of the children's private school tuition, through the then current school year, as a marital debt was not an abuse of discretion. Therefore, the circuit court's conclusion on this issue will stand.

Payments Made For Piano Lessons

John challenges the circuit court's holding ordering him to reimburse to Cheryl 50% of the her payments made for their children's piano lessons. It is John's position that the payments made for the piano lessons were not a debt at all because Cheryl's father paid for the lessons without expecting to be reimbursed. Further, John argues that even if Cheryl's father did not pay for the piano lessons, the child support he

had been ordered to pay should cover the costs of the piano lessons.

Cheryl argues that the debt existed prior to the separation of the parties, thus making it a marital debt. Cheryl further argues that even if her father contributed to those expenses at some point in the past that does not change the fact that the debt was incurred prior to the dissolution, and that the lessons were a benefit to their children. Therefore, John should be responsible for 50% of any payments made by her for piano lessons.

"[I]ssues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard." Neidlinger, 52 S.W.3d at 523. The trial court's decision will not be disturbed on appeal unless it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Goodyear Tire and Rubber Co., 11 S.W.3d at 581.

In the instant case, the parties' two sons, Russell and Geoffrey, had been taking the piano lessons since they were in kindergarten. In fact, the two children are still participating in the piano lessons. Therefore, the parties' have been absorbing the debt for these lessons for a long time. Further, Cheryl specifically testified that her father had not been sending her money as consistently as he did in previous years. In fact, the circuit court found that the small amounts

of money Cheryl's father periodically sent was not specifically intended or used for the piano lessons. In addition, the circuit court found that Cheryl, not her father, paid for the majority of the piano lessons.

John relies on Smith v. Smith, Ky. App., 845 S.W.2d 25 (1993), to argue that John's child support payments should cover the expense of the piano lessons. In Smith, this court held that the debt incurred from the parties' music lessons did not constitute an extraordinary education, for which the husband would be responsible. Id. at 26. Here, however, Cheryl is not attempting to increase John's child support by including the piano lessons in the child support calculation. Instead, the circuit court treated the lessons as an existing marital debt. Clearly, allocating an existing marital debt is very different from increasing one's child support obligation to cover the cost of piano lessons.

Since the payment of the children's piano lessons was an existing debt prior to the parties' separation and dissolution, and because the payments did not only benefit one of the parties, the circuit court properly concluded that the payments were a marital debt. Again, the circuit court's decision was neither unreasonable nor arbitrary. Therefore, we hold there was no abuse of discretion and the circuit court's conclusion will not be disturbed.

Consolidation Loan

John contends that the circuit court erred in ordering him to pay 50% of the \$2,000 portion of the consolidation loan, which represented the amount Cheryl paid to satisfy the debt for John's vehicle. Specifically, the \$2,000 in dispute represents a portion of a \$6,410.85 consolidation loan that the parties undertook together. Cheryl was required to pay off the consolidation loan in order to place the mortgage for the marital residence in her own name after the dissolution. John argues that the amount of money that he received from the equity in the marital residence in proportion to the value of the home was incorrect and caused him to receive less than he should have, as such he argues he should not be obligated to pay his 50% share of the \$2,000 portion of the consolidation loan.

Cheryl argues that the consolidation loan was acquired during the marriage to pay family debts, including \$2,000 to pay off the debt on John's vehicle. Cheryl further argues that since John received the benefit of that debt being satisfied he should be required to pay Cheryl 50% of that payment. Moreover, Cheryl asserts that the connection John places on the equity in the marital residence and the satisfaction of the consolidation loan is misplaced.

The distribution of debts incurred during the marriage is reviewed under an abuse of discretion standard. Neidlinger,

52 S.W.3d at 523. Here, the circuit court concluded that the assignment of the debt was proper because the loan was assumed during the marriage and for the benefit of paying off debts, *inter alia*, John's vehicle. It was not arbitrary or unreasonable for the circuit court to conclude that John had benefited from this loan being paid in full by Cheryl. In addition, we find no connection between the valuation of the house and the consolidation loan. Therefore, we conclude that the circuit court did not abuse its discretion in ordering John to pay Cheryl 50% of the \$2,000 used to pay off the consolidation loan.

Custodial Evaluation Fee

John also challenges the circuit court's conclusion that the custodial evaluation fee, used during the course of the litigation to determine, *inter alia*, child custody issues, should be allocated in proportion to each of their respective salaries. In other words, the circuit court concluded that John should pay 62% of the fee, and Cheryl 38%, based on their combined salaries. John argues that this debt should be treated the same as the other judicially resolved debts, which is a 50/50 split.

Cheryl disagrees, arguing that John is the one who requested a custodial evaluation. In fact, Cheryl initially objected to the need for such an evaluation. Furthermore,

Cheryl argues that this debt should be treated differently from the other debts because they were marital debts accumulated during the course of their marriage, whereas this is a litigation-related expense that was initiated due to John's insistence.

Expenses connected with the trial or preparation of the case will not be disturbed unless the trial court abused its discretion. Scott v. Scott, Ky., 433 S.W.2d 631 at 635 (1968). See also, Justice v. Justice, Ky., 421 S.W.2d 868 (1967). In the case at bar, John initiated and insisted upon the evaluation over Cheryl's objection. In fact, the DRC expressed his reluctance to allow such an evaluation because he stated that he usually found them unhelpful. However, the DRC allowed John to have a custodial evaluation conducted, and later commented that this particular custodial evaluation was more helpful than previous ones he had ordered. The custodial evaluation clearly benefited John because as a result of it he was able to attain custody of the parties' children 46.66% of the time. Furthermore, the DRC specifically mentioned during the trial that he usually required the party who initiated or requested such an evaluation to pay the entire cost. However, because this particular evaluation was so helpful in resolving the custody issue, the DRC stated that he would not require John to pay the entire cost. Instead, he required him to pay only 62%

of the cost. We believe this reasoning and conclusion to be proper; therefore, we find no abuse of discretion.

For the foregoing reasons, the March 27, 2002, opinion and order of the Woodford Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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