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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001246-MR

ROBERT E. LADD

APPELLANT

v. APPEAL FROM CHRISTIAN FAMILY COURT
HONORABLE JUDY A. HALL, JUDGE
ACTION NO. 98-CI-01220

PATRICIA DAY LADD

APPELLEE

AND: NO. 2006-CA-001315-MR

PATRICIA R. DAY

CROSS-APPELLANT

v. APPEAL FROM CHRISTIAN FAMILY COURT
HONORABLE JUDY A. HALL, JUDGE
ACTION NO. 98-CI-01220

ROBERT E. LADD

CROSS-APPELLEE

OPINION
AFFIRMING

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BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI¹, SENIOR JUDGE

GUIDUGLI, SENIOR JUDGE: Robert Ladd (“Robert”), on direct, and Patricia Day

Ladd (“Patricia”), on cross, individually appeal portions of the Christian Family Court's

Order and Judgment entered May 22, 2006. We affirm.

The parties were married on June 10, 1988. Robert was self-employed as a real estate developer and business owner and Patricia was employed as a teacher in Montgomery County, Tennessee. The parties had one child during the marriage, Justin, born October 9, 1996. The parties separated on November 5, 1998. On November 24, 1998, a temporary order was issued awarding joint custody of Justin to the parties. On December 29, 1998, an order was entered establishing a time-sharing arrangement which resulted in Justin being with Robert approximately 40% of the time and with Patricia approximately 60% of the time.

Throughout the marriage, the parties bought and sold numerous tracts of real estate and acquired personal property. Prior to the marriage, Robert owned some real property as well as three pawn shops which housed inventory. A majority of the personal property acquired by the parties during their marriage, as well as non-marital property brought into the marriage by Robert, was liquidated after the filing of the divorce action

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

on November 12, 1998. The proceeds from this court-ordered sale of property were placed in an account in the Christian County Circuit Clerk's office, held by the clerk and paid out for attorney's fees, storage costs, ad valorem taxes and other expenses.

In July of 2002, Patricia requested an adjustment to the time-sharing arrangement. In his response, Robert requested an alternate adjustment. After considering the requests, but without an evidentiary hearing, the court ruled in favor of Robert's proposed time-sharing adjustment which would allow each parent to have Justin 50% of the time. Patricia filed a motion to alter, amend or vacate, requesting reconsideration, bifurcation of the custody issue and an evidentiary hearing. In February of 2003, the court conducted a custody hearing, which included testimony from the infant child, and entered an order on May 5, 2003 awarding joint custody of Justin to the parties. An interlocutory decree for dissolution of marriage was entered November 10, 2005. The court conducted a final evidentiary hearing in February of 2006 on the issues of child custody, division of marital property and debt and restoration of non-marital property. A final judgment and order, on all issues, was entered on May 22, 2006. This appeal and cross-appeal followed.

In his direct appeal, Robert argues the family court committed seven errors. They are: 1) failure to designate and award certain real estate as non-marital; 2) failure to designate and award certain items contained in storage as non-marital; 3) requiring Robert to pay for a private detective that Patricia hired; 4) requiring Robert to pay certain income tax indebtedness; 5) ordering Robert to pay Patricia for an interest in certain

businesses; 6) using the method of alternate selection to distribute marital real estate; and 7) ordering the parties to alternately claim Justin on their tax returns.

In her cross-appeal, Patricia, in addition to refuting Robert's arguments, argues the following family court errors: 1) the award of joint custody to the parties and failure to designate Patricia as primary physical custodian; 2) modifying custody without an evidentiary hearing; and 3) failure to award Patricia marital equity in two properties located on Durrett Drive in Clarksville, Tennessee.

We will first address those issues raised by Robert. Robert first argues that the court erred by failing to award certain real estate and personal property as non-marital property. “Findings of fact 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. We are therefore bound to the findings of a court in a divorce proceeding unless we find them to be “clearly contrary to the weight of the evidence.” *Clark v. Clark*, 782 S.W.2d 56, 58 (Ky. App. 1990). Legal issues will be reviewed de novo and conclusions of law will not be disturbed absent an abuse of discretion. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002). An abuse of discretion “implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Id* at 783 (citation omitted).

In dividing marital property, including debts, appurtenant to a divorce, the trial court is guided by [KRS 403.190(1)], which requires that division be accomplished in 'just proportions.' This does not mean, however, that property must be divided equally.

Lawson v. Lawson, 228 S.W.3d 18 (Ky. App. 2007) (internal citations omitted). The party claiming property as non-marital bears the burden of proving such. *Hunter v. Hunter*, 127 S.W.3d 656, 660 (Ky.App. 2003).

As his non-marital property, Robert claims twelve real estate tracts. He claims that one parcel was given to him as a gift from his father and the others were owned by him prior to his marriage to Patricia. Testimony regarding the alleged gifted property (known as RL-27) was conflicting. The other eleven tracts were owned by Robert prior to the marriage, but later mortgaged. The funds from the mortgages were allegedly used to purchase more tracts of land, which Robert did not claim a non-marital interest in. The mortgages were paid with marital funds. If Robert was unsuccessful at tracing the mortgage payments to the benefit of marital property and receiving all of his non-marital property, it is because he failed to meet his burden of proof, and therefore we do not find an abuse of discretion.

Robert also claims a non-marital interest in certain documents located in a storage facility. All property in this location was to be divided between the parties through the process of alternate selection. Robert's testimony during the trial reflected his claim that these items were non-marital in nature. Again, his inability to persuade the trial court is not an abuse of discretion.

Robert next argues that the trial court erred in ordering him to pay fees to Pennyrile Detective Agency for surveillance. "As with issues pertaining to the assignment of marital property, issues pertaining to the assignment of debts incurred

during the marriage are reviewed under an abuse of discretion standard.” *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). There is no statutory authority for assigning debts in an action for dissolution of marriage, but rather such assignments are made as a matter of common law. A panel of this court has held that debts incurred after the separation of the parties but before entry of the final decree, should be assigned to the party who incurred them. *O’Neill v. O’Neill*, 600 S.W.2d 493, 496 (Ky.App. 1980). Other panels have held that such debts could be deemed marital in nature if incurred to benefit the family, to provide necessary support for children, or if incurred to acquire property later designated as marital. *Gipson v. Gipson*, 702 S.W.2d 54, 55 (Ky.App. 1985); *Daniels v. Daniels*, 726 S.W.2d 705, 706-07 (Ky.App. 1986). The panel in *Daniels* clarified itself by stating that all such debts “are presumed to be marital debts unless the presumption is rebutted.” *Id.* This treatment of debts accrued subsequent to separation, but before entry of a divorce decree was followed in subsequent decisions. *Underwood v. Underwood*, 836 S.W.2d 439, 445 (Ky.App. 1992). Another panel of this court held that a debt incurred after separation for the sole benefit of the party by whom it was incurred should be assigned to that party alone. *Van Bussum v. Van Bussum*, 728 S.W.2d 538, 539 (Ky.App. 1987).

It appears that the trial court's presumption for the debt incurred through the use of the Pennyrile Detective Agency is that it is marital. Robert argues that the services of the agency were contracted by and for Patricia alone. We do not agree. Testimony reflects that the agency was hired in an effort to discover information regarding Robert's

interaction with Justin and the movement and possible dissipation of marital assets. It is understandable how the court could have assigned this debt to Robert, either as a marital debt or as an equitable assumption of a debt accrued because of his misconduct. Either way, it is within the court's discretion and we see no abuse.

The treatment of income tax indebtedness would be the same as any other debt accrued during the marriage. Robert argues that Patricia should be held responsible for part of the 2004 income tax indebtedness because she received the benefits of the debt. While we may have decided the issue differently, it nonetheless fails to be an abuse of discretion.

Robert's next argument is that the trial court erred in ordering him to pay Patricia the sum of \$425, 401.00 for her interest in certain business partnerships owned during the marriage. In support of his argument, Robert cites the business appraisal. He argues that the appraiser failed to consider the income tax liability assumed by Robert, when determining Patricia's share. Robert had ample opportunity during the action to present any alternate values of the businesses. If he failed to convince the trial court that the business values should be reduced by any amount, it is not an abuse of discretion that can be remedied by this court.

Robert next argues that the trial court erred by ordering the marital real estate be divided by process of alternate selection. Robert's suggested division was to have the properties sold and the proceeds split. He maintains that the process of alternate selection is not a division, but rather allows the parties to divide the property themselves.

He further argues that the alternate selection process is not in accordance with KRS 403.190 which requires a division of 'just proportions.' We do not agree with either of these arguments. As we have already stated, just proportions does not mean equal proportions. Again, while this is another issue we may have decided differently, it is not an abuse of discretion. Because the parties will take turns selecting their properties, there is no reason to believe the division will not be just. Robert is free to take his properties and do with them as he wishes. Furthermore, since Robert has no interest in retaining any particular pieces of property, he has suffered no prejudice.

Robert's final argument is that the trial court erred in ordering the parties to alternate years claiming Justin for tax exemption purposes. In support of this argument, Richard states that he pays the majority of the support for Justin.

The law is well-settled in this jurisdiction that the trial court has the discretion to allocate the tax exemption between the spouses, in spite of 26 U.S.C. § 152(e) which permits the deduction to be taken by the custodial parent. The trial court is to be guided in the exercise of its discretion by making an allocation which will best maximize the benefit of the exemption and 'the amount available for the care of the children.'

Pegler v. Pegler, 895 S.W.2d 580 (Ky.App. 1995) quoting *Hart v. Hart*, 774 S.W.2d 455, 457 (Ky.App. 1989). In the present case, there is no designated custodial parent. Instead, the timesharing arrangement is such that Justin spends equal time with both parents. In the past, we have granted broad discretion to the trial court and have refused to find an abuse of discretion in permitting parties to take the tax exemption in alternating years, even when one was unemployed. *Marksberry v. Riley*, 889 S.W.2d 47 (Ky.App. 1994).

Similarly, we refuse to find an abuse of discretion here and thereby affirm the family court's decision.

Patricia argues in her cross-appeal that the family court's finding that an award of joint custody with equal time to both parties was in Justin's best interest was clearly erroneous. A custody award shall not be disturbed unless it constitutes an abuse of discretion. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App.,2005).

'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.' ... The exercise of discretion must be legally sound.

Id. (quoting *Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky.App.,2002) (quoting *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky.1994))).

The precedent for determining child custody is set out in KRS 403.270, which fixes the child's best interest as the determining factor. The Christian Family Court held numerous hearings on the issue of child custody over the lengthy duration of this action and a custodial evaluation was conducted. The court found that both parents make significant contributions to the the well being of Justin, are actively involved in his care, are bonded with him and show an active interest in his care, education and social development. The court also noted, by referencing the custody evaluation, that the logistical problems of two households made facilitation of Justin's schedule difficult.

We recognize that a dissolved marriage is not the ideal situation in which to rear a child and that parties often fail to amicably cooperate with one another. This does not mean that one parent takes automatic precedence over the other. Based on the family

court's findings, we do not find its decision to be unreasonable or unfair and therefore affirm.

Patricia next argues that the trial court's modification of temporary custody on August 6, 2002 without an evidentiary hearing was an abuse of discretion. Custody and time-sharing are two separate and distinct issues. KRS 403.350 requires a motion and affidavit from a party seeking a temporary custody order or modification of a custody decree. KRS 403.350 also requires the court to hold a hearing before granting the request. No new custody decisions were made until the custody issue had been bifurcated, the court had held a hearing and the May 5, 2003 order, awarding joint custody, was entered. Even at that time, the custody remained joint, as it had always been. The controlling documents in the record, at the time Patricia filed her motion to amend timesharing, were the November 24, 1998 temporary order awarding joint custody and the December 29, 1998 order establishing a time-sharing schedule. Robert, in his response, was not seeking a custody modification, but rather a timesharing modification. In fact, Robert was seeking the same thing Patricia was, just with different terms.² The August 6, 2002 order altering the timesharing schedule between the parties had no bearing on the custody arrangement, which remained joint. Patricia's challenge of the timesharing change, under a statute pertaining to custody, is moot.

Patricia's final argument is that the trial court abused its discretion by failing to award her marital equity in certain rental properties located on Durrett Drive in

² It should be noted that Patricia failed to file an affidavit with her motion to alter timesharing yet argues that Robert's failure to do the same is error.

Clarksville, Tennessee. In support of her argument, Patricia claims that after the parties separated, she had been making the monthly mortgage payments on these properties. As already noted above, all property acquired after marriage and before a decree of legal separation is presumed to be marital property, under KRS 403.190(3). This includes income from employment. Therefore, any income of Patricia's that was used to pay the mortgages of any properties was marital income. It is recognized that these parties owned an extensive amount of real property during the marriage and mortgage payments were made by both parties. Both parties carried the same burden of proving the non-marital interest in any properties. Patricia's failure to prove otherwise during the trial is not an abuse of discretion by the trial court.

For the foregoing reasons, the May 22, 2006, Order and Judgment of the Christian Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

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