

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000496-ME
&
NO. 2007-CA-001450-ME

BARRY L. EUBANK

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM ANDERSON CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, JUDGE
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 05-CI-00018

KATHY A. EUBANK

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

STUMBO, JUDGE: This appeal and cross-appeal arise from a decision of the Anderson Family Court concerning issues of custody, child support, parenting time, and distribution of marital and non-marital property and debt. Barry L.

Eubank, Appellant and Cross-Appellee (hereinafter Mr. Eubank), has six

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

arguments on appeal. They include alleged errors in custodial arrangements, child support obligations, property valuation, monetary awards, a stock distribution, and a debt allocation. Kathy A. Eubank argues that the trial court should be affirmed on all the above issues and cross-appeals on two issues of child support. After reviewing the law, facts, and record on this case, we affirm the trial court as to Mr. Eubank's issues and find that one of Ms. Eubank's issues is moot and the other is not ripe for our judgment.

Mr. Eubank's first argument is that the trial court erred in failing to award the parties joint and equal custody of their son, Will Thomas Eubank. The parties were awarded joint custody, but Ms. Eubank was declared the primary residential custodian. Mr. Eubank argues that neither parent should be the primary residential custodian and that they should have equal time and control over the raising of their child. He states that the court has no statutory authority to make one parent the primary residential custodian.

One parent may be designated primary residential custodian in joint custody cases. *Fenwick v. Fenwick*, 114 S.W.3d 767, 776 (Ky. 2003). This status does not arise by statute, but from either an agreement by the parties or by an order of the court. *Id.* at 779. The trial court is required to determine the custody arrangement in accordance with the best interests of the child. KRS 403.270(2). The trial court here decided that the parents should have joint custody, but that Ms. Eubank should be the primary residential custodian. The court's decision is supported by evidence in the record, including the custodial evaluation of Dr. Paul

Ebben. We find that the trial court did not abuse its discretion in designating Ms. Eubank the primary residential custodian. Additionally, the joint custody arrangement with Ms. Eubank as primary residential custodian does not violate KRS 403.270 as there was evidence to support a finding that this was in the best interest of the child.

Mr. Eubank's second argument is that the trial court erred in calculating child support and requiring him to pay arrearages. First, Mr. Eubank claims that child support in this case should be calculated as if it were a split custody arrangement. A split custody arrangement is a "situation where each parent is the residential custodian for one (1) or more children for whom the parents share a joint legal responsibility." KRS 403.212(2)(h). Accordingly, Mr. Eubank argues that the split custody child support calculation set forth in KRS 403.212(6) should have been used. This is not a split custody arrangement because Ms. Eubank was made the residential custodian. Even though the parties have joint custody and have almost equal time with the child, child support can still be ordered. *Downey v. Rogers*, 847 S.W.2d 63, 64 (Ky. App. 1993).

Additionally, Mr. Eubank contends the trial court erred in finding that there was an arrearage of child support. He argues that there was no order directing him to pay child support until June 17, 2005. He claims that until the order was entered, he had no duty to pay the support. While Mr. Eubank is correct that the order was not entered until June 17, 2005, the original motion for child

support was filed on March 11, 2005. Further, a hearing was held on the matter on March 29, 2005, at which Mr. Eubank did not appear.

KRS 403.160(2)(a) allows an award of child support to be retroactive to the date the original motion was filed. Therefore, the trial court could direct Mr. Eubank's child support payments to begin as of March 11, 2005, and not June 17, 2005, when the order was actually entered. The arrearage found was for the time from March 11, 2005, to June 10, 2005. We affirm the lower court's decisions regarding Mr. Eubank's child support obligations.

Mr. Eubank's third argument concerns the valuing of certain pieces of property. Mr. Eubank claims that the court erroneously valued his non-marital interest in two pieces of property and that based on this error, he was ordered to pay over \$75,000 to Ms. Eubank in order to equalize the amount of money and property each party received. Both parties submitted expert testimony regarding the value of each of the pieces of land. The Domestic Relations Commissioner (DRC) heard this testimony and found Ms. Eubank's expert more credible. Specifically, the DRC found that Mr. Eubank's expert contradicted himself a number of times and was unable to explain his method for valuing the property. The trial court agreed.

Because this claim of error revolves around findings of fact, we review using the clearly erroneous standard. *Hunter v. Hunter*, 127 S.W.3d 656 (Ky. App. 2003). *Hunter* goes on to say:

due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person.

Id. at 659. The DRC and the trial court both found that Mr. Eubank's expert was not credible. Having reviewed the record, we cannot find that holding to be clearly erroneous.

Also, Mr. Eubank claims that one of the pieces of property, an 88 tract of land with a house on it, increased in value because of general economic conditions and not through the joint efforts of the parties. Mr. Eubank purchased this land prior to the marriage and claims that any increase in its value was non-marital. Ms. Eubank testified that it was the joint efforts of the parties that improved the land and caused its value to increase. We cannot find any evidence to support Mr. Eubank's contention that general economic factors cause the increase in value. The only evidence related to the increase in this land's value was presented by Ms. Eubank. The DRC and the trial court both found that the increase in value was caused by the joint efforts of the parties and we agree. For these reasons we affirm the values the DRC used for the properties and find that the \$75,000 equalization payment was justified.

Mr. Eubank next argues that the court erred by awarding Ms. Eubank the first \$7,500 received from the sale of property located at 1400 Harry Wise Road, and then equally dividing any remainder of the proceeds. This property is a

two-acre tract of land which had a trailer located on it. The trailer burned down on February 18, 2006. The insurance on the property had lapsed on January 25, 2006, due to nonpayment of premiums. The trailer had been valued at \$15,000.

The lapse of the insurance policy seems to have occurred accidentally due to a confluence of events. When Ms. Eubank moved out of the marital home, she had all mail forwarded to her new residence. This included any mail that had both her name and Mr. Eubank's name on it. By agreement of the parties, they were to split the insurance premium on this property. Ms. Eubank received the premium bill and paid her half, but did not inform Mr. Eubank of her receipt of the bill. Mr. Eubank therefore did not pay his half of the premium and the insurance lapsed. Ms. Eubank contended that this failure was a dissipation of marital assets, but the court found Mr. Eubank did not intentionally try to deprive his spouse of her share of the property. *See Brosick v. Brosick*, 974 S.W.2d 498 (Ky. App. 1998)(discusses the elements of dissipation).

While we agree with the trial court that Mr. Eubank did not dissipate marital assets, he did agree on the record to pay half of the insurance premiums in November of 2005. The court ordered this property to be sold and the first \$7,500, which would have been half the value of the trailer had it not burned down, to be awarded to Ms. Eubank. It is unfortunate that Ms. Eubank did not inform Mr. Eubank of her receipt of the bill, but it was still his duty to pay half the premium and, as the trial court noted, he was aware of when the payment was due. We find

that giving Ms. Eubank the first \$7,500 from the sale of the property is supported by evidence of record.

Next, Mr. Eubank argues that the trial court erred in its valuation and award of stock to Ms. Eubank. The evidence contained in the record shows that Ms. Eubank was the only one to present evidence to the court of the value of the stock, \$21,875. The source of the valuation was the corporation itself. The stock was in the Citizens Commerce Bank, a closely-held corporation and Ms. Eubank's former employer. It was acquired during Ms. Eubank's employment at the bank. Mr. Eubank argues that the stock was worth more, but failed to provide any specific value. We find that the use of Ms. Eubank's value was proper because it was the only one the court had available to it.

Further, marital property is to be distributed in an equitable manner. KRS 403.190(1). According to KRS 403.190 (1)(a)-(d), when determining the disposition of marital property, the court can look to the “(a) [c]ontribution of each spouse to acquisition of the marital property . . . ; (b) [v]alue of the property set apart to each spouse; (c) [d]uration of the marriage; and (d) [e]conomic circumstances of each spouse when the division of property is to become effective”

Because the stock was acquired due to Ms. Eubank's employment and Mr. Eubank was awarded substantially more property equity than Ms. Eubank, we find that the court did not err in awarding Ms. Eubank all the stock. This award adheres to the marital property disposition factors set forth above.

Mr. Eubank's final argument is that the trial court erred when it assigned \$21,000 of a second mortgage loan debt solely to him. During the marriage, the parties borrowed \$125,000 to purchase a lot in a subdivision. The purchase price of the lot was \$104,000. The parties kept the \$21,000 remaining from the loan. Ms. Eubank used \$1,160 of the remainder to either pay for the private schooling of the parties' son or to take a vacation, it is disputed as to which. After she removed this sum, Mr. Eubank withdrew the rest of the funds. He contends that he used it to pay various mortgage payments on marital property.

The court ordered the subdivision lot sold and that the full amount of any proceeds be applied to the \$125,000 debt. It further held that since Mr. Eubank solely retained over \$19,000 of the remainder, he would be responsible for any deficiency. "As with the division of marital assets, the trial court has broad discretion in its allocation of marital debt." *Lykins v. Lykins*, 34 S.W.3d 816, 822 (Ky. App. 2000). Just because marital debts are not divided equally does not mean that it was an inequitable decision. *See Id.* After our review of the record, we find that the trial court's allocation of marital debt is not clearly erroneous.

Ms. Eubank's cross-appeal concerns two issues of child support. First, she argues that the trial court did not have the authority to designate portions of the child support to be paid to a third party. Mr. Eubank was to pay a total of \$682 to Ms. Eubank in child support per month. The trial court allowed Mr. Eubank to pay \$300 of this obligation to the private school the parties' child was

attending as tuition payments. Ms. Eubank wants Mr. Eubank to pay this money directly to her instead. This issue has become moot since the filing of this appeal.

During the August 17, 2007, motion hour in the Anderson Circuit Court, a motion was heard which informed the court that the parties' child was no longer attending a private school, but was instead attending the Shelby County West Middle School. Since a public school does not require tuition, the court ordered Mr. Eubank to pay the full child support amount to Ms. Eubank. This order makes this portion of Ms. Eubank's cross-appeal moot.

The second issue on cross-appeal is the trial court's abatement of the approximately \$1,400 child support arrearage. A hearing was held on May 25, 2007, during which the court appears to have ordered Mr. Eubank's child support arrearage to be abated in order to help him make payments on a second mortgage. Ms. Eubank argues that this is impermissible because the funds are to be used solely for the benefit of the child. We cannot, however, find where an actual order abating this arrearage was entered. After the hearing, counsel for Ms. Eubank was to tender an order encompassing all the decisions made during the hearing. Nowhere in that tendered and subsequently signed order does it state that the child support arrearage is to be abated. We cannot find any order in the record regarding this matter. As such, this issue is not ripe for our review.

For these reasons, we hereby affirm the trial court as to Mr. Eubank's issues and decline to rule on the issues presented by Ms. Eubank as they are either moot or not yet ripe.

ALL CONCUR.

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