THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jennifer K. Walters, ... Appellant,

v.

Dibbon Carl Walters, ... Respondent.

Appeal From Dorchester County
Alvin C. Biggs, Family Court Judge

Unpublished Opinion No0. 99-UP-606
Heard June 9, 1999 - Filed November 29, 1999

AFFIRMED IN PART, REVERSED IN PART, MODIFIED IN PART & REMANDED

David L. DeVane, of Charleston, for appellant.

Gregory S. Forman, of Charleston, for respondent.

PER CURIAM: In this domestic action, Jennifer K. Walters (Wife) appeals numerous aspects of the family court's order. Wife also appeals certain evidentiary rulings made at trial. We affirm in part, reverse in part, modify in part, and remand.

BACKGROUND

Wife and Dibbon Carl Walters (Husband) married in March 1977 and separated in November 1994. The marriage produced two children, both of whom are minors.

Wife instituted this action against Husband in March of 1995, seeking, inter alia, a divorce on the ground of adultery, equitable distribution of marital property, custody of the parties' two minor children, child support, alimony, attorney's fees, and costs. Husband answered and included a plea for divorce on the ground of one year's continuous separation.

By order dated June 11, 1996, the family court granted Wife a divorce on the ground of adultery, yet found Wife primarily at fault in the breakdown of the marital relationship. The court awarded Wife provisional custody of the parties' minor children, granted Husband visitation, ordered Husband to pay child support, equitably divided the marital estate, denied Wife alimony, ordered Wife to pay seventy-five percent of the guardian ad litem and psychologist's fees and costs, and ordered each party to pay a portion of the other's attorney fees and costs. With a few exceptions, the family court denied Wife's subsequent motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Epperly v. Epperly, 312 S.C. 411, 440 S.E.2d 884 (1994). This broad scope of review, however, does not relieve the appellant of the burden of convincing us that the family court committed error. Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979). Nor are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981). Because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to trial court findings where matters of credibility are involved. See Aiken County Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 403 S.E.2d 142 (Ct. App. 1991).

DISCUSSION

Security for Child Support

Wife alleges the family court erred in failing to secure Husband's child support obligation by ordering Husband to maintain a life insurance policy listing her or the children as beneficiaries. We disagree.

Generally, the family court may require a supporting spouse to secure a child support obligation. S.C. Code Ann. § 20-3-160 (1985). However, the imposition of such a requirement must be based on justice, equity, and compelling reasons. See Fender v. Fender, 256 S.C. 399, 182 S.E.2d 755 (1971); Mallett v. Mallett, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996); Harlan v. Harlan, 300 S.C. 537, 389 S.E.2d 165 (Ct. App. 1990); Ivey v. Ivey, 286 S.C. 315, 334 S.E.2d 123 (Ct. App. 1985). The ability of the supporting spouse to pay (whether he or she earns adequate income to meet the obligation) and the spouse's willingness to pay are relevant factors. See Mallett, 323 S.C. at 150, 473 S.E.2d at 810; Harlan, 300 S.C. at 540, 389 S.E.2d at 167-68; Ivey, 286 S.C. at 318, 334 S.E.2d at 125.

Our review of the record reveals no compelling reason to require Husband to secure his child support payments. Husband does not suffer from any major health problems, Wife does not allege he has shunned his child support obligation, and he has adequate income to maintain the obligation. Should security become necessary at some point in the future, "the continuing jurisdiction of the family court affords ample opportunity to require security by life insurance." Ivey, 286 S.C. at 318, 334 S.E.2d at 125.

Fault

Wife contends the family court erred in determining she was primarily at fault for the breakup of the marriage, a finding she alleges adversely impacted her alimony and equitable apportionment awards. We disagree.

It is undisputed Wife denied Husband marital intimacies during the last few years of the marriage. Additionally, the record supports the family court's finding that "the evidence indicated vicious conduct and mistreatment of the Husband by the Wife." By way of example, Wife threatened to divorce Husband on several occasions prior to their ultimate separation, threw his belongings into the garage, stirred his food with the dog food spoon, cursed at him, and hit him. Although Husband sought marriage counseling when Wife began requesting a divorce, Wife was unwilling to see counselors because of the cost. We find no abuse of discretion in the judge's finding Wife was primarily at fault for the marital breakup. See Wilcox, 304 S.C. at 93, 403 S.E.2d at 144.

Alimony

Wife argues the family court erred in failing to award her alimony. We disagree.

An award of alimony rests within the sound discretion of the trial court whose conclusions will not be disturbed absent a showing of abuse of discretion. Williamson v. Williamson, 311 S.C. 47, 426 S.E.2d 758 (1993); Hatfield v. Hatfield, 327 S.C. 360, 489 S.E.2d 212 (Ct. App. 1997), cert. denied, (July 30, 1998). "An abuse of discretion occurs when [the court] is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support." McKnight v. McKnight, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984).

The family court may grant alimony in such amounts and for such term as the court considers appropriate under the circumstances. S.C. Code Ann. § 20-3-130(A) (Supp.1998). Twelve factors must be considered in deciding whether to make an award of alimony. These factors include the employment history and earning potential of each spouse; the current and reasonably anticipated earnings of both spouses; the marital and nonmarital properties of the parties, including those apportioned in the divorce action; the standard of living established during the marriage; as well as other factors

the judge considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 1998). Fault is an appropriate factor for consideration in determining alimony in cases where the misconduct affected the economic circumstances of the parties or contributed to the breakup of the marriage. S.C. Code Ann. § 20-3-130(C)(10) (Supp. 1998).

The family court's order indicates the court was aware of and considered the statutory factors. Although we may have accorded these factors different weights, we defer to the wisdom of the trial court and find no abuse of discretion. See generally S.C. Code Ann. § 20-3-130(C) (Supp. 1998) (vesting family court judge with discretion to weigh statutory factors).

Equitable Apportionment

A. Homemaker Equity

Wife asserts the family court erred in failing to consider her homemaker's equity when equitably dividing the marital estate. We disagree.

On review of the equitable apportionment of marital property, "this Court looks to the fairness of the overall apportionment. If the end result is equitable, it is irrelevant that this Court might have weighed specific factors differently than the trial judge." Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988) (internal citation omitted). This court will affirm the family court if it can be determined that the family court addressed the factors enumerated under the equitable apportionment statute with sufficiency for us to conclude it was cognizant of the statutory factors. West v. West, 294 S.C. 190, 363 S.E.2d 402 (Ct. App. 1987). See generally S.C. Code Ann. § 20-7-472 (Supp. 1998) (vesting family court judge with discretion to weigh statutory factors).

In the instant case, the family court expressly stated it had considered the factors prescribed by the equitable apportionment statute. On reconsideration, it specifically noted it had looked at the direct and indirect contributions of each party. We thus find no error.

B. Dissipation of Marital Assets

Wife argues the family court erred in failing to find Husband dissipated thousands of dollars in marital funds. We disagree.

Marital property is all real and personal property acquired during the marriage which is owned by the parties at the date of filing of marital litigation. S.C. Code Ann. § 20-7-473 (Supp. 1998). Section 20-7-473 requires the marital estate be identified as of a fixed date. In drafting the section, "the Legislature has elected to foreclose the spouses from litigating every expenditure or transfer of property during the marriage."

Panhorst v. Panhorst, 301 S.C. 100, 105, 390 S.E.2d 376, 379 (Ct. App. 1990). Although either spouse

> may have spent marital funds foolishly or selfishly or may have invested them unprofitably . . . [t]he statute wisely prevents the other spouse from resurrecting these transactions at the end of the marriage to gain an advantage in the equitable distribution. Were it to do otherwise, human greed and vindictiveness would transform the courts into "auditing agencies for every marriage that falters."

Id.

An exception to the above noted legal principle exists when the spouse disposing of the funds is deemed guilty of fraudulent transfers or dissipation of marital assets in contemplation of the breakdown of the marriage. Id. Here, however, there is no evidence Husband used the money for fraudulent purposes or to deprive Wife of her right to equitable distribution. Wife did not negate Husband's testimony that he used the funds he withdrew to pay marital debts.

C. Transmutation

Wife argues the family court erred in failing to find a lot given to Husband by his mother, upon which the parties built the marital home, was transmuted into marital property. We disagree.

Our review of the record convinces us the family court did consider both the lot and the home to be marital property. Although the court acknowledged the lot was gifted to Husband, it made no specific finding the value of the lot should be subtracted from the appraised value of the home. Rather, the court noted that Husband obtained financing without Wife's assistance, the mortgage was held solely in his name, and all mortgage payments were paid from Husband's income. Furthermore, testimony established that Husband, Wife, and Husband's father all helped in the actual construction of the home. We find the family court acted within its discretion in awarding Husband fifty-five percent of the martial home equity and Wife forty-five percent. "An equitable distribution is not necessarily an equal one." Barr v. Barr, 287 S.C. 13, 18, 336 S.E.2d 481, 484 (Ct. App. 1985). The relative contributions of the parties, including those made by the parties' family members, are important factors to consider in determining the proper portion of property owned in equity by each party. Id. at 18, 336 S.E.2d at 484-85.

D. Exclusion of Husband's Pension Plan

Wife asserts the family court erred in failing to include Husband's pension plan in the marital estate. We agree.

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The family court failed to include a portion of Husband's pension plan at First Citizens Bank because Husband held no vested interest in the plan at the time marital litigation commenced. This was error.

Husband's accounting expert testified the pension plan was a "cliff vesting" account and Husband would not acquire an interest in it until after five years of employment. We hold Husband's nonvested pension plan was marital property subject to equitable distribution.

"Marital property" is generally defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." S.C. Code Ann. § 20-7-473 (Supp. 1998). In South Carolina, vested retirement accounts are considered marital property. Murphy v. Murphy, 319 S.C. 324, 461 S.E.2d 39 (1995). Furthermore, military retirement accounts, whether vested or nonvested, are marital property subject to equitable distribution. Ball v. Ball (Ball II), 314 S.C. 445, 445 S.E.2d 449 (1994) (finding nonvested military retirement benefits to be a marital asset subject to equitable distribution); Tiffault v. Tiffault, 303 S.C. 391, 401 S.E.2d 157 (1991) (finding vested military retirement pay to be a marital asset).

We conclude Husband's pension account, though nonvested at the time of litigation, is marital property subject to equitable distribution. Under the same rationale as this court employed in Ball v. Ball (Ball I), 312 S.C. 31, 430 S.E.2d 533 (Ct. App. 1993), aff'd, 314 S.C. 445, 445 S.E.2d 449 (1994), the pension benefits Husband stands to acquire upon completing five years of employment would be, when received, a form of deferred compensation for services performed, at least in part, during the course of the marriage.

It is of no consequence the family court was unable to assign a value to Husband's pension plan at the time of trial. Under such circumstances, the family court should equitably divide the plan according to a delayed scheme of distribution. See Ball II, 314 S.C. at 447-48, 445 S.E.2d at 451.

Adhering to the family court's equal division of the marital property (excluding the marital home), we hold Wife is entitled to receive fifty percent of the marital portion of Husband's pension plan. If Husband's plan never vests and thus he never becomes entitled to receive any pension benefits, Wife will not be entitled to receive them either. See Ball I, 312 S.C. at 35, 430 S.E.2d at 535.

We remand this issue to the family court for disposition according to our decision herein. In particular, the court should determine the exact date Husband began participating in the First Citizens pension plan and the exact date marital litigation commenced in order to determine what portion of the plan is marital in nature. In the event the plan has already vested, the court is directed to assign this portion a value

certain and award it on a 50/50 basis, allowing Husband to retain the pension by offsetting other marital assets against it. If the plan has not yet vested or the value cannot be fairly calculated, the court is to award Wife fifty percent of the marital portion of Husband's benefit payments as he receives them. The family court is authorized to take additional testimony on this issue if necessary.

Evidentiary Rulings

A. Exclusion of Witness

Wife sought to call Sharon Kizer as a witness during her case in chief even though Kizer was not listed on Wife's answers to interrogatories. Wife's counsel explained that they had not intended to call Kizer, but as a result of Husband's cross examination they needed to do so. Wife's counsel also explained that Husband had notice of Kizer as a potential witness because of a letter sent to Husband's attorney prior to trial. The court excluded the witness, ruling Wife violated the applicable rules of discovery. The court, however, allowed Wife to proffer Kizer's testimony which established Kizer was Wife's sister-in-law and was involved in an adulterous affair with Husband. Wife argues exclusion of this witness was error. We disagree.

Exclusion of a witness not named in answer to an interrogatory is a matter within the discretion of the trial judge who has a duty to ascertain (1) the type of witness involved, (2) the content of the testimony, (3) the nature of the neglect, and (4) the degree of surprise to the opposing party. Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974); Brandi v. Brandi, 302 S.C. 353, 396 S.E.2d 124 (Ct. App. 1990).

Trial of this case began on January 29, 1996. Wife failed to add Kizer to her list of witnesses until mid trial. Furthermore, Wife did not adequately explain her failure to list the witness on her answers or to amend her answers prior to trial to include the witness. Under the circumstances as they existed at the time of trial, the unexplained nature of Wife's failure to identify Kizer as a witness in her answers, the time constraints involved, and a lack of showing of prejudice, we find no abuse of discretion by the trial judge in excluding the witness.

Additionally, we also disagree with Wife's contention that even if the trial court appropriately excluded Kizer as a witness in Wife's case in chief, Wife should have been able to call Kizer as a rebuttal witness. Admission of reply testimony is within the discretion of the trial judge which will not be disturbed absent an abuse of discretion. Kramer v. Kramer, 323 S.C. 212, 473 S.E.2d 846 (Ct. App. 1996). Here, Wife's counsel indicated he wished to proffer the same testimony he proffered earlier, this time to impeach Husband because Husband invoked the Fifth Amendment when asked questions regarding relationships with other women. We note Husband first pled the Fifth Amendment during Wife's case in chief. Moreover, the court freely admitted that each time Husband pled the Fifth, it presumed he committed adultery. We do not

believe the exclusion of this witness prejudiced Wife and find no abuse of discretion in the family court's determination that under these circumstances, Kizer should not be permitted to testify.

B. Exclusion of Evidence

At trial, Wife sought to enter a tape recorded telephone conversation into evidence. The family court excluded the tape based on the court's concerns about federal wiretapping laws. Wife asserts this was error.

We decline to determine this issue on its merits. Rather, we find that any error committed in refusing to allow the tape was harmless. The family court found Husband committed adultery and that his adultery contributed to the breakup of the marriage. Ultimately, the court granted Wife a divorce on the ground of adultery. We find little merit in Wife's argument the tape would have "illustrat[ed] the egregious nature and scope of the Husband's marital misconduct, i.e., not just one but multiple extramarital affairs." Our review of the record convinces us the family court was fully aware of Husband's marital misconduct, but also considered Wife's own marital misconduct. In our view, Wife suffered no prejudice due to the exclusion of the tape recorded conversation. See Doe v. Doe, 324 S.C. 492, 478 S.E.2d 854 (Ct. App. 1996) (explaining that to warrant reversal, the appellant must show both error and resulting prejudice).

C. Fifth Amendment Privilege

During the trial, both Husband and Susan Payne asserted their Fifth Amendment rights against self-incrimination in response to questions regarding an adulterous affair. In addition, Husband asserted his Fifth Amendment privilege as to three other women. Wife sought to have the court compel the witnesses to testify on the ground each had been granted immunity by the solicitors in their respective counties. The court refused, finding there was no evidence the attorney general had granted Husband or Payne immunity. On appeal, Wife contends the family court erred. We disagree.

Adultery is a criminal offense in South Carolina. See S.C. Code Ann. § 16-15-60 (1985). A conviction of adultery subjects the violator to punishment of up to one year imprisonment, or a $500 fine, or both. Id. The privilege against self incrimination, codified in both the United States Constitution and the South Carolina Constitution, prohibits compelling a witness to testify against himself. U.S. Const. amend V; S.C. Const. art. I, § 12; cf. S.C. Code Ann. § 19-11-80 (1985) (statutory privilege against self-incrimination). "[I]t is legally proper for persons facing criminal prosecution for adultery to invoke their Fifth Amendment privilege against self-incrimination." Griffith v. Griffith, 332 S.C. 630, 637, 506 S.E.2d 526, 529 (Ct. App. 1998). However, a witness in a civil trial may not invoke the right to remain silent absent a claim that

the answer might subject the witness to criminal responsibility. King v. Williams, 276 S.C. 478, 279 S.E.2d 618 (1981).

Here, Wife erroneously asserts Husband and Payne were under no threat of prosecution due to the grants of immunity from the county solicitors. In South Carolina, the Attorney General is the chief prosecuting officer and, as such, exercises authority to supervise prosecution of all criminal cases in courts of record. S.C. Const. art. V, § 24. The Attorney General, not the local solicitor, has the ultimate authority to decide when, where, and indeed whether an indictment should be presented. State v. Thrift, 312 S.C. 282, 440 S.E.2d. 341 (1994). Accordingly, the family court correctly held neither Husband nor Payne were free from threat of prosecution, and neither could be compelled to testify regarding the alleged adultery.

Regardless, Wife can show no prejudice resulting from the family court's refusal to compel Husband and Payne to testify regarding this matter. The family court granted Wife a divorce on the ground of adultery. Moreover, as noted earlier, the family court presumed an admission of adultery when Husband pled the Fifth Amendment. Therefore, we affirm the family court's decision. See Doe, 324 S.C. at 499, 478 S.E.2d at 858 (explaining that to warrant reversal, the appellant must show both error and resulting prejudice).

Weight Accorded Guardian ad Litem's Testimony[1]

Wife asserts the family court erred in granting Husband five weeks of consecutive summer visitation despite the guardian's recommendation that visitation be no longer than two consecutive weeks. We find no error. The function of a guardian ad litem in making custody and visitation recommendations is to aid, not direct, the court. In all cases, the ultimate decision as to custody and visitation lies with the trial court. See Dodge v. Dodge, 332 S.C. 401, 505 S.E.2d 344 (Ct. App. 1998). Here, the family court explicitly considered, but did not rely solely on, the guardian's recommendations. We find no abuse of discretion in the weight the court accorded the guardian's recommendation.

Guardian ad Litem and Psychologist's Fees

Wife also argues the family court erred in ordering her to pay seventy-five percent of the guardian ad litem and court appointed psychologist's fees. We disagree.

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[1] Although Wife's Issue on Appeal also states the court failed to grant sufficient weight to the psychologist's recommendation, Wife failed to present any arguments regarding this matter. Thus we only address the guardian ad litem's recommendation. See Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504 (1977) (ruling that an issue not specifically argued is abandoned).

"An award of guardian ad litem fees lies within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion." Nash v. Byrd, 298 S.C. 530, 537, 381 S.E.2d 913, 917 (Ct. App. 1989). "The same equitable considerations which apply to attorney's fees also apply to costs." Garris v. McDuffie, 288 S.C. 637, 644, 344 S.E.2d 186, 191 (Ct. App. 1986).

The family court found the evidence "clearly indicated a bitterness and anger of the Wife which resulted in her lack of cooperation in issues regarding the minor children." The court specifically found Wife tried to separate the children from Husband, while Husband tried to resolve issues involving the children. We find the record supports the court's finding Wife was uncooperative throughout the course of these proceedings regarding Husband's access to and relationship with the children. Accordingly, we affirm the family court's finding Wife should be responsible for seventy-five percent of the guardian ad litem and psychologist's fees.

Wishes of the Children

Wife contends the family court erred in refusing to allow the guardian ad litem to testify about the children's wishes regarding custody and visitation and in refusing to speak with the children in chambers regarding their wishes. We disagree.

It is within the sound discretion of the trial court to determine whether and to what extent the guardian ad litem may testify. Shainwald v. Shainwald, 302 S.C. 453, 395 S.E.2d 441 (Ct. App. 1990). We believe the court rightly allowed the guardian ad litem to testify to her observations and recommendations without specifically testifying to the particular wishes of the children. The children involved here were relatively young and still very impressionable. The record reflects that any preferences attributed to them may have resulted from the extreme negative attitude of Wife toward Husband. The family court did not abuse its discretion in restricting the guardian ad litem's testimony.[2]

We further find no error in the family court's refusal to interview the children regarding visitation. Family Court rules provide that in all matters involving children, "the family court judge shall have the right, within his discretion, to talk with the children . . . ." Rule 22, SCRFC. Particularly in a case such as this involving tremendous acrimony between the parents, forcing the children to express a preference would undoubtedly be more harmful to the mental well being of the children than helpful to the court. We find the family court did not abuse its discretion in refusing to speak with the children.

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[2] Moreover, Wife presented no argument as to why the judge erred in ruling that statements attributed to the children would be inadmissible hearsay.

Attorney's Fees

Lastly, Wife contends the family court erred in ordering each party to pay a portion of the other party's attorney fees.

We have reviewed the family court's findings in light of the factors enumerated in Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991). Under the facts and circumstances of this case, and particularly in light of our decision herein, we hold each party should be fully responsible for his or her own attorney's fees.

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, MODIFIED IN PART, AND REMANDED.[3]

CURETON, ANDERSON, and STILWELL, JJ., concur.

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[3] We do not address Wife's Issue II (inclusion of day care expenses in child support calculations) or III (reduction of child support during extended visitation) because the original custody arrangement has been altered and Wife concedes these issues are now moot. Furthermore, Issue XII (sale of marital home) has been abandoned by Wife. Nor do we address Issue XVIII (posting of bond during pendency of appeal) as the supersedeas granted by this court in Wife's favor moots that issue. Appellate courts "will not issue advisory opinions on questions for which no meaningful relief can be granted." Gainey v. Gainey, 279 S.C. 68, 69, 301 S.E.2d 763, 764 (1983).