

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001529-MR

JESSE LEO WHITT

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
CIVIL ACTION NO. 03-CI-00261

JACQUELINE KING WHITT

APPELLEE

OPINION  
AFFIRMING IN PART AND  
VACATING AND REMANDING IN PART

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BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

MINTON, JUDGE:

**I. INTRODUCTION.**

Jesse Leo Whitt appeals from the findings of fact, conclusions of law, and judgment that dissolved his marriage to Jacqueline King Whitt and divided their property. We affirm in part and vacate and remand in part.

## II. FACTUAL AND PROCEDURAL HISTORY.

Jesse and Jacqueline were married in 1988 and are the parents of twin children born in 1989. In their divorce in 2003, child custody was not an issue; but they could not agree on how to divide their debts and some of the marital property.

The final decree found that the parties had credit card debt totaling \$36,459.00 at the time of their separation and that Jacqueline, herself, had paid down that debt to \$22,000.00. The trial court ordered Jesse to pay Jacqueline \$18,230.00, half of the amount of debt at the time of separation. The trial court further ordered Jesse to pay \$694.00 per month in child support, half of the monthly insurance premium for the children, and "one-half the medical, dental and other expense not covered by insurance." Believing the decree to be in error in several respects, Jesse filed a motion for clarification of the decree, as well as a notice of appeal, in July 2004.

In August 2004, with a new attorney, Jesse filed a motion for extension of time to submit a proposed decree or, in the alternative, to file objections to the decree previously entered. In September 2004, while this appeal was pending, the trial court granted Jesse's motion to file belated objections to the previously entered decree. Jesse filed his objections in

October 2004. In December 2004, the trial court entered an amended decree. Although that amended decree clarified some of the language in the original decree, it did not disturb the essential property and debt division set forth in the original decree. In April 2005, another panel of this Court ordered that the amended decree be returned to the trial court, stating that "[t]he Court is of the opinion that the Bell Circuit Court was without jurisdiction to amend the judgment of July 2, 2004, due to the pendency of this appeal." Thus, the parties' briefs and, consequently, our analysis are based upon only the original decree.

### **III. ANALYSIS.**

Jesse raises several issues on appeal, many of which concern the proper allocation of debts incurred during his marriage to Jacqueline. Each issue will be dealt with separately.

#### **A. Child Support.**

As stated previously, the trial court ordered Jesse to pay Jacqueline \$694.00 per month in child support. Jesse does not object to that amount of child support. But Jesse is disabled, and his twin children already receive a combined \$740.00 per month as a result of Jesse's disability. Kentucky Revised Statute (KRS) 403.211(14) provides in relevant part that

"[a] payment of money received by a child as a result of a parental disability shall be credited against the child support obligation of the parent." The decree contains no language mandating the statutorily required offset of Jesse's child support obligation due to these disability payments received by his children, which even Jacqueline recognizes as error. So the child support portion of the decree must be vacated and remanded so that the trial court can bring the decree into compliance with KRS 403.211(14).

#### **B. Credit Card Debt.**

Jesse's biggest issue on appeal is that the trial court erred by requiring him to pay half of credit card debt that Jacqueline incurred. Before we address the particulars of this case, however, we must note the proper scope of our review.

Despite the fact that the credit card debt in question was incurred during Jesse and Jacqueline's marriage, there is no presumption that the debt is marital in nature.<sup>1</sup> Rather, in a dissolution proceeding, debts incurred during the marriage:

are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation; whether the debt was incurred to purchase assets designated as marital property; and whether the debt was necessary to provide for the maintenance and support of the family. Another factor, of course, is the economic circumstances of

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<sup>1</sup> Neidlinger v. Neidlinger, 52 S.W.3d 513, 522 (Ky. 2001).

the parties bearing on their respective abilities to assume the indebtedness.<sup>2</sup>

Furthermore, a court does not necessarily have to divide the debts equally or in the same proportion as the marital property.<sup>3</sup> Finally, we may reverse a trial court's division of either debts or marital property only if that division is an abuse of discretion.<sup>4</sup>

Jacqueline testified that the credit cards were in her name only and that she had the bills sent to her mother's address. Furthermore, Jesse testified that he was unaware of Jacqueline's extensive credit card usage. Thus, Jesse contends that he should not be responsible for paying any of Jacqueline's credit card debt. In response, Jacqueline notes that the credit cards were primarily used to purchase goods and services for the entire family, such as appliances, clothing, household repairs, and school supplies. Furthermore, Jacqueline testified that Jesse was aware of her credit card debt. Jesse testified that he was not aware of the credit card debt. Determining whom to believe when the evidence is conflicting is a matter solely within the discretion of the trial court.

Jacqueline's testimony, combined with the "credit card summary" attached to her deposition, is evidence that the credit

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<sup>2</sup> *Id.* at 523 (internal citations omitted).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

card indebtedness was apparently incurred to purchase marital assets and to provide for the care and maintenance of Jacqueline, Jesse, and their children. Furthermore, the parties' respective incomes are roughly equal,<sup>5</sup> meaning that each could shoulder an equal amount of the credit card debt. In addition, it is uncontested that Jacqueline alone has reduced the credit card debt from approximately \$36,000.00 to approximately \$22,000.00. Though we may have decided the issue differently, we cannot say that the trial court's division of the credit card debt was so arbitrary, capricious, unreasonable, or unfair as to constitute an abuse of discretion.<sup>6</sup> Accordingly, the trial court's division of Jacqueline's credit card debt must be affirmed.

### **C. Orthodontia Expenses.**

Jesse contends that he should not be required to pay any share of the children's orthodontia-related expenses because

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<sup>5</sup> We note that the trial court listed Jesse's income from cutting hair as \$500.00 per month. Jesse's undisputed deposition testimony provides that his income from cutting hair is between \$200.00-\$350.00 per month. On remand, the trial court shall amend its decree to reflect Jesse's testimony.

<sup>6</sup> Sherfey v. Sherfey, 74 S.W.3d 777, 783 (Ky.App. 2002) (quoting Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994)) ("'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.'").

he did not agree that they needed braces.<sup>7</sup> Jesse has not, however, shown that the children did not reasonably require braces and the associated orthodontia-related treatment. Thus, Jesse has not shown that the trial court abused its discretion by ordering him to pay for half of the costs associated with providing braces for his children.

#### **D. "Other Expense."**

Paragraph four of the judgment section of the decree states that Jesse is required to pay Jacqueline "one-half of the cost (\$250.00) of the CHA insurance policy of \$125.00, one-half the medical, dental and other expense not covered by insurance." Jesse asks that we strike the "other expense" language because he cannot discern its meaning.

Paragraph four is not a model of clarity. But we do not believe that the "other expense" language must be stricken. Rather, we simply construe that language as requiring Jesse to pay for half of any medical or dental expenses incurred by the children (including orthodontia) that is not otherwise covered by health insurance. Furthermore, the parties may ask the trial court for guidance in resolving any actual dispute that may

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<sup>7</sup> The original decree makes no explicit mention of orthodontia-related expenses. However, each party seems to agree that Jesse is responsible for paying half of the orthodontia expenses, presumably due to the original decree's requirement that he be responsible for "one-half the medical, dental and other expense not covered by insurance." Although it has previously been essentially rendered a nullity by this court, we note that the amended decree explicitly requires Jesse to pay for half of the orthodontia bills.

arise as to whether a particular expense is covered by this paragraph.

**E. Paragraphs 4 and 5 of the Decree.**

Jesse contends that paragraphs four and five of the decree section of the original decree are difficult to understand.<sup>8</sup> We agree.

In their entirety, those paragraphs provide as follows:

4. The Respondent [Jesse] shall pay unto the Petitioner [Jacqueline] the sum of \$694.00 per month in child support and the sum of \$21,018.19 as her share of equity in marital property within sixty (60) days of this date.
5. The Respondent shall be responsible for the remainder of the credit card debt of \$22,000.00 inasmuch as the Court has awarded her above one-half the same to be paid to her directly from Respondent.

There is no indication as to how the trial court arrived at the \$21,018.19 figure mentioned in paragraph four. Furthermore, in paragraph five, the trial court seemingly orders Jesse, the respondent below, to pay \$22,000.00 in credit card debt, even though paragraph 2(A)c of the judgment section of the decree orders Jesse to pay only \$18,230.00 in credit card debt. In addition, paragraph five refers to the respondent as "her," even though Jesse is the respondent. In short, paragraphs four and

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<sup>8</sup> Jacqueline's brief does not address this issue.



five are written in such a manner as to be confusing. On remand, the trial court shall clarify those paragraphs.

**F. Division of Bank Account.**

Paragraph 2(A)e provides that Jacqueline is to be awarded half of the savings account at Home Federal Bank in Middlesboro, the purported balance of which is \$2,788.19. Jesse contends that the Home Federal savings account contained only \$23.26. Jacqueline's brief does not address this issue.

The only evidence in the record on this issue is exhibit 3 to Jesse's deposition, which contains two statements from Home Federal Savings, one dated March 15, 2002, and one dated March 13, 2003. The 2002 statement shows that Jesse had two savings accounts with balances of \$58.83 and \$0.64, respectively. The March 2003 statement lists only one savings account with a balance of \$23.26. Therefore, it is unclear how the trial court arrived at the \$2,788.19 figure it cites in the decree. Thus, this aspect of the decree must be remanded so that the trial court can either amend the amount it believes existed in the savings account or, in the alternative, can explain how it arrived at the \$2,788.19 amount.

**IV. CONCLUSION.**

The portions of the decree dealing with child support, division of the Home Federal Savings account, and the recitation

of Jesse's income earned from cutting hair are vacated and remanded for further proceedings consistent with this opinion. Paragraphs four and five of the "decree" section of the decree are also vacated and remanded for clarification. In all other aspects, the trial court is affirmed.

BARBER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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