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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001777-ME

DARLENE GRIPSHOVER

APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 02-CI-00044

GEORGE HENRY GRIPSHOVER

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,¹ SENIOR JUDGE.

CLAYTON, JUDGE: This is the second appeal of the trial court's decision regarding child support and maintenance. We find as follows:

BACKGROUND INFORMATION

¹ Senior Judge Michael L. Henry 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.

Appellant Darlene Gripshover and appellee, George Gripshover, were married in June of 1988. Darlene had two children from a previous marriage and the couple eventually had two additional children together: George W. (8/1/90) and Austin (1/15/95). Darlene did not have a high school diploma and had worked as a house cleaner and grocery store clerk. George did not have a high school diploma, either, and he and his brother, Charlie, operated their family's farm in Boone County, Kentucky. The family court found George had received an income of \$64,000.00 per year from his work on the farm.

George also owned an interest with Charlie and their sister Kathy in a 283.43 acre parcel of land which was also located in Boone County. Although undeveloped, this property substantially appreciated throughout the years that George and Charlie owned it. A portion of this property was sold in 1989, another in 1995, and the final portion in January of 2001. The three parcels of land were valued at \$895,000.00. With the proceeds from the sale of the 1995 portion, Charlie and George purchased a 93.2-acre farm on U.S. Highway 42 in Boone County. The 2001 portion was sold in exchange for three parcels of Mason County property and a promissory note in the amount of \$1,021,925.00.

In May of 2001, the brothers had an attorney, Hugh Campbell, prepare documents effectuating a real estate partnership (the Gripshover Family Limited Partnership #1) and a partnership for the ownership and management of the family farming business (the Gripshover Family Limited Partnership #2). For estate planning and taxation purposes, Campbell also recommended the partners in these

partnerships assign their interests to trusts. Each family would have two trusts, one irrevocable to receive the real estate partnership interest and one revocable which would hold the farming interests. Under the trusts, George's children would be the beneficiaries of both of his trusts. Charlie was the trustee for George's irrevocable family trust and vice versa.

In May of 2001, Darlene signed the necessary documents to effectuate the above plan. In December of 2001, the parties separated and Darlene filed a petition for dissolution in January of 2002. While Darlene contested the creation of the trusts, the family court entered a decree declaring the trusts valid and concluded that she had not been misled or coerced into the creation of the trust.

The family court considered the assets of the farm business partnership (#2) as marital assets, but assigned some to George as nonmarital property. The court thereafter made an equitable division of the marital portion. The family court also awarded Darlene maintenance and child support. The court imputed income to Darlene at \$360.00 per week due to her prior work as a housekeeper. As for George, the court found his annual income to be \$64,256.25 after averaging his last four federal income tax statements and adding \$18,000.00 per year for housing, transportation and food costs that he charged to the farming business.

Based upon these income amounts, the family court awarded Darlene child support in the amount of \$199.32 per week and five (5) years of maintenance in the amount of \$600.00 per month. Darlene filed an appeal which eventually

resulted in a Kentucky Supreme Court published opinion, *Gripshover v.*

Gripshover, 246 S.W.3d 460 (Ky. 2008). In its opinion, the Court remanded the case to the family court finding that the parties' income had to be recalculated, the record did not support the imputation of income to Darlene, and ordered that the maintenance award must be reconsidered.

On June 24, 2009, the family court issued new findings and conclusions based upon the Supreme Court's mandate. It found that Darlene's earning capacity was \$836.88 per month, or \$10,042.50 per year. There was no change in George's earning capacity. The family court did not increase its spousal maintenance award but added an additional period of time during which Darlene would continue to receive maintenance at a reduced amount. The court stated this would lessen the impact of an abrupt withdrawal of maintenance. Darlene then brought this appeal.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of witnesses." A judgment is not "clearly erroneous" if it is "supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is "evidence of substance and relevant

consequence having the fitness to induce conviction in the minds of reasonable men.” *Id. Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

DISCUSSION

We first visit the issue of the incomes attributed to the parties for child support and maintenance purposes. KRS 403.212(2)(a) defines “income” as the “actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed.” When dealing with income from self-employment, KRS 403.212(2)(c) provides that “gross income” is “gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Straight-line depreciation, using Internal Revenue Service (IRS) guidelines, shall be the only allowable method of calculating depreciation expense in determining gross income.” *Gripshover*, 246 S.W.3d at 468.

KRS 403.200 provides that a court may grant maintenance to a party if the spouse seeking the maintenance award:

(1)(a) Lacks sufficient property, including marital property apportioned to h[er], to provide for h[er] reasonable needs; and

(b) Is unable to support h[er]self through appropriate employment[.]

In determining an appropriate amount of maintenance to award, the court must look to the following:

(2)(a) The financial resources of the party seeking maintenance, including marital property apportioned to

h[er], and h[er] ability to meet h[er] needs independently[.]

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

In its Opinion reversing and remanding the case to the family court, the Kentucky Supreme Court ordered that “George’s income should be recalculated in accordance with the statutory limitation on depreciation.” It did not, as agreed by Darlene, require the family court to use one-half of the \$3,000,000.00 of real estate assets in the irrevocable trusts to determine income available to George. The family court, in recalculating George’s income, used the straight-line method as mandated by the Supreme Court and required by caselaw.

The Court also found that the record did not support the family court’s imputation of income to Darlene. It found:

Darlene testified that while living in Boone County during the months leading up to the 2001 separation, she had worked four or five days per week for regular house cleaning customers. She earned, she estimated, between \$300.00 and \$375.00 per week. Her adjusted 2001 income for tax purposes, however, was only \$8,565.00.

At the time of the final hearing in November 2003, Darlene was earning less than \$100.00 per week from two regular house cleaning jobs. . . . The trial court deemed Darlene underemployed and imputed income to her of \$360.00 per week or more than \$18,000.00 per year, nearly twice what Darlene had earned during any of the previous four years.

On remand, therefore, the trial court must redetermine both parties' incomes and recalculate child support accordingly. George's income may not be based on section 179 expense deductions, and income should not be imputed to Darlene without due consideration of all of the statutory factors.

Gripshover, 246 S.W.3d at 468-69. The Court also found that "the parties' disparate post-divorce circumstances require reconsideration of the family court's maintenance award." *Id.* at 469. The Court noted that this may be a case where the statutory goal of rehabilitation may not be attainable. The Court held:

While we cannot and do not say that the trial court's original maintenance award amounted to an abuse of discretion, our ruling that the parties' incomes must be redetermined and our clarification of the fact that George's continued benefit from the partnership realty is a factor bearing on the maintenance determination change the landscape enough to require that the maintenance award be revisited. On remand, accordingly, the trial court must again determine a suitable amount and duration of maintenance.

Gripshover, 246 S.W.3d at 470.

The trial court revisited the issue of maintenance and concluded as follows:

26. The Court has again reviewed KRS 403.200 relative to duration of maintenance. The Court believes the

crucial factor in determining the duration of maintenance is the duration of the marriage. This was a marriage of 13 years. It was the Petitioner's second marriage and she brought two children into the marriage in addition to the two children born of the marriage. The parties did not raise their two children to adulthood together. There is no testimony that the Petitioner deferred occupational opportunities to further her husband's career. The Court does not believe that these factors justify an award of permanent maintenance. However, in order to eliminate the economic shock of the termination of maintenance, the Petitioner shall be awarded additional maintenance in the amount of \$400.00 per month for an additional four years from the original termination of maintenance. Said maintenance shall terminate sooner in the event of the death of either party, the remarriage or co-habitation by the Petitioner, or any other factor that would terminate maintenance as a matter of law. KRS 403.250(2).

The family court did not, it appears, take into account George's continued benefit from the partnership realty as required by the Supreme Court's Opinion. We believe the trial court did not appropriately make a determination on the facts given the mandate of the Supreme Court in its opinion and remanding of the case. While the trial court allowed a longer period of time for maintenance, it appears that it did so without a specific finding as to the necessity of the extended period.

On remand, the family court must make a clear finding relating to the amount of maintenance due to Darlene. It must set forth what it uses to determine maintenance and should allow for the disparate income of the parties as required by the Supreme Court. Thus, we reverse the decision of the trial court and remand

this case to the trial court to reexamine its finding and to apply the mandate of the
Kentucky Supreme Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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