

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001568-MR

JOYCE ANN THOMPSON BURCHETT

APPELLANT

v. APPEAL FROM JOHNSON FAMILY COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 08-CI-00278

JEFFREY BURCHETT

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Joyce Ann Thompson Burchett appeals from an order and judgment of the Johnson Family Court in a dissolution of marriage action. She argues three issues: 1) that the trial court failed to award maintenance

¹ Senior Judge David C. Buckingham 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.

in a sufficient amount and duration; 2) that the trial court abused its discretion in the disposition of property as it related to the distribution of the parties' guns; and 3) that the trial court failed to allocate a marital asset, Workhorse Construction, to either party. We disagree and thus affirm.

Joyce Ann Thompson and Jeffrey Burchett were married on July 13, 1974. They separated on March 30, 2008, and a decree of dissolution was entered on May 15, 2009. Both were 53 years old at the time. Joyce Ann does not have a high school education and has a limited employment history. She testified that she suffers from hypertension, carpal tunnel syndrome, back problems, and depression. Jeffrey was a coal miner but is disabled and receives \$2,910 per month in social security and workers' compensation disability benefits. He testified that he suffers from black lung disease, back problems, and depression.

Joyce Ann's first argument is that the trial court failed to issue an award of maintenance in a sufficient amount and duration to adequately meet her needs. In its order and judgment, the trial court awarded Joyce Ann \$450 per month for two years as rehabilitative maintenance.

"Maintenance determinations are within the sound discretion of the trial court." *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky. App. 1987). Also, "[t]he determination of whether to award maintenance is highly discretionary with the trial court after its consideration of the dictates of KRS 403.200." *Beckner v.*

Beckner, 903 S.W.2d 528 (Ky. App. 1995). Kentucky Revised Statutes (KRS) 403.200(2) requires trial courts to consider all relevant factors, including several that are enumerated in the statute, in setting maintenance awards.

Joyce Ann contends that the maintenance award is insufficient in light of her lack of education, lack of sufficient employment history, and medical problems. She notes that Jeffrey receives nearly \$3,000 per month in disability benefits. She also alleges that Jeffrey makes approximately \$3,000 per month operating a small business called Workhorse Construction. Joyce Ann states that “the Court clearly erred and abused its discretion in failing to award maintenance in the amount of \$1,200 per month until she reached retirement age and could file a claim for retirement benefits on Appellee’s social security account provided she meets certain criteria.”

In support of her argument that the maintenance award was inadequate, Joyce Ann cites *Beckner, supra*. In that case, a panel of this court determined that the denial of maintenance to the wife was an abuse of discretion. *Id.* at 530. There are, however, two significant differences in the *Beckner* case and this case. In *Beckner*, there was a total denial of maintenance; in this case, an award of maintenance was made. Further, in *Beckner*, the husband was a lawyer; in this case, the husband is a disabled coal miner. In light of these significant differences, we are not persuaded by the *Beckner* case.

We conclude that the trial court did not abuse its discretion in the maintenance award in this case. Joyce Ann was awarded her one-half of the equity

in the marital residence and one-half of the equity in a residence gifted to the parties by Jeffrey's mother. She was also awarded a 2004 Toyota Corolla vehicle and one-half of a relatively small certificate of deposit. While Jeffrey was awarded the marital residence and his mother's residence, he was directed to pay Joyce Ann her one-half marital interest in the equities of the properties. Further, he assumed the mortgage, which exceeded \$130,000, and the required monthly payments of \$1,051.

Granted, the maintenance awarded is a modest amount. However, Jeffrey is a disabled coal miner with a monthly income of only \$2,910, out of which he must pay his utilities, mortgage payment, and other living expenses. As for Joyce Ann's allegation that Jeffrey had income of \$3,000 per month from Workhorse Construction, the trial court found that it was "not convinced that [Jeffrey] has meaningful income outside of the above noted disability benefits." Under these circumstances, we cannot say that the trial court absolutely abused its discretion.

Joyce Ann also contends that "[t]he Court failed to consider the factors set forth in KRS 403.200 (a)-(f)" when it determined maintenance. We believe, however, that it is evident the trial court did consider the factors set forth in the statute. In fact, the court specifically referenced those factors near the end of its order and judgment.

As for the guns, Joyce Ann contends that the trial court erred in awarding her only her grandfather's gun but awarding Jeffrey all other guns.

According to the trial court in its order, Joyce Ann only asked for her grandfather's gun, which she was awarded, and two guns that had been gifts to Jeffrey. The remaining guns were awarded to Jeffrey as part of a division of the marital property.

It was not within the trial court's power to award Joyce Ann the guns that had been gifts to Jeffrey. She got the only gun she asked for that she was entitled to receive. Although Joyce Ann argues that the distribution of the guns was unfair, she does not dispute the portion of the trial court's order that states that she only requested that she be awarded the three guns. We cannot say the trial court's determination was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). There was no abuse of discretion in this regard.

As for Joyce Ann's argument that the trial court failed to address Workhorse Construction, Joyce Ann testified that the company was worth \$20,000 and requested a portion of that value as her share of the marital property. Jeffrey testified in effect that Workhorse Construction had no assets and was not really a company at all. He testified that the business was maintained primarily by his son and that his son merely had some stationary printed with the business name on it.

Jeffrey further testified that in 2007 Workhorse Construction took in \$9,000, which was divided between him and his son. He also testified that in 2008 Workhorse Construction took in \$4,700, which he and his son also divided equally. Jeffrey stated that he mainly supervised his son and a nephew on odd jobs when he

was physically able and when he could find someone to take care of his mother. He stated that Workhorse Construction was not a business, did not own any property, and did not pay him.

Issues related to the weight and credibility of evidence are within the sole realm of the fact finder and generally will not be disturbed on appeal.

Frances v. Frances, 266 S.W.3d 754, 756 (Ky. 2008). The trial court in this case determined it had not been convinced that Jeffrey had any meaningful outside income. We find no abuse of discretion and affirm the decision of the trial court to not treat Workhorse Construction as a marital asset to be divided.

The order of the Johnson Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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