

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001052-MR

KAREN RISTAU

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 08-CI-05053

JEROLD WILLIAM RISTAU

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Karen Ristau appeals from the Fayette Circuit Court's divorce decree and order finding that her ex-husband's, Jerold Ristau, income had been reduced by fifty percent and which failed to allocate to Karen any share of the equity in the marital residence. After careful review, we affirm.

¹ Senior Judge Ann O'Malley Shake 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.

Karen and Jerold Ristau were married on May 14, 1991, and have one child, W.A.R., born on November 24, 1994. Karen filed a petition for dissolution of marriage on October 3, 2008. The matter comes before this Court as a result of the trial court's order and decree entered on April 9, 2010, which found that Jerry's income was only \$75,000.00 for purposes of maintenance and child support, and which did not require Jerry to reimburse Karen for her share of the equity lost on the marital residence as a result of missed mortgage payments.

This divorce action has been ongoing for more than two years. The parties appeared before the trial court on numerous occasions to address the multitude of issues that typically arise in divorce cases. Both parties were, and have continuously been, represented by counsel. By the date of trial, which occurred on February 2, 2010, and concluded on March 24, 2010, the trial court was intimately familiar with the facts of the case, the circumstances of the parties, and the parties themselves.

Karen and Jerry had a small amount of marital property and a large amount of marital debt. The order and decree entered on April 9, 2010, lists those marital debts, which, excluding the marital residence, total \$353, 244.00. Karen does not challenge the apportionment of marital debt on appeal.

Karen contends that the trial court erred in not requiring Jerry to reimburse her one-half of the equity in the marital residence. The parties originally purchased the marital residence for \$375,000.00. However, by the time of the divorce, the residence was encumbered by two mortgages totaling approximately

\$398,000.00. The first mortgage on the property was \$328,146.75, and the second mortgage totaled \$69,569.92. Given this, and the current depressed real estate market, the parties were “upside down” on the loan and had no equity in the marital residence. Karen testified that the residence needed a substantial amount of repairs due to water damage from a leak, damage from an ice storm, and general lack of maintenance over several years. The parties presented testimony indicating that the home was not marketable in its current condition.

Aside from the residence, the marital estate possessed a few divisible assets. There were three retirement accounts totaling \$107,545.00, twenty head of cattle, a one-half interest in Madison Hall Rental Company, and funds held in escrow in the amount of \$22,542.00. The trial court awarded Karen forty percent of the marital estate and awarded Jerry sixty percent of the estate.

Jerry also received the bulk of the marital debt. The trial court ordered that Jerry be solely responsible for the first and second mortgages on the marital residence (totaling \$398,00.00); a \$60,000.00 debt for Karen’s daughter’s college tuition;² \$255,000.00 owed to the Ford Hall Company for loans taken out during the marriage; a \$7,239.00 American Express credit card debt; \$4,326.00 in debt, which is the difference between the amount held in escrow and the total debt allocated to be paid by the escrow funds; and a GM credit card debt totaling \$2,200.00. All of these debts were either stipulated to as marital debts or were found to be marital debts by the trial court. The other debts were paid from the

² It should be noted that Karen’s daughter is not Jerry’s biological child. The student loan, however, was taken out in Jerry’s name only.

escrow account, including two substantial Internal Revenue Service (IRS) debts, which were proven to be marital debts.

Karen testified as to both parties' inability to properly manage money or control their spending. Notwithstanding the evidence that the parties jointly created the marital debt, the trial court apportioned 99.8% of the remaining debt to Jerry.³ Karen was only ordered to pay a \$1200.00 First Financial Visa credit card debt that was in her daughter's name and accumulated after the parties separated.

Karen was a homemaker for a majority of the marriage and has not completed her education at this time. Jerry is the vice president of Ford W. Hall Company, Inc. (hereinafter Ford), in which he is a shareholder with an ownership interest of 22.5%. Jerry's step-father, Ford W. Hall, owns a 75% interest in Ford, and Cheryl Page, Jerry's sister, owns a 2.5% interest. Jerry was employed by Ford during the majority of his marriage to Karen, and this was his main source of income during the marriage.

In addition to his position as an officer at Ford, Jerry works full-time as a salesman for the company. Ford manufactures a product called an "algae sweep automation," which is used for water treatment. Ford Hall invented this product, and from 1989 through May 2009, Ford held a patent for the product.

In addition to selling the algae sweep, Jerry is an independent contractor for Sullivan Environmental Technologies (hereinafter Sullivan), and he

³ The marital estate paid \$22,542.00 of the debt. Jerry is responsible for paying 99.8% of the remaining debt.

sells and markets the algae sweep on its behalf pursuant to a contract between Sullivan and Ford. Under the terms of the agreement, Sullivan pays Ford a percentage of the commission Sullivan receives for Jerry's work on its behalf.

From 2004 until the end of 2009, Jerry was Ford's highest paid salesman, earning \$150,000.00 in salary per year. Evidence presented at trial showed that 1099s from Sullivan for Jerry's independent contractor work were as follows: 2006-\$116,511.00; 2007-\$220,985.00; 2008-\$117,377.00; and 2009-\$224,404.00. Jerry testified that in 2005, despite his commissions for Sullivan being only around \$62,000.00, Ford did not lower his income of \$150,000.00, even though the company made less money that year.

Jeannie Copper, CEO of Ford, testified that she has worked for Ford for fifteen years and has been CEO of the company for five years. In 2009, Jeannie recommended that Jerry receive a 50% pay reduction and that other cost cuts be made within Ford. Jeannie testified at length about the condition of Ford at the time of trial. She testified that the company needed to lower costs across the board for numerous reasons. First, she testified that the company lost its patent in 2009 and began facing competition on the only profitable item it manufactures and sells, the algae sweep. She also testified about the weak economy and the fact that Ford experienced a 25% decrease in sales from 2008 to 2009. Ford was also paying Jerry more in salary than he was actually earning for the company. She testified that Ford had entered into a contract with Sullivan in 2005 where Jerry sold miscellaneous equipment in exchange for commissions to be paid to Ford.

However, Ford experienced a \$235,000.00 loss attributable to Jerry through 2009. Finally, Karen and Jerry had taken personal loans from Ford, and by the time the order and decree was entered by the trial court, the parties owed Ford \$255,000.00. Jeannie testified that based on the factors above, Ford had legitimate reasons for lowering Jerry's salary, because at that time he was Ford's highest paid employee.

On December 22, 2009, Jeannie circulated a memorandum to all Ford shareholders (Ford Hall, part-time employee Cheryl Page, and Jerry) recommending pay cuts due to an economic downturn and the loss of the algae sweep patent. Jeannie testified that due to the 25% loss in sales from 2008 to 2009, Ford's accountant recommended that corrective measures be taken to restore the health of the company. The accountant suggested that the company needed to either downsize or manufacture other products to make up for the lost revenue. Because Ford did not profit from or manufacture any other products, the only solution was to cut costs.

The proposed cost saving recommendations were as follows: (1) that Ford Hall apply for Medicare benefits in order to reduce the amount of funds that Ford spent on health insurance for him; (2) that one employee be laid off; (3) that the shareholders and CEO reduce their salaries, which included Jeannie's salary being cut by 25% and Jerry's pay being cut by 50% because he was costing Ford substantially more than he was bringing in; (4) that Cheryl Page's hourly wage be reduced from \$10.00 to \$8.00 per hour; (5) that Janet Hall's wages be reduced to minimum wage; (6) that several properties owned by Ford be sold as well as all

vehicles that were not actively used; and (7) that the company reduce its rent payment by half.

Jeannie circulated two drafts of the memorandum detailing the above recommendations, but the drafts differ very little. The first memorandum included a line regarding Cheryl Page that read, “[a]nd since wages paid to you in the last 5 months have been solely for the purpose of supporting Jerry in his divorce, those dollars actually go towards another Jerry expense.” The second memorandum did not include this line. In her brief to this Court, Karen indicates that Jerry’s income was reduced with knowledge and approval by Ford in anticipation of Jerry’s upcoming divorce trial. However, Jerry argues that language that was missing from the second memorandum only provides that Cheryl’s salary should be reduced and Jerry should be credited with an expense.

Jeannie testified at trial regarding the two drafts and explained that she drafted the memorandum and sent it to the shareholders. After she sent out the original memo, it was brought to her attention that Cheryl Page did work for Ford in a capacity other than helping Jerry with his divorce, and that she performed ratings reviews, prepared binders for clients, and did other tasks. Thus, Jeannie edited the memo to correct her errant belief that Cheryl had only assisted Jerry in the divorce proceedings. No other substantial changes were made to the memo, and Jerry agreed to a salary reduction to relieve his burden on the company.

The parties entered into a mediation agreement in October 2008. Per the agreement, Jerry was to make the mortgage payments on the marital residence.

Before the parties entered into the agreement, however, the mortgage had fallen behind on several occasions. In May, 2008, Karen took out a “Home Saver Advance” loan in the amount of \$10,500.00 to get the mortgage current. However, the loan only added to the growing debt accumulated by the parties. During the time leading up to the mediation agreement, Karen still had access to Jerry’s checking account, and Karen was still presumably making the mortgage payments. When Jerry agreed to solely assume paying the mortgage, the parties were behind on their obligations. In order to get current on the mortgage payments, Jerry sold some cattle in the fall of 2008 and applied \$10,000.00 of the proceeds to the mortgage debt. Jerry then got behind again and was working with Bank of America (BOA) to make the mortgage current.

Jerry testified that when he entered negotiations with BOA to re-negotiate the loan, he was informed by BOA that making a mortgage payment would be disruptive to the loan modification program. Thus, in hopes of modifying the terms of the loan and based on professional advice directly from BOA, Jerry ceased paying the mortgage obligation. The trial court was aware that Jerry chose to modify the terms of the mortgage because Karen filed several motions on the issue, and the trial court heard arguments of counsel during motion hours.

Karen’s first argument on appeal is that the trial court abused its discretion in failing to order Jerry to reimburse her for her one-half interest in the equity of the marital residence. The trial court determined in its final order and

decree that Karen was entitled to one-half of the equity in the marital residence, but ultimately concluded that the property was worth less than the debt, and thus there was no equity in the marital residence. As a result, Karen received no money for her share. Karen argues that the testimony at trial indicated that the default penalty and costs totaled \$46,990.82 and occurred as a result of Jerry not making timely mortgage payments. Thus, Karen argues that the balance of the mortgage minus the default penalties amounted to \$350,724.00. Karen alleges that the difference in the current value of the residence (\$375,000.00) and the balance of the mortgage (\$350,724.00) is approximately \$24,000.00 in divisible equity in the marital residence. Karen also argues that the trial court abused its discretion in determining Jerry's salary for purposes of establishing maintenance and child support.

Trial courts have broad discretion in determining marital property, allocating such property, and dividing up marital debt. Accordingly, we review the trial court's order in the instant case to determine if there was an abuse of that broad discretion. *See Kleet v. Kleet*, 264 S.W.3d 610, 618 (Ky. App. 2007). *See also Lykins v. Lykins*, 34 S.W.3d 816, 822 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Bailey v. Bailey*, 246 S.W.3d 895, 897 (Ky. App. 2008) (internal citations omitted). In cases where the trial court has broad discretion, "we are mindful that...unless *absolute abuse* is shown, the appellate court must maintain confidence in the trial court and not disturb the

findings of the trial judge.” *Weldon v. Weldon*, 957 S.W.2d 283, 286 (Ky. App. 1997) (emphasis in original).

A careful review of the record indicates that the trial court considered the amount of equity, if any, in the marital residence. The order and decree states: “The Court also determines that the amount of principal that [Jerry] would have paid down on the [] residence from October 2008 through March 2010 could have been paid and the Court determines that half of such amount should be allocated to [Karen].” However, the Court then determined that Karen dissipated marital assets well above the amount owed to her from the missed mortgage payments by selling two marital vehicles and keeping the proceeds. Further, the trial court found that Karen dissipated marital assets by purchasing a dog and incurring vet fees associated with its illnesses. Ultimately, the trial court found that Karen dissipated approximately \$9,400.00 in marital assets. In contrast, the trial court found that Jerry dissipated between \$4,000.00 and \$5,000.00 and determined that such amount “is appropriate if not being high for what [Jerry] potentially dissipated.” Due to the dissipation, the trial court deemed that any potential principal pay down in the marital residence was a “wash.” Moreover, there was evidence presented that the mortgages on the marital residence were continually behind, even during the marriage, and that the residence needed substantial repairs.

Based upon the foregoing, we cannot say that the trial court abused its discretion in declaring any equity in the residence to be a “wash” and not awarding any such equity to Karen. There was substantial evidence in the record indicating

that Karen and Jerry failed to make the mortgage payments and care for the residence during the marriage, as well as ample evidence supporting the trial court's finding that Karen dissipated assets equaling just as much, if not more, than Jerry. Accordingly, the trial court's holding that Karen would not receive any equity from the marital residence was not an abuse of the broad discretion it is afforded in dividing marital property.

Karen next argues that the trial court abused its discretion in finding Jerry's salary to be reduced by fifty percent of his past earnings. Karen argues there was not substantial evidence presented at trial indicating that Jerry's salary had been legitimately lowered due to a downturn in the economy. Karen contends that Ford's actions after the date of the memorandum indicate that the memorandum was only written in anticipation of the divorce for purposes of lowering maintenance and child support.

Again, we do not find that the trial court abused its discretion in determining Jerry's salary to be \$75,000.00 for purposes of setting maintenance and child support. The trial court was in the best position to determine the credibility of the witnesses and the weight to be given to each witness's testimony. *See* Kentucky Rules of Civil Procedure (CR) 52.01. *See also Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991) ("It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.") (Citation omitted).

The trial court heard the testimony of Jeannie Cooper regarding the downturn in the economy, the loss of Ford's patent, and the need for Ford to cut costs or manufacture other items. Furthermore, the trial court had records of Jerry's earnings from the years leading up to the divorce, as well as Ford's records of sometimes paying Jerry more than he brought into the company. Finally, Jeannie testified that her salary was also cut due to the economic downturn and the loss of the algae sweep patent. Therefore, the record indicates that the trial court's findings are supported by substantial evidence, and the trial court did not commit an abuse of discretion in determining Jerry's income to be reduced to half of his previous income, or \$75,000.00.

The trial court found that Karen could not support herself through appropriate employment and determined that her reasonable needs were \$3,729.00 per month. Because Karen was not working and did not have a degree, the court imputed Karen with an income of \$1,257.00 in minimum wage per month. Based on his income of \$75,000.00, the trial court determined that Jerry could not simultaneously pay the substantial marital debts assigned to him and provide for Karen's reasonable needs. Therefore, the trial court ordered Jerry to pay Karen \$1,000.00 per month in maintenance and \$543.00 per month in child support. In light of the evidence presented and the substantial amount of debt allocated to Jerry, the trial court properly divided the marital debt and properly determined maintenance and child support in this case.

Based on the foregoing, the April 9, 2010, order and decree of the
Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rocco J. Celebrezze
Jennifer S. Begley
Louisville, Kentucky

BRIEF FOR APPELLEE:

Carl D. Devine
Anna Dominick
Lexington, Kentucky