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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002232-MR
AND
NO. 2008-CA-002268-MR

GEORGE WAYNE BUSH

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 05-CI-01807

GABRIELLE DANAE BUSH;
HON. PAUL LAWLESS; AND BELL,
ORR, AYERS & MOORE, PSC

APPELLEES/CROSS-APPELLANTS

OPINION AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; SHAKE,¹ SENIOR
JUDGE.

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.

SHAKE, SENIOR JUDGE: George Wayne Bush (Wayne²) appeals from a Warren Circuit Court Decree of Dissolution (Decree), entered on November 7, 2007, and the Order, entered on November 6, 2008, that vacated and amended the prior decree. On appeal, Wayne claims that the trial court abused its discretion by (1) awarding Gabrielle Bush (Gabrielle) an excessive amount of maintenance; (2) finding that Wayne dissipated marital assets; (3) making Wayne pay a portion of Gabrielle's attorney fees; and (4) decreasing Wayne's amount of time with the children.

Gabrielle cross-appeals claiming that the trial court abused its discretion by (1) reversing its findings concerning one instance of alleged dissipation; and (2) reducing her maintenance award.

I. Factual and Procedural Background

Gabrielle and Wayne were married on October 15, 1994. Their marriage produced three children.³ In November 2005, Gabrielle filed for divorce.

At the time of trial, Gabrielle was 39 years old and self-employed as a part-time photographer. She has a high school diploma and an expired cosmetology license. At the time of trial, Wayne was 41 years old and self-employed as a general surgeon.

² The parties are referred to by their first names for purposes of clarity.

³ Gabrielle has two children from a previous marriage. During the parties' marriage Wayne financially provided for all five children.

On November 22, 2005, the parties entered into an agreement concerning the temporary custody of their children, maintenance, and child support. Pursuant to this agreement, Gabrielle remained in the marital home during the separation. Wayne agreed to pay all of the expenses associated with the home and to pay Gabrielle \$4,000.00 per month.⁴ The agreement also provided that neither party would “sell, mortgage, give away, or in any manner transfer, convey, destroy, or dissipate” any property without the court’s consent.

Following trial, which included the testimonies of twenty-four witnesses, the court issued its Decree on November 7, 2007. On November 16, 2007, Wayne moved the court to alter, amend, or vacate the Findings of Fact, Conclusions of Law, and the Decree. Wayne also moved the court for a new trial and relief from the Judgment. On November 6, 2008, the court vacated and amended portions of its prior decree.⁵ These appeals followed.

⁴ This amount was agreed upon in lieu of Gabrielle’s pursuit of maintenance and child support.

⁵ Judge Catherine Holderfield issued the November 7, 2007, decree of dissolution. Following its issuance, Judge Holderfield recused herself from the case. Following a review of the case and examination of the November 18, 2007, motion, Judge Margaret Huddleston issued the November 6, 2008, order.

II. Dissipation of Marital Assets

In its Decree, the trial court concluded that Wayne dissipated marital assets in two ways. In its November 6, 2008, Order, the court amended the Decree and found that only Wayne's post-separation investments in Fineline Construction constituted a dissipation of marital assets.

Dissipation of marital assets occurs when a spouse uses marital funds for nonmarital purposes. *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987). The party alleging dissipation has the burden to prove that the dissipation occurred during a separation period or during divorce proceedings. *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998). Further, the blaming party must show that there was a clear intent to deprive the other spouse of marital assets. *Id.*; *Bratcher v. Bratcher*, 26 S.W.3d 797, 799 (Ky. 2000).

A. Joint Savings Account Withdrawal

In her cross-appeal, Gabrielle claims that Wayne's withdrawal of \$121,000 from the parties' joint savings account constituted dissipation. Wayne alleged that the money withdrawn from the account was spent on items required to establish a new home for him and his children. Although Wayne produced documents to show a portion of his expenditures, he was unable to produce receipts or other documentary evidence to account for \$113,971.60 of the money.

Based upon Wayne's failure to support his claims, the trial court first found that Wayne dissipated the funds. In the court's subsequent Order, the court amended its findings and concluded that Wayne was not required to provide a full accounting of his expenditures. The November 6, 2008, Order provided:

[The decree] was in error in desiring a full and precise accounting of the money spent, which would be required only with an enhanced evidentiary standard that is not present in dissipation decisions. The proper evidentiary standard is preponderance of the evidence, not clear and convincing evidence. [Wayne] has provided credible evidence in the form of testimony, sufficient to establish a legitimate, non-dissipation use for the money. The finding of dissipation as it relates to the U.S. Bank Savings Account is therefore vacated, and this Court . . . finds no dissipation with regard to the approximately \$120,000 withdrawn from said bank account.

After the party alleging dissipation proves the inference by a preponderance of the evidence, the party charged must provide an accounting for the funds in question. "Once the dissipation is shown, placing the burden of going forward with the evidence on the spouse charged with the dissipation is reasonable because that spouse is in a better position to account for these assets." *Brosick*, 974 S.W.2d at 502.

Although the court found that Wayne was not required to provide a precise accounting of his expenditures, its conclusion is not inconsistent with the burden-shifting requirement in *Brosick*. Once the inference is established, the party charged with dissipation must account for the funds in question. However,

there is no affirmative obligation to provide a paper trail account of the expenditures.

The trial court may decide whether an oral accounting and explanation is sufficient. The Kentucky Rules of Civil Procedure (CR) 52.01 requires that due regard shall be given to “opportunity of the trial court to judge the credibility of the witnesses.” Although Wayne’s accounting was sparse and incomplete, the trial court found that his testimony was credible enough to refute the inference of dissipation. Based upon Wayne’s testimony, we will not disturb the court’s findings.

B. Fineline Construction

Wayne claims that the court abused its discretion by finding that his investments in Fineline Construction constituted dissipation. In November 2006, Wayne used marital funds to establish Fineline Construction. His good friend and former college roommate, Tim Pearson (Pearson) became his business partner in the company. Under their arrangement, Wayne was supposed to buy one or two lots of land on which Pearson would build homes, which would then be sold.

Fineline quickly became a losing investment. In addition to drawing a generous salary from the company, Pearson used the Fineline funds for his personal needs. At the time of trial, Pearson lived in a home owned by Fineline without paying rent or assuming any debt associated with the property. Pearson

and his wife both drove new cars purchased by Fineline. Wayne refused to get involved in business matters and disregarded Gabrielle's concern of the company's finances. Although Fineline spent a significant amount of money, the company was not profitable.

Since Wayne's initial investments in Fineline occurred prior to the parties' separation, the court did not find that those initial investments constituted a dissipation of marital assets. However, the trial court found that Wayne's expenditures to Fineline after separation were dissipation. The court concluded:

Despite the fact that it was clearly apparent that Fineline was continuing to lose money and that Gabrielle did not approve of this business model, Wayne continued to make expenditures with regard to Fineline while operating without a profit, resulting in show cause proceedings being filed against him when he continued to put substantial funds into Fineline, over \$57,000, after entry of that order. Wayne clearly did not have a marital purpose as of October 1, 2005 and had the purpose of depriving Gabrielle of these funds. He continued to use Fineline funds to benefit Tim to the detriment of Gabrielle. However, the funds spent from 10/1/05 to present were clearly spent at a time when the benefits of any profits would likely flow to Wayne solely, not to Gabrielle, and therefore these funds were spent for a non-marital purpose.

Wayne argues that the trial court erred by finding that potential profits from Fineline would solely benefit him. He also argues that the money used for the investments were borrowed funds for which he was allocated the debt. We disagree. While any Fineline profits could have been divided between Gabrielle

and Wayne, the monies invested in Fineline were used for the benefit of Pearson. A finding of dissipation requires that the charged party intend to deprive his/her spouse of funds. There is no requirement that the funds are used for the benefit of the charged party. These facts provided a substantial basis for the trial court's finding of dissipation.

III. Maintenance

In the original decree, the court concluded that Gabrielle's liquid assets and her individual monthly income were insufficient to meet her monthly expenses. The court ordered Wayne to pay Gabrielle maintenance in the amount of \$7,100.00 for a period of seventy-two months. This award was based upon Gabrielle's potential to earn \$12,000.00 per year as a photographer, her monthly expenses of \$8,102.41, and the standard of living established during the marriage. The court calculated Wayne's monthly income to be \$22,760.75 and his reasonable monthly expenses to be \$13,242.89. In its subsequent order, the court amended the original award of maintenance to \$6,100.00 per month based upon a recalculation of Gabrielle's monthly expenses. Both Gabrielle and Wayne appeal the amended maintenance order.

KRS 403.200 provides:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court

may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(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.

The trial court has broad discretion to evaluate and assess maintenance. We will not disturb the court's decision absent an abuse of discretion. *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky. App. 1987). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

On appeal, Wayne claims that the trial court's award of \$6,100.00 per month for seventy-two months was excessive. For her portion of the marital assets, Gabrielle received \$387,751.8. She receives \$1,722.40 per month in child support from Wayne and \$700.00 per month in child support for her two children from a previous marriage. The trial court's calculation of Gabrielle's monthly debts and liabilities exceeds \$8,000.00, an amount larger than Gabrielle's monthly maintenance award.

Although Wayne claims that the trial court's calculations were erroneous, the calculations were based upon reasonable approximations of Gabrielle's liabilities, income, and the standard of living to which she had become accustomed. The trial court's order meticulously outlined the figures upon which its calculations are based. Therefore, we conclude that the trial court's award of maintenance was supported by ample evidence.

Conversely, Gabrielle argues that the trial court erred by reducing the maintenance award. The trial court amended the original maintenance award based upon the Decree's failure to deduct debts and liabilities of which Gabrielle was no longer responsible. Gabrielle claims that her monthly income, derived from child support payments, maintenance, and her business income, is \$130.76 short of monthly obligations. As previously stated, courts must consider whether a party "lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs." KRS 403.200 (1)(a). Given Gabrielle's liquid assets, the award is reasonable, even though it may not cover all of her expenses.

III. Attorney's Fees

Wayne claims that the trial court erred by awarding Gabrielle attorney's fees based upon the parties' similar financial situations. KRS 403.220 authorizes a trial court to order a party to pay the attorney's fees of another party if a financial disparity exists between the parties. *Sullivan v. Levin*, 555 S.W.2d 261, 263 (Ky. 1977); *overruled on other grounds by Hale v. Hale*, 772 S.W.2d 628, 629 (Ky. 1989). The question of whether a party should be awarded attorney's fees in a divorce action is left solely to the sound discretion of the trial court. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519-520 (Ky. 2001).

The trial court based the award of attorney's fees upon the financial disparity which existed between Gabrielle and Wayne. In its amended order, the court reasoned,

Using the monthly income figures listed above, which are probably more appropriate than adjusted gross income in this case, [Wayne's] figure is \$22,760.75, less \$6,100.00 maintenance, leaving him with \$16,760.75 in earnings. [Gabrielle], meanwhile, has \$6,100.00 per month income, and her figure is prior to income taxation, while his is a net figure, so her earnings would be less than the stated amount. It is still a significant disparity. . . .

Given the disparity in the parties' monthly incomes and the discretion vested in the trial court, the court's award of attorney's fees was not unreasonable.

IV. Timesharing

Finally, Wayne claims that the trial court erred by failing to award Wayne equal timesharing with his children. In the Decree, Gabrielle and Wayne were awarded joint custody of the parties' three minor children. Gabrielle was named as the children's primary residential parent, while Wayne was designated as the secondary residential parent. Although Wayne had more time with the children under the temporary custody agreement, the trial court did not award Wayne with the same amount of timesharing in the Decree. The custody and timesharing provisions of the Decree and Order were based upon the parties' failure to communicate and Wayne's underlying anger issues.

Our review of the trial court's decision is limited to whether the trial court's findings of fact are clearly erroneous or whether the court abused its discretion in applying those facts. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). A trial court must make custody decisions pursuant to the best interest of the child standard. KRS 403.270 and KRS 403.320; *see also Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Gabrielle presented evidence of Wayne's disruptive behavior. Such behavior could adversely affect his children's emotional well-being. Therefore, the trial court had sufficient evidence on which to base the timesharing reduction. Therefore, we conclude that the trial court did not abuse its discretion.

Accordingly, the Warren Circuit Court Decree of Dissolution and subsequent Order amending are both affirmed.

ALL CONCUR.

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