

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000362-MR AND  
NO. 2001-CA-001971-MR

HOWARD McKNIGHT

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE WILLIAM T. CAIN, JUDGE  
ACTION NO. 99-CI-00586

HARRIET McKNIGHT

APPELLEE

OPINION  
AFFIRMING IN PART - REVERSING IN PART AND REMANDING  
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BEFORE: GUIDUGLI, HUDDLESTON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Howard McKnight (hereinafter "Howard") has taken two appeals from four rulings of the Pulaski Circuit Court. Appeal No. 2001-CA-000362-MR involves an appeal from the Decree of Dissolution of Marriage dissolving his marriage to Harriet McKnight (hereinafter "Harriet") entered December 5, 2000, and from the January 19, 2001, order denying his motion to alter, amend or vacate. Appeal No. 2001-CA-001917-MR involves his appeal from a June 26, 2001, order and from an August 29, 2001, order denying his motion to alter, amend or vacate the June 26, 2001, order. Specifically, Howard is appealing the award of

maintenance to Harriet and whether the circuit court properly denied his CR 60.02 motion and granted Harriet's CR 60.02 motion. We affirm in part, reverse in part and remand for further proceedings.

Howard and Harriet were married in Pulaski County on September 13, 1984. No children were born of the marriage. On July 19, 1999, Howard filed a Petition for Dissolution of Marriage, asserting that the marriage was irretrievably broken and that there was marital property and debts to be divided. On November 29, 1999, the circuit court confirmed the Domestic Relation Commissioner's recommendation that Harriet be granted temporary maintenance, and ordered Howard to pay the mortgage on the marital residence in Burnside as well as the car payments. Later the circuit court found Howard in contempt for failing to make the required payments, but permitted him to pay back the money due in order to purge himself of contempt.

The circuit court eventually entered its Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage on December 5, 2000. In the decree, the circuit court found that Howard had a Kentucky Public Employees Deferred Compensation account in excess of \$68,000.00, which was not subject to its QDRO authority, as well as a retirement account through Kentucky Retirement System worth \$29,979.66. The circuit court further found that Harriet was completely disabled and received \$750.00 per month in social security disability payments, constituting her sole income. Additionally, Harriet lacked sufficient property to provide for her reasonable needs and was unable to

support herself through appropriate employment. Howard's award of marital property included his deferred compensation account valued at \$58,601.71, representing the portion earned during the marriage, along with several vehicles and trailers. Harriet's award included the marital residence in Burnside and her automobile, along with the debt associated with each, as well as 100% of Howard's Kentucky Retirement System account valued at \$29,979.66. The credit card debt of approximately \$12,000 was divided equally between them. Finally, the circuit court ordered Howard to pay Harriet \$670.00 per month in maintenance for sixty months. The circuit court also found Howard in contempt for failing to pay the house and car payments, and gave him thirty days to make the required payments.

Howard moved the circuit court to alter, amend or vacate the decree and to reopen proof pursuant to CR 60.02, arguing that the maintenance award to Harriet was inappropriate pursuant to KRS 403.200 as she had been engaged in paid employment. Additionally, she had not been living in the marital residence during the pendency of the dissolution proceedings in opposition to her prior assertion that she needed the marital residence due to her unemployment. The circuit court denied this motion on January 19, 2001, noting that the allegations in the motion were unsubstantiated and unverified. It is from the decree and the January 19, 2001, order that appeal No. 2001-CA-000362-MR was taken.

On February 12, 2001, Howard filed another CR 60.02 motion for relief from the decree, again arguing that Harriet

perpetrated a fraud on the court regarding her residence and ability to work. He noted in the motion that the circuit court had refused to allow his witnesses to testify in a prior hearing on Harriet's motion to hold him in contempt. Howard also attached several affidavits indicating that Harriet had received compensation for working subsequent to being found totally disabled for social security purposes and that she had not lived in the marital residence during the pendency of the dissolution action. Harriet then moved the circuit court to issue a bench warrant for Howard's failure to purge himself of contempt, followed by Howard's motion to hold her in contempt for her failure to make any effort to satisfy her portion of the credit card debt. On May 25, 2001, Harriet filed a CR 60.02 motion to amend the decree in light of KRS 61.690, enacted several months prior to the entry of the decree, which exempts Howard's retirement from being classified as marital property or as an economic circumstance.

On June 4, 2001, the circuit court held a hearing, but did not entertain argument from counsel on any of the pending motions. At the hearing, Howard presented testimony from several witnesses, including Harriet's adult children, daughter-in-law, friends, and neighbors. Their testimony reflected that Harriet did not reside in the marital home in Burnside during the pendency of the dissolution action, but resided in McCreary County with another individual, and that she received compensation for employment after having been awarded total disability benefits by social security. Harriet, on the other

hand, testified that she had been receiving total disability benefits from social security since 1992, that she had resided in the marital home since the separation, but took several overnight trips away from home, and that she had only provided services to the American Legion on a voluntary basis without receiving any payment. The finance officer from the American Legion testified on Harriet's behalf that she had worked as a volunteer and that he had never issued a check to her. At the end of Howard's presentation of evidence, Harriet noted that she wanted to take an additional deposition and would probably present three or four witnesses. She also moved for a directed verdict on the offer of proof, which the circuit court declined to rule on at that time. Neither Harriet's nor Howard's attorneys were permitted to present any type of argument following the presentation of witnesses.

By order entered June 26, 2001, the circuit court ruled on several of the pending matters. The circuit court first made findings regarding the amount of money which should have been paid to Harriet and as to how much had been paid, finding a deficiency of \$535.00. The circuit court then found, based upon Harriet's and the American Legion Finance Officer's testimony, that Harriet had no income due to her volunteer work. Lastly, the circuit court found that it erred in awarding Harriet Howard's retirement fund. The circuit court then ordered Howard to pay the additional \$535.00 to Harriet to correct the deficiency in payments, denied Howard's CR 60.02 motion to amend the decree and eliminate maintenance, and granted Harriet's

motion to amend the decree regarding the award of Howard's retirement to her. In order to correct the equity value of the property awarded to Harriet as compared to that awarded to Howard, the circuit court ordered Howard to pay her the sum of \$20,000.00 in monthly installments of \$250.00 and awarded the entirety, rather than half, of the credit card debt to Howard.

On July 5, 2001, Howard moved the circuit court to alter, amend or vacate its June 26, 2001, order and for a hearing on his motion to hold Harriet in contempt. He argued that based upon the totality of the testimony presented at the prior hearing, his CR 60.02 motion should have been granted. Additionally, the court did not allow the parties to present any argument or evidence regarding Harriet's CR 60.02 motion, thereby denying him due process. Lastly, Howard pointed out that the circuit court still had not ruled on his motion to hold Harriet in contempt. On August 29, 2001, the circuit court denied Howard's motion, but granted Harriet a judgment against Howard for maintenance from December 5, 2000, through July 2001. It is from the June 26 and August 29, 2001, orders that appeal No. 2001-CA-001971-MR was taken. This Court consolidated the two appeals for all purposes on September 19, 2001.

Howard has raised several arguments on appeal. These issues include the award of and amount of spousal maintenance, the valuation of marital assets, the treatment of his deferred compensation account as marital property, and the propriety of the rulings on the CR 60.02 motions. In response, Harriet argues that the award of maintenance was appropriate and that the amount

awarded was in accordance with the evidence. Additionally, she argues the circuit court did not err in valuing the marital property and did not deprive Howard of his right to due process.

Our standard of review regarding an award of maintenance is that of abuse of discretion. "The amount and duration of maintenance is within the sound discretion of the trial court. Gentry v. Gentry, Ky., 798 S.W.2d 928, 937 (1990); Combs v. Combs, Ky.App., 622 S.W.2d 679, 680 (1981), citing KRS 403.200(2) and Browning v. Browning, Ky.App., 551 S.W.2d 823 (1977)." Russell v. Russell, Ky.App., 878 S.W.2d 24, 26 (1994).

Furthermore, we are mindful that in matters of such discretion, "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge." Clark v. Clark, Ky.App., 782 S.W.2d 56, 60 (1990). (Emphasis added.) See also Platt v. Platt, Ky. App., 728 S.W.2d 542 (1987), and Moss v. Moss, Ky.App., 639 S.W.2d 370 (1982).

Weldon v. Weldon, Ky.App., 957 S.W.2d 283, 285-86 (1997).

Likewise, in reviewing a circuit court's ruling on a CR 60.02 motion, "[t]he trial court's exercise of discretion will not be disturbed on appeal except for abuse." Fortney v. Mahan, Ky., 302 S.W.2d 842, 843 (1957). With this in mind, we shall review the circuit court's rulings.

Howard first argues that Harriet was not entitled to an award of maintenance, or, even if appropriately awarded, that the amount awarded was excessive. The legislature set out the requirements for an award of maintenance in KRS 403.200 as follows:

403.200 Maintenance; court may grant order  
for either spouse

- (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 amount 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.

First, we hold that the evidence supports the circuit court's valuation of the marital property. There was sufficient evidence in the record through the testimony of both Howard and Harriet to allow the circuit court to place a reasonable value on each item, including those with disputed values. Next, we hold that the circuit court properly treated Howard's deferred compensation account as marital property. Howard's argument that KRS 61.690, which exempts his retirement from being classified as marital property or as an economic circumstance, also applies to his deferred compensation plan established pursuant to 26 U.S.C. § 457 is not well taken. Because the legislature did not specifically include § 457 deferred compensation plans in KRS 61.190, the statute does not apply. Therefore, the circuit court properly treated Howard's deferred compensation account as marital property and assigned it to him.

We believe the circuit court did not abuse its discretion in awarding maintenance to Harriet. It is undisputed that she is disabled and receives \$750.00 per month in social security disability benefits. Although she was awarded both the furnished marital residence and her automobile, she was also awarded the debt on each, which equals approximately \$935.00 per month. Additionally, she was not awarded any income-producing marital property. Therefore, Harriet meets the requirements for an award of maintenance as she lacks sufficient property to

provide for her reasonable needs and is unable to support herself through appropriate employment due to her disability.

However, we believe the circuit court abused its discretion in the amount of maintenance awarded. In the original decree, the circuit court awarded Harriet \$670.00 per month in maintenance for sixty months. The circuit court later amended the decree, and ordered Howard to pay her the sum of \$20,000.00 in monthly installments of \$250.00, thereby raising the monthly payments Howard was ordered to pay Harriet to \$920.

Pursuant to KRS 420.200(2)(a), the circuit court is to consider the financial resources of the party seeking maintenance. In this case, the circuit court specifically found that Harriet "is completely disabled and has as her sole income social security disability payments of \$750.00 per month." Following the June 4, 2001, hearing, the circuit court found that Harriet had no income as a result of her volunteer work at the American Legion. There is no indication in the June 26, 2001, order that the circuit court even considered the testimony offered by Howard. Janie Chambers, who had known Harriet her whole life, testified that she paid Harriet \$150.00 per week for bookkeeping services from November 1995 through July 1996, and that Harriet continued working there after Janie left the business. Barbara Tucker, a lifelong friend of Harriet, testified that Harriet told her she was being paid for her work at the American Legion, and that she had been living with her boyfriend in McCreary County. Margaret Langdon, who had been a friend of Harriet for thirty years, testified that Harriet told

her she needed to make some money and worked at the American Legion. Tad Beaty, Harriet's son, and Tracy, his wife, testified that they would contact Harriet in McCreary County after the separation, and that they would visit Tad's brothers at the marital residence. Tina Embry, Harriet's daughter, testified that she had visited her mother many times at the marital residence and a few times in McCreary County since the separation, and had stayed overnight with her mother in February 2000 in McCreary County at Ken Lyon's residence. She testified that she saw some of her mother's clothes at Ken Lyon's residence as well. Howard was attempting to use this testimony to attack Harriet's credibility and to establish her ability to work. She had earned income as a bookkeeper following her award of disability benefits from social security and had related to others that she was working at the American Legion because she needed the money.

In determining the amount of maintenance to award to Harriet, the circuit court was also required to assess Howard's ability to meet his own needs while meeting Harriet's needs pursuant to KRS 403.200(2)(f). It appears that with the maintenance and additional \$250.00 monthly payment awarded, Howard may be unable to meet his own needs. As pointed out in his brief, after deducting the \$920.00 payment to Harriet, he only has \$1673.00 remaining to meet his reasonable monthly living expenses, which he had previously claimed to be \$1725.31. It is also apparent to us that Harriet might not have the same amount of reasonable monthly living expenses at this time. The \$68.00

per month allotted to tires in 2000 was limited to six months and it appears that the debt on Harriet's automobile might be paid off at this point. Therefore, we must reverse on the issue of the amount of maintenance and remand for further proceedings.

Likewise, we believe the circuit court abused its discretion in denying Howard's CR 60.02 motion as to the issue of the maintenance award.

As to Harriet's motion to amend the decree, we believe the circuit court properly granted the motion to remove Howard's retirement benefits from consideration as marital property in order to comply with KRS 61.690. We also agree that the circuit court's order for Howard to pay an additional sum of \$20,000.00 to Harriet as well as the entire credit card debt is proper to recreate an equitable division of marital property pursuant to KRS 403.190.

Lastly, we agree with Howard that the circuit court has never ruled on his motion to hold Harriet in contempt for failing to attempt to pay the portion of the credit card debt assigned to her in the original decree. Although the circuit court's re-assignment of the debt apparently mooted the issue, the circuit court is still required to rule on the pending motion.

For the foregoing reasons, the rulings of the Pulaski Circuit Court are affirmed in part and reversed in part and this case is remanded for further proceedings regarding the amount of maintenance to be awarded to Harriet, and Howard's motion to hold Harriet in contempt.

HUDDLESTON, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KNOFF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I concur in part and dissent in part from the majority opinion with respect to the amount of maintenance. Although I agree with the majority that the circuit court should reconsider the amount of maintenance in light of Harriet's ability to work and Howard's ability to pay, I do not believe that this Court may set aside the trial court's factual findings regarding Harriet's income absent clear error. The majority opinion states that the trial court failed to consider Howard's evidence that Harriet earned additional income working for the American Legion. As the majority correctly points out, Howard presented substantial evidence regarding the cash payments that allegedly had been made to Harriet. Nevertheless, the trial court specifically found, based upon Harriet's testimony and the testimony of the finance officer of the American Legion, that Harriet has no outside income. Although I certainly agree with the majority that the evidence would (and probably should) have supported a contrary finding, this Court is not permitted simply to substitute its judgment for that of the trial court. Leveridge v. Leveridge, Ky., 997 S.W.2d 1 (1999). The trial court's factual findings were supported by evidence of probative value and are therefore not clearly erroneous. CR 52.01.

Nonetheless, I agree with the majority's decision to remand this matter for reconsideration of the amount of maintenance. Even if Harriet did not receive additional income above her social security disability payments, there was uncontested evidence that Harriet actually does volunteer work for the American Legion. Despite her disability she is "able to support herself" at least to some degree, through appropriate employment, and thus income should be imputed to her. Furthermore, as the majority correctly points out, the total payments which the trial court ordered Howard to make to Harriet now exceed his reasonable expenses. See KRS 403.200(2)(f). In addition, the trial court's orders do not address Howard's allegations and evidence regarding Harriet's co-habitation with another man. Therefore, upon remand the trial court must address these issues and reconsider the amount of maintenance to which Harriet is entitled. Dotson v. Dotson, Ky., 864 S.W.2d 900, 903 (1993).

Furthermore, I agree with the majority's decision to affirm the trial court's adjustment in its division of marital property, but I write separately to emphasize why the adjustment did not constitute an abuse of discretion. Harriet pointed out that the 2000 amendment to KRS 61.690 prohibited Howard's state retirement from being classified as marital property or from being considered as an economic circumstance in a dissolution proceeding. Consequently, in its amended decree, the trial court excluded the value of

Howard's retirement from its calculation of the marital estate. The net result of this change was to skew the division of marital property even more in favor of Howard. To make the property division more equal, the trial court ordered Howard to pay Harriet an additional \$20,000.00 and to assume responsibility for an additional \$6,000.00 in marital credit card debt.

In determining a party's entitlement to maintenance, the trial court must consider any marital property awarded to her. KRS 403.200(1). However, the trial court's division of marital property is not contingent upon the amount of maintenance awarded. Rather, the court "shall divide the marital property without regard to marital misconduct in just proportions considering" all of the criteria set out in KRS 403.190(1)(a)-(d). Even with these additional payments, the trial court's amended decree still awarded Howard more than 60% of the entire marital estate. Given the duration of the marriage and all other factors, I agree with the majority that the trial court's adjustment in its division of marital property and debt did not constitute an abuse of discretion.

Lastly, I agree with the majority that KRS 61.690 does not preclude division of Howard's deferred compensation plan. However, I write separately to express my concern about the Kentucky Public Employees' Deferred Compensation Authority's position that a deferred compensation plan established pursuant to 26 U.S.C. § 457 is

not subject to a qualified domestic relations order (QDRO). The Authority has taken this position in this action and in other actions despite statutory authority to the contrary. In 1989, Congress amended 26 U.S.C. § 414(p) to add a new subsection (11). That subsection provides that a distribution or payment from a governmental plan shall be treated as made pursuant to a QDRO if it is made pursuant to a domestic relations order which creates an alternate payee's right to receive part or all of the benefits payable to a participant. Pub. Law 101-784 § 784(a)(2). § 414(p)(11). The definition of "governmental plan" in § 414(d) would seem to include a § 457 plan. Although the question of when a QDRO will be recognized in such cases remains unsettled, I do not believe that the Authority's position on this issue is well founded. See generally, "Code Sec. 457 Deferred Compensation Plans for State and Local Governments and Tax-Exempt Employers," 1A Pension Plan Guide (CCH) ¶ 8018 at 9926. (Mar. 3, 1999). Nevertheless, I recognize that the Authority has not been made a party to this case, and this issue is not before the Court at this time.

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