

RENDERED: August 29, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002742-MR

MARGARET A. JONES

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET COLEMAN, JUDGE
ACTION NO. 98-CI-00365

WILLIAM G. JONES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND KNOPF, JUDGES; AND MILLER, SENIOR JUDGE.¹

JOHNSON, JUDGE: Margaret A. Jones has appealed from a judgment and decree entered by the Hardin Circuit Court on November 26, 2001, which adopted the Domestic Relations Commissioner's findings of fact and conclusions of law. Having concluded that the trial court's findings of fact were not clearly erroneous and that it did not abuse its discretion in dividing the marital

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

property and debts and by denying Margaret's maintenance claim, we affirm.

William G. Jones and Margaret A. Jones have been married and divorced twice; no children were born of either marriage. The parties were first married on October 19, 1974. The first marriage was dissolved pursuant to a separation and property settlement agreement dated January 26, 1987, and a decree of dissolution of marriage entered on April 6, 1987. The couple divided their interest in various personal and real property pursuant to the property settlement agreement. Margaret received inter alia, a duplex, a house, a farm, and a parcel of real estate, all of which were located in Kentucky; a parcel of real estate in Florida; two automobiles; her personal property; and \$200.00 per month from William's military retirement pension, as well as 20% of any increase in his military retirement pension as of January 26, 1987. Margaret assumed all indebtedness on the real property she received, except William assumed a second mortgage on Margaret's duplex. William received, inter alia, \$1,000.00 of Margaret's savings; a duplex in Kentucky; a farm in Kentucky; a condominium in Florida; a parcel of real estate in Florida; a pickup truck; all of the parties' interest in Panda Petes Corporation; his personal property; and his military retirement, with the exception of that portion awarded to Margaret. William assumed

all indebtedness on the real property he received. The property settlement agreement finally provided that "[i]t is understood and agreed between the parties that any property or indebtedness not specifically mentioned herein shall be shared equally by the parties."

On October 19, 1987, about six months after their divorce was final, the parties remarried. On March 4, 1998, William filed a petition for legal separation. Over the next two years, the parties then filed various pendente lite motions, and on January 21, 2000, William moved the trial court to convert the petition for legal separation to a petition for dissolution of marriage.² The parties then filed various financial disclosure documents, and after numerous continuances, a three-hour evidentiary hearing was held before the Domestic Relations Commissioner on July 16, 2001.

On September 28, 2001, the Commissioner filed his report, which recommended a division of the parties' property and debts and a denial of Margaret's request for maintenance. Margaret filed objections to the Commissioner's recommendations, which were denied by an order entered on November 26, 2001. The trial court adopted the Commissioner's recommended findings of

² On September 1, 1998, the Larue Circuit Court entered an agreed order in the previous divorce action, 87-CI-016, which directed William to pay Margaret her portion of his military retirement pay in the amount of \$251.53 per month, beginning immediately. This sum included 20% of the increase William had received since 1987.

fact and conclusions of law in the judgment and decree entered on November 26, 2001. This appeal followed.

Margaret has raised five issues on appeal. Four of these issues involve the division of marital property and debts and the fifth issue concerns her claim for maintenance. Our standard of review on all these issues is limited to first determining whether the findings of fact relied upon by the trial court for its ruling were clearly erroneous, and second to determining based on those factual findings whether the trial court abused its discretion in dividing the property and debts and by denying the maintenance claim.³

Margaret first argues that the trial court erred by dividing the equity in the marital residence as of the date of the divorce instead of the date of the parties' separation. Margaret claims that since she made all the mortgage payments after the parties separated that she should "at the very least, be awarded the equity in the house from the time the parties separated on February 22, 1998[,] up and until the date of the final hearing on July 16, 2001."

Margaret claims that she made monthly payments of \$515.00 from funds she received from disability insurance, social security disability, and rents from her non-marital property. The trial court valued the residence at \$78,000.00,

³ Kentucky Rules of Civil Procedure (CR) 52.01; Drake v. Drake, Ky.App., 721 S.W.2d 728, 730 (1986).

with a mortgage on the date of dissolution of \$8,130.00, and ordered that the equity of \$69,870.00 be divided equally between the parties. Margaret states in her brief that she "wants all of the equity accumulated in the marital property from the date she and William separated[;]" but when she calculates the amount of the trial court's alleged error, she only asks that her payment to William for his equity in the house be decreased by \$7,435.00.⁴

Marital property is all property acquired by either spouse subsequent to the marriage.⁵ William and Margaret purchased their marital residence in 1998 after they remarried, and it is clearly marital property. KRS 403.190(1) provides four factors to be considered in distributing marital property:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and

⁴ Margaret claims that instead of the mortgage payoff of \$8,130.00 that was used by the trial court that it should have used \$23,000.00, the amount owed in June 1998. Thus, Margaret claims that with the payments she made during the parties' separation she reduced the debt by \$14,870.00. Her calculation divides \$14,870.00 by two to arrive at her claimed error of \$7,435.00. We fail to understand the reason for dividing the \$14,870.00 by two, since her argument is that her payments alone produced the entire increase in equity of \$14,870.00.

⁵ KRS 403.190(2).

- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

Margaret argues that, in contravention of KRS 403.190(1)(a), the "Commissioner failed to consider [her] sole contribution to the acquisition of the marital residence from the time the parties separated."⁶ She relies upon Stallings v. Stallings,⁷ in support of her contention, but we conclude that Stallings actually supports William's position. In Stallings, our Supreme Court noted that property acquired after separation but before entry of the decree is presumed to be marital property.⁸

The major flaw in Margaret's argument is that all the funds that she used in making the payments on the mortgage during the period of separation were marital property. As the Supreme Court noted in Stallings, supra, the exclusions from the definition of marital property are limited to those at KRS 403.190(2). None of the funds used by Margaret to pay the mortgage come within the statutory exclusion. The trial court's

⁶ At all times relevant to this appeal, Margaret resided in the marital home.

⁷ Ky., 606 S.W.2d 163 (1980).

⁸ Stallings, supra at 164; see also Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 522 n.5 (2001) (citing KRS 403.190(2); and Stallings, supra).

findings of fact were not clearly erroneous, and it did not abuse its wide discretion in dividing this marital property.⁹

Margaret also claims that the trial court erred by finding that she and William entered into an oral agreement whereby William would pay various bills on behalf of Margaret in lieu of paying her a portion of his monthly military retirement benefits.¹⁰ Pursuant to the parties' 1987 divorce decree and the subsequent agreed order entered on September 1, 1998, William was to pay Margaret, as her portion of his military retirement benefits, \$251.53 per month. The trial court found that William and Margaret had entered into an oral agreement whereby in lieu of the payment of \$251.53 per month, William paid Margaret's car insurance, health insurance, and life insurance. The trial court also found that during the period from September 1, 1998, to July 31, 2001, that William was obligated to pay Margaret for her share of the military retirement benefits the sum of \$5,785.19; and that pursuant to their agreement, he had made various expense payments on her behalf totaling \$5,284.40; leaving a balance owed by William to Margaret of \$500.79.

⁹ Johnson v. Johnson, Ky.App., 564 S.W.2d 221, 222 (1978).

¹⁰ The trial court recognized that any dispute over payments that had been ordered by the Larue Circuit Court in the first divorce action (87-CI-016) might better be addressed by that court, but at the request of the parties and in the interest of judicial economy it decided the issue as a part of this litigation.

Margaret claims not only that the factual finding by the trial court that the parties entered into an oral agreement was clearly erroneous, but also that the trial court's finding of fact as to the amount actually paid by William was clearly erroneous. Since an alleged oral agreement is at issue, the first factual finding centers on which party the trial court chose to believe. The trial court "had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, is in the best position to make findings of fact."¹¹ Obviously, when the trial court accepted William's testimony that there was an oral agreement over Margaret's denial of such an agreement, William's testimony constituted substantial evidence of the oral agreement. Thus, we cannot hold the trial court's finding to be clearly erroneous.

As to the amount actually paid by William for Margaret's expenses, once again the trial court considered the parties' disputed testimony and the documentation submitted in support of their positions. While Margaret reargues her contentions in her brief, our review is limited to determining whether there was substantial evidence to support the trial court's finding. Since the trial court chose to accept William's testimony and his supporting documentation in arriving

¹¹ Bealert v. Mitchell, Ky.App., 585 S.W.2d 417, 418 (1979)(citing 7 W. Clay, Kentucky Practice, CR 52.01).

at the total paid of \$5,284.40, we cannot hold that finding to be clearly erroneous.

Margaret also claims the trial court erred in dividing the parties' retirement accounts. The decree refers to three separate accounts: (1) Margaret's IRA valued at \$22,000.00; (2) William's retirement benefits accrued at his former employer, New York Life Insurance Company, from 1983 to 1998; and (3) William's 401(k) account with New York Life, which he cashed out for \$8,200.00. The trial court determined that the first divorce decree only addressed this particular property in a general manner by providing "that any property or indebtedness not specifically mentioned herein shall be shared equally by the parties." The trial court then found that all retirement benefits accumulated by the parties during their marriage constituted marital property, which it determined should be divided equally. Thus, the trial court ordered that a Qualified Domestic Relations Order should be entered on William's and Margaret's retirement plans whereby each party would receive their one-half share of any such benefits which had accrued during both of the two marriages. The trial court also determined that William's 401(k) account had been cashed out for \$8,200.00 and that the funds had been used to pay off two credit card debts.

Margaret first argues that the trial court's findings of fact concerning William's 401(k) account were clearly erroneous. Once again, we are presented with an issue of fact which the trial court found favorably to William. While there was conflicting testimony concerning the value of William's 401(k) account on different dates, the trial court's factual finding was supported by William's testimony. Likewise, the trial court's finding that William used the \$8,200.00 to pay off two credit card debts was also supported by his testimony.

Margaret further claims that William dissipated his 401(k) account. While this concept is recognized by Robinette v. Robinette,¹² and other Kentucky case law, Margaret failed to produce evidence of dissipation which would allow this Court to hold that the trial court was clearly erroneous by not finding that there had been a clear showing of William's intent to deprive Margaret of her proportionate share of this marital property.¹³

Margaret also asserts in regard to the division of the retirement accounts that the trial court erred by not assigning her IRA to her as non-marital property. We believe the trial court correctly relied upon the parties' separation agreement from the first divorce in determining that all of the retirement

¹² Ky.App., 736 S.W.2d 351 (1987).

¹³ Id. at 354.

accounts were adjudged in the first decree as being jointly and equally owned by the parties.

The final issue of the four issues related to division of property concerns the trial court's award of William's 1990 Ford truck to him and Margaret's 1988 Crown Victoria to her. The trial court accepted William's evaluations and assigned the value of \$2,850.00 to each of these vehicles. Margaret claims that William's truck was worth \$3,400.00, that her car was worth only \$1,550.00, and that William should be required to pay her the difference of \$1,850.00. A property owner is allowed to testify as to the value of his own property so long as there is a basis for his opinion.¹⁴ We cannot conclude that the trial court abused its discretion by accepting William's testimony as to the value of the two vehicles, that the values as found by the trial court were clearly erroneous, or that its equal division of these assets was an abuse of discretion.

The final issue for our review involves Margaret's argument that the trial court erred by denying her claim for maintenance. An award of maintenance is a matter within the sound discretion of the trial court.¹⁵ KRS 403.200 provides that, in a proceeding for dissolution of marriage or legal

¹⁴ Roberts v. Roberts, Ky.App., 587 S.W.2d 281, 283 (1979).

¹⁵ Browning v. Browning, Ky., 551 S.W.2d 823, 825 (1977)(citing Bell v. Bell, Ky., 494 S.W.2d 517 (1973)).

separation, the court may grant a maintenance order for either spouse only if the spouse seeking maintenance (a) lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs, and (b) is unable to support herself through appropriate employment. If the court finds that a maintenance award should be granted, then pursuant to KRS 403.200(2) six factors must be considered, 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 determined that Margaret's net disposable income was \$3,281.53 per month, and that William's was \$2,374.00 per month. The trial court also determined that

seven of Margaret's drug prescriptions totaled \$1,151.00 per month.¹⁶ The trial court further found that William's monthly expenses were \$1,931.00, and that although he suffered from some medical problems, his medical expenses were covered under his Tri-Care health insurance coverage. The trial court then found as follows:

Margaret wants this Court to impute an income to William equal to the amount he was earning in 1998. William was employed as New York Life Insurance agent for 16 years until September 1998. In 1998, he was earning approximately \$40,000. William was terminated from that position when he failed to meet his required quotas. William has not applied for any other insurance agent positions since 1998.

This Commissioner concludes that William is unable to earn the same income now as in 1998. His ability to earn income has diminished. He is already working, but at a much less paying job.

Thus, the trial court found that "Margaret has much more income than William does, and she has assets valued over \$107,000." The trial court further found that although it was unfortunate that Margaret's medical expenses were so costly, "there was insufficient evidence to support that Margaret is not eligible for private insurance that covers prescriptions." The trial court found "that this was an inappropriate case for the award of maintenance." We cannot conclude that the trial

¹⁶ Margaret disputes this finding.

court's findings of fact were clearly erroneous or that it abused its discretion when it applied those factual findings by denying Margaret's request for maintenance.

Based on the foregoing reasons, the judgment and decree of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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