

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001595-MR

JIMMY RAY THRASHER

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 01-CI-00002

SARA JO McWHORTER

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Jimmy Ray Thrasher appeals from a final decree entered by the Clinton Circuit Court dissolving his marriage to Sara Jo McWhorter. He argues that the trial court erred in making an award of maintenance to his former wife. Our review of the record reveals no abuse of discretion by the trial court. Thus, we affirm.

Thrasher and McWhorter were married in 1975; their three children are all emancipated. They separated in November 2000, and McWhorter filed a petition to dissolve the marriage the following year. A final decree was not entered until June of 2003. During the pendency of the action, Thrasher was

ordered to pay McWhorter temporary maintenance in the amount of \$650 per month. In the final decree of dissolution, McWhorter was awarded maintenance of \$600 per month until her death, remarriage, or cohabitation with a person of the opposite sex.

Thrasher had worked for the same employer (Pepsi Cola) for more than twenty years, and he was earning approximately \$48,000 per year when the parties separated in 2000. However, he changed positions in the company after the petition for dissolution was filed. At the hearing conducted by the trial court in June 2003, he testified that he was then earning about \$26,000 annually.

McWhorter worked during the marriage at a convenient-type store owned by the parties. They closed the store in 1999 after it began losing money. McWhorter then obtained her certification as a nurse's assistant and worked for a short time for Family Home Health. However, McWhorter began experiencing health problems that prevented her from continuing in that line of work. At the time of the dissolution, she was working part-time at a Sav-A-Lot grocery store and was earning \$5.15 per hour. She testified that she hoped to be able to be employed on a full-time basis eventually at the store.

The parties had accumulated some property during the marriage, but their primary asset was equity in the marital residence. They presented two appraisals of that property. One

expert valued the home at \$115,000; the other appraised it at \$159,000. They owed approximately \$63,000 on the house at the time of dissolution.

Thrasher and McWhorter were unable to agree on the value of their realty and of many items of personal property. Because of the disparity in the values offered into evidence, the trial court determined that the fair market value could only be resolved by a sale. In the final decree, the court accordingly ordered the Master Commissioner to sell the property. From the proceeds of the sale, the Commissioner was ordered to pay the costs of the sale, the indebtedness owed on the property, and certain other marital debts. The balance of the proceeds was then ordered to be divided between the parties in equal shares.

The trial court made thorough and extensive findings and conclusions with respect to an award of maintenance under the criteria set forth in KRS¹ 403.200 as follows:

This Court further finds that there is a significant disparity in the income received by [McWhorter] and that received by [Thrasher]. [McWhorter's] income, as has been previously stated, is only \$5.15 per hour, and she is presently working less than 40 hours per week. [Thrasher] received 36 cents per mile from his employer, and according to a document tendered by his attorney styled, "Sworn Joint Disclosure Statement," his annual income is

¹ Kentucky Revised Statutes.

approximately \$26,000. [Thrasher] was previously employed as a pre-salesman for Pepsi Cola, and prior to that position, was a route supervisor for Pepsi Cola earning approximately \$48,000.00. [Thrasher] claims that he was forced to take a position with Pepsi Cola reducing his income because of [knee] surgery. . . . This Court finds that there is no credible evidence presented indicating that [Thrasher] could not return to the more lucrative position he originally held. In particular, there is no medical evidence of record to support any type of debilitating injury. This Court further finds that [Thrasher] has recently purchased a 2001 Honda motorcycle. This Court finds that apparently, riding a motorcycle does not interfere with the condition delineated by Dr. Sajadi [Thrasher's doctor].

. . .

This Court finds that [McWhorter's] poor health, coupled with her limited financial resources, render her unable to acquire sufficient education or training to find appropriate employment that would enable her to earn a greater amount of money. Dr. Carol B. Peddicord testified in a deposition taken on March 17, 2003, that [McWhorter] suffers from degenerative disc disease of the cervical and lumbar area. Dr. Peddicord testified that [McWhorter] has back pain and neck pain and has a nerve impingement from a ruptured or bulging disc in the cervical and lumbar area. Dr. Peddicord further testified that a M.R.I. had been performed and that this led to her diagnosis. Dr. Peddicord restricted [McWhorter] to refrain from lifting anything over ten (10) pounds, to avoid reaching, pulling, bending down, sitting, or standing for greater than one (1) hour. Dr. Peddicord further testified that [McWhorter] suffers from hypertension and that she is required to take medication for this condition. Dr. Peddicord still further

testified [McWhorter] suffers from migraine headaches. According to Dr. Peddicord, [McWhorter] has recently undergone a biopsy of her stomach which disclosed a large ulcer. Dr. Peddicord finally testified that [McWhorter's] overall health was not good for her age. Dr. Peddicord opined that [McWhorter], in her opinion, could not work 40 hours per week in Albany, Kentucky, or within close, reasonable proximity, and earn \$6.50 per hour. . . .

This Court finds that [the parties] did not enjoy an elaborate standard of living during their marriage. This Court finds that [the parties] did not take many vacations, but they did attend numerous walking horse shows.

This Court finds that [the parties] were married for 25 years before their separation. This Court believes that this is a long marriage under modern standards.

This Court finds that due to [McWhorter] being 44 years of age, coupled with the physical and mental problems enumerated by this Court . . . [McWhorter] is entitled to maintenance. This Court further finds that [McWhorter] testified at the oral hearing before this Court that she has no medical insurance since [Thrasher] cancelled the medical insurance which previously covered her medical expenses.

. . .

This Court concludes as a matter of law from the findings set forth [earlier], that there is a disparity in the income of the parties. This Court further concludes as a matter of law that the physical impairments affecting [McWhorter] will undoubtedly limit her ability to work in the immediate area in which the parties reside.

KRS 403.200 seeks to enable a spouse to acquire the skills necessary to support herself in the current workforce so that she does not rely upon the maintenance of the other spouse indefinitely. However, in situations where the marriage was long term, a discrepancy in income is significant, or the prospects for self-sufficiency are rather dismal, courts may award maintenance for a significant period of time. This Court concludes as a matter of law that whatever income which may be realized by [McWhorter] from the sale of the property will likely be expended on acquiring a new residence.

(Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage, entered June 30, 2003, pp. 12-16, 20-21.)

In his appeal in this Court, Thrasher objects to several of the trial court's findings of fact and to the court's application of those facts to the statutory factors in KRS 403.200. Thrasher has not complied with CR² 76.12(4)(c)(v), failing to state where and how the issues were preserved for our review. He has also neglected to include any references to the specific places in the videotape recording pertinent to his argument that the maintenance award was not supported by substantial evidence. Nonetheless, despite these deficiencies, we have carefully reviewed the entire record -- including the depositions of the parties and the video recording of the two hearings conducted by the trial court.

² Kentucky Rules of Civil Procedure.

The decision as to whether to grant or to deny maintenance is within the sound discretion of the trial court. Therefore, our standard of review must be deferential:

Under [KRS 403.200], the trial court has dual responsibilities; one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous, or that the trial court has abused its discretion.

Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992); see also, Leveridge v. Leveridge, Ky., 997 S.W.2d 1 (1999). Moss v. Moss, Ky.App., 639 S.W.2d 370, 373 (1982), states our standard even more forcefully: "[b]arring a showing of absolute abuse, the confidence of the appellate courts is reposed in the trial judge." (Emphasis added.)

Thrasher first argues that the trial court erred in calculating the income available to McWhorter from her employment. He argues that the court based its finding of the number of hours that McWhorter worked on the evidence which she submitted for a single week. He contends that the result is "grossly unfair" since it "may not adequately represent" the actual number of hours that she might work on an annual basis. (Appellant's brief, unpaginated p. 7). Also, he argues, "it

does not represent her prior employment, nor her ability to obtain more substantial employment." (Id.)

At the hearing conducted in June 2003, McWhorter testified that she had only been working part-time at Sav-A-Lot for three weeks. Although it was her hope that she might later be hired on a full-time basis, her employer had no immediate plans to expand her schedule or to enhance her income. Thrasher presented no evidence to contradict McWhorter's testimony on this point.

Thrasher also complains that the court did not consider the possibility that McWhorter might be able to find more substantial employment. On the contrary, its findings, as we have noted, directly contemplated and recited two major hindrances that encumber her: her limited education and numerous health problems. And regardless of whether McWhorter ever obtains full-time employment, the evidence indicates the strong likelihood that she would not earn nearly as much income as Thrasher. We cannot agree that the court's finding of disparity in the incomes was erroneous.

Thrasher next argues that the court had no basis for rejecting his stated reason for taking a lower-paying position with his employer. He contends that he quit the more lucrative job "in order to prevent further damage to his knees, not . . .

to avoid paying a higher support obligation." (Appellant's brief, p. 8.)

As the trier of fact, the trial court was in the best position to judge the credibility of the witnesses. Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999); CR 52.01. The court was not required to accept Thrasher's explanation for reducing his salary by nearly one-half after the petition for dissolution was filed. The court noted that Thrasher had undergone knee surgery more than five years prior to his job change and that he had not been to the doctor for more than three years. Additionally, it observed that he was able to ride a motorcycle.

The court also remarked upon Thrasher's decision to change his health insurance during the dissolution proceeding without giving notice to McWhorter. Although McWhorter has serious medical conditions necessitating her access to prescription drugs, Thrasher admitted changing his plan in order to exclude coverage for her -- with a resulting savings to him of \$25 per month. This evidence indicates that Thrasher was acting at the least in callous disregard of her needs -- if not indeed in bad faith. The court was entitled to assess his conduct under the statutory criteria.

In his third argument, Thrasher contends that the trial court awarded maintenance prematurely. Because the sale

of their property had not yet been accomplished, he believes that the amount of property that McWhorter would have at her disposal was as yet unknown and that, therefore, a proper decision as to maintenance could not be made.

It is true that the trial court was required to consider the amount of property awarded to McWhorter before setting maintenance.

In the fixing of maintenance the trial court must take into consideration the assignment of property made pursuant to the provisions of KRS 403.190 and the factors delineated in KRS 403.200. As a matter of fact, there must be a division of property before considering the amount of maintenance. Farmer v. Farmer, Ky., 506 S.W.2d 109 (1974).

Newman v. Newman, Ky., 597 S.W.2d 137, 138 (1980). Thrasher is also correct in asserting that the court did not know the exact amount to be realized from the sale of the marital property. Nevertheless, we believe that it had sufficient evidence to support its finding that McWhorter would not be able to support herself -- regardless of the outcome of the sale.

As we noted previously, the only major asset to be divided was the marital residence, which was separately appraised at either \$115,000 or \$159,000. If we were to assume that it sold for the greater amount, McWhorter's share of the equity (\$159,000 minus \$63,000, the remainder divided by two) would amount to \$48,000. Even if she did not exhaust that

amount to obtain another residence, her share of the proceeds (if invested) would not provide significant income to meet her reasonable needs. Thus, the trial court's findings with respect to McWhorter's need for maintenance are not clearly erroneous.

Thrasher argues that the amount of maintenance awarded to McWhorter destroys his ability to meet his own needs. He criticizes the court for its unrealistic findings as to his expenses. However, the expenses listed in the final decree were all provided by Thrasher himself. He testified to two other expenses (feed and rent for horses) that were not included in the trial court's findings. But he did not provide any testimony concerning the amount of these expenses. We agree that the list of Thrasher's expenses was conservative. Nonetheless, the court was not at liberty to assume the likely existence of any additional expenses in the absence of proof.

Thrasher last argues that the amount of maintenance is too high considering the standard of living established during the marriage. He contends that the sum of \$600 per month is "wholly inappropriate" in light of the court's finding that the parties did not enjoy an elaborate standard of living.

(Appellant's brief, p. 11.)

The record reveals that the parties owned their own home that was worth well over \$100,000 according to either of the two appraisals offered into evidence. They owned multiple

vehicles and were able to purchase automobiles for their children. They owned a boat and a camper. They owned several horses, which they paid to board and which they transported to various locations to participate in horse shows. While their standard of living may not have been elaborate, it is evident that McWhorter will not be able to maintain anything approximating her previous lifestyle with the property assigned to her, \$600 per month maintenance, and her minimum- wage income from employment.

The record provides substantial evidentiary support for all of the findings of fact of the trial court. It is apparent that the court properly considered all of the factors contained in KRS 403.200 in determining the amount and the duration of the maintenance award. We have discovered no abuse of discretion.

Therefore, we affirm the judgment of the Clinton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew B. Dehart
Jamestown, Kentucky

BRIEF FOR APPELLEE:

Scarlett B. Latham
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