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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002585-MR

RANDALL D. DAWES APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 03-CI-00403

PHYLISTY EDWARDS DAWES APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR, JUDGES, KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Randall Dawes appeals from a February 4, 2005 decree of the Pulaski Circuit Court and several post-decree orders dissolving Randall's marriage to Phylisty Dawes. The decree divides the former couple's property, pensions, and debts and awards Phylisty maintenance. Randall contends that this divorce proceeding should have been assigned to the Pulaski Family Court and that the regular division of Pulaski

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Circuit Court lacked subject matter jurisdiction. He also contends that the pension and debt divisions and the award of maintenance were based upon unsupported factual findings or otherwise constituted abuses of the trial court's discretion. With the exception of an erroneous pension provision, which must be corrected on remand, we find no error. Accordingly, we affirm in part, vacate in part, and remand.

Phylisty and Randall were married on December 18, 1976, when the parties were fifteen and seventeen years of age, respectively. They separated in March 2003, and Phylisty petitioned for divorce in April of that year. Both children born to the marriage had reached majority by the time of these proceedings. In July 2003, the matter was assigned to the regular division of the Pulaski Circuit Court, which, pursuant to CR 43.04, permitted the parties to submit proof by way of deposition.

In its February 4, 2005 decree, the trial court found that the parties' twenty-eight year marriage was irretrievably broken. It noted that Randall's career as a heavy equipment mover with D & D Machinery Movers and Phylisty's work as a secretary/bookkeeper at the Oakhill Elementary School had afforded the couple a modest but comfortable life style, which included equity in their residence, time shares in a Florida condominium, two all-terrain vehicles, annual trips to NASCAR races, a collection of NASCAR memorabilia, two burial lots, and certain pension and retirement benefits. The court also found, however, that the marital estate was burdened by substantial credit card debt and that subsequent to the separation Phylisty had continued to rely on credit cards to meet her expenses. In fashioning its decree, the court

emphasized the importance to the parties' new beginnings of resolving those debts, and so ordered that most of the marital assets—the residence, the time shares, the all-terrain vehicles, the burial lots—be liquidated and the proceeds used to satisfy the creditors. The court also found that Phylisty's approximately $860.00 per month net income during the school year was not adequate to meet her reasonable post-divorce expenses and so awarded her permanent maintenance of $600.00 per month. On appeal, Randall contends for the first time that KRS 23A.100 vests the Pulaski Family Court with exclusive jurisdiction of divorce proceedings and thus that the regular division of the Pulaski Circuit Court lacked authority to enter its decree. We disagree.

As Randall notes, KRS 23A.100 provides in pertinent part for the jurisdiction of family court as follows:

> (1) As a division of Circuit Court with general jurisdiction pursuant to Section 112(6) of the Constitution of Kentucky, a family court division of Circuit Court shall retain jurisdiction in the following cases:
> (a) Dissolution of marriage; . . .
> (d) Maintenance and support;
> (e) Equitable distribution of property in dissolution cases.
> . . .
> (3) Family court divisions of Circuit Court shall be the primary forum for cases in this section, except nothing in this section shall be construed to limit the concurrent jurisdiction of District Court.

Randall contends that by designating the family court as the "primary forum" for domestic cases, the General Assembly intended both to withdraw those cases from the regular circuit court's general jurisdiction (KRS 23A.010) and to assign them exclusively

to the family division. For the following reasons, we reject Randall's reading of KRS 23A.100.

First, in other instances when the General Assembly has vested exclusive jurisdiction in a court other than the Circuit Court, it has made its intention clear by employing the term "exclusive jurisdiction." *See* KRS 24A.110, KRS 24A.120, KRS 24A.130. KRS 23A.100's use of the term "primary forum" instead, indicates that the General Assembly did not intend in that section to effect a jurisdictional limitation, but intended rather to emphasize that the purposes underlying the creation of family courts (*see* KRS 23A.110) are best realized when domestic cases proceed in the family courts.

Domestic matters will doubtlessly arise, however--and this is our other reason for rejecting Randall's argument--in which resort to family court is either unnecessary or impractical. Decrees are frequently amended, for example, by subsequent agreement of the parties, and such undisputed matters may sometimes be handled more easily and efficiently in the regular circuit court division where the case was heard, avoiding transfer to a family division. A sole family court judge may need to recuse, moreover, and again it may then be most efficient to assign the matter to a regular circuit court division in the same circuit as opposed to appointing a special family court judge from a different jurisdiction. We do not believe that the General Assembly intended to foreclose these and other common sense adjustments to the family court docket, and for this reason and for the reason discussed above we reject Randall's contention that the

regular division of the Pulaski Circuit Court lacked subject matter jurisdiction to hear Phylisty's petition for divorce.

Randall next contends that because this case was tried by deposition, pursuant to CR 43.04, this Court's standard of review should be less deferential than in cases tried by hearing. He relies on *Reichle v. Reichle,* 719 S.W.2d 442 (Ky. 1986), in which our Supreme Court acknowledged that in cases tried by deposition "the trial judge does not have an opportunity to judge the credibility of the witnesses on the basis of physical appearance in court." *Id.* at 444. The Court then observed that

> [t]he "clearly erroneous" standard is sufficiently broad to permit the reviewing court to adopt a method of review which best fits the questions involved and the particular facts in a specific case. The appellate court should review each case according to what is most appropriate under the specific circumstances.

Id. at 444. Randall contends that the Court thus authorized a departure from the usual standard of review under the circumstances of trial by deposition. We disagree.

On the contrary, notwithstanding the language just quoted, the *Reichle* Court emphasized that

> [t]he fact that part of the proceedings before the trial court are taken by means of deposition does not permit the reviewing court to conduct a *de novo* consideration of the facts and it does not allow the reviewing court to substitute its judgment for that of the original finder of fact.
>
> The reviewing court should not substitute findings of fact for those of the trial court where they were not clearly erroneous. . . . Even where a trial judge has essentially tried the case on depositions, the Court of Appeals should not make a *de novo* determination of the facts.

Id. at 444-45 (citations omitted). The Court thus in no way departed from its earlier holding in *Largent v. Largent,* 643 S.W.2d 261 (Ky. 1982), where it addressed "the question of whether the 'clearly erroneous' standard of CR 52.01 applies to cases tried solely by deposition":

> We hold that it does. The trial court is the finder of fact whether the case is tried by deposition or by personal attendance, and the judgment of the trial court may not be reversed unless the findings are clearly erroneous.

643 S.W.2d at 263. We decline, therefore, Randall's invitation to expand our standard of review.

Turning at last to the merits of Randall's appeal, he first challenges the trial court's award of maintenance. Under KRS 403.200, as the parties note, the court may grant maintenance 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." As our Supreme Court has observed,

> [u]nder this statute, 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, 833 S.W.2d 825, 826 (1992).

Although the car, furniture, and future retirement benefits awarded to Phylisty in the decree clearly do not provide for her reasonable current needs, Randall

contends that the trial court erred by finding that she is unable to support herself through appropriate employment. Phylisty testified that her ordinary expenses were about $1,000.00 per month and that her net income was only about $860.00 per month for nine months of the year. Randall does not challenge Phylisty's expense claims, which are all modest, and which do not include any of the recreational expenses she and Randall incurred during the marriage or any provision for emergencies.

He argues rather that her income is understated either because she could supplement it by selling cosmetics, as she sometimes tried to do during the marriage, or because she could obtain higher paying, year-round employment. The trial court did not clearly err, however, by declining to impute additional income to Phylisty. She testified that she had ceased to sell cosmetics, and in any event the evidence did not indicate that her spare-time selling had produced or could produce a substantial and reliable supplement to her income. Nor did the trial court clearly err by finding Phylisty's employment with the Pulaski County Schools suitable for her circumstances. She had held the position since 1989, and thus had made significant progress toward a county retirement. Her pay was well above minimum wage—more than $10.00 per hour—and during the school year was nearly full time—seven hours per day. After the divorce she would be eligible for employee health insurance. These facts adequately support the trial court's finding that although Phylisty's income does not provide for her reasonable needs, her school board employment was nonetheless suitable. The court did not clearly err, therefore, by awarding her maintenance.

Even if Phylisty was eligible for maintenance, Randall next argues, the trial court's award was not limited to a reasonable duration. KRS 403.200(2) provides that maintenance orders

> 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 h[er], and h[er] ability to meet h[er] needs independently;
> (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.

Again, this Court may disturb the trial court's order only if "the trial court abused its discretion or based its decision on findings of fact that are clearly erroneous." *Powell v. Powell,* 107 S.W.3d 222, 224 (Ky. 2003).

The trial court ordered that Phylisty's $600.00 per month maintenance award will "continu[e] until she remarries." The amount of this award is no more than what will permit Phylisty to live in very modest comfort, and is clearly a just amount given Randall's $50,000.00 to $70,000.00 per year income. Randall contends, however, that at the time of the decree Phylisty was still young enough (forty-three) to be able in a reasonable time to make herself independent. The independence of divorcing spouses is

indeed one of the important principles underlying KRS 403.200, but as our Supreme Court recently noted, that principle must sometimes yield to other considerations:

> KRS 403.200 seeks to enable the unemployable spouse to acquire the skills necessary to support himself or herself in the current workforce so that he or she does not rely upon the maintenance of the working spouse indefinitely. . . . However, in situations where the marriage was long term, the dependent spouse is near retirement age, the discrepancy in incomes is great, or the prospects for self-sufficiency appear[] dismal, our courts have declined to follow that policy and have instead awarded maintenance for a longer period or in greater amounts.

Id. at 224 (citations and internal quotation marks omitted). It is appropriate, moreover, in determining the amount and duration of maintenance, for the trial court to consider the standard of living enjoyed during the marriage. *Id.*

In this case, the trial court could reasonably find that the parties' twenty-eight year marriage and their raising of two children had foreclosed Phylisty's best opportunities for education and training and had left her with little prospect of significantly bettering her position with the school board, a position that alone does not enable her even to approximate her former standard of living. On that ground, therefore, the trial court's award of permanent maintenance did not constitute an abuse of discretion.

Randall also notes that in the case of *Weldon v. Weldon,* 957 S.W.2d 283 (Ky.App. 1997), this Court held it an abuse of discretion to award maintenance beyond the recipient spouse's retirement age, since the parties' retirement incomes would be far more equal than their incomes at the time of the decree. Although the parties in *Weldon*

were situated similarly to Phylisty and Randall, we decline to disturb the trial court's order on a ground which at this point is utterly speculative. We note, however, that should Phylisty and Randall reach retirement without Phylisty's having remarried, then the changes in their incomes may well justify a reopening of the decree and the modification or elimination of Randall's obligation.

Randall next contends that the trial court erred and abused its discretion by finding that all of the credit card debt incurred before separation was marital and by ordering that the debt be paid from marital assets. As he correctly notes, in *Neidlinger v. Neidlinger,* 52 S.W.3d 513 (Ky. 2001), our Supreme Court explained that absent a statute to the contrary there is no presumption that debts incurred during marriage are marital, that debts incurred after separation are nonmarital, or that marital debts should be divided equally between divorcing spouses. Where the assignment or division of debt is at issue, therefore, it is left to the trial court to fix the burden of proof on such equitable and practical grounds as which party has best access to the evidence. The *Neidlinger* Court noted that

> [d]ebts incurred during marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation . . . ; whether the debt was incurred to purchase assets designated as marital property . . . ; and whether the debt was necessary to provide for the maintenance and support of the family. . . . Another factor, of course, is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness.

Id. at 523 (citations omitted). As with the maintenance issues discussed above, this Court reviews "issues pertaining to the assignment of debts incurred during the marriage . . . under an abuse of discretion standard." *Id.* at 523.

The parties' proof on this issue, which was often vague and not well-documented, did not permit detailed findings regarding the purposes for which the debt was incurred, or even which of the many credit cards still had outstanding balances. The trial court ruled, nevertheless, "[t]hat the Petitioner [Phylisty] obtained credit cards during the marriage and these debts are found to be marital in nature, except those incurred after separation by the Petitioner." This finding is not clearly erroneous.

The parties testified that Randall's job required his frequent absence from home, and that the task of managing the household's finances thus fell to Phylisty. She admitted having acquired numerous credit cards and testified that the parties used them to purchase household items (at Sears, for example), to finance their NASCAR vacations, to make the down payment on their Florida time shares, to purchase one of their all-terrain vehicles, and to purchase Phylisty's inventory of cosmetics. All of these expenditures were marital, and though Phylisty could not account for every dollar charged, the trial court did not clearly err by finding that these expenditures roughly accounted for the outstanding balances. The balances thus represented marital debt and debt in which Randall participated, although he may not have been fully aware of its growing extent. The trial court did not abuse its discretion, therefore, by ordering that most of the marital assets be liquidated and the credit card debts paid from the proceeds.

In *Bodie v Bodie,* 590 S.W.2d 895 (Ky.App. 1979), this Court found no abuse of discretion in the trial court's assignment of debts to a husband who incurred them without the wife's knowledge, and who refused to testify or to produce other evidence tending to show how the acquired funds were used. This case includes no suggestion that Phylisty was attempting to divert marital assets to nonmarital uses. *Bodie,* therefore, does not require a different result.

Finally, Randall contends, and Phylisty does not dispute, that the Qualified Domestic Relations Order (QDRO) entered in this case incorporates in the set off provision of paragraph 5 an inaccurate finding regarding the value at the time of the decree of Phylisty's retirement accounts. There appear to be two such accounts, a 403(B) account with the Putnam Voyager Fund and a County Employees Retirement System (CERS) account. The QDRO incorporates a finding that the CERS account had a value of $1,900.00, but one of Phylisty's CERS statements reflects a balance as of June 30, 2001 of $5,557.70. This undisputed error requires that the QDRO be vacated and remanded to the trial court for a redetermination of the value of Phylisty's retirement accounts at the time of the decree and correction of the QDRO to reflect that amount in its set off provision.

In conclusion, the creation of family court did not divest the regular divisions of circuit court of their general jurisdiction over domestic matters. Although under KRS 24A.100 the family court division's expanded jurisdiction and its expertise in family law make it the forum of choice in such cases, where, as here, the parties raised no

objection to having their case heard in the regular division, that division's rulings may not be challenged on appeal on the ground that the case could, and perhaps should, have been assigned to the family division. The trial court's disposition of credit card debts, furthermore, and its award of permanent maintenance were not based upon clearly erroneous findings and otherwise comported with sound discretion. Accordingly, we vacate the Qualified Domestic Relations Order, entered August 23, 2005, and remand for entry of a new order that accurately reflects the value of Phylisty's retirement accounts as of the date of the decree. In all other respects, we affirm the February 4, 2005 decree of the Pulaski Circuit Court.

ALL CONCUR.

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