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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002585-MR

EDUARDO ROMAN GOMEZ — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
CIVIL ACTION NO. 00-CI-00941

CHERYL GOMEZ — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: ACREE AND VANMETER, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Eduardo Roman Gomez appeals from the Final Judgment of the Pulaski Circuit Court entered on November 6, 2006, following remand from this Court. Eduardo argues that the trial court erred in characterizing the credit card debt as marital and in awarding maintenance to his now ex-wife, Cheryl Gomez. We affirm.

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

This case comes to us for the second time. The facts were succinctly set out in the prior appeal and need not be repeated here. *See Gomez v. Gomez*, 168 S.W.3d 51 (Ky.App. 2005). In *Gomez*, this Court affirmed the trial court's valuation of Eduardo's medical practice, but otherwise vacated and remanded in relevant part, with respect to the maintenance awarded to Cheryl as well as its allocation of a $52,000 credit card debt entirely to her. On remand, the trial court entered a final judgment awarding Cheryl maintenance in the amount of $7,000 per month for ten years and allocated Cheryl 30% of the total credit card obligation in the amount of $15,600. Thereafter, both Eduardo and Cheryl, respectively, moved to alter, amend or vacate the final judgment. On December 5, 2006, the trial court denied both motions. This appeal followed. Such additional facts as may be necessary for clarity will be presented as each issue is discussed.

As a preliminary matter, Cheryl's brief includes a motion to strike references contained in footnote 1 on page 7 of Eduardo's brief and an article entitled "Reentering the Workforce Confidently" attached as an appendix to his brief. Cheryl argues that the footnote and article are matters not contained as a part of the record in this case and should be stricken. CR[2] 76.12(4)(c)(vii) clearly provides that "materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." As we decline to take judicial notice of these matters, the motion to strike must be granted and we shall disregard the footnote and article.

Turning now to the merits of this appeal, we begin with a statement of our standard of review. The trial court's findings of fact will "not be set aside unless clearly

[2] Kentucky Rules of Civil Procedure.

erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. A finding of fact is clearly erroneous unless it is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc.*, 25 S.W.3d 130, 134 (Ky. 2000). Legal issues will be reviewed de novo. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002).

Eduardo first argues that the trial court erred when it allocated $36,400 of credit card debt to him. We disagree.

Cheryl was originally ordered solely responsible for the disputed credit card debt in the amount of $52,000. On appeal, this Court stated:

> Cheryl next complains of the allocation of a $52,000.00 credit card debt as her sole responsibility. The trial court found insufficient evidence to believe that this was a marital debt. The evidence on this issue consisted of Cheryl and Eduardo's testimony. Cheryl testified as to part of the source for the total charges. She stated that at least $18,000.00 of the debt was for two rugs of which Eduardo received one. Both cost the same amount. Eduardo did not deny this and also admitted that there was at least one credit card and the debt was marital. The problem really comes in the fact that Cheryl presented no documentation of the debt. Cheryl claims that bills were equally available to Eduardo since the card was in his name.
>
> The evidence seems sufficient to support a finding that the debt was marital in nature. However, its allocation should be reconsidered once an appropriate level of maintenance is

> awarded. It could be that the court could still fairly award the responsibility of paying this debt to Cheryl.

Gomez, 168 S.W.3d at 57-8.

On remand, the trial court found that:

> [a]fter reviewing the credit card records the Court concurs with the opinion of the Family Court and Court of Appeals that the debt is marital in nature. As such, the debt is allocated in just proportions to the parties' respective incomes following the maintenance award calculated above.
>
> Cheryl's expected income approaches $150,000 annually taking into account the maintenance award and amounts derived from her own reasonable employment efforts. Eduardo's annual gross income is reduced by his maintenance payments to approximately $500,000. Thus, Cheryl shall be allocated thirty (30) percent of the total credit card obligation (i.e., $15,600.00), with Eduardo responsible for the balance (i.e., $36,400.00).

Based upon these findings, Eduardo argues that the trial court erred because it could not possibly "concur with both the Family Court and the Court of Appeals." We agree that the trial court, on remand, made a misstatement because the original family court held the debt to be non-marital while this Court found that the evidence seemed sufficient to support a finding that the credit card debt was marital. Nevertheless, we determine that the trial court's misstatement was harmless. The only reasonable understanding of the trial court's well supported final judgment is that it determined the credit card debt to be marital in nature and divided it accordingly. Furthermore, our review of the record persuades us that the trial court properly determined that the credit card debt was marital.

In determining the nature of the debt, the trial court should consider both the extent of participation in the creation of the debt and the receipt of the benefits from the debt. *Niedlinger v. Niedlinger*, 53 S.W.3d 513, 523 (Ky. 2001). Also, the court should consider the respective abilities of the parties to pay the debt. *Id.* Here, we find that the trial court did not err in its allocation of $36,400 of the credit card debt to Eduardo as marital debt.

Finally, Eduardo argues that the trial court erred by awarding Cheryl maintenance in the amount of $7,000 per month for ten years. Again, we disagree.

Cheryl was originally awarded maintenance in the amount of $5,000 per month for a period of three years. In vacating the maintenance award, this Court stated that:

> [t]he court is required to consider the factors listed in KRS 403.200(2)(a)-(f) before ordering the amount and duration of maintenance. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990). From the court's order in this case it appears that none of those factors were taken into consideration. This is clearly error.
>
> Further, the recent case of *Powell, supra*, a case very similar factually to the one considered here, would suggest that the amount and duration of maintenance awarded to Cheryl is unjust and an abuse of discretion. The parties in *Powell* had been married 18 years. Cheryl and Eduardo were married for 18 years. Mrs. Powell had been an R.N. but let her license lapse and devoted her time to raising their child. Cheryl is similarly situated.
>
> Dr. Powell grossed close to $600,000.00 just prior to the parties' divorce. Eduardo, the evidence shows, grossed more than Dr. Powell. Although Cheryl could return to work as an R.N. upon reinstatement of her license and earn

> approximately $40,000.00 a year, there is likely to be limited job opportunities for a 45-50 year-old R.N. who has not practiced the trade in a significant number of years. As the Supreme Court noted in *Powell*, the amount of money that could be earned by Mrs. Powell in one year was about what Dr. Powell would earn in one month. *Powell, supra* 107 S.W.3d at 225. The evidence in this case shows much the same.
>
> The award of maintenance to Cheryl did not consider the standard of living to which the parties were accustomed. It is also clear Eduardo had more than sufficient resources from which to meet his needs and pay an appropriate level of maintenance. *Powell, supra* 107 S.W.3d at 224.

Gomez, 168 S.W.3d at 57.

Eduardo contends, unpersuasively, that on remand the trial court "gave no justification of the amounts of maintenance he ordered nor of the reason for the ten year duration." Indeed, the court properly considered all the relevant statutory factors in its well reasoned and factually supported decision. Those factors included the marital property apportioned to Cheryl, her need for employment rehabilitation because she has not maintained full time employment for 19 years plus the lapse of her nursing license, the standard of living established during the marriage, the duration of marriage, and Cheryl's age upon reentering the workforce. The trial court also carefully considered Eduardo's ability to meet his own needs while paying maintenance. Upon a thorough review of the record, we conclude that the court's decision was based upon substantial evidence and that it did not abuse its discretion when it awarded Cheryl maintenance in the amount of $7,000 per month for ten years.

Accordingly, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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