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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002613-MR
AND
NO. 2006-CA-002648-MR

KURT C. SMIALEK

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 04-CI-504143

PAULA CASH SMIALEK
AND EUGENE L. MOSLEY

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** *

BEFORE: COMBS; CHIEF JUDGE; KELLER, JUDGE; HENRY, □ SENIOR
JUDGE.

KELLER, JUDGE: In this dissolution action, Kurt Smialek has appealed and
Paula Cash Smialek and her attorney, Eugene L. Mosley, have cross-appealed from
the Jefferson Family Court's May 3, 2006, Findings of Fact, Conclusions of Law,

Distribution of Property and Debts, and Supplemental Decree, and from its November 17, 2006, Order ruling on the parties' motions to alter, amend, or vacate. Among the issues we shall address are the award of maintenance, the assignment of debt, and the partial award of attorney fees to Paula's attorney. For the reasons set forth below and after a thorough review of the record, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kurt and Paula were married in Oldham County, Kentucky, on July 6, 1984. Two children were born of the marriage; both are now adults. During the course of their marriage, Kurt and Paula owned and operated two businesses, Smialek Enterprises and Louisville Power Sports. Paula, who has a degree in business management, worked as the bookkeeper. The parties separated on December 25, 2003, and Paula filed a Petition for Dissolution of Marriage on November 3, 2004. In her prayer for relief, Paula requested an equitable division of marital property and debts as well as maintenance. The same day she filed the petition, Paula sought a *status quo* order to prevent Kurt from disposing of, transferring, or dissipating their assets. The family court granted Paula's motion on November 29th and ordered that Paula would continue as the bookkeeper for the businesses. Kurt filed his response and counterclaim on December 28, 2004, asserting that Paula should be required to contribute to his support, as he was without funds to maintain himself. We note that this dissolution proceeding was highly contentious, with each party blaming the other party for the collapse of their business and of dissipating both business and personal assets. The family court

dissolved the marriage in a decree entered December 21, 2005, which was subsequently amended on April 5, 2006.

After holding several hearings, the family court entered a 48-page judgment on May 3, 2006, in which it set forth its findings of fact, conclusions of law, distribution of property, and supplemental decree. To Paula, the family court awarded the marital residence (fair market value \$220,000), the first mortgage debt of \$149,000, and the \$73,000 debt owed to Stock Yard Bank. To Kurt, it awarded the lakehouse (fair market value \$213,400), the first mortgage debt of \$115,000, and the second mortgage debt of \$100,000. Due to the debts associated with the real properties, no equity remained to be divided. Regarding Paula's claim for maintenance, the family court looked to Paula's earnings ability, as well as Kurt's ability to meet his needs while paying maintenance, and determined that Kurt was barely able to meet his own living expenses. For those reasons, the family court denied Paula's motion for maintenance. The family court then ordered Kurt to pay \$7,500 toward Paula's attorney fees, which at that point equaled \$63,000, noting that Kurt had a higher earning potential than Paula.

Both Kurt and Paula moved the family court to alter, amend, or vacate its prior ruling. Following another hearing, the family court entered a 15-page order on November 16, 2006, ruling on the two motions. Significantly, the family court reversed its previous maintenance ruling and awarded Paula maintenance in the amount of \$730 per month for seven years. These direct and cross-appeals followed.

We have identified three primary issues between Kurt's direct appeal and Paula's cross-appeal: 1) maintenance; 2) the assignment of debt; and 3) the award of attorney fees. In his direct appeal, Kurt raises essentially two arguments, which address the award of maintenance to Paula and the family court's assignment of marital debt.¹ In her cross-appeal, Paula raises secondary issues concerning the use of Kurt's testimony from a prior hearing, the valuation of Smialek Enterprises, dissipation by Kurt, the divisibility of a storage shed, the valuation of several vehicles, the imputation of income to Paula, maintenance, and the award of attorney fees. We shall address each of the primary issues after we address secondary issues Paula raised in her cross-appeal.

Our standard of review is described in *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003), as follows:

Under CR 52.01, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." *See also Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, Ky., 602 S.W.2d 427 (1980). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, Ky., 976 S.W.2d 409, 414 (1998); *Uninsured Employers' Fund v. Garland*, Ky., 805 S.W.2d 116, 117 (1991). Substantial evidence is evidence, when taken alone or in light of all the evidence,

¹ In his prehearing statement, Kurt listed the award of attorney fees as an issue that would be raised in his appeal, and therefore named Paula's attorney as an appellee in his notice of appeal. Kurt did not, however, raise the issue of attorney fees in his brief filed in support of his direct appeal. We note that in his cross-appellee brief, Kurt instead argued that the \$7,500 fee award was within the family court's discretion.

which has sufficient probative value to induce conviction in the mind of a reasonable person. *Golightly*, 976 S.W.2d at 414; *Sherfey v. Sherfey*, Ky.App., 74 S.W.3d 777, 782 (2002). An appellate court, however, reviews legal issues *de novo*. See, e.g., *Carroll v. Meredith*, Ky.App., 59 S.W.3d 484, 489 (2001). (Footnote omitted).

With this standard in mind, we shall consider the issues raised in the present appeals.

SECONDARY ISSUES

1. Prior Hearing Testimony

First, Paula contends that the family court erred when it struck the transcript of Kurt's testimony from earlier hearings regarding his income and business activities. From what we can glean from the record, following the second hearing in January 2006, the family court entered an interim order permitting Paula to introduce Kurt's deposition testimony. Kurt then submitted a copy of Paula's deposition as evidence, and Paula submitted transcripts of the earlier hearings as well as another of her depositions. At that point, Kurt withdrew his submission of Paula's deposition and moved to strike Paula's submissions. In its May 3, 2006, judgment, the family court noted that:

During the hearing, neither party requested permission to submit as evidence Paula's entire pre-trial depositions or the June 2, 2005 and July 22, 2005 hearings. The Court did allow the parties to be deposed post trial and submit their depositions as rebuttal evidence; however, the Court did not hold the case open for submission of any other evidence.

Accordingly, the family court refused to admit either the transcripts of the previous hearings or Paula's pre-trial depositions.

Paula now argues that the family court should not have stricken the hearing transcripts as there was no basis in law for them to be excluded. She contends that the family court had authority under Kentucky Rules of Evidence (KRE) 613 to include this as evidence. It appears to this Court that even if the family court erred in excluding the hearing transcripts, any error would be harmless. The videotaped recordings of the two hearings are in the certified record and available for review, regardless of whether the transcripts are in evidence. Therefore, we decline to disturb the family court's decision to strike the hearing transcripts.

2. Value of Smialek Enterprises

Paula contends that the family court erred when it failed to place a value on Smialek Enterprises. In its initial order, the family court found that Smialek Enterprises was a combination of Kurt's trim carpentry business and Paula's nameplate business, although neither was working through Smialek Enterprises at the time the decree was entered. After reviewing the evidence submitted, the family court determined that Paula did not provide any supporting documentation regarding her claim that the Smialek Enterprises was worth \$100,000. In its later order, the family court indicated that the unaudited financial statements from 2002 and 2003 were not reliable support for her claim of the value

of the business, and therefore declined to place a value on the business. In that same order, the family court also indicated that Kurt's trim business was worth more than Paula's nameplate business.

Paula now contends that there was no basis for the family court's finding that the financial statement valuations were inadequate, and that the family court should have assigned the trim portion to Kurt and the nameplate portion to Paula and ordered Kurt to pay Paula \$25,000 to equalize the division. On the other hand, Kurt points out that the accountant who prepared the financial statements was not called to testify and was therefore not subject to cross-examination. Accordingly, Kurt argues that the family court did not commit any error or abuse its discretion in assigning no value to the business.

In *Gomez v. Gomez*, 168 S.W.3d 51, 55 (Ky. App. 2005), this Court addressed its role in reviewing a lower court's valuation of a business, stating that:

[A] trial court's ruling as to valuations in a dissolution action will not be disturbed on appeal unless clearly contrary to the evidence submitted. [*Clark v. Clark*, 782 S.W.2d 56 (Ky. App. 1990),] set the task of the appellate court to determine whether the trial court's approach fairly estimated the value of the business and the individual's interest. [Internal citations omitted.]

We also note that the weight and credibility of evidence is within the sole province of the factfinder. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky. 1990).

In its November 17, 2006, order, the family court explained its decision not to assign a value to Smialek Enterprises:

The Court did not place a value on Smialek Enterprises because reliable evidence of the true value was not submitted to the Court. Had the parties followed this Court's Order of June 24, 2005 and August 11, 2005 to turn over all business records and accounts to a receiver, this Court might have had some reliable information to value Smialek Enterprises.

The fact finder is not required to adopt the value placed on an item by one party simply because the other party does not place a value on that item. We decline to make a guess based upon an unreliable past report. The accountant preparing the 2002 and 2003 report was not even called as a witness and examined as to the basis of his valuation. . . .

We agree with Kurt that the family court did not commit any error in deciding not to accept Paula's valuation based upon its finding that the submitted reports were not reliable.

3. Dissipation

Next, Paula contends that the family court erred in failing to find that Kurt had dissipated marital assets. In its initial judgment, the family court concluded that "neither party has been truthful about assets and both sold assets for less than [sic] fair market value. Neither party has proved that the other party's actions were any different prior to separation. Dissipation has not been proven on either side." In its subsequent order, the family court upheld its previous conclusion, adding that, "[n]either party showed an intent to deprive the other of their marital share." The family court also noted that neither Kurt nor Paula established how money was deposited into the Smialek Enterprises account prior to

their separation, leading to its inability to determine whether their actions changed after the separation.

In *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987), this Court addressed the issue of dissipation, stating:

KRS 403.190(1) provides that “[The court] also shall divide the marital property *without regard to marital misconduct* in just proportions considering all relevant factors. . . .” (Emphasis our own.) Nevertheless, there is authority in this jurisdiction to require one to account for marital property improvidently spent. *Barriger v. Barriger*, Ky., 514 S.W.2d 114 (1974). We believe the concept of dissipation, that is, spending funds for a nonmarital purpose, is an appropriate one for the court to consider when the property is expended (1) during a period when there is a separation or dissolution impending, and (2) where there is a clear showing of intent to deprive one’s spouse of his or her proportionate share of the marital property. *Id.*, p. 115; *see also Culver v. Culver*, Ky.App., 572 S.W.2d 617 (1978). [Footnote omitted.]

See also Brosick v. Brosick, 974 S.W.2d 498 (Ky. App. 1998).

Paula contends that the family court disregarded her proof that Kurt received \$52,174.97 that he failed to deposit in the Smialek Enterprises account, that Kurt removed property and concealed it at the lake house, and that Kurt transferred titles to marital property but kept the property in his possession.

Based upon our review of the record and the family court’s rulings, we agree with Kurt that Paula failed to establish a clear intent on Kurt’s part to deprive her of her share of the marital property. Therefore, we shall not disturb the family court’s findings or conclusions on this issue.

4. Valuation of Storage Shed

Next, Paula contends that the family court erred when it failed to order Kurt to reimburse her for their marital interest in a storage shed previously owned by Kurt's parents. The family court found that Kurt and Paula contributed \$12,000, or two-thirds of the cost, to the building of the storage shed on his parents' property, which they used to store items. However, Paula did not present any written evidence that she and Kurt had a two-thirds marital interest in the shed. Because there was no proof of any ownership, the family court characterized their interest as an indivisible right to lease and did not assign any marital interest in the storage shed.

We agree with the family court that Paula did not adequately support her position that there was a marital interest in the shed. Accordingly, we shall not disturb the family court's ruling on this issue.

5. Valuation of Vehicles

Next, Paula argues that the family court erred in relying on values provided to Kurt by Bill Humble for three vehicles that Kurt transferred to his sister. Humble did not testify, but instead provided written appraisals for the three vehicles at issue; namely, the 1967 Camaro, the 1967 Chevrolet truck, and the 1994 Corvette. Because he did not testify at trial, Paula contends that it was an abuse of the family court's discretion to consider Humble's appraisals. On the other hand, Kurt asserts that Paula failed to object to Humble's valuations at trial, waiving her right to presently raise this issue. Furthermore, Kurt contends that the

family court considered not only Humble's appraisals, but also the testimony of Sam Swope used car manager, Tracy Childress, as well as photographic evidence of the vehicles' conditions.

We are unable to identify any abuse of discretion on the family court's part regarding its findings as to the vehicles at issue. The family court did not rely solely on Humble's testimony, but rather viewed all of the evidence regarding valuation before setting the proper value for each vehicle. We perceive no abuse of discretion and shall not disturb the family court's decision.

6. Imputation of Income to Paula

Paula argues that the family court improperly imputed income to her of \$40,000 to \$45,000 per year, when it should have relied solely on the evidence of her actual net income for 2005, which was \$26,304.49. She contends that in doing so, the family court was improperly requiring her to have two jobs to support herself. Kurt, on the other hand, argues that the family court properly imputed income to Paula based upon a variety of factors, including her past work experience and her advanced educational background.

We agree with Kurt that the family court's decision to impute income to Paula was supported by the record. Paula has an associate's degree as well as a bachelor's degree in business management; she has worked for many years as a bookkeeper; and she has obtained licenses in the field of real estate. Furthermore, the expert testimony of vocational evaluator Ralph Crystal, PhD, concerning Paula's ability to earn income supports the family court's ultimate finding. We

specifically disagree with Paula's claim that the family court was requiring her to have two jobs; it merely determined what her possible income could be based upon the evidence of record. Accordingly, we perceive no abuse of discretion in the family court's finding that Paula's monthly income equaled \$3,583.

PRIMARY ISSUES

1. Assignment of Debt

Having completed our review of the secondary issues, we shall now turn to the three main issues we have identified. First we shall address the family court's assignment of debt. Kurt contends that the family court abused its discretion in inequitably assigning him 65% of the debt, while only assigning Paula 35% of the debt, without providing any justifiable reason. He asserts that the reasons given by the family court, which were that his absence from the business contributed to its demise and his receipt of valuable assets from Louisville Power Sports, do not support the family court's assignment to him of the majority of the debt. On the other hand, Paula argues that both of them were encumbered with a substantial amount of debt that was equitably distributed based upon their respective incomes as well as the amount of property each retained.

Kentucky's appellate courts have recognized that although "[t]here is no statutory authority for assigning debts in an action for dissolution of marriage[,] . . . such assignments are routinely made as a matter of common law in all divorce actions[.]" *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522 (Ky. 2001).

The Neidlinger court went on to list several factors to consider when assigning debt:

Debts incurred during the 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. [Citations omitted.]

Id. at 523. “As with the division of marital assets, the trial court has broad discretion in its allocation of marital debt.” *Lykins v. Lykins*, 34 S.W.3d 816, 822 (Ky. App. 2000).

In reviewing the assignment of debt, it appears that the family court assigned debt in line with the property awarded. We perceive no abuse of discretion.

2. Maintenance

Both Kurt and Paula have raised the issue of maintenance in their respective appeals. Kurt contends that the family court abused its discretion in awarding maintenance to Paula, while Paula contends that she should have been awarded maintenance at a higher amount for a longer duration.

The family court initially denied Paula’s motion for maintenance. It first estimated Kurt’s income to be \$5,292.39 per month, after deducting an expense ratio of 63% from his gross income for 2005, which equaled \$171,645. The family court then determined that Kurt’s reasonable living expenses equaled

\$5,000. Turning to Paula, the family court determined that she could earn a combined income of \$3,333 to 3,750 per month and that her reasonable expenses equaled \$4,313. Based upon those findings, the family court concluded:

Due to the few assets in this case, Paula received less than \$2,000 in assets. She did not receive any non-marital monetary assets. None of the assets she received will produce any income (other than the sign business).

Based upon Paula's ability to earn \$40,000 to \$45,000, she is unable to fully support herself through appropriate employment. However, Kurt is barely able to meet his own living expenses. He does not earn enough to pay Paula maintenance.

However, the family court altered this ruling when it ruled on the parties' respective motions to alter, amend or vacate. The family court imputed a specific income to Paula in the amount of \$3,583 per month and noted its prior finding that her reasonable living expenses totaled \$4,313 per month. Based upon those calculations, the family court noted that Paula required an additional \$730 per month to meet her expenses. Regarding Kurt, the family court reduced his expense ratio from 63% to 43% because he no longer had employees, but rather was paying contractors. Accordingly, his gross income increased to \$9,318 per month. Looking to maintenance, the family court, as it did before, determined that Paula was entitled to maintenance and then conducted the necessary inquiry pursuant to Kentucky Revised Statute (KRS) 403.200(2). This time, however, the family court awarded Paula maintenance in the amount of \$730 per month for seven years.

403.200:

(1) In a proceeding for dissolution of marriage or legal separation, . . . 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 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 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 enjoyed 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.

See also Gomez v. Gomez, 168 S.W.3d 51 (Ky. App. 2005). “The amount and duration of maintenance is within the sound discretion of the trial court.” *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky. App. 1994). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004), citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)(citations omitted); *Kentucky Nat. Park Com’n ex rel. Commonwealth v. Russell*, 301 Ky. 187, 191 S.W.2d 214, 217 (1945). The *Russell* court further stated: “It is appropriate to award maintenance when a party is not able to support themselves [sic] in accord with the same standard of living which they enjoyed during marriage and the property awarded to them is not sufficient to provide for their reasonable needs.” 878 S.W.2d at 26.

Kurt first argues that the family court erred when it failed to consider Paula’s ability to support herself through appropriate employment pursuant to KRS 403.200(1)(b). He cites the family court’s decision to deny Paula temporary maintenance, coupled with her ability to support herself during the pendency of the action, as supporting his argument that she is not entitled to maintenance. Kurt also points to Paula’s work experience, her professional licensing, and her educational background. We disagree with Kurt’s assertion and note that the family court considered the factors Kurt raised when it imputed income to Paula.

However, even with imputed income added to her proven earnings, Paula did not earn enough to support herself fully on a monthly basis. Furthermore, the family court found, and Kurt has not disputed, that Paula was awarded insufficient assets to support herself. Therefore, we hold that the family court did not err in finding that Paula met the threshold for maintenance.

Next, Kurt argues that the family court erred and abused its discretion when it failed to consider Kurt's ability to pay maintenance pursuant to KRS 403.200(2)(f). Paula asserts that the family court did consider Kurt's ability to pay and appropriately awarded maintenance.

Although not specifically stated, we may infer from the family court's orders that its original reason for denying maintenance (Kurt's inability to pay) was negated by the increase in Kurt's gross monthly income from \$5,292.39 to \$9,318 as a result of the reduction of his expense ratio from 63% to 43%. Kurt contends that the family court failed to provide an adequate explanation as to why it reduced the expense ratio other than that Kurt no longer had any paid employees. Although he no longer had that expense, Kurt contends that his ability to generate income decreased because he was the only person performing any of the work. He also cites to his health limitations that will affect his ability to perform the same amount of carpentry work. However, we note that the family court took into account his hiring of contractors and a bookkeeper when it set Kurt's expense ratio. Furthermore, the family court determined that Kurt's monthly income was more than \$4,000 over his reasonable expenses, meaning that he was capable of

paying \$730 in maintenance to Paula even if the expense ratio were closer to the original 63%. Based upon the evidence of record, we hold that the family court did not err in finding that Kurt was able to support himself while paying Paula maintenance.

Finally, Kurt asserts that the amount and duration of maintenance are excessive based upon Paula's work experience, degrees, and real estate licenses. He argues that the family court failed to make specific findings for each of the factors listed in KRS 403.200(2), but focused instead on Paula's imputed income. On the other hand, in her cross-appeal, Paula argues that the amount of maintenance awarded was too low and the duration too short.

In reviewing the November 17, 2006, order awarding maintenance, we note that the family court conducted the necessary inquiry pursuant to KRS 403.200(2) before it determined the amount and duration of maintenance. Based upon those relevant factors, including the lengthy marriage, Paula's degrees and employment history, the parties' earning history, and Kurt's ability to pay maintenance, we hold that the family court did not abuse its discretion in awarding Paula maintenance in the amount of \$730 per month for seven years.

3. Attorney Fees

Paula argues that the family court should have awarded her more than \$7,500 toward her attorney fees, which totaled more than \$63,000, based upon the assets Kurt received, as well as his earnings and earning potential. Although he

initially disputed the award, Kurt now contends that the family court did not abuse its discretion in awarding \$7,500 in attorney fees.

In *Allison v. Allison*, 246 S.W.3d 898, 909 (Ky. App. 2008), this Court set out the standard for an award of attorney fees as follows:

Attorney fees may be awarded to a party pursuant to KRS 403.220. Expert witness fees may also be awarded pursuant to that statute. *See Culver v. Culver*, 572 S.W.2d 617, 622 (Ky.App. 1978). The statute states that the court should consider “the financial resources of both parties [.]” KRS 403.220. Further, the statute states that the court may award a “reasonable amount” for the fees. *Id.* An award of fees is reviewed by this court under an abuse of discretion standard. *Neidlinger*, 52 S.W.3d at 520.

In deciding to award fees to Paula, the family court noted the high fees both parties generated, which it attributed to their failure to turn over bookkeeping responsibilities to a receiver as ordered and to provide better documentation of their respective claims. Additionally, the family court looked to assets awarded to each party, noting that Kurt’s award left him with a negative balance, while Paula’s award did not. Finally, the family court noted that Kurt had higher earnings and a higher earning potential than Paula. In light of the family court’s findings, which are supported by the record, we perceive no abuse of discretion in the decision to award a portion of Paula’s attorney fees.

CONCLUSION

For the foregoing reasons, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-
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