

RENDERED: SEPTEMBER 19, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002593-MR

WILLIAM MARSH

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 04-CI-01202

RHONDA ANN MARSH

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, STUMBO, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: William Marsh appeals the Bullitt Circuit Court's findings and decree of dissolution of marriage entered on November 21, 2007, and the supplemental judgment entered on January 3, 2008. After careful review, we affirm.

William and Rhonda Marsh were married on October 17, 1975, and separated on September 1, 2003. On December 2, 2004, William filed a petition

for dissolution of marriage. No further action occurred until October 24, 2005, when Rhonda filed a motion for maintenance, stating that William earned approximately \$70,000.00 per year, and that she earned approximately \$37,000.00 per year. The parties' 2004 income tax return reflects that William earned \$57,671.00, and that Rhonda earned \$32,229.00. In 2006 William earned \$59,966.00, and Rhonda earned \$38,718.00.

On January 10, 2007, the trial court entered an order awarding temporary maintenance in the amount of \$250 per week effective October 12, 2006. A trial was scheduled for September 20, 2007. At that trial, the court halted the presentation of evidence and instructed that a real estate appraiser be appointed to appraise the parties' various properties. The court set a new trial date for November 2, 2007, and the trial was conducted that day.

The court entered its order on November 21, 2007, which provided that the parties should agree on a personal property appraiser and divide the cost of that appraiser equally. After an appraiser was obtained, Rhonda was to make two lists of personal property and provide them to William, who was to have first pick of the lists. The court noted that during the divorce, Rhonda retained her 2002 Chrysler Sebring with a fair market value of \$8,675.00 and that William retained a 1998 Ford Expedition with a fair market value of \$8,585.00, but sold it during the proceedings for \$5,500.00. The debt on the Ford was secured by a mortgage on the parties' home with a current payoff of \$7,400.00. William also retained a 1989 Ford truck with a fair market value of \$1,000.00, a 2002 Harley-Davidson

motorcycle which the parties valued at \$14,000.00, a Kawasaki Jet Ski valued by both parties at \$1,500.00, and a 1989 Century Fury boat valued at \$1,500.00. The court determined that this left Rhonda with \$8,675.00 of value in vehicles and William with \$16,405.81 of value in vehicles and boat and then noted that William's value totaled \$23,500.00, less the payoff of the loan on a Navigator, which was \$7,094.19. The court makes no other mention of the Navigator until this portion of the order. The court then ordered William to pay Rhonda \$3,865.41 to secure an equal division of the value of the vehicles and the associated debt and to assume and refinance the third mortgage on the home which financed the purchase of the Navigator.

The court then determined that the parties had acquired three pieces of real estate during the marriage: the marital residence on 790 Ellis Cook Road, a rental property on 3681 Blue Lick Road, and a rental property on 179 Azure Drive. The Ellis Cook Road property appraised at a fair market value of \$255,000.00 with a first mortgage in the amount of \$55,217.00 and a second mortgage in the amount of \$74,134.44, leaving equity of \$125,648.56. The court noted that Rhonda wanted to keep the residence. The Blue Lick property appraised at a fair market value of \$103,000.00 with a mortgage of \$74,894.00, leaving equity of \$28,105.40. The Azure Drive property appraised at \$100,000.00 with a mortgage of \$81,423.47, leaving equity of \$18,576.53. William wanted to keep the two rental properties. The difference in equity received by Rhonda (\$125,648.56) and

William (\$46,681.93) was \$78,966.63 and the court ordered Rhonda to pay William one half the difference, or \$39,483.32.

The court ruled that William owed Rhonda \$4,250.00 in back maintenance payments. William had a General Electric Savings and Security Plan through his employer worth \$142,003.00 as of December 31, 2006, and an additional pension plan. Rhonda had \$48,523.20 in her 401k through her employer as of that same date. The court ordered that Rhonda should receive \$46,739.00 to equalize the two retirement accounts and that the pension should be divided by use of a qualified domestic relations order.

The other marital debts included a Chase credit card with a balance of \$7,200.00 and a Capital One card with a balance of \$1,336.00, for a total amount of debt of \$8,536.00. Each party is responsible for one half those debts, or \$4,268.00. The court ordered Rhonda to set off her amount by the money William owed her, with William to then pay off the debt on the credit cards.

The court ordered William to pay Rhonda \$3,300.00 from his savings and security plan, which she would add to her 401k plan.

The court ordered that William pay Rhonda maintenance of \$250.00 per week as permanent maintenance until his or her death or her remarriage. The court found that the parties were in their fifties with two adult children. The court found that Rhonda works at Humana and earns \$38,000.00 gross annually and that William works for General Electric and made \$63,606.02 in 2006 and that his pay stub through October 21, 2007, reflected that his 2007 income would be

approximately \$89,100.06. His average gross income for the last three years was \$73,235.36. The court found that the parties had a comfortable lifestyle which included regular vacations, private school for their children, and weekends at the lake. Out of the three properties, Rhonda did not receive any income producing real estate. Further, the court found that Rhonda's monthly living expenses would be approximately \$3,007.83 and her average monthly gross income was \$3,166.68. William's monthly gross income was \$6,102.95 and his monthly expenses were approximately \$2,122.00. The court found that Rhonda lacked the means to provide for her needs in the context of the standard of living established during the marriage and awarded maintenance of \$250.00 per week.

In a supplemental judgment dated January 3, 2008, the court ordered William to quitclaim all his right, title, and interest in the Ellis Cook Road property and for Rhonda to do the same with her interests in the Azure Drive and Blue Lick Road properties. This appeal followed.

William argues that the trial court committed reversible error in the amount and duration of maintenance it awarded; in not enforcing compliance with the civil rules of procedure and the Bullitt Circuit Court local rules; and in its valuation of some marital assets.

An award of maintenance is subject to the sound discretion of the trial court and may only be disturbed if clearly erroneous. *Powell v. Powell*, 107 S.W.2d 222 (Ky. 2003), citing *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992) and *Browning v. Browning*, 551 S.W.2d 823 (Ky.App. 1977). An award of

maintenance shall not be disturbed absent an abuse of discretion. *Gomez v.*

Gomez, 168 S.W.3d 51 (Ky.App. 2005).

In *Gomez*, this Court held that the trial court must consider the factors in KRS 403.200, which include: (a) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his 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.

A careful review of the record reveals that the trial court considered these factors. The divorce decree awarding the maintenance thoroughly details the financial state of both William and Rhonda, including their respective salaries, the values of properties awarded to them, the debts and incomes associated with those properties, and the values of the respective pensions, etc. Thus, we do not find that the court abused its discretion in awarding the maintenance of \$250.00 per week to Rhonda, given that she was used to a comfortable lifestyle and that the parties had been married for a significant time.

Furthermore, the court awarded two income bearing properties to William, so his argument that he must pay the mortgage on these properties out of his disposable income is without much merit, given that he can use the income

from those properties to pay the mortgage payments. And, as Rhonda argues on appeal, William will still receive significant tax advantages from the two properties. Under *Clark v. Clark*, 782 S.W.2d 56 (Ky.App. 1990), a court's consideration of the parties' post divorce tax position is an entirely appropriate factor to consider.

William argues that the trial court did not enforce compliance with the civil rules of procedure and with its own local rules, specifically that Rhonda did not tender her financial declaration until October 26, 2007, the Friday before trial was to take place the following Friday. William argues that under CPR 350(14), Rhonda had to file a pre-hearing statement at least seven days before the trial of the case and that at the trial, upon objection, the court shall exclude all evidence that should have been attached in the disclosure statement. We agree with Rhonda that the fact that William did not object and instead began the presentation of his case constitutes waiver and the issue was not properly preserved for appeal.

William additionally argues that the court's valuation of the marital assets was not proper, including the valuation of the three real properties and the various motor vehicles. The court appointed an appraiser to value the real property, and we find this to be proper. The court used the market valuation for the pick-up truck, jet ski, and the 1989 Century boat, the sale price of the Ford Explorer, Rhonda's valuation of her automobile, and the parties' joint valuation of the motorcycle at \$14,000.00. William now takes issue with the court using the NADA value of some vehicles and with the court not using his non-expert

testimony regarding his motorcycle, which he claims he wrecked and was worth less than the original amount he listed. His testimony at trial, however, indicated this motorcycle was still driveable and thus the court properly accepted both parties' valuation of the motorcycle at \$14,000.00. William failed to object to the court's use of the NADA values of the other vehicles thus the issue was not preserved, and we will not address it here.

Otherwise, we find the distribution of the marital assets to be proper and fair. Equity, pension funds, and debts were offset so that an equitable distribution could be made. We find no errors with this distribution.

For the foregoing reasons, the decree and supplemental judgment of the Bullitt Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark E. Edison
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Alan S. Rubin
Louisville, Kentucky