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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001079-MR
AND
NO. 2012-CA-001151-MR

LEE ROY WESLEY

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM PULASKI FAMILY COURT
v. HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 09-CI-00725

ROSE ANN WESLEY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Lee Roy and Rose Ann Wesley appeal and cross-appeal, respectively, from the May 17, 2012 order of the Pulaski Family Court, dissolving the parties' marriage. Lee Roy takes issue with the family court's division of debt, division of marital property, and award of maintenance to Rose

Ann. Rose Ann is also dissatisfied with the maintenance award, claiming it is not of a sufficient amount to meet her basic needs. We have carefully reviewed the record and law, and affirm.

I. Facts and Procedure

This is not the first time this dissolution of marriage action has been before this Court. In the interest of judicial economy, we will rely at length on the statement of facts and procedure set forth in *Wesley v. Wesley*, 2010-CA-001262-MR, 2012 WL 246283, at *1 (Ky. App. Jan. 27, 2012) (*Wesley I*).

Rose Ann and Lee Roy married on June 10, 1991. One child, a daughter, was born of the marriage on September 30, 1992. The parties separated in August 2004. However, neither party sought to dissolve the marriage for several years.

After more than four years of separation, in February 2009, Lee Roy filed a petition for dissolution of marriage. Rose Ann was awarded temporary maintenance in the amount of \$450.00 per month. The parties agreed Lee Roy would pay child support at the rate of \$620.69 per month until the daughter's emancipation in May 2011. A final hearing was held on March 25, 2010. At the hearing, the family court heard testimony and received evidence concerning the division of property, division of debt, maintenance, division of retirement accounts, and the payment of attorney's fees. The evidence at the hearing was as follows.

Lee Roy is employed with a telecommunications company; he earned \$66,000.00 in 2009. He also received a lump-sum payment of \$10,000.00 along with a monthly annuity payment of \$797.44 as part of a workers' compensation settlement following a work injury in 2006.¹ At the time of the final hearing, Lee Roy had received a total of \$33,328.00 of his workers' compensation award.

Rose Ann has a tenth-grade education and a GED. She is employed as a part-time cook with the local school system earning \$1,156.40 per month. Rose Ann also cleans houses and from this endeavor earns an additional \$40.00 per week. Rose Ann claims she suffers from COPD and Crone's Disease that affect her ability to provide for herself.

At the time of the final hearing, Lee Roy was forty-seven years old and Rose Ann was fifty years old.

Rose Ann and their daughter resided in the marital residence during the parties' long period of separation; Rose Ann continues to reside there today. The marital residence has both marital and non-marital components. One year prior to the parties' marriage, Rose Ann purchased the property for \$36,900.00 and made a down payment of \$600.00 to \$900.00. At the final hearing, Lee Roy testified the value of the residence was \$75,000.00, while Rose Ann testified the house's value was only \$50,000.00, noting that repairs were needed. Rose Ann admitted a recent appraisal valued the residence at \$65,000.00. The outstanding mortgage at the time of the final hearing was slightly less than \$26,000.00.

¹ The monthly annuity amount was payable for a five-year period beginning in November 2007 and ending in November 2012.

While they were pursuing their separate lives, marital property and debt continued to accrue. Rose Ann claimed that she became indebted to others in trying to meet her financial needs during the period of separation; Rose Ann testified this debt equaled approximately \$8,000.00. Each of the parties continued to accumulate retirement benefits. Rose Ann's account had an estimated worth of \$5,000.00; the value of Lee Roy's account was not disclosed. Further, at the time of separation, the parties owed a substantial debt for federal income tax. During these proceedings, they disputed how that debt, which has now been paid in full, was repaid. The parties both testified they had sold a second residence and from the sale proceeds paid \$10,000.00 on their tax debt, reducing it to approximately \$17,000.00 to \$19,000.00. At one point, the second residence had been in danger of foreclosure. Rose Ann testified she loaned \$4,000.00 against her life insurance to prevent the foreclosure. The \$4,000.00 loan remains outstanding. As for the remaining federal tax debt, Lee Roy testified he repaid most of it through a wage garnishment. In contrast, Rose Ann testified that she repaid approximately \$5,300.00 of the remaining debt through tax-refund garnishments. The only documentation submitted was a pay stub indicating that, as of December 2004, the IRS had garnished \$4,965.00 from Lee Roy's wages.

The parties also owned several horses, a horse trailer, and vehicles, the ultimate disposition of which was contested. The evidence showed Lee Roy's vehicle was worth \$6,300.00, while the value of Rose Ann's vehicle was between \$500.00 and \$2,000.00. Rose Ann further testified that, at the time of separation,

the parties owned ten to twelve horses; Lee Roy claimed the parties only owned five horses. Lee Roy testified he had cared for the horses, but after awhile could no longer afford to do so. Lee Roy sold the horses for an unknown amount. Rose Ann received \$230.00 for the sale of her horse. However, Rose Ann believed the value of each horse to be \$1,000.00, and the value of the horse trailer to be \$1,000.00.

In May 2010, the family court entered a final judgment disposing of all outstanding issues. The parties appealed and cross-appealed that order in *Wesley I*. This Court found the family court's May 2010 order to be a bare-bone, conclusory order void of adequate findings of fact to support the family court's conclusions. Accordingly, this Court remanded the matter to the family court "with directions to prepare a proper judgment that reflects the [family] court's findings of fact and conclusions of law based upon the evidence that had been presented at its earlier hearing." *Wesley I*, 2012 WL 246283, at *2. This Court's opinion expressed no judgment as to the merits of the family court's rulings, or the parties' arguments.

On remand, the family court issued a new order entered on May 17, 2012, detailing factual findings in support of its legal conclusions. The family court found that the workers' compensation benefits Lee Roy received during the marriage in the amount of \$33,328.00 to be marital property, and that Rose Ann was entitled to half. The family court also found the equity in the marital residence

to be \$39,000.00, of which Lee Roy would be entitled to slightly less than half.² In light of the similar values, the family court awarded Lee Roy his workers' compensation benefits and Rose Ann the equity in the marital residence. The family court also ordered the parties to split equally their retirement accounts, and to retain the personal property currently in their possession. The family court awarded each party his or her own vehicle free of any claim by the other. Finally, the family court awarded Lee Roy the full proceeds from the sale of the horses to offset any disparity in the equity awarded Rose Ann in the marital residence relative to the award to Lee Roy of his workers' compensation benefits.

The family court next addressed the parties' marital debt and Rose Ann's request for maintenance. The family court found that, after the initial \$10,000.00 payment by both parties, Lee Roy paid the lion's share of the remaining tax debt. Accordingly, the family court assigned Rose Ann the \$4,000.00 loan against her life insurance and the \$8,000.00 debt she incurred during the period of separation. Lastly, the family court ordered Lee Roy to pay Rose Ann maintenance in the amount of \$600.00 per month. This appeal and cross-appeal followed.

II. Standard of Review

Regrettably, the innate nature of domestic-relations proceedings tends to breed acrimony. Discord is not uncommon, emotions are heightened, and conflicting evidence is virtually inevitable. The family court is faced with the

² Because Rose Ann made one year of mortgage payments prior to the parties' marriage, the family court reasoned that she was entitled to slightly more of the marital residence's equity.

difficult task of weeding through emotionally-charged testimony and often slanted evidence to reach a fair and equitable result. Because of this, the family court is afforded broad discretion in dividing marital property and marital debt, and awarding maintenance. We decline to disturb the family court's rulings on these issues in the absence of an abuse of its discretion or clearly erroneous factual findings. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003); *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). "An abuse of discretion generally 'implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" *Rice v. Rice*, 372 S.W.3d 449, 452 (Ky. App. 2012) (citation omitted). Clearly erroneous factual findings are those not supported by substantial evidence. *Mullins v. Picklesimer*, 317 S.W.3d 569, 581 (Ky. 2010).

III. Discussion

Lee Roy first contends the family court erred when it refused to allow him to seek additional discovery pertaining to Rose Ann's income and debts following remand. He has not, however, identified any legal authority in support of his argument. We need not consider the argument and decline to do so. *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005).

Lee Roy next argues that the family court's marital property and marital debt division amounts to an abuse of discretion. Lee Roy contends the family court awarded Rose Ann significantly more property and money while failing to award him his fair share of the marital property. He also claims he was not compensated for paying the majority of the federal tax debt.

After classifying property as either marital or non-marital,³ the family court must divide the marital property between the parties in just – but not necessarily equal – proportions. KRS 403.190(1); *Heskett v. Heskett*, 245 S.W.3d 222, 228 (Ky. App. 2008) (“KRS 403.190(1) requires courts to divide marital property “in just proportions,” which does not necessarily equate with an equal division of marital property.”). The family court’s property-division ruling must take into consideration the:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

KRS 403.190(1); *see Snodgrass v. Snodgrass*, 297 S.W.3d 878, 887 (Ky. App. 2009).

Here, we are not persuaded that the family court abused its discretion in apportioning the parties’ marital property. The parties divided equally their retirement accounts and their personal property. The family court awarded Rose Ann the equity in the marital residence (\$39,000.00), her vehicle (\$500 - \$2,000), and the amount she received for the sale of her horse (\$230.00). In total, Rose Ann

³ Lee Roy does not take issue with the family court’s property classifications.

received property valued between \$39,370.00 to \$41,230.00. The family court awarded Lee Roy the marital portion of his workers' compensation benefits (\$33,328.00), his vehicle (\$6,300), the horse trailer (\$1,000.00) and the proceeds from the sale of the horses (exact amount unknown).⁴ Lee Roy's property award was at least equal, if not slightly larger, than Rose Ann's property award. We find the family court rendered a "just" division of the parties' marital property. No abuse of discretion occurred.

Likewise, the family court's division of the marital debt does not rise to the level of an abuse of discretion. Unlike property, there is no presumption that debt acquired during the marriage is marital or that debt must be divided equally between the parties. *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011). Principles of equity guide the family court's debt-division decision. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001).

In this case, the family court first found that, after the initial \$10,000.00 joint payment, Lee Roy paid the majority of the remaining federal tax debt. To offset Lee Roy's larger-than-necessary share of that debt, the family court assigned to Rose Ann the \$4,000.00 loan used to prevent foreclosure on the parties' second house, and the \$8,000.00 debt Rose Ann acquired during the parties' separation. The family court's decision was equitable and fair. Again, we perceive no abuse of discretion.

⁴ While the family court's order reveals it was unsure exactly how much Lee Roy received from the sale of the horses, the family court found he certainly received something. Lee Roy admitted he sold at least 5 horses, one of which was Rose Ann's horse valued at \$230.00. Rose Ann testified the horses were valued at \$1,000.00 each, and that Lee Roy sold 10-12 horses.

Lee Roy's third argument is that the family court abused its discretion by awarding Rose Ann maintenance. Utilizing the factors set forth in KRS 403.200, Lee Roy asserts that Rose Ann is clearly capable of self-sufficiency. Lee Roy also claims the family court's factual findings relative to the maintenance award are clearly erroneous.

In response, Rose Ann asserts via cross-appeal that the family court's twelve year, \$600.00 per month maintenance award was insufficient to meet her basic needs; instead, Rose Ann requests a \$900.00 monthly maintenance award. Rose Ann maintains that, because Lee Roy's child support obligation expired in 2011, he is capable of paying her \$900.00 per month in maintenance while still meeting his own financial needs.

KRS 403.200 sets forth the parameters governing maintenance awards. It requires the family court to engage in a two-step process. First, the family court must determine whether the party seeking maintenance is entitled to it and, second, the family court must establish the amount and duration of any maintenance award. KRS 403.200(1), (2).

Maintenance is proper if the spouse seeking it:

(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.

KRS 403.200(1)(a), (b). Both sections of the statute must be satisfied before the family court may award maintenance. *Atwood v. Atwood*, 643 S.W.2d 263, 265 (Ky. App. 1982). The amount and duration of a maintenance award, however, must reflect careful consideration of the following:

- (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 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.

KRS 403.200(2).

In the case before us, the family court's findings of fact are not clearly erroneous; the family court heard testimony from Rose Ann supporting them. While Lee Roy believes much of Rose Ann's testimony to be false, misleading, or crafty, the family court found that testimony to be credible and it serves as substantial evidence in support of the findings. The family court, in its capacity as

the finder of fact, “is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses” and, in its discretion, “may choose to believe or disbelieve any part of” the testimony presented. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007).

Rose Ann testified that that she holds two part-time jobs and earns approximately \$1,360.40 per month. Nevertheless, Rose Ann presented evidence that her monthly expenses of \$2,203.00 exceed her monthly income. While Rose Ann did receive the marital residence and her vehicle, neither of these items is income-producing. Nor are they the kinds of property she could liquidate to meet her needs without creating a new need to replace them. The family court reasoned that given the low cost of maintaining her current residence, Rose Ann’s prospect of acquiring less-expensive housing was minimal.

Lee Roy argues that Rose Ann can support herself through more fruitful employment, but simply chooses not to. The family court found Rose Ann did not appear to have any reasonable prospect of employment at a significantly greater wage in light of her tenth-grade education and history as a low-wage earner. Rose Ann also testified that leaving her current employment with the school system would be financially detrimentally because she is soon eligible for retirement benefits.

In ascertaining the amount and duration of the maintenance award, the family court, in addition to the evidence already discussed, also took into consideration Rose Ann’s age, the wide disparity of income between Lee Roy and

Rose Ann, the parties' 18-year marriage, and the modest yet comfortable lifestyle enjoyed by the parties during the marriage. Moreover, the evidence adduced at the final hearing was that Lee Roy's monthly income was approximately \$5,488.54 and his monthly expenses were relatively low. Accordingly, as of the final hearing, Lee Roy had the means to meet his basic needs while also fulfilling Rose Ann's basic needs. In light of this evidence, we cannot say the family court abused its discretion in finding that Rose Ann was entitled to maintenance, nor did it act outside its discretion in setting the amount and duration of the maintenance award. As to maintenance, "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge." *Clark v. Clark*, 782 S.W.2d 56, 60 (Ky. App. 1990).

We now turn to Rose Ann's cross-appeal. She claims the family court's maintenance award is insufficient to fulfill her basic needs and, therefore, constitutes an abuse of discretion. We are not persuaded. We reiterate that maintenance is not designed to last indefinitely or to require one party to wholly support the other. A principal "goal of the dissolution process . . . is to sever all ties as much as possible as soon as possible." *Daunhauer v. Daunhauer*, 295 S.W.3d 154, 156 (Ky. App. 2009). While Rose Ann may have limited employment opportunities, they are not non-existent. She is not precluded from re-assessing her employment situation and obtaining employment which would allow her greater financial independence from Lee Roy. Moreover, while Rose Ann claims she needs further support, it cannot come at the expense of impoverishing

Lee Roy. *See* KRS 403.200(2) (requiring the family court to consider “the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance”). It is clear in this case that the family court evaluated the credibility of the parties, weighed all the evidence, and rendered an equitable, reasonable maintenance award. Therefore, as to the Rose Ann’s cross-appeal, we also affirm the circuit court’s decision.

We are mindful that the family court’s final order – and specifically the maintenance award – was based on evidence received by the family court in 2010. Lee Roy claims much has changed since then. Nothing in this opinion should be construed as prohibiting Lee Roy from filing a motion to modify the maintenance award in the event changed circumstances exist rendering the maintenance award unconscionable. KRS 403.250(1).

Finally, Lee Roy contends the family court erred when it declined to hold his maintenance obligation in abeyance pending resolution of the appeal. Less than one month after the family court issued its May 17, 2012 order, Lee Roy filed a motion to terminate his maintenance obligation or, in the alternative, to hold maintenance in abeyance pending appeal. By order entered June 15, 2012, the family court denied Lee Roy’s motion, finding it was not appropriate at that time in light of Lee Roy’s decision to appeal the initial maintenance award.

While a “trial court may exercise jurisdiction [over a motion for modification of maintenance] even during the pendency of an appeal of the original award[,]” it is not obligated to do so. *Ogle v. Ogle*, 681 S.W.2d 921, 923

(Ky. App. 1984). This is especially true if the motion to modify a “is merely an additional attack on maintenance . . . as originally granted.” *Id.* In such circumstances, “the trial court in its sound discretion may properly refuse to exercise jurisdiction during the pendency of an appeal of that same question.” *Id.* The family court in this matter acted within its discretion when it denied Lee Roy’s motion. Moreover, an appellant who desires to stay enforcement of a judgment on appeal has a right to file a supersedeas bond. CR 73.04. Lee Roy did not seek to stay enforcement of the family court’s May 17, 2012 order by giving a supersedeas bond. Lee Roy chose not to avail himself of this valuable tool wholly at his disposable.

IV. Disposition

We affirm in all respects the Pulaski Circuit Court’s May 17, 2012 Findings of Fact, Conclusions of Law, and Judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/ CROSS-
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