

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000600-MR

JAMES ROBERT ETHRIDGE

APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 08-CI-00607

KIMBERLY ETHRIDGE

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: James Robert Etheridge (James) appeals from the Scott Circuit Court's findings of fact, conclusions of law, and final order entered in the instant dissolution action. After careful review, we affirm the judgment of the trial court.

James and Kimberly were married on May 13, 1995, and separated in early June 2008, after which Kimberly filed a petition for legal separation on August 5, 2008. During the pendency of the matter, Kimberly was compelled to file no less than six motions due to James's contemptuous conduct regarding court orders. He had two attorneys withdraw during the pendency of the action. The matter was further complicated by the fact that James lived and worked in the Middle East and Colorado during the pendency of the divorce. He had worked out of the country for a significant portion of the marriage, as both a military officer and a civilian contractor. James left active duty military service in May 2006.

The final hearing in this matter was not conducted until August 13, 2010, some fourteen months after it was initially scheduled. James was non-compliant with Kimberly's requests and with court orders to provide certain financial information throughout. The final hearing was conducted in a relaxed manner because James was in custody for being in contempt of court. James was not represented by counsel at that time, but the parties met with Kimberly's counsel prior to the final hearing and reached some agreements. The trial court took judicial notice of the pleadings filed in the record and allowed the parties to provide additional information during the hearing. The only witnesses to testify were the parties. James's bank statements were entered by Kimberly as an exhibit.

The trial court entered its findings of fact, conclusions of law, and a final order on February 23, 2012. In that order, the trial court awarded sole custody of the parties' minor daughters to Kimberly, set child support in the

amount of \$2,863.08 per month, set maintenance in the amount of \$3,000.00 per month for thirty-six months; and ordered James to pay \$10,000.00 of Kimberly's attorney's fees. The order also divided up the parties' debts and instructed that Kimberly was to maintain the residence and make the payments thereon.

James alleges he did not receive a copy of the final order, as his address was listed incorrectly and a copy was not sent to his counsel of record at that time. Despite the incorrect address, James received his copy of the final order on March 9, 2012. Since neither James nor his counsel was made aware of the entry of the order prior to the running of time for motions to be filed pursuant to Kentucky Rules of Civil Procedure (CR) 59, James filed a motion pursuant to CR 60.02 and CR 73.02(d) requesting the court to amend the final order and extend the running time for filing an appeal to ten days from the expiration of the original time for filing pursuant to CR 73.02(d). This motion was not heard prior to the expiration of the original time in which the notice of appeal was required to be filed, and James filed his notice of appeal on March 23, 2012. On May 16, 2012, the trial court ruled that the CR 60.02 motion was moot, because the case was then before this Court on appeal.

James makes several arguments on appeal, and we will address each in turn. First, James argues that the award of child support was incorrectly and impermissibly calculated. The establishment, modification, and enforcement of child support obligations are within the circuit court's jurisdiction. *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007). On appeal, review is subject to an

abuse of discretion standard. *Holland v. Holland*, 290 S.W.3d 671, 674 (Ky. App. 2009). An abuse of discretion occurs when the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Kentucky trial courts have been given broad discretion in considering a parent's assets and setting corresponding appropriate child support. A reviewing court should defer to the lower court's discretion in child support matters whenever possible. *Id.* at 454.

James does not address the income used in the child support calculation by the trial court and instead only complains about the amount of arrears that had accrued. James asserts that the trial court's finding that "an arrearage of over \$30,000 has accrued since August 2009" was erroneous and not supported by substantial evidence. He only relies on Kimberly's counsel's statement that the amount in arrears was \$4,410.00 on the day of the final hearing. Admittedly, James asked how far he was behind, claiming that he paid more than \$1,000.00 per month, and Kimberly stated that she had bank statements. However, Kimberly's counsel clarified to the trial court that James paid child support directly to her because he failed to cooperate with the Division of Child Support to have a wage assignment entered and that Kimberly had bank statements evidencing his payments. Counsel informed the trial court that James sent \$2,250.00 in February, when he was already behind, and that he had paid \$1,100.00 in December 2008, and \$250.00 in March 2009, but paid nothing between January and March or between March and May. The trial court was also informed that James's girlfriend

sent a child support check that was deposited on August 1, 2009, which was returned due to insufficient funds. James did not disagree or refute any of these statements to the trial court.

James contends on appeal that from the day of the hearing, August 13, 2010, through the issuance of the final decree on February 23, 2012, there was a temporary child support order of \$1,000.00 per month which remained in effect. Thus, he claims the maximum child support which could have accrued during the almost eighteen month period under the then-existing orders was \$18,000.00. Even if James did not pay any further child support from the day of the final hearing, he argues the maximum arrearage he could have accrued by the date of issuance of the final order would have been \$22,410.00.

Kimberly argues that the arrearage amount in the final order was not based solely on the initial temporary child support amount. Present at the final hearing was a representative from the Scott County Division of Child Support to whom the trial court gave the variables required to calculate child support, i.e. income, health insurance costs for the children only, and the child care costs. The trial court requested the Division of Child Support to prepare a child support worksheet based on the information ascertained at the hearing. The Division of Child Support subsequently calculated James's child support obligation at \$2,863.08 per month, an amount that the trial court adopted and included in its findings of fact, conclusions of law, and final order, with such ordered retroactive to August 12, 2009, the date on which Kimberly's first motion for an increase in

child support was before the trial court. Notwithstanding that the initial order was temporary, which could be modified at the trial court's discretion, Kentucky Revised Statutes (KRS) 403.213(1) provides that the provisions of any decree respecting child support may be modified as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.

Throughout the pendency of this case, James made it impossible for Kimberly to ascertain his income despite having entered an agreed order that each party would account for his or her income and expenditures pending final resolution of the matter. James failed to file a verified disclosure statement as required, refused to answer discovery requests, and refused to comply with multiple court orders to provide income information. The trial court stated to James, "Part of the problem—and your previous attorney's frustration—the exact amount of your income." At this point, James agreed with the trial court. Kimberly's counsel then informed the trial court that James handed her an employment contract that was different from previous employment that he had obtained, and he also provided her with a termination letter and said that the contract had already terminated in March and he was already working another job in Afghanistan. James testified that he was working as a visitor in the country for Afghan companies and was not working under a government contract. James offered, "I am in the middle of the best position I have been in my career to make a lot of money." However, James also stated at this time that he averaged \$7,500.00

per month. James later testified that his last employment contract paid him \$9,300.00 per month in the beginning and \$9,800.00 per month near the end with a \$33,000.00 bonus at the one-year mark. The trial court advised James that the only proof of income it had was \$9,800.00 per month and a \$33,000.00 bonus, which he claimed was no longer valid. When the trial court told James that was the only information it had to go by, he said “That is fine.”

Counsel proffered to the trial court that the employment contract that James provided on the morning of trial along with a letter terminating the same indicated a base salary of \$135,000.00 payable monthly up to \$30,000.00 per month with year-end completion and performance bonuses. Counsel further informed the Court that James also provided bank statements that morning evidencing that he was depositing \$10,000.00-12,000.00 per month, which James confirmed by stating, “Yeah.” Counsel also informed the trial court that James’s bank statements additionally showed his military pay. James then testified that he earned \$880.00 net and \$1,026.00 gross per month from reservist pay, which the trial court determined was an additional \$12,300.00 per year.

When Kimberly argued that James was making more than \$10,000.00 per month with performance bonuses, James insisted that he did not receive any performance bonuses. However, when confronted about additional deposits in the amounts of \$7,881.00 on February 4th and \$10,289.00 on February 17th, James recanted and stated he could not remember if he received a bonus, but it was great if he did.

The trial court stated that it had calculated James's income thus far to be \$147,312.00, to which James said, "I appreciate if we can stop there." However, the Court advised James that it had not yet included his bonus income. James testified that he received a \$33,000.00 bonus in 2007, but that he had not received a bonus with any subsequent contracts. However, such was contrary to the evidence and the trial court determined that it would rely on his previous testimony that he received \$33,000.00 per year in bonuses. Kimberly's counsel then tendered exhibits showing James's Kuwaiti bank account statements from June 25, 2007, to October 8, 2008, evidencing that James had deposited \$285,317.19 into the account during that period of time. James admitted the earnings and testified that he transferred \$7,000.00 per month back home to Kimberly to maintain the household. James then conceded that his income, including bonuses, was \$180,000.00 per year. However, Kimberly argued that based on his bank statements, he earned \$217,987.75 in 2008 alone. James then again conceded to the court that his earnings were \$210,000.00 per year. The trial court, with the assistance of the Division of Child Support, ultimately determined James's income to be \$200,000.00 annually, which is reasonably between what James conceded his income to be and what his bank statements evidenced.

James further testified that he pays \$94.00 per month for the children's medical insurance through TriCare Reserve Select and \$75.00 per month for their dental insurance through TriCare dental.

Kimberly testified that she reported income of \$9,312.00 on her income tax return. She further testified that she incurred child care expenses in the amount of \$50.00 per week per semester in order for her to attend evening classes and \$75.00 per week during the summer so that she could attend evening classes in addition to \$70.00 per week for the children's regular after-school care. Kimberly additionally incurs \$140.00 per child for child care during both Spring and Fall breaks and \$510.00 per month over eight weeks during the summer. The trial court determined that child care averaged \$370.00 per month, which James did not dispute.

We disagree with James that the trial court improperly set child support or that it improperly determined the amount of arrearages that had accumulated. KRS 403.211(5) provides:

When a party has defaulted or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs of the child or the previous standard of living of the child, whichever is greater. An order entered by default or insufficient evidence to determined gross income may be modified upward and arrearages awarded from the date of the original order if evidence of gross income is presented within two years which would have established a higher amount of child support pursuant to the child support guidelines set forth in KRS 403.212.

In determining the reasonable needs of the children, the trial court should also take into consideration the standard of living which the children enjoyed during and after the marriage... [T]he child's standard of living should be altered as little as possible by the dissolution of the family. Consequently, the concept of 'reasonable needs' is flexible and may vary depending upon the

standard of living to which they have become accustomed.

Downing v. Downing, 45 S.W.3d 449, 456-57 (Ky. App. 2001).

At the final hearing, the trial court determined James's income to the extent reasonably possible, calculated child support based on that income, and ordered child support to be paid retroactively to the date of Kimberly's first motion to modify the same. As a result, additional arrearages resulted that were not known on the day of the trial but later determined by the Division of Child Support and adopted by the trial court. We agree that the trial court acted within the parameters of its discretion, and such decision was neither arbitrary, unreasonable, unfair, nor unsupported by sound legal principles. We find no abuse of discretion.

James next argues that there was insufficient evidence to support an award of spousal maintenance in compliance with the requirements of KRS 403.200. In support of this, James argues that pursuant to that statute, the trial court must consider the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance. James argues that there was no evidence presented regarding James's current needs, therefore the evidence was insufficient for the court to have considered his ability to meet his current needs at the time of the hearing. James argues that he testified that while he was able to send home \$7,000.00 at one point during the marriage, he was no longer working a job earning the same amount.

The standard of review is whether the court's findings of fact are clearly erroneous or whether the court abused its discretion. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). We find James's argument in this regard to be completely disingenuous. James ultimately conceded that he was making \$200,000.00 per year with all of his income combined. To be sure, James is the party who would have introduced evidence about his ability to meet his needs while paying maintenance, and in this regard James said nothing and presented no evidence to the trial court. While we are cognizant of the fact that James was representing himself at the time of the final hearing, the fact of the matter is that he had two attorneys throughout these proceedings, and his second attorney only withdrew a month before the hearing. "An individual may file and practice his own lawsuit in any court within the Commonwealth. If he elects to do so, he is bound by the same rules and procedures as a licensed lawyer." *Taylor v. Barlow*, 378 S.W.3d 322, 326 (Ky. App. 2012). "Though a degree of lenity is afforded *pro se* litigants and they are not strictly held to the same standard as legal counsel, the judiciary's conciliatory attitude is not boundless." *Caldwell v. Commonwealth*, 354 S.W.3d 582, 585 (Ky. App. 2011).

Ultimately, it was James who moved for the final hearing that took place in the instant case. While he was unrepresented, he clearly knew his financial situation better than anyone and could have presented testimony regarding his inability to meet his needs while paying maintenance. He failed to present any such evidence. Instead the evidence showed that Kimberly was pursuing a degree

in social work and the trial court awarded temporary maintenance to enable Kimberly to obtain that degree and support herself. We find no error in the trial court's findings of fact and no abuse of discretion in the trial court's ultimate award of temporary maintenance.

Next, James argues that the trial court erred by awarding attorney's fees. James argues that Kimberly did not testify at the hearing or present evidence with respect to her attorney's fees and that accordingly the trial court abused its discretion by awarding such fees.

A decision to award attorney's fees in divorce proceedings is within the discretion of the trial court, and such determinations will be reviewed for abuse of discretion. *Miller v. McGinty*, 234 S.W.3d 371, 373 (Ky. App. 2007). At the final hearing in this matter, the trial court advised that it would take judicial notice of what it could from the file and allow the parties to testify to anything different or additional. The record contains multiple motions by Kimberly requesting attorney's fees, both prior to and subsequent to the hearing, all due to James's obstinacy in this matter. Each request states the amount by which Kimberly's attorneys fees increased as a result of James's blatant disregard for the court's orders and proceedings. In August 2009, one year after the petition was filed and two months after the final hearing had initially been scheduled to occur, Kimberly's attorney's fees had exceeded her retainer by \$3,388.50. By May 2010, Kimberly had exceeded her retainer by \$8,500.00, and she requested the trial court to order James to pay \$5,000.00 of that amount. In October 2010, Kimberly's

attorney's fees were in excess of \$10,000.00 over her retainer, primarily due to James's actions and conduct and not due to any fault of her own.

We agree that the trial court properly awarded attorney's fees in this action. "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment." KRS 403.220. The court may only award attorney's fees under KRS 403.220 if there exists a disparity in the relative financial resources of the parties in favor of the payor. *Lampton v. Lampton*, 721 S.W.2d 736, 739 (Ky. App. 1986). The undisputed evidence and facts in this matter clearly show that James's income is substantially more than Kimberly's and that James's conduct was to blame for the lengthy delays that resulted. Therefore, the trial court was within its discretion to award attorney's fees.

Finally, James argues that the finding of dissipated assets and the order to reimburse same was not based on substantial evidence. The final order found that the "testimony and subsequent conduct of husband and his girlfriend showed that he was dissipating funds of the marriage by depositing funds intended to support his family into a bank account owned by his girlfriend" and ordered James to repay \$24,000.00, or half of the \$48,000.00 of dissipated assets. James argues there was no evidence to support the finding that he dissipated marital assets.

Kimberly argues that the record was replete with evidence that James had dissipated marital assets, and she contends that she raised the issue numerous times through motions, etc. Specifically, Kimberly notes that on November 19, 2008, she first raised the concern, and an agreed order was entered that specified status quo language, that the parties would exchange financial documentation, and that they would account for income and expenditures pending final resolution. In January 2009, Kimberly filed another motion regarding the more than \$48,000.00 that was still unaccounted for from James's bank statement. Kimberly's motion stated, "Approximately \$14,000.00 was given to [James's] mother, an additional \$100,000.00 was paid on [James's] two Visa Cards, which only he accessed; and approximately \$55,000.00 was cash/ATM withdrawals.

James filed a response stating, "Both parties by agreed order are accountable for his/her income and expenses pending final resolution of the case. The Respondent [James] will abide by the agreement and had conveyed that to the Petitioner [Kimberly], through her attorney, prior to her filing the pending motion." In May 2009, Kimberly filed another motion regarding the dissipated funds. James's attorney moved to withdraw upon receiving the motion, and James failed to appear at the hearing for that motion. In August 2009, James had retained new counsel when Kimberly filed yet another motion that added concerns about James's girlfriend being in charge of his finances after Kimberly received a child support check signed by the girlfriend that bounced. James did not address that issue or concern in his response, and the court ordered that he provide discovery or

be held in contempt of court. James's Kuwaiti bank statements, which were attached to Kimberly's initial motion raising the dissipation issue, evidenced the deposits and withdrawals to support her claims.

We agree with the trial court that James dissipated marital assets.

The concept of dissipation requires that a party used marital assets for a non-marital purpose. The spouse alleging dissipation should be required to present evidence establishing that the dissipation occurred. Once the dissipation is shown, placing the burden of going forward with the evidence on the spouse charged with the dissipation is reasonable because that spouse is in a better position to account for these assets.

Brosick v. Brosick, 974 S.W.2d 498, 502 (Ky. App. 1998).

In *Brosick*, this Court held that the wife had presented sufficient evidence to raise a reasonable inference that her husband had dissipated marital assets when she showed that he had made deposits into a joint checking account that he held with his mistress, and was unable to account for funds. *Id.* In *Bratcher v. Bratcher*, 26 S.W.3d 797, 799 (Ky. App. 2000), this Court upheld a finding of dissipation where the wife presented evidence of marital funds that were unaccounted for during the separation period.

In the instant case, Kimberly alleged that for two years James had dissipated marital funds. Specifically, there was no dispute between the parties that James transferred \$7,000.00 per month to Kimberly to pay marital debts totaling more than \$6,000.00 per month when he was earning in excess of \$200,000.00 per year. James also never disputed Kimberly's claim regarding

funds deposited into his Kuwaiti bank account, which totaled \$285,317.19 between June 25, 2007, and October 8, 2008, as evidenced by the account statement. Further, James never refuted that he was depositing funds into his girlfriend's account from which she paid his marital obligations. Because James was never forthcoming about his income or in compliance with court orders to provide financial documents, Kimberly could not ascertain beyond \$48,000.00 how much more was dissipated. Based on the evidence, the trial court did not commit error by finding that James dissipated assets and that Kimberly was entitled to one-half the amount claimed.

Finding no error, we affirm the February 23, 2012, order of the Scott Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rebecca Novak Ashman
Lexington, Kentucky

BRIEF FOR APPELLEE:

Denotra Spruill Gunther
Lexington, Kentucky