RENDERED: MAY 15, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000798-MR

ELIZABETH ANN WHITSETT — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 11-CI-01552

DAVID EARNEST WHITSETT — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: This case pertains to an award of maintenance following dissolution of a marriage that spanned more than twenty-five years. Elizabeth Ann Whitsett (Ann) argues the trial court erroneously calculated her former husband's net monthly income by failing to consider expert testimony about an annual bonus he customarily received but was not guaranteed. Due to that alleged

miscalculation, she asks that David Earnest Whitsett's (David) maintenance obligation be recalculated.[1] Upon review of the facts, the briefs and the law, we reverse and remand for further findings consistent with this Opinion.

FACTS

David and Ann wed in Daviess County on January 30, 1988. A son, Gray, was born to the couple on March 16, 1994. Gray graduated from high school on May 24, 2011, and was a freshman at Centre College when David petitioned the court to dissolve the marriage on November 3, 2011.

At the time of filing, David was 50 years of age and a long-term Kentucky Farm Bureau (KFB) employee. With Gray entering college, David anticipated relocating from Owensboro to Louisville where he expected to generate increased monthly expenses. He also expected to absorb about $10,000.00 a year in Gray's college costs. As figured by the Domestic Relations Commissioner (DRC), David's net monthly pay was $5,249.00 and his monthly expenses were about $2,900.00. According to Ann, David's expenses were inflated because some of them, like gas for his company car, were reimbursed by KFB. David responded he had to pay for gas used for personal mileage.

[1] Originally, Ann raised a second allegation on appeal—that David's pension was valued as of the wrong date. However, between the filing of Ann's brief and the filing of David's brief, the parties executed an agreed order entered on December 19, 2013—a fact revealed in David's brief. Ann acknowledged in her reply brief this claim is now moot and in no need of comment by this Court. The record on appeal ends with entry of the decree of dissolution on April 19, 2013, thus, the agreed order referenced by David is not included in the record provided to us.

Ann was 49 when the petition was filed. She is a two-time cancer survivor, an insulin-dependent diabetic, and has a myriad of health concerns. She has not worked since 2002[2] due to health issues that may flare unexpectedly making a regular job impractical, but on good days, she would occasionally assist Gray with his lawn mowing business. According to David, Ann has a B.S. in veterinary medicine, worked many years as a veterinary technician, and he believes she can—and should—return to the workforce.

Since 2003, Ann has been deemed fully disabled by the Social Security Administration and receives $963.00 in monthly disability benefits. Gray had been receiving $543.00 in monthly social security benefits as a result of Ann's disability—an amount the couple had saved for Gray's education—but once he graduated from high school in June of 2011, those payments ceased. The DRC directed Ann to use that money for her living expenses.

Ann's current expenses—including costs for Gray, who lived with her between graduation and the start of the 2011 fall semester—exceeded her disability income by $3,900.00 a month.[3] Included in her expenses was more than $700.00 for health insurance and prescription medicine. Upon dissolution, she would no longer be covered by David's employer-provided health insurance policy, but

[2] The DRC's report stated Ann was employed at the Family Y, a factual misstatement corrected by the trial court in its subsequent Findings, Conclusions and Orders entered on February 1, 2013.

[3] David argues the DRC properly reduced Ann's needs because Gray had become emancipated and was no longer living with her. David also noted Ann had projected a shortfall of $2,471.50 at the time of the *pendente lite* hearing, but subsequently increased her shortfall to $3,918.00.

wanted to purchase the same policy from KFB, as well as a policy to supplement the benefits she would receive through Medicare. David disputes Ann's needs.

The DRC characterized as "unreasonable" both David's and Ann's positions on maintenance. David suggested zero maintenance be paid, meaning Ann would live on less than $1,000.00 a month—about the same amount of two mortgage payments the DRC assigned to her in the division of property. In contrast, Ann argued she should receive $4,000.00 each month, which would leave David less than $1,500.00 a month for himself, despite working full time. Finding an award of maintenance to be appropriate, the DRC set David's obligation at

> $1,700.00 per month for fifteen years, or until [Ann] remarries or cohabits with another adult, or the death of either party, whichever occurs first.

David filed two exceptions to the DRC's report, asking first that Ann be required to refinance the mortgage on the marital home, and second, that she provide—at least partially—for her own needs. The same day, Ann filed her own exceptions and objections to the report—identifying at least fifteen alleged flaws—and asking that the DRC's report be made to conform to the proof received. Relevant to this appeal, she urged the trial court to apply testimony given by her expert, Robert E. Neely, Jr.—her brother and a veteran mortgage loan representative for BB&T—about calculating gross and net income, the disproportionate effect of bonuses paid by employers, the tax deduction benefit of maintenance payments, and how a bank would compute David's net income for a loan request. The DRC did not adopt or reference Neely's testimony in its report,

but he must have been aware of Neely because he personally questioned Neely during the hearing. The word "bonus" does not appear anywhere in the DRC's report—causing one to question whether a bonus now eclipsing $15,000.00 a year was forgotten.

The trial court convened a hearing on the exceptions, after which it issued a three-page Findings, Conclusions and Orders on February 1, 2013. That document corrected some of the DRC's erroneous findings and confirmed others. The trial court stated in pertinent part:

> [t]he major issue about which the parties have disagreed concerns amount and duration of maintenance. [David] does not believe [Ann] should receive any maintenance arguing primarily that she can work and claims an excessive amount of expenses. [Ann] argues that the $1700.00 a month for fifteen years until she remarries or cohabitates is insufficient to meet her monthly expenses of $4800.00. Her social security disability payments and the $1700.00 monthly maintenance would, according to her, leave her $2200.00 short each month in meeting her expenses. Having reviewed the charts, the income tax returns and considering the net incomes of both parties as affected by the maintenance the Court concludes that the Commissioner's findings with regard to maintenance are well supported by the record and will not be disturbed.

Curiously, the word "bonus" does not appear in the trial court's findings, conclusions or orders. Again, it is as if the bonus about which Ann has argued so vociferously was overlooked.

Ann moved the trial court to alter, amend, vacate or otherwise reconsider its order, noting once again the DRC's failure to mention Neely's expert testimony in his report and how the absence of even a mention of said testimony

may have influenced the DRC to reduce the amount of maintenance—an amount ultimately adopted by the trial court. Ann wrote,

> [t]he essence of Mr. Neely's testimony is that a disproportionate amount of taxes is withheld from David's large bonus checks (such as the one received by David), that such disproportionate taxes should be adjusted, because they are refunded to the individual, that David will be receiving a tax benefit for paying maintenance, and the combination of the adjustment for disproportionate taxes and tax benefit paid effectively increases David's net income.

Ann also quoted exchanges between the DRC and Neely during the hearing at which the DRC pointed out David would not receive tax refunds until the following year.

After further argument, the motion to alter, amend, vacate or otherwise reconsider was denied by the trial court on April 12, 2013. The decree of dissolution was entered on April 19, 2013. This appeal follows.

ANALYSIS

In reviewing findings of fact in a dissolution case, we look only for clear error. CR 52.01; *Sexton v. Sexton,* 125 S.W.3d 258 (Ky. 2004); *Ghali v. Ghali,* 596 S.W.2d 31 (Ky. App. 1980). CR 52.01 directs, in part, "[f]indings of fact shall not be set aside unless clearly erroneous, and due respect shall be given to the opportunity of the trial court to judge the credibility of the witnesses." We review the trial court's conclusions of law *de novo. Gosney v. Glenn,* 163 S.W.3d 894, 898–99 (Ky. App. 2005).

Determining duration and amount of a maintenance award is within a trial court's sound discretion. *Weldon v. Weldon,* 957 S.W.2d 283, 285-86 (Ky. App. 1997). Absent a showing of an abuse of that discretion, or reliance on clearly erroneous findings of fact, we will not disturb the trial court's award. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). An abuse of discretion occurs only when a trial judge renders a decision that is "arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). Mindful of these standards of review, we consider this appeal.

The record shows every other week David is paid $3,448.12 gross, or $2,423.01 net. Thus, his annualized salary reflects a monthly net income of $5,249.83. Based on this number, it appears the DRC—and ultimately the trial court—used $5,249.00 as David's net monthly pay in calculating the amount of maintenance to be paid to Ann.

Ann argues the DRC failed to consider expert testimony she offered from her brother about David's income, bonus, and the tax-benefit that would inure to David as a result of his bonus and the maintenance he was paying. Neely calculated David's net monthly income to be $6,220.27, rising to $7,139.00 after tax benefits were considered. In contrast, the DRC calculated David's monthly net pay to be $5,249.00. Because the divide between those two numbers is so great, Ann maintains the DRC must have ignored Neely's testimony since it was not mentioned in his report.

The DRC's succinct finding, which the trial court adopted, neither reflects nor rejects inclusion of an annual bonus David has consistently received—a major bone of contention Ann has repeatedly voiced. We understand the bonus is not guaranteed and has not remained constant—rather it has repeatedly increased, sometimes significantly—but those two characteristics are insufficient grounds for ignoring it completely. If the DRC considered Neely's testimony and rejected it, which he is certainly authorized to do, *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977) (factfinder may pick and choose evidence to believe and disbelieve), that is one thing. But if he failed to consider it at all, that is quite another and one we cannot endorse. Based upon our reading of the record—and the DRC's report—we cannot determine which of those alternatives occurred making reversal and remand essential.

This Opinion should not be read to say the amount of maintenance awarded in this case must be modified. Rather, the trial court, or perhaps the DRC, must tell us whether and how David's bonus was included in the calculation of his net pay; alternatively, if it was considered and rejected, we must know the rationale—something to assure us the testimony was not overlooked. Perhaps the DRC did not deem Neely to be a credible witness and rejected his testimony. Perhaps the DRC reviewed all the figures and determined an annual bonus was simply too speculative a figure on which to base a maintenance award. Perhaps the DRC reconfigured Ann's needs. These are just three of many possible scenarios.

Without an explanation, we are left to wonder whether an abuse of discretion has occurred.

Under the facts presented, David has consistently received a bonus for several years. It began as a few hundred dollars in the early 2000s and grew to $15,237.18 gross/$9,335.09 net for the year 2011 (received in 2012). David testified he received a bonus each year since KFB launched its program, but the amount received varies widely and no bonus is guaranteed. It is David's position the bonus is too speculative upon which to base an award of maintenance—a theory negated by *Snow v. Snow*, 24 S.W.3d 668, 673 (Ky. App. 2000), which—in the context of a child support obligation—encouraged consideration of proof of "current or reasonably-projected income and also of recent years' past income" in determining the proper amount of an award. While child support and maintenance are two distinct concepts, we discern no reason to ignore proof of earnings from prior years—especially when it demonstrates consistency. If David's bonus was overlooked, we realize the trial court will be challenged in assigning a value to it since it fluctuates yearly, but it must be done so David's net pay reflects all his income, from whatever source.

For the foregoing reasons, we reverse the order of the Daviess Circuit Court and remand for further findings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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