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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000966-MR

AMJAD R. ALI

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 11-CI-01149

SAMIA M. SAEED and
DAVID O. SMITH

APPELLEES

AND

NO. 2013-CA-001043-MR

SAMIA M. SAEED

CROSS-APPELLANT

v. CROSS-APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 11-CI-01149

AMJAD R. ALI

CROSS-APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT, AND TAYLOR, JUDGES.

COMBS, JUDGE: Amjad Ali appeals from an amended decree of dissolution of his marriage to Samia Saeed entered on May 16, 2013. Samia cross-appeals. Upon our review, we affirm in part, vacate in part, and remand for further proceedings.

Samia and Amjad were married on March 26, 1990, in the United Arab Emirates. Three children were born of the marriage. They separated on April 15, 2011, and Samia petitioned for dissolution of the marriage on November 7, 2011. A voluminous record was compiled as a result of the contentious proceedings.

Amjad, a physician, earns more than \$385,000.00 per year. Samia does not work outside the home. At a hearing *pendente lite*, Samia indicated that the expenses required to run her household and to maintain the standard of living of the two minor children exceeded \$7,000.00 per month. She testified that before the couple's separation, Amjad had provided her with between \$7,000.00 and \$9,000.00 per month for her individual use and for the children's expenses. Based upon this testimony, the family court awarded Samia temporary child support in the amount of \$3,500.00 per month and temporary maintenance of \$5,000.00 per month.

After their middle child graduated from high school, Amjad filed a motion to modify his child support obligation for the one remaining minor child. The child support order was reduced to \$2,125.00 per month, and the maintenance award remained unchanged.

Ultimately, the parties were able to agree with respect to issues relating to custody of the minor child. They also stipulated to the valuation of: Samia's collection of gold jewelry; Amjad's interest in his medical practice; the parties' residence; and certain real property that the parties owned in Pakistan. They agreed that Amjad would pay all of the costs associated with the children's higher education. The parties also stipulated as to the value of their joint bank account near the date of their separation.

Following its final hearing conducted in February 2013, the family court continued child support at \$2,125.00 per month and ordered Amjad to pay 92% of the unreimbursed medical, dental, orthodontic, optometric, and therapy fees incurred on the child's behalf. He was also ordered to pay to Samia's counsel \$14,262.50 for legal fees.

The trial court rejected Samia's argument that the parties' residence was her non-marital property. However, it accepted her contention that certain jewelry given to her by Amjad and valued at \$150,000.00 was, indeed, her separate property. The court found that the entirety of Amjad's pension funds were marital property as was the real estate located in Pakistan. The court found that Samia was entitled to an award of maintenance.

The court ordered Amjad to pay \$28,231.50 toward an outstanding balance for home improvements undertaken at the residence. It awarded to Amjad the real property in Pakistan; a PNC checking account; the value of his medical practice; and the value of his life insurance policies. Amjad's retirement funds were divided equally between the parties. Samia was awarded the residence; the household furniture; a vehicle; one-half of the parties' joint checking account; and \$2,500.00 per month as maintenance until she reached the age of retirement. The court's decree was entered on March 22, 2013. It erroneously recited that Samia was to be awarded one-half of Amjad's medical practice.

On March 28, 2013, Amjad filed a motion to alter, amend, or vacate the decree. He argued that the court erred in decreeing: that he had stipulated that the gold jewelry which he had given to Samia was her separate property; that Samia was the sole custodian of the parties' minor child; and that Samia had been awarded one-half of the value of his medical practice. On April 2, 2013, Samia also filed a motion to alter, amend, or vacate.

The court's amended decree was entered on May 16, 2013. The amended decree omitted any indication that Amjad had stipulated that the disputed jewelry was Samia's separate property; it also awarded the entire value of the medical practice to Amjad alone. The appeal and cross-appeal followed.

On January 16, 2014, Amjad tendered an appellate brief. Because the brief had been tendered out of time and without a motion for an extension, this Court

required a showing of “excusable neglect” before it could be filed.¹ Counsel filed a response to the court and tendered a brief on March 5, 2014.

On April 3, 2014, Samia filed a motion to strike the brief as fatally deficient under the Rules of Civil Procedure. She argued that Amjad’s brief failed to state with reference to the record whether any of the issues that he presented had been properly preserved for our review, and if so, in what manner. She observed that the record consists of more than 2,000 pages of pleadings and orders and 25 CD/DVD’s. Samia observed that neither she nor this Court should be required to search the record to determine whether the arguments presented had been properly preserved for review. In response, Amjad filed a motion for leave to amend the brief so that the deficiencies could be addressed.

On April 21, 2014, Amjad tendered an amended brief. On April 28, 2014, Samia filed a second motion to strike Amjad’s brief and a motion to dismiss the appeal. She again challenged the sufficiency of the brief and asked the court to dismiss the appeal pursuant to our decision in *Oakley v. Oakley*, 391 S.W.3d 377 (Ky. App. 2012). Amjad asked the court to consider the appeal on its merits.

In an order entered on June 12, 2014, a panel of this Court granted the motion to strike Amjad’s first tendered brief. However, it granted Amjad leave to file the amended brief tendered on April 21, 2014. The Court declined to dismiss the appeal, but it advised that the merits panel could consider anew whether the

¹ Kentucky Rule[s] of Civil Procedure (CR) 6.02.

brief filed by Amjad was in substantial compliance with the Kentucky Rules of Civil Procedure.

In his brief, Amjad presents numerous issues for our review. However, Samia renews her contention that his brief should be stricken since it fails to comply with the procedural rules requiring the appellant to explain in a clear and specific manner whether and how each issue has been preserved for review.

We have a compelling interest as well as a duty in maintaining an orderly appellate process. *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986). The inadequacy of Amjad's brief has impaired our ability to review this matter expeditiously, inevitably resulting in prejudice to Samia. Nevertheless, pursuant to our discretion under CR 73.02 (2), we have elected not to strike Amjad's brief but instead to address the issues presented.

First, Amjad argues that the family court erred in its calculation of his child support obligation both in the temporary award and in the final decree. Samia contends that Amjad waived the issue.

Since Amjad's income greatly exceeds the maximum contemplated by Kentucky's statutory child support table,² the court was required to consider the "reasonable and realistic" needs of the child. *See Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001). Amjad contends that no testimony was taken which directly pertained to the needs of the child and that the family court merely arbitrarily exceeded the statutory guidelines in establishing his child support obligation.

² Kentucky Revised Statute[s] (KRS) 403.212.

Where the parties' incomes exceed the child support guidelines, it is well settled that the sound discretion of the trial court governs the award. That discretion cannot be disregarded unless there is clear abuse. *Ciampa v. Ciampa*, 415 S.W.3d 97 (Ky. App. 2013). The test for an abuse of discretion is whether the decision of the trial judge was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing, supra*.

With ample citation to the record, Samia contends that the child support order to which Amjad now objects was actually proposed by his own counsel when the temporary support order was reduced following the eighteenth birthday of the parties' middle child. It was simply reaffirmed at the final hearing in February 2013 because nothing relevant to that child's needs had changed. We are satisfied that any argument for reversal of the child support award has been waived and is not now subject to our review. We are further persuaded that regardless of waiver, no abuse of discretion by the family court occurred.

Next, Amjad contends that the family court erred by awarding attorney's fees to Samia's counsel. He argues that Samia abandoned her claim for fees by failing to testify as to the outstanding balance during the final hearing. We disagree.

An award of attorney's fees is authorized by the provisions of KRS 403.220. It is within the broad discretion of the family court to award attorney's fees -- especially in the case of a disparity in the parties' income. *See Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990).

Counsel for Samia filed a motion for fees and provided the court with an itemized statement for services rendered. He requested an award of fees at the beginning and at the conclusion of the family court's final hearing. The evidence of record confirmed a wide disparity in the parties' resources, and the fee requested was not unreasonable under the circumstances. The family court did not abuse its discretion by ordering Amjad to pay a portion of Samia's attorney's fees.

Amjad next argues that the family court abused its discretion by awarding maintenance. In her cross-appeal, Samia contends that the family court abused its discretion by awarding an insufficient amount of maintenance.

The provisions of KRS 403.200(1) provide that a party is entitled to maintenance where the court finds that the party seeking maintenance lacks sufficient property (including marital property apportioned to her) to provide for her reasonable needs and that she is unable to support herself through appropriate employment. Where an award of maintenance is warranted, the provisions of KRS 403.200(2) set forth factors to be considered in determining the *amount* to be paid. Those statutory factors include: the financial resources of the party seeking maintenance (again, including marital property apportioned to her) and her ability to meet her needs independently; the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; the standard of living established during the marriage; the duration of the marriage; the age, physical, and emotional condition of the spouse seeking maintenance; and the ability of the spouse from whom maintenance is sought to

continue to meet his own needs while supporting the spouse seeking the maintenance award.

A review of the evidence indicates that Samia was indeed entitled to an award of long-term maintenance. Under the statutory criteria, the family court did not err by awarding her maintenance until she reaches the age of retirement. However, we are persuaded that the award of only \$2,500.00 per month is grossly insufficient in light of the elements set forth at KRS 403.200(2).

Samia's individual financial resources are not income-producing. Moreover, there is no indication that she is capable of obtaining education and training sufficient to enable her to find appropriate employment. The language barrier alone is a considerable impediment to such an endeavor. Additionally, the standard of living established during the marriage indicated that Samia had access to between \$7,000.00 and \$9,000.00 per month to manage her household. The marriage was a relatively long one, and Amjad's resources were more than sufficient to maintain his own expenses while continuing to pay maintenance. Although the amount of maintenance to be awarded is a question left to the discretion of the family court, we conclude that the decision reached in this case was arbitrary, unfair, and unreasonable in light of the clear statutory criteria. Consequently, we are compelled to remand the issue to the family court for consideration of an appropriate increase in amount of maintenance to be awarded to Samia.

Amjad also contends that the family court erred in its division of the marital estate by awarding to Samia more than one-half of the marital property. We note that the family court is under no obligation to equally divide the marital estate. Both the statute (KRS 403.190) and numerous cases require that property be divided “in just proportions” resulting in equitable rather than equal apportionment. *McGowan v. McGowan*, 663 S.W.2d 219, 223 (Ky. App. 1983). However, we are unable to address the merits of the issue at this juncture. A review of the amended decree indicates that the family court failed to determine whether the parties’ residence was a gift of Amjad’s interest in the property to Samia as she contends. Depending upon the family court’s characterization of this asset upon remand, the court will need to consider anew its division of the marital property.

Pursuant to the provisions of KRS 403.190, the family court's division of property involves a three-step process. First, the court must characterize each asset as marital or non-marital. Next, the court must assign to each party his or her non-marital property. Finally, the court must equitably divide the marital property between the parties. *McGowan, supra, and Russell v. Russell*, 878 S.W.2d 24, 25 (Ky. App. 1994).

Pursuant to the provisions of KRS 403.190(2), the term “marital property” includes “all property acquired by either spouse subsequent to the marriage.” However, property acquired by either spouse *by gift* during the marriage is specifically excluded from the definition and is automatically characterized as non-

marital property. A party claiming that property acquired during the marriage is non-marital bears the burden of proof. *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 002).

During the family court's final hearing, Samia testified that Amjad had given his interest in the residence to her on their anniversary in March 2010. She indicated that Amjad deeded the property to her as a gesture of his good intentions going forward -- an inducement to remain in what had allegedly been an abusive relationship. Samia identified the residence as her non-marital property in her final disclosure statement to the court. In contradictory fashion, Amjad testified that he had deeded the property to Samia merely to protect the asset from creditors in the event that a malpractice action was filed against him.

In determining whether the residence was given to Samia by Amjad as a gift, the family court had to consider: the source of the money used to acquire the home; the intentions of Amjad at the time of the transfer; the status of the marriage at the time of the transfer of the property; and whether there was an understanding between the parties that the transferred property was to be excluded from the marital estate. *See O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. App. 1980). The intent of the purported donor has been considered the primary factor in determining whether a transfer of property is a gift. *See Clark v. Clark*, 782 S.W.2d 56 (Ky. App. 1990).

The family court did not recite any of the evidence in its findings, and there is no discussion or indication that it considered whether Amjad had made a gift of

his interest in the property to Samia. Under these circumstances, we cannot determine whether the court properly applied the law to the facts. Upon remand, the family court shall determine whether Amjad made a gift of his interest in the residence and whether it was, as a consequence, Samia's separate property.

In conjunction with this issue, we must also consider Amjad's contention that the family court erred by ordering him to pay for a portion of the work undertaken to improve the residence after the date of separation.

Debts acquired by the parties during marriage (even after separation) and for a marital purpose or on account of a marital asset can be designated as marital and divided within the discretion of the family court according to the parties' respective abilities to pay. *See Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky.

2001). The family court found that the repairs made to the residence were essential to its maintenance and that they were incurred to preserve the asset.

While the evidence supports this conclusion, Amjad can be held responsible for a portion of the costs of the repairs *only if* the residence is deemed marital property by the family court on remand. Thus proper resolution of this issue is contingent upon the court's ruling as to whether the marital residence was a gift to Samia and was her non-marital property.

We shall next consider Amjad's contention that the family court abused its discretion by concluding that he had made a gift to Samia of her gold jewelry collection and thus by characterizing it as her non-marital property.

According to its findings of fact, the family court was persuaded by Amjad's testimony that he had purchased the jewelry for Samia as a gift "as it was the least he could do for her raising the children" and that it was "a rainy day fund" for her. The court's determination is supported by the record, and it appears that the court undertook a proper analysis of the issue. Therefore, we find no error in its disposition of the jewelry, and we shall not disturb its decision on this issue.

Finally, Amjad contends that the family court erred by failing to credit him with an overpayment of maintenance and child support in the amount of \$12,392.45. He claims that Samia withdrew funds totaling \$11,392.45 from a joint bank account for her daily use and support of the family during November and December 2011. He contends that he also gave to her an additional \$1,000.00 in November 2011. Amjad argues that the family court's order for temporary child support and maintenance entered in January 2012 (for child support retroactive to November 11, 2011) failed to award him a credit for these amounts. Samia contends that the total debits from the disputed account were substantially less than the amount contested by Amjad.

When the parties separated, Amjad continued to deposit funds into a joint bank account for the maintenance and support of his family as he had done during the course of the marriage. Samia accessed this account through a debit card that she used to pay expenses. Since Amjad made these payments voluntarily and there was no agreement or understanding between the parties that the payments would operate as a credit against the court-ordered maintenance, the family court did not

abuse its discretion by concluding that he was not entitled to a credit for the contested sum.

The judgment of the Laurel Family Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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