

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001593-MR

EARNEST WAYNE PHILLIPS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON SHEA FLEMING, JUDGE
ACTION NO. 11-CI-01089

DAWN RENEE PHILLIPS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND J. LAMBERT, JUDGES.

JONES, JUDGE: The Appellant, Earnest Wayne Phillips, appeals from a dissolution of marriage decree entered by the Christian Family Court. On appeal, Earnest asserts that the trial court erred in (1) allocating the parties' marital debts; (2) awarding his former wife, Dawn Renee Phillips, maintenance; and (3) failing to award him reimbursement for certain items of personal property he claims Dawn

destroyed after the parties separated.¹ For the reasons explained below, we

AFFIRM.

I. BACKGROUND

Earnest and Dawn were married on August 30, 2003. They separated on April 1, 2011. Earnest filed a Petition for Dissolution on August 3, 2011. The only disputed issues concerned the division of property and debts and whether Dawn was entitled to maintenance. While the parties were initially able to reach some tentative agreements, they were not able to come to a final agreement on these issues.

To determine the disputed issues, the trial court conducted an evidentiary hearing at which both parties presented evidence over the course of four nonconsecutive days.² The trial court was thoroughly convinced that neither Dawn nor Earnest was forthright with it during the evidentiary hearing. The trial court stated that their deception "went well beyond a mere manipulation of the facts or a faulty perception of reality." Because of the parties' deception, the trial court was deeply concerned that any decision it rendered would be somewhat

¹ Earnest also alleged error with respect to the manner in which the trial court divided the parties' interests as related to the marital home. Earnest subsequently sought leave to withdraw this argument, which we granted by order entered January 23, 2015. Accordingly, we have not addressed any of Earnest's arguments concerning the marital home.

² The evidentiary hearing commenced on September 10, 2012, and ultimately concluded on June 5, 2013. While the reason for the intervening delay is not entirely apparent from the face of the record, it appears that proof taking was frustrated by the parties' animosity towards one another. For example, on April 12, 2013, the second day of proof, Dawn became so disruptive that the trial court held her in criminal contempt and sentenced her to spend the weekend in jail.

based on "faulty evidence."³ Nevertheless, the trial court rendered its findings, conclusions and order on June 27, 2013.⁴ Earnest filed a motion to alter, vacate or amend the trial court's order. The trial court denied Earnest's motion with the exception of modifying its prior order to delay Earnest's first payment to Dawn for her share of equity in the marital home. This appeal followed.

Dawn did not file a brief in this matter. In a case where an appellee does not file a brief, CR 76.12(8)(c) provides three alternative avenues of action for an appellate court—all essentially punitive to the appellee:

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

CR 76.12(8)(c).

The decision whether to proceed in imposing such penalties is a matter committed to our discretion. *Kupper v. Kentucky Bd. of Pharmacy*, 666 S.W.2d 729, 730 (Ky. 1983). While the record in this case is rather lengthy, the issues in dispute are fairly discrete. Accordingly, we have elected to review the relevant portions of the record notwithstanding Dawn's failure to file a brief. This

³ Quoting a Tennessee opinion, *Tandy v. Tandy*, No. 106814 R.D., 1991 WL 3817 (Tenn. Ct. App. Jan. 18, 1991), the trial court lamented that this case required it to decide the facts based on a "preponderance of perjury."

⁴ Overall, the trial court found Earnest's testimony to be more credible than Dawn's testimony. However, on a few issues, the trial court rejected Earnest's testimony in favor of Dawn's testimony.

election should not be seen as condoning Dawn's failure to comply with our rules. In choosing not to impose sanctions that would affect the merits of this matter, however, we relied most on the trial court's statements regarding the veracity of both parties. Given the trial court's reservations about the truthfulness of the testimony presented by both parties, we believe it the better course to proceed with an independent review of the record.

II. Analysis

A. Maintenance

The trial court awarded Dawn permanent maintenance of \$600 per month "beginning July 1, 2013, until and including February 28, 2022, when [Dawn] reaches age 62 years old and can draw partial social security benefits." On appeal, Earnest argues that the trial court erred in awarding maintenance to Dawn because she is voluntarily unemployed. Additionally, Earnest disputes the length of the maintenance award given the parties' relatively short marriage. Finally, at the very least, Earnest believes that the trial court's order should have included a provision terminating his maintenance obligation in the event Dawn is ever awarded any social security disability or social security income benefits.

“[T]he amount and duration of maintenance is within the sound discretion of the trial court.” *Weldon v. Weldon*, 957 S.W.2d 283, 285 (Ky. App. 1997). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (quoting *Commonwealth v. English*,

993 S.W.2d 941, 945 (Ky.1999)). The order of the trial court awarding maintenance may only be disturbed by a reviewing court if it finds the trial court abused its discretion or based its decision on factual findings that are clearly erroneous. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

An award of maintenance involves a two-part analysis. First, the trial court must determine whether the requesting spouse is entitled to maintenance. To this end, Kentucky Revised Statutes ("KRS") 403.200(1) provides that a "court may grant a maintenance order for either spouse only if it finds the spouse seeking maintenance: (a) lacks sufficient property, including marital property apportioned to [her], to provide for [her] reasonable needs; and (b) is unable to support [her]self through appropriate employment." This first prong focuses solely on the requesting spouse's financial needs and resources.

If the trial court determines an award of maintenance is justified, it must next decide the appropriate amount and duration of the award. In making these determinations, the trial court should consider all relevant factors, including:

- (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).

With respect to the first prong, the trial court observed that while the parties had acquired some disposable marital property, it was meager, especially after division. Additionally, the trial court observed that Dawn was not currently employed. The court found that Dawn had no steady income other than the temporary maintenance she had been receiving from Earnest and was being supported by her mother. The trial court additionally found that Dawn's numerous medical issues (crushed spine at C5-C6 and C-7, two prior neck surgeries, a prior stomach surgery, a prior hysterectomy, a history of migraines and black outs, and a drug regimen consisting of thirteen medications) kept her from being a candidate for gainful employment. The trial court also concluded that Dawn was likely to have monthly expenses of at least \$600, including food and the co-pays for her medications. The court also noted that Dawn would have housing expenses were it not for the benevolence of her mother who was not legally required to support her adult daughter.

Based on these facts, the trial court found that Dawn lacked sufficient property, including the marital property apportioned to her, to provide for her reasonable needs. The trial court further concluded that Dawn's current health situation and work history prevent her from being able to support herself through

appropriate employment. Thus, the trial court concluded that Dawn was entitled to maintenance.

Earnest claims the trial court's factual finding that Dawn is unable to work is in error. He maintains that the only credible evidence regarding Dawn's ability to work is an unfavorable decision from an administrative law judge in response to Dawn's application for social security disability benefits, in which the judge found that Dawn had the ability to do light work. Earnest further asserts that Dawn's testimony that she is not able to work was undermined by evidence indicating that she was quite active during a recent trip to Oregon.

The federal administrative law judge's factual findings were not binding on the trial court in this state dissolution proceeding. While we believe that the trial court was certainly entitled to consider the federal opinion, it was not bound by it. The evidence of record included Dawn's testimony as well as various medical records. While evidence related to Dawn's trip might have called her physical capacity into question, it was certainly not conclusive with respect to Dawn's ability to find and maintain gainful employment.

It is clear to us that the trial court carefully considered and weighed the evidence. While Earnest presented evidence which suggests Dawn may be able to work, Dawn presented contradicting evidence. In the end, the trial court found Dawn's testimony and evidence more persuasive on these issues. We find no error in this regard.

Earnest's next assignment of error concerns the duration of the maintenance award. Earnest argues that the trial court erred in ordering maintenance for nearly ten years when the parties were married for a “short” duration. In *Powell v. Powell*, 107 S.W.3d 222 (Ky. 2003), the Kentucky Supreme Court explained that “[KRS 403.200](#) seeks to enable the unemployable spouse to acquire the skills necessary to support himself or herself in the current workforce so that he or she does not rely upon the maintenance of the working spouse indefinitely.” However, “in situations where the marriage was long term, the dependent spouse is near retirement age, the discrepancy in incomes is great, or the prospects for self-sufficiency appears dismal,” our courts have declined to follow that policy and have instead awarded maintenance for a longer period or in greater amounts. [Clark v. Clark, 782 S.W.2d 56, 61 \(Ky. App. 1990\)](#). Additionally, while the duration of the marriage is one factor to consider, it is not necessarily determinative and a short marriage will not necessarily preclude maintenance if the other factors such as the requesting spouse's ability, or lack thereof, to support herself weigh in favor of maintenance. *See Carter v. Carter*, 656 S.W.2d 257, 260 (Ky. App. 1983).

Dawn and Earnest were married for approximately ten years. This is not necessarily a short time period. Moreover, even though the award is for roughly the same duration as the marriage, we believe it was justified in this particular instance. The trial court appropriately considered that Dawn's health, education, and work history made it unlikely that she would ever be able to support

herself. Aside from the equity in the marital home, Dawn had no real assets. In comparison, the trial court found that Earnest has a military pension and is physically able to find employment to supplement his pension income. We believe the trial court considered the relevant factors and that its award of maintenance was reasonable and supported by the evidence with respect to both the amount and duration of the award.

Earnest's final argument concerns his future maintenance obligation should Dawn ever become entitled to social security income or disability benefits. The court ordered that if Dawn received "either SSI or SSD in the future prior to her retirement age in an amount more than a minimum wage job would pay at full time (*i.e.* \$1256.66 per month), then the maintenance award shall be reduced dollar-for-dollar in any amount over the \$1256.66." Earnest argues that the trial court should have provided that "any receipt of SSI or SSD by [Dawn] should terminate [his] maintenance obligation in its entirety" instead of ordering a dollar-for-dollar reduction only if Dawn's benefits exceeded \$1256.66.

We find inclusion of the language suggested by Earnest to be unnecessary. If Dawn receives SSI or SSD in the future, Earnest may certainly move to modify the maintenance award if he can convince the trial court that such benefits amount to a substantial and continuing change in Dawn's financial situation.⁵ *See* KRS 403.250.

⁵ The modification of maintenance awards is governed by KRS 403.250, which provides, in part, that the "provisions of any decree respecting maintenance may be modified only upon showing of changed circumstances so substantial and continuing as to make the terms unconscionable." KRS 403.250(1). "To determine whether the circumstances have changed, we compare the

Upon review, we believe the trial court carefully considered the required factors and reached a decision regarding maintenance that was well within its statutory authority and discretion.

B. Division of Debts

Earnest also challenges the trial court's allocation of certain marital debts, a Lendmark debt of \$682.31, and a Vystar debt of \$2998.45, entirely to him. He believes that because the trial court classified the debts as marital, they should have been divided equally.

There is no statutory presumption that marital debts must be divided equally or in the same proportions as marital property. *Neidlinger v. Neidlinger*, 52 S.W. 3d 513, 522 (Ky. 2001). Rather, debts are generally “assigned on the basis of such factors as receipt of benefits and extent of participation, whether the debt was incurred to purchase assets designated as marital property, and whether the debt was necessary to provide for the maintenance and support of the family.” *Id.* at 523 (internal citations omitted). Another factor, of course, is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. *Id.* The trial court's decisions regarding division of marital debt are reviewed for abuse of discretion. *MacLean v. Middleton*, 419 S.W.3d 755, 773 (Ky. App. 2014).

parties' current circumstances to those at the time the court's separation decree was entered.” *Block v. Block*, 252 S.W.3d 156, 160 (Ky. App. 2008).

In addition to the two debts Earnest was ordered to assume, the trial court classified a Visa debt in the amount of \$1912.00 as a marital debt and allocated that debt entirely to Dawn. Therefore, there was an apportionment of marital debt albeit not one that was fifty-fifty. However, as already noted, there is no requirement for a trial court to apportion marital debt in even percentages. Given the trial court's careful recitation of the evidence and its clear consideration of the financial situations of the parties, we believe the trial court acted appropriately in dividing the marital debt. Accordingly, we will not reverse its decision to allocate more of the marital debt to Earnest than to Dawn.

C. Personal Property

Lastly, Earnest takes issue with the trial court's failure to award him reimbursement from Dawn for certain personal property, both marital and non-marital, he claims Dawn dissipated following the parties separation.

With respect to the dissipation of the personal property, the trial court found that Dawn had sold, given away, or failed to secure some items of personal marital and non-marital personal property. However, the trial court did not find Earnest's accounting of that property "credible as to the nature of the property being marital or non-marital, the value of the property or even if some of the property existed."

It was clear to the trial court that Dawn willfully dissipated some of the parties' personal property. It was equally clear to the trial court that Earnest overinflated the nature, amount, and value of the missing property. The trial court

was placed in a difficult situation. It chose to resolve the situation by awarding Earnest all the personal property still located in the marital residence and by ordering Dawn to return to Earnest certain personal property of his that was still in her possession.

Earnest's overreaching in identifying and valuing the missing property prevented the trial court from being able to "value, locate or even delineate what property ever existed." Earnest did not meet his burden with respect to the reimbursement he requested. Given the circumstances, the trial court's apportionment of the personal property was fair and equitable. We find no abuse of discretion in this regard.

III. CONCLUSION

For the reasons set forth above, we AFFIRM the decision of the Christian Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO APPELEELEE BRIEF FILED.

Katherine Hicks Demps
Hopkinsville, Kentucky