

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000519-MR

JOHN MARVIN ABNEY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JUDITH BARTHOLOMEW, JUDGE
ACTION NO. 12-CI-00360

LOIS JEAN ABNEY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND KRAMER, JUDGES.

CLAYTON, JUDGE: John Abney appeals the February 13, 2014 Warren Family Court's Findings of Fact, Conclusions of Law, and Decree of Dissolution and also the March 7, 2014 Order denying his motion to alter, amend, vacate, and make specific findings in this order. In general, he contests portions of the family court's order dividing the marital property and credit card debt. After careful consideration, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

John and Lois Abney were married on December 18, 1999. John left the marital home in February 2012, and filed for divorce on March 12, 2012. The parties are the parents of two children born in 1996 and 1997. In addition, Lois cares for and has custody of four foster children who, at the time of the decision, ranged from age two to age eight. Lois's great-niece is the children's mother. They were placed with Lois through a Boyle Circuit Court order. The parties have permanent custody of the eight-year-old child; Lois has permanent custody of the six-year-old child and the four-year-old child; and, a permanent custody order placed the two-year-old child with Lois.

The primary issue on appeal is the family court's allocation of assets. We begin with a review of the parties' income. John is employed with Magna where his 2012 gross income was \$38,826.00. Although Lois is not employed, she receives benefits including a monthly adoption stipend of \$1,217.00 for the youngest foster child, \$328.00 per month in K-Tap benefits on the behalf of all four foster children, plus \$494.00 per month in child support. Additionally, she is eligible for \$449.00 in monthly food stamps.

John maintains that the family court allocated a disproportionate share of the marital estate to Lois. His primary complaint concerns both the award of the marital residence, a mobile home, to Lois and also the allocation of one-half of her post-separation credit card debt to him. During the marriage, the parties lived in a mobile home located on 20.1 acres. After the parties separated in February 2012,

Lois continued living in the mobile home with the six children and paid the \$299.00 monthly mortgage. John now lives with his parents whom he claimed as dependants on 2012 income tax.

John has no objection to the allocation of the mobile home if Lois is ordered to refinance the indebtedness and provide him a portion of the marital equity. According to John's trial exhibit, Plaintiff's Exhibit 4, the fair market value of the mobile home is \$47,000.00. He also averred that its mortgage is \$35,912.95. Therefore, using John's figures, the marital equity in the mobile home is \$11,087.05. He maintains that he is entitled to one-half the equity as his marital share.

The parties owned additional marital property including farming equipment, vehicles, household goods, and building materials. Other than the contested property issues, John and Lois agreed to the itemization, value of the property, and its distribution. Nonetheless, the list included John's 401K with his employer, Magna. The account is valued at \$19,812.37 with a loan balance of \$432.58, and hence, the value is \$20,244.95. The family court gave each party one-half of the 401K, which John maintains was in error.

Another issue is the parties' debt. John claims that when the parties separated, he had paid all the marital debt except for the mobile home's mortgage. But six months after John left, he testified that Lois began to incur credit card debt, which ultimately totaled \$12,216.00. The family court ordered that each party was

responsible for one-half of this debt. John argues that he should not be responsible for any credit card debt incurred after the parties' separation.

Concerning the credit card debt, Lois testified that she had been able to pay the bills without using credit cards when John and she were together and for about six months after he left. But at that point, she was no longer able to meet her expenses. She explained that typically, while the parties were married, they used credit cards to meet the household expenses incurred throughout the year, and then, paid the credit card debt off with their tax refund. John's testimony corroborated this assertion when he noted that upon receipt of the 2011 refund, he insisted that Lois use it to pay the parties' debt for a van and credit card debt.

John stated that he received the 2011 and 2012 refunds. In 2012, John filed as a head of household and, as previously mentioned, claimed his parents as dependents. In addition, he claimed the parties' son as a dependent. The 2012 income tax refund was \$2,578.00, which he maintains he used to pay bills. Nonetheless, John never informed Lois about filing income taxes in this manner nor sought to file a joint return. Lois claimed that had they filed jointly, the parties would have received a much larger refund. Furthermore, on the 2012 tax return, he entered a farm loss of \$3,427.00, of which \$2,306.00 was interest based on the mortgage payments made by Lois.

Another pertinent debt was \$6,346.43 in medical debt. These hospital bills were related to a motorcycle accident John was involved in during the pendency of the action. As a result of the accident, he received an approximate

\$36,000.00 settlement, which included \$3,400.00 for the motorcycle, PIP payment of \$10,000.00, and an additional \$1,000.00. And while he was off work, John collected an additional \$403.00 per week in short-term disability. In the findings of fact, the family court noted that the settlement was entirely nonmarital, and he received recompense for the medical expenses resulting from the accident. Consequently, the family court required John to pay this medical debt.

Thirty days prior to filing the dissolution petition, John sold the parties' cattle for \$4,342.45. John prepared an exhibit labeled "[c]attle receipts and bills paid with funds." He indicated on the exhibit that he paid a tax preparation fee of \$473.00, provided his son \$1,150.00 for the sale of the son's cow and calf, and paid his first attorney \$1,726.00. Besides these payments, John testified that he made two deposits to Lois's accounts in the amount of \$200 and \$900. (On the exhibit, John listed a \$700.00 payment deposited to Lois's account.) Lois vehemently denied that she received any deposits. And John's explanation of the expenditures from the cattle sale total \$4,767.60 rather than the \$4,342.45 on the exhibit.

John concludes, based on his interpretation of the findings and conclusions concerning the allocation of assets and debt, that he was awarded \$3,082.86 and Lois was awarded \$22,346.52. However, our evaluation of the family court's disposition of the marital estate results in a different outcome as will be demonstrated in the analysis section of the opinion.

After the family court entered the findings, conclusions and decree on February 13, 2014, John filed a motion to vacate, alter, amend, and make additional findings. The family court amended its order and clarified that because the 2012 tax refund and the profits from the cattle sale were used for marital debt, they were not John's marital assets. Additionally, the family court elucidated that the value of the marital property was properly listed on Plaintiff's Exhibit 4; the monthly child support was \$494.00; Lois was not voluntarily underemployed; the proceeds from the motorcycle accident were irrelevant since they were nonmarital, and Lois had no responsibility for these medical bills given John's settlement; and lastly, the use of John's gross income instead of net income was appropriate to ascertain the parties' ability to meet their basic needs. The family court then denied the rest of the motion. John now appeals from these two orders.

STANDARD OF REVIEW

In dissolution proceedings, appellate review is constrained by procedural rules, statutes, and case law. Reversal is only appropriate if the trial court has abused its considerable discretion. The test for abuse of discretion is whether the family court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130 (Ky. App. 2008).

Appellate courts review the family court's factual findings under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01.

Further, an appellate court must defer to the family court's findings of fact unless they are clearly erroneous, i.e., not supported by credible evidence. CR 52.01; *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). But the family court's legal conclusions are reviewed *de novo*. *Smith v. Smith*, 235 S.W.3d 1, 6–7 (Ky. App. 2006). With these standards in mind, we turn to the case at hand.

ANALYSIS

Before we review the case before us, we observe that the front cover of John's brief is not signed. CR 76.12(6) necessitates that "[e]very brief shall bear on the front cover a signed statement" A brief may be stricken for failure to comply with these rules. CR 76.12(8). The purpose of the signature is for the author of the brief to designate that all necessary parties have been served. Here, although John did not sign the front cover of the brief, he did sign the brief at its conclusion. Further, Lois was clearly served since she responded to John's brief, and consequently, suffered no cognizable harm or prejudice by John's failure to sign the front cover of the brief. Given our discretion in such cases,

notwithstanding our authority to strike John's brief, we choose to ignore the deficiency primarily because Lois was not prejudiced by the noncompliance.

In the case at bar, John frames the issues as follows: whether the family court erred by not requiring Lois to refinance the mobile home debt or, if that was not possible, to sell it; whether the family court erred in using John's gross income, rather than net, as a basis for not requiring Lois to refinance or sell the mobile home; whether the family court erred in the distribution of the marital equity by awarding the mobile home to Lois and dividing the retirement account in half; and finally, whether the family court erred in ordering John to pay one-half of the credit card debt incurred after the separation.

The division of property in a dissolution action is governed by Kentucky Revised Statutes (KRS) 403.190(1)(a-d). Essentially, a family court first assigns each party their own property. It then divides the marital property without regard to marital misconduct in just proportions considering all relevant factors. The enumerated factors are the contribution of each spouse (including the contribution of the spouse acting as a homemaker), the value of the property, the duration of the marriage, and the economic circumstances of each spouse when the division of property is to become effective. This final factor states that it encompasses "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)(d).

The family court, in making its decision about the allocation of the parties' marital estate, relied on *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009), and its discussion of the economic circumstances of the parties in dissolution of marriage. The family court noted that while the present situation did not mirror the amount of marital assets in *Gaskill*, it was similar in the disparity of the parties' ability to earn income and the disparate nature of their income. Indeed, the Supreme Court advised in *Gaskill*:

Another important statutory factor is what the economic circumstances of the parties will be at the time the property division becomes effective. To determine this, the trial court can look at the nonmarital property each has been awarded, if any, and the future earning capacity of each spouse.

Id. at 317. The Supreme Court went on to articulate that “there is no presumption of a 50–50 division without regard to the evidence,” and that “the trial court considers ‘all relevant factors.’” *Id.* at 316 (quoting KRS 403.190).

We now turn to John's first argument that the family court erred when it did not require Lois to refinance the home, or, if unable to do so, sell it. With this argument, he also suggests that the family court incorrectly used John's gross income rather than his net income in making the determination. In making its decision about the mobile home, the family court observed that a court is not mandated to divide marital property in exact 50/50 proportion since the statute says that property is to be divided in just proportions. The family court then found that a 50/50 division was not appropriate in this case because Lois cares for four state-

placed foster children, is the custodian of the parties' two teenage children, and only has state benefits and child support for income. Moreover, the family court noted that it would likely be impossible for Lois to find a residence for these six children with a similar payment of \$299.00 per month.

Subsequently, the family court awarded the mobile home and the land to Lois and obligated her to make the mortgage payments. The mobile home had been the family's residence for some time. In doing so, the family court protected John by indemnifying him from any loss if Lois failed to make the payments. Regarding the family court's decision not requiring Lois to refinance the home, the family court explained that if the property were sold at a Commissioner's Sale, it would probably bring in a deflated price, and maybe even a deficiency judgment. And given Lois's tenuous source of funds, the family court did not believe Lois could refinance the property.

We agree with the family court's reasoning. Moreover, even if we did not agree, the family court did not abuse its discretion in reaching this decision. Lois is unemployed, and her only source of income is governmental benefits or child support. She would have an extremely difficult, and perhaps impossible, ability to secure new financing. Further, Lois is rearing four foster children and has her teenage boys living with her. Providing the mobile home to Lois provides the children with an affordable, stable environment and allows them continuity. Authorizing Lois and the children to remain in the home is not only reasonable but also compassionate.

Next, we address John's contention that the family court incorrectly made the decision about the mobile home by using John's gross income rather than his net income. Statutorily, a family court divides marital property in "just proportions," considering "all relevant factors." *Gaskill* at 316. Whether the family court used John's gross or net income would have no impact on its final decision to award Lois the mobile home. The final factor for the division of property under KRS 403.190(1)(d) provides that "[e]conomic 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."

Regardless of the income amount used, John has steady employment, lives with his parents, and other than child support, has few encumbrances on his income. Moreover, John's characterization of Lois's income is disingenuous. She is completely dependent on government benefits or child support to handle the expenses of six children. And she has not provided therapeutic foster care for some time, so including this amount as income is false.

Furthermore, we agree with the family court's decision that she is not underemployed. Lois is currently raising six children in a mobile home – it is not unreasonable, indeed some would say it was judicious, to no longer provide therapeutic foster care. Moreover, while John makes a point about whether gross or net income is significant, he, in fact, provides no evidence regarding his monthly expenses nor requires Lois to do so, thus rendering this issue even more

meaningless. The family court followed the provisions of KRS 403.190(1)(d) in dividing the marital assets and did not abuse its discretion by using John's gross income.

John also contests the division of the retirement account, which the family court allocated one-half to each party. Having determined that the family court did not err in awarding the mobile home to Lois because of KRS 403.190(1)(d), which permits the award of the family home to a party caring for the children of the family, we conclude that it did not abuse its discretion by subsequently providing each party one-half of the retirement account. The award of the mobile home with its debt was for the benefit of the family and based on Lois's rather dire financial circumstances. Significantly, once the mobile home is removed from the list of marital assets, including the retirement account, the marital assets, including the retirement account, were divided in almost a 50/50 proportion. The division of the 401K retirement account was based on KRS 403.190(1), which provides that the family court "shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors. . . ." Such was the case here, and the family court did not abuse its discretion in so allocating the retirement account.

John's final assertion is that the family court erred in ordering him to pay one-half of the credit card debt incurred by Lois after the parties separated. There is no statutory authority for assigning debts in dissolution of marriage actions, but such assignments are routinely made. Further, no statutory

presumption exists as to whether debts incurred during the marriage are marital or nonmarital. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001).

Debts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of the 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.* Another factor is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. *Id.* Our Court has held that debts could be deemed marital if incurred for the benefit of the family, e.g., to provide necessary support for the children. *Gipson v. Gipson*, 702 S.W.2d 54, 55 (Ky. App. 1985). Lastly, there is no presumption that debts must be divided equally or in the same proportions as the marital property. *Neidlinger v. Neidlinger*, 52 S.W.3d at 523. As with issues pertaining to the assignment of marital property, issues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard. *Id.*

We begin our discussion of the assignment of marital debt by observing John claimed a medical debt with T.J. Sampson Hospital as a setoff to his portion of the marital estate. In fact, the family court correctly ascertained that this medical debt was John's personal expense. As mentioned, he was involved in a motorcycle accident wherein he incurred \$6,346.43 in medical expenses. The family court assigned John responsibility for this debt because he received a nonmarital settlement related to the accident, which provided reimbursement for

medical expenses. Therefore, the family court required that John pay this medical debt without reference to the division of the marital estate. We agree with the family court's decision, and it was not an abuse of discretion.

Next, we address the family court's assigning of one-half of a \$12,216.00 credit card debt to each party. It was established that this debt was incurred by Lois to support the children. However, John adamantly claims that since he left the family residence before the debt was incurred, he should not have to pay any of it. Other grounds, however, mitigate against this conclusion.

First, neither party has a substantial income nor estate but clearly Lois is significantly challenged because her only source of income is governmental benefits and child support. Before John left the marital home, clearly the family depended on his income. And Lois has not worked outside the home for a significant time. Moreover, with this limited income, she is responsible for two teenagers and four foster children. It is indisputable that John has more financial resources to meet his lessened daily expenses.

Both parties explained that it was customary during the marriage to use credit cards when they could not meet their day-to-day expenses and pay them off with their tax refunds. Additionally, Lois established that the majority, if not all, of the credit card debt was incurred for Lois and the children's daily living expenses – food, clothing, and car repair. Finally, John may have left the marital home in February 2012, but he continued financially to be intertwined with it. For example, he filed the 2012 income tax return claiming one son as a dependent and

using the interest on the mobile home mortgage as a deduction. And he controlled the use of the funds from the sale of the cattle.

Consequently, we believe that the family court did not err in assigning one-half of this credit card debt to John. Furthermore, the family court's assignment of one-half of the credit card debt to both parties was fair and equitable, particularly in light of KRS 403.190. Again, this is appropriate regardless of whether John's gross or net income is used. He is employed, has a salary, less expenses, and financially is in a better position than Lois. Recognizing that the economic circumstance of each party is a factor a court must take into consideration per KRS 403.190, the decision to assign John one-half of this credit card debt was proper.

Our overview of the family court's allocation of the marital estate is starkly different than John's monetary assessment. John and Lois, for the most part, amicably split the tangible marital assets. John received approximately one-half the tangible assets, one-half the retirement account, and was responsible for the already-reimbursed medical expense and one-half the credit card debt incurred by Lois. Similarly, Lois received roughly one-half the tangible assets, one-half the retirement account, and one-half the credit card debt. The mobile home with its mortgage was awarded to Lois. The rationale for the distribution was based on KRS 403.190(1)(d) and the reasoning in *Gaskill*, which was discussed above. Disregarding the mobile home, the parties share a nearly equal distribution of the

marital estate. Thus, we believe that the marital estate was allocated in just proportions and that the family court did not abuse its discretion.

CONCLUSION

Accordingly, the February 13, 2014 Warren Family Court's Findings of Fact, Conclusions of Law, and Decree of Dissolution and the March 7, 2014 Order are affirmed.

DIXON, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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