

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001906-MR

SHARI FRASURE
(FORMERLY CRISP)

APPELLANT

v.

APPEAL FROM CLARK FAMILY COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 12-CI-00255

TIM F. CRISP

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: In this domestic relations appeal, Shari Frasure (formerly Crisp) appeals from the portion of the Clark Family Court's October 16, 2014, findings of fact, conclusions of law, and decree of dissolution denying her request for maintenance. She also appeals from the November 17, 2014, order denying her

motion to alter, amend, or vacate the prior ruling. Finding no error or abuse of discretion, we affirm.

Shari and Tim Crisp were married on August 18, 1979, in Floyd County, Kentucky. Tim is a pediatric dentist, and Shari is a real estate agent. Shari and Tim separated on March 1, 2012, and Shari filed a petition for dissolution on April 16, 2012, after thirty-three years of marriage. Two children were born of the marriage, but they had reached the age of majority at the time the petition was filed. In addition to requesting that the marriage be dissolved, Shari requested temporary and permanent maintenance, an award of exclusive occupancy of the marital residence, a status quo order, attorney fees, a split of property and debts in just proportion, and approval of any separation agreement. In his response to the petition, Tim denied that Shari was entitled to either temporary or permanent maintenance or that she should be entitled to exclusive use of the marital residence.

On June 2, 2012, the family court entered an agreed order incorporating the parties' agreements related to the pendency of the action. Pursuant to the terms of the agreement, Tim was to deposit \$2,250.00 on a bi-weekly basis into the parties' joint account from his dental practice's business account and \$3,000.00 per month into the joint account from the dental practice as rental of the building. Also from the parties' joint account, Tim agreed to pay all of the household and utility bills, credit card bills, and all other monthly expenses. Tim was to maintain all of the parties' insurance policies, including the health, life,

and automobile policies. The parties agreed to obtain appraisals of the residence, their farms, the dental business and furnishings in the office, the mobile home on the farm, and all of their personal property. Shari was to have exclusive occupancy of the marital residence and use of the parties' pontoon boat housed at Cave Run Lake. Tim was permitted to remove a list of specified items from the marital residence, including Civil War prints and memorabilia as well as his personal items. Tim later moved for and received exclusive possession of the parties' farm at Pilot View pursuant to a separate agreed order.

Shari filed her verified disclosure statement on August 13, 2012. She was born on August 25, 1961, and she was working as a realtor for Rector/Hayden, where she had been working for eight years. She was paid on commission. Shari indicated that she was not claiming any non-marital property. Next, Shari listed several items of marital property, including the marital residence in Winchester, Kentucky, and several vehicles. She stated that there was no debt on the residence or vehicles. She also listed bank accounts, investment accounts, retirement accounts, and the pediatric dentistry office as marital property. As debts, Shari indicated that the parties owed \$600,000.00 on the Pilot View farm and \$200,000.00 on the Owingsville farm. Finally, Shari estimated her monthly expenses to be \$8,619.00 per month, which included expenses for her adult daughters.

In her response to discovery requests filed December 6, 2012, Shari indicated that she was spending \$7,229.00 per month on expenses for herself, not

including their daughters, Jennifer and Rachel. Shari also indicated that she had received \$40,000.00 in commissions in 2012, less business expenses in the amount of \$14,833.23 and horse expenses of \$36,983.76. In an amended disclosure filed March 6, 2013, Shari indicated that she had earned \$49,166.55, with business expenses of \$16,247.76 and horse expenses of \$4,064.97. She received \$7,597.78 per month in maintenance. Her monthly expenses totaled \$6,853.00, not including an additional \$1,000.00 in anticipated additional monthly expenses. Shari stated that both of her daughters lived with her at the marital residence on Cabin Creek Road. Jennifer, who lived in a dorm except over the summer and during holidays, had monthly expenses of \$2,000.00, including counseling costs. Rachel lived at the residence full-time, accruing an additional \$1,000.00 in monthly expenses. Shari listed her total monthly expenses as between \$9,853.00 and \$11,653.00. Pursuant to Shari's October 22, 2013, filing, her expenses, not including her adult daughters' expenses, totaled \$8,648.00, which included \$600.00 per month in home repairs. Shari also indicated that she earned \$19,880.00 as a real estate agent in 2012, while Tim's ordinary income from his dental practice that year totaled \$540,633.00.

Tim filed his preliminary verified disclosure statement on October 20, 2012. Tim is self-employed as a dentist with a practice in Winchester, Kentucky, where he has worked for twenty-three years. His gross income year-to-date totaled \$65,450.00. His gross income the previous years was \$110,100.00. Tim indicated that the Pilot View farm had a balance of \$626,669.48 remaining on the mortgage

and that the Owingsville farm had a balance of \$200,576.53 remaining on its mortgage. Tim's monthly expenses totaled \$18,464.16, and included the \$4,903.00 mortgage payment for the Pilot View farm, \$2,019.17 in tuition expenses, as well as automobile, medical, and insurance expenses for his daughters. Tim included valuations of the marital estate, including their real estate, bank accounts, annuities, investment accounts, farm equipment, horses, vehicles, jewelry, household furnishings, Civil War art, and other personalty.

By Agreed Order entered February 13, 2013, the parties agreed to sell the Owingsville farm, and each would receive half of the net sales proceeds after payment of the debt on the property and the expenses of the sale. These amounts were to be treated as a partial distribution of the marital estate, and the parties were permitted to use the funds without restriction.

Shari filed an updated pre-hearing memorandum on August 5, 2014. In her filing, Shari stated that she and Tim had successfully mediated the division of the marital estate and had decided all issues except maintenance. Based upon that division and her income and expenses, Shari was seeking lifetime maintenance pursuant to Kentucky Revised Statutes (KRS) 403.200. She listed her expenses in light of their negotiated property division. Her new amount of monthly expenses totaled \$23,115.00, and included \$4,903.00 for the mortgage on the Pilot View farm, \$3,000.00 for her daughters' expenses, \$650.00 for home maintenance and repairs, and \$5,000.00 for farm expenses. Shari stated that she received the parties' farm in the settlement, which had a large mortgage and substantial

maintenance costs associated with it. She also noted that the farm was not operating to capacity, and she anticipated that it would be seven to ten years before the farm would operate at a profit based on her business plan. Based on her monthly income of \$2,000.00 and Tim's monthly income of \$55,126.00, she argued that she had the need, and Tim had the ability to pay, for her requested maintenance.

Tim filed a supplemental trial memorandum the same day opposing Shari's request for maintenance. Tim stated that pursuant to the terms of the agreed division of property, Shari received \$1,880,824.00 in net worth and he received \$2,127,614.31 in net worth. Shari received a debt-free house worth \$375,000.00 with a cabin, a 358-acre farm along with the farming operation and equipment, a second home in which she had been living, a truck, \$400,000.00 in non-retirement assets, and \$1,000,000.00 in retirement assets. Tim received his dental practice and the building that holds it, a truck, and \$1,000,000.00 in other assets and retirement assets. Tim asserted that Shari's reasonable monthly expenses totaled \$3,907.00 and that she could reasonably be expected to have a monthly income of \$6,326.00 through her employment as a real estate agent, rental properties, earnings from her portion of the investments, and earnings from the farm. Tim also argued that based upon the agreed order filed earlier in the case, he had paid to Shari, or for her benefit, \$335,276.00 over twenty-six months. He indicated he thought he was making these payments to allow Shari to transition to

a full-time, self-supporting employment. Tim also pointed out that Shari chose to receive the farm and its equipment, along with its associated debt.

The day before the hearing, Shari's attorney filed a motion requesting that Tim be required to pay Shari's outstanding and estimated future attorney fees in the amount of \$27,345.79 as well as a portion of the \$24,862.00 in attorney fees Shari had already paid. Tim objected to the motion based upon the amount Shari was receiving in the property settlement agreement. He also pointed out that the issue of attorney fees was not reserved at the conclusion of their mediation.

The court held a hearing on August 20, 2014, on the issue of maintenance. Shari testified first. She lived in the marital residence on Cabin Creek Road, which she received in the property settlement, with her adult daughters, one granddaughter, and her daughter's fiancé. Shari's mother lived in a cabin on the property as well. None of them paid rent. She also received the 358-acre farm, along with the more than half a million dollars in debt associated with it. The farm was not presently generating any income, but it had shown income in 2012 and 2013. Shari planned to raise cattle on the farm as an income-producing business, and she had drafted a business plan. She explained that she wanted to get into the organic beef business and that she needed to purchase cows to do so. Shari knew it would take some time to grow the herd, and she believed it would take three to five years to make the business profitable, if everything went well.

Shari went on to testify that she had \$28,816.00 in credit card debt and that she had to pay for maintenance on the house and attorney fees. She

testified that she had been a real estate agent for the last ten years, and she provided information about her income and expenses in this field. She also testified about her past work history, including her work in the industrial safety sales industry and other home-sales jobs. Shari stated that she attended a small community college in 1979, and she started her real estate classes in 2002 and received her license. She did not have a desire to go back to college because she thought she was too old. She intended to work until she could retire, but planned to work as a farmer as long as she could. She also testified about the standard of living established during the marriage, which included boating, riding horses, and fishing. The family took vacations three or four times per year to destinations including Charleston, South Carolina, and Gatlinburg. Shari drove a 2008 Infiniti as well as a newer model truck. She shopped for her clothing at Macy's or Kohl's. Shari wanted to receive an award of maintenance large enough to pay her reasonable expenses so that she could pursue her farming career without having to liquidate her retirement or go into more debt.

On cross-examination, Shari admitted that she chose what she wanted in the settlement and that she knew the potential or lack of potential of each item she chose. She did not plan to rent any of the buildings on her properties.

Tim testified about his dental practice and their investment plans. Tim's sister, Margaret Hicks, testified about Tim's and Shari's standard of living during the marriage. They took trips to Gatlinburg, Charleston, and Florida, but no

overseas trips, and they had a nice, but not lavish, home. She described their standard of living as not extravagant.

The parties returned to court on October 7, 2014, during which the family court entered an oral ruling on maintenance. The court entered the written decree and judgment on October 16, 2014. Based upon the testimony presented, and in keeping with the oral ruling, the court found that Shari's reasonable needs could be met with an income of between \$5,000.00 and \$5,800.00 per month. She had received more than \$1.8M in assets in the property settlement, and the court pointed out that Shari had received \$335,276.89 during the pendency of the action, which provided her with "significant assistance towards meeting her reasonable needs during the 29 months after separation such that she could have transitioned into full-time employment." The court went on to consider Shari's earning history and earning potential, finding her social security statement to be the "most credible evidence" of her earning history during the first twenty-one years of the marriage. Based upon its findings, the court concluded that Shari had not met either requirement set forth in KRS 403.200(1), which required her to prove that she lacked sufficient property to provide for her reasonable needs and that she was unable to support herself through appropriate employment. Therefore, the court denied Shari's request for maintenance. The court also entered a decree of dissolution, found the parties' property settlement agreement to not be unconscionable, and denied Shari's motion for attorney fees.

Tim moved to amend the decree to change the effective date that the temporary order would end from the date the order was entered to the date the court made its ruling in open court. Shari, in turn, moved the court to alter, amend or vacate its ruling pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, and to enter more specific findings of fact pursuant to CR 52.02. She requested more specific findings related to the conscionability of the property settlement division spreadsheet, which had been approved and incorporated by reference into the decree, and she maintained that the court refused to enforce the status quo portion of the agreement. She also asserted that she was entitled to maintenance. Shari also moved to compel compliance with the property division agreement related to Tim's duty to continue payments on property awarded to Shari.

By order entered November 17, 2014, the family court denied Tim's motion to alter, amend, or vacate as well as Shari's motion as it related to maintenance. The court granted Shari's motion as it related to the status quo under the parties' property settlement agreement and clarified that Tim was to make all payments that he had been making on the farm and related to the farm through October 1, 2014, the date he vacated the property, and to make all payments due under the temporary agreed orders for rent on the office building and his net salary that was payable on October 15, 2014, to Shari, through October 16, 2014, the date the decree was entered. This appeal now follows on the single issue of the family court's decision not to award Shari maintenance.

CR 52.01 provides the general framework for the family court as well as review in the Court of Appeals: “In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.] . . . Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *See Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (An appellate court may set aside a lower court’s findings made pursuant to CR 52.01 “only if those findings are clearly erroneous.”). The *Asente* Court went on to address substantial evidence:

“[S]ubstantial evidence” is “[e]vidence that a reasonable mind would accept as adequate to support a conclusion” and evidence that, when “taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men.” Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses” because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, “[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal,” and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted).

Kentucky’s General Assembly provided for the award of maintenance in KRS 403.200. KRS 403.200(1) provides that a court may grant maintenance only if it finds the spouse seeking it lacks sufficient property, including marital

property apportioned to him, to provide for his reasonable needs and is unable to support himself through appropriate employment. Once a court determines that an award of maintenance is appropriate pursuant to KRS 403.200(1), it must then determine the amount and duration of maintenance by considering all of the relevant factors as listed in KRS 403.200(2). These factors include the spouse's financial resources, the time needed to obtain sufficient education or training, the standard of living during the marriage, the duration of the marriage, the age and condition of the spouse seeking maintenance, as well as the ability of the paying spouse to meet his own needs.

“While the award of maintenance comes within the sound discretion of the trial court, a reviewing court will not uphold the award if it finds the trial court abused its discretion or based its decision on findings of fact that are clearly erroneous.” *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). *See also Brenzel v. Brenzel*, 244 S.W.3d 121, 126 (Ky. App. 2008) (“An award of maintenance and the amount are within the discretion of the trial court.”). “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) (citations omitted); *Kentucky Nat. Park Com’n ex rel. Commonwealth v. Russell*, 301 Ky. 187, 191 S.W.2d 214, 217 (1945).

In the present case, the family court concluded that Shari failed to meet the threshold test in order to establish that she was entitled to maintenance

pursuant to KRS 403.200(1). We note that a party must establish both prongs of this subsection to be eligible for a maintenance award:

Kentucky law is clear that in order for an award of maintenance to be proper, the elements of both KRS 403.200(2)(a) and (b) must be established. In other words, there must first be a finding that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for his reasonable needs. Secondly, that spouse must be unable to support himself through appropriate employment according to the standard of living established during the marriage.

Drake v. Drake, 721 S.W.2d 728, 730 (Ky. App. 1986), citing *Lovett v. Lovett*, 688 S.W.2d 329, 332 (Ky. 1985).

For her first argument, Shari contends that the court abused its discretion in finding that she had sufficient property, including marital property apportioned to her, to provide for her reasonable needs. She asserts that the family court failed to make the appropriate findings related to the nature of the marital property she received or recognize that her reasonable needs had changed over the period of separation.

We shall begin with the family court's assessment of her reasonable needs. Shari's monthly expenses varied throughout the proceedings, beginning at \$8,619.00 in her first verified disclosure filed in August 2012, and rising to \$23,115.00 at the time of the hearing. Her last filing included the mortgage on the farm, which she received in the agreed settlement of the marital estate, other farm expenses, and expenses for her daughters. In its findings of fact, the family court addressed Shari's reasonable needs:

The Court has had a difficult time ascertaining [Shari's] reasonable needs as [her] own testimony and proof regarding this matter was a "moving target" throughout this proceeding. The court notes that at various times during this proceeding [Shari] has made varying estimates of her expenses, and at times she exaggerated their amount. In her AOC Form 238, filed in August 2012, she claimed monthly expenses of \$8,719.00 per month. Another of her initial Disclosures estimated her monthly expenses at \$6,853.00 (see Amended Verified Disclosure Statement filed in the record on 3/6/2013) to which she added additional costs for her adult children to increase her monthly expenses to \$9,853.00. Thereafter, her claimed reasonable monthly expenses were ever-increasing. At the hearing, she stated her reasonable expenses in the future were \$23,115.00. She acknowledged that these claimed expenses include expenses for her proposed organic cattle farm business, her adult children, her daughter's fiancé and her mother, as well as some expenses for her paramour who spends some nights at her home. [Tim] estimated [Shari's] reasonable needs (and hers alone) based upon the standard of living during the marriage was \$4,140.00 per month and detailed such expense budget [sic] on his Exhibit 8, but he admitted that he had underestimated a few items on that exhibit and that an additional \$300.00 to \$400.00 should be added to the budget thereby making his estimate of her reasonable monthly expenses \$4,500.00 per month.

Based upon our review of the record, we agree with the family court that a reasonable estimation of Shari's monthly expenses does not exceed \$5,800.00.

Next, we shall examine the marital property and assets Shari chose and ultimately received in the property settlement agreement. These properties and assets totaled close to \$1.9M. She received the marital residence on Cabin Creek Road, with a fair market value of \$375,000.00 and without any debt; the Pilot View farm with a net equity at the time of the hearing of \$424,595.00 but with a

mortgage debt of \$555,455.00; more than \$800,000.00 in investment, retirement, and annuity accounts; more than \$120,000.00 in cash assets, including a \$50,000.00 cash withdrawal in March 2012; her share of the proceeds from the sale of the parties' farm; as well as vehicles, household furnishings, a boat and slip trailer, horses, a horse trailer, and barn personalty. Shari also received a total of \$335,276.89 from Tim from February 1, 2012, to August 20, 2014, under the temporary agreed order. Of this amount, she received \$8,240.85 per month in cash, net of taxes.

Regarding the standard of living, the court properly rejected Shari's post-separation expenditures as reflective of the parties' standard of living during the marriage. The evidence reflects that Tim and Shari lived a moderate lifestyle during their marriage and did not spend lavishly.

Therefore, we agree with the family court's conclusion that Shari failed to establish the first prong of KRS 403.200(1) by proving that she lacked sufficient property to provide for her reasonable needs.

For her next argument, Shari contends that the family court abused its discretion in concluding that she was able to support herself through appropriate employment pursuant to KRS 403.200(1)(b). She argues that her former position for which she received a large salary was obsolete, that she was only earning between \$20,000.00 and \$35,000.00 per year in the real estate field, and that she planned to work on the farm as long as possible.

The family court found as follows:

22. [Shari] has significant earning history and earning potential. Both parties presented evidence and estimates of [Shari's] past income; but the Court finds that page 3 of [Shari's] social security statement . . . contains the most credible evidence of [Shari's] earning history during the first 21 years of the parties' marriage, while she worked full-time at various jobs. That record shows and the Court finds that in the last five years of [Shari's] full-time employment between 1996 and 2001, she earned an average annual gross salary of \$115,432.00.

23. [Shari] is an experienced, talented, sales person. She is in good health and leads an active lifestyle. [Shari] is now actively working as a licensed realtor for Rector-Hayden Real Estate. Her income has increased steadily as a realtor, and she has earned accolades from her employer. Both in the short term and the long term, she has the ability to earn at least \$100,000.00 per year from her employment in sales and from the investments of the assets awarded to her.

The court recognized that the farm Shari was awarded would provide income for her in the future pursuant to her business plan, or that she could choose to sell the farm and associated equipment and invest the equity to provide another form of income. Further, the family court posited that Shari could rent out buildings located on her properties.

We agree with the family court that Shari was able to support herself through appropriate employment based upon the evidence presented. As she admitted in her brief, Shari wants Tim to help her start her cattle farming operation, just as she helped Tim open his dental business early in their marriage.

Accordingly, we hold that the family court did not abuse its discretion in finding that Shari failed to prove both prongs of KRS 403.200(1) and that she was

therefore not entitled to any maintenance. While Shari chose to address in her brief the amount and duration of maintenance to which she believed she was entitled pursuant to KRS 403.200(2), we agree with Tim that this argument is irrelevant because she failed to meet the threshold for being entitled to an award of maintenance.

For the foregoing reasons, the judgment of the Clark Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ann D'Ambruoso
Lexington, Kentucky

BRIEF FOR APPELLEE:

John H. Rompf, Jr.
Winchester, Kentucky