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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000982-MR

NICOLETTE D. FEUQUAY

APPELLANT

v. APPEAL FROM OLDHAM FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 13-CI-00551

KURT E. FEUQUAY

APPELLEE

AND

NO. 2015-CA-001025-MR

KURT E. FEUQUAY

CROSS-APPELLANT

v. CROSS-APPEAL FROM OLDHAM FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 13-CI-00551

NICOLETTE D. FEUQUAY AND
D. BERRY BAXTER

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Nicolette D. Feuquay appeals from the findings of fact and conclusions of law entered in this dissolution action. She presents the following issues: (1) the family court erred in imputing income to her when determining the amount of maintenance and child support; (2) the family court abused its discretion in the division of marital property and debts; and (3) the family court's award of attorney fees was not based on the provisions of Kentucky Revised Statutes (KRS) 403.220. Kurt E. Feuquay cross-appeals, presenting the following arguments: (1) the amount ordered as an offset for equity in the marital residence versus United Parcel Service (UPS) stock allocated to Kurt was erroneous; (2) the family court erred in determining the duration and amount of maintenance; and (3) the award of attorney fees to Nicolette was erroneous. We affirm.

Nicolette and Kurt were married in 1987, and the marriage was dissolved on December 14, 2015. At the time of final hearing in the dissolution action, Nicolette was forty-eight years old and Kurt was forty-nine years old. The parties have four children, only one of whom was a minor at the time of the hearing and who resides with Nicolette.

During the marriage, Kurt obtained his engineering degree and became employed by UPS where he continues to work. In 2012, he had a gross income of \$244,455 and, in 2013, his gross income was \$217,037. In addition to his monthly salary of \$11,678, he earns bonuses based on his performance and ownership factors, and participates in the company's Omnibus Incentive Compensation Plan. Kurt testified that he has monthly living expenses in the amount of \$4,653.

Nicolette has seventy-hours of college credit but did not obtain a college degree and, throughout the marriage, stayed at home with the parties' children. Shortly before the final hearing, she was employed by Lowe's for approximately two weeks. She testified that her monthly living expenses are \$9,623.

The parties' two largest assets are the marital home and Kurt's UPS stock. The home appraised for \$401,100 and, as noted in the appraisal, is in "below average" condition. The balance on the mortgage at the time of the hearing was \$252,173.35. The monthly mortgage payment, including escrowed sums for insurance and taxes, totals \$1,874.41. Nicolette testified that the home is need of multiple repairs.

Through UPS's Omnibus Incentive Compensation Plan, Kurt has been granted Restricted Stock Units (RSUs) and Restricted Performance Units (RPU), with each unit corresponding to one share of UPS stock. The awards vest

on a five-year schedule, with approximately twenty percent of the units vesting each year. As the units vest, they are treated as ordinary income to Kurt for tax purposes based upon the fair market value of UPS stock at the time of vesting.

The family court issued its findings of fact and conclusions of law on December 14, 2014. Because Kurt was scheduled to receive RSUs that vested in October 2014, before making its final division of the marital estate, the court directed Kurt to file documentation of the value of the RSUs. The family court found that the value of the UPS stock on December 14, 2014, was \$213,115.68 offset by a loan of \$60,509.70 secured by that stock. Repayment of the loan was assigned to Kurt and deducted from the total value of the shares.

The family court ultimately awarded Nicolette the entire equity in the marital home. It awarded Kurt the UPS stock, including the vested and unvested amounts, but required Kurt to transfer to Nicolette \$39,096.30 in UPS stock.

During the marriage, the parties accumulated substantial debt, including the amount secured by the UPS stock, over \$24,000 to a payday lending company, each party's parents, unpaid medical expenses, and an accruing tax debt of \$4,459.15 for 2012 and \$3,468 for 2013. Additionally, Kurt incurred a credit card debt to pay his attorney fees incurred in the dissolution action.

Nicolette was assigned \$3,228.69 of debt plus \$15,167 owed to her father. In addition to the debt secured by the UPS stock, Kurt was assigned debt to the

payday lending company, the tax debt, his credit card debt and \$7,810.45 owed to his parents.

The parties own five vehicles, three of which have no debt. Two of the debt free vehicles were in the possession of the parties' two emancipated children, which each retained. The third vehicle, a 2002 Chrysler van with a value of \$2,300, was assigned to Kurt who was directed to pay one-half the equity to Nicolette. The fourth vehicle, a 2012 KIA driven by the parties' daughter, has a negative equity and the debt was assigned to Kurt. The fifth vehicle, a 2012 Chevrolet, with a value of \$16,450, carries a loan of \$23,500 and was awarded to Nicolette with her being solely responsible for the debt.

The family court awarded Nicolette maintenance, child support, and reimbursement for some of the attorney fees claimed. For purposes of determining the amount of those awards, it imputed income to Nicolette based on her ability to earn a minimum wage based on a forty-hour week. The family court awarded maintenance as follows:

[E]ffective January 1, 2015, and for a period of 36 months thereafter, the Court orders [Kurt] to pay maintenance to [Nicolette] in the amount of \$5,000 per month. Beginning January 1, 2018 and for a period of 36 months thereafter [Kurt] shall pay maintenance to [Nicolette] in the amount of \$3,500 per month. Beginning January 1, 2020, and for a period of 36 months thereafter, [Kurt] shall pay maintenance to [Nicolette] in the amount of \$2,000 per month. [Kurt's] maintenance shall terminate upon the death of either

party, or the remarriage or co-habitation of [Nicolette] with an unrelated adult male.

The family court ordered Kurt to pay monthly child support in the amount of \$793 for the parties' one minor child.

Regarding attorney fees, Nicolette requested \$31,288.05 less a \$6,000 credit for amounts advanced by Kurt. The family court ordered Kurt to pay Nicolette's attorney \$12,000.

Both parties filed motions to alter, amend or vacate the family court's findings of fact and conclusions of law pursuant to Kentucky Rules of Civil Procedures (CR) 59.05 and CR 52.01. After the family court ruled on the motions, Nicolette appealed and Kurt cross-appealed.

As stated, the parties present issues that include the division of marital property and maintenance. In determining maintenance, the family court is required to first assign the property pursuant to KRS 403.190 and then consider the factors in KRS 403.200. *Newman v. Newman*, 597 S.W.2d 137, 138 (Ky. 1980). Because the division of property must precede maintenance, we first address the division of marital property and debts.

A family court "has wide discretion in dividing marital property; and we may not disturb the trial court's rulings on property-division issues unless the trial court has abused its discretion." *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky.App.

2006). The family court is required to divide the marital property in just proportions considering the facts set forth in KRS 403.190(1):

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic 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.

Nicolette argues the family court abused its discretion regarding the method employed to allocate the marital residence to her, the failure to offset the negative equity of the vehicle awarded to her and the failure to adequately address whether the proceeds of stock liquidated by Kurt during the pendency of the action should be deducted from his marital share.

The parties agreed that Nicolette be permitted to reside in the marital home until the parties' youngest child, then a junior at North Oldham High School, graduates. The family court ordered that the marital residence be refinanced or sold by November 1, 2016, when the child will be emancipated, without reduction for repairs to the home, closing costs or real estate commission.

Kurt is listed on the note secured by the mortgage and, therefore, remains liable on that note until Nicolette refinances, assumes the mortgage or the house is

sold. The family court properly ordered that the parties' mutual obligation on the residence be severed by November 1, 2016. Nicolette argues that the family court erred by not offsetting the cost of repairs, closing costs or real estate commission from the value of the home.

The home was appraised and allocated to Nicolette in its "as is" condition and, therefore, already discounted for needed repairs. Moreover, the hypothetical closing costs and real estate commission that Nicolette may incur in the future are too speculative to offset against the value of the residence. Nicolette did not present any evidence of the amount that might be spent if the house is sold or refinanced. In the absence of such evidence, the family court properly refused to impute any amount for closing costs or any real estate commission that might be paid in the future.

Nicolette argues the family court should have awarded her an additional \$3,525 representing one-half the \$7,050 negative equity in the vehicle awarded to her. 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 513, 523 (Ky. 2001). Generally, debts are 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.* (citations omitted).

Finally, the court should consider the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. *Id.*

Nicolette was awarded the vehicle and the payment on the vehicle was included in her monthly living expenses upon which the maintenance award was based. Nicolette will receive the exclusive benefit of the vehicle associated with the debt and, if she continues to pay the debt until satisfied, the vehicle will have a positive market value. The family court did not abuse its discretion in rejecting Nicolette's argument that she should be awarded one-half the negative equity in the vehicle.

Nicolette's final argument regarding the division of marital property concerns Kurt's sale of UPS stock during the pendency of the dissolution action in an amount that exceeded what was permitted by the family court's temporary order. She argues Kurt dissipated marital assets pending the dissolution of the marriage.

On January 6, 2014, the family court issued a temporary order pursuant to which Kurt deposited his entire regular paycheck into the parties' joint bank account for Nicolette's use to pay living expenses. To pay for his own living expenses, Kurt was authorized to use \$3,500 per month from the sale of UPS stock.

Both parties testified that Kurt withdrew a greater amount than permitted pursuant to the temporary order. Nicolette contends this amount exceeded \$30,000

over a twenty-month period and that she is entitled to be reimbursed at least \$15,000 as her marital share.

In determining a just distribution of the marital estate, it is proper for the court to consider whether one spouse dissipated or wasted marital assets if the property is expended: “(1) during a period when there is a separation or dissolution impending, and (2) where there is a clear showing of intent to deprive one’s spouse of his or her proportionate share of the marital property.” *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky.App. 1987). The family court found that while Kurt used more than \$3,500 per month as authorized in its temporary order, those amounts were expended to support Nicolette and service marital debt. Its finding was supported by documentation submitted by Kurt as well as his testimony. The family court’s finding that the amount claimed by Nicolette to have been dissipated was used for marital purposes was based on substantial evidence. There was no clear error.

Having concluded that Nicolette’s arguments regarding the division of marital property and debt do not warrant reversal, we address Kurt’s arguments on cross-appeal concerning the same. While Kurt for the most part agrees with the family court’s division of marital property and debt, he argues that it erred when it awarded Nicolette \$39,096 of UPS stock in addition to the marital residence. He points out that the family court stated it intended to “equalize” Kurt’s one-half share of the equity in the marital residence against the current value of the UPS

vested stock. Ultimately, the family court awarded the home to Nicolette, valued at \$148,826 and Kurt the UPS stock valued at \$141,267, after deducting the loan amount. Kurt contends that while the small difference in the value of the marital home and the UPS stock may be inconsequential, the property division became erroneously disproportionate when the family court ordered that he transfer \$39,096 of UPS stock to Nicolette. Kurt contends that the additional transfer of \$39,096 was in direct contradiction of the family court's statement that it was to "equalize" the allocation of UPS stock and real estate equity.

Under our statutory law, marital property is not required to be divided equally. KRS 403.190(1) requires that the property be divided in "just proportions," not equal proportions. *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky. App. 2007). What constitutes a just division lies within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. *Neidlinger*, 52 S.W.3d at 523. However, that discretion is abused if the family court did not consider the factors set forth in KRS 403.190(1). *McVicker v. McVicker*, 461 S.W.3d 404, 420 (Ky.App. 2015).

In dividing the marital property, the family court specifically considered the statutory factors. The family court found that both parties contributed significantly to the acquisition of property and debt during their twenty-seven-year marriage. While ultimately the family court did not make an

equal division of the property, the amount awarded was not so disparate as to render its division unjust.

Kurt's second argument concerns the property division as well as the maintenance award, attorney fees and child support. He contends that the family court erroneously included the RSUs and the RPU's that vested in 2013 in the marital estate and then included income from the RSUs and RPU's to determine his gross income. He argues that the family court counted the same asset twice constituting "double-dipping" prohibited by this Court's opinion in *Penner v. Penner*, 411 S.W.3d 775 (Ky.App. 2013).

In *Penner*, this Court concluded that an award of only 50% of the vested stock and the other half to the wife followed by charging the husband with 100% of the income from the entirety of that same asset for purposes of maintenance and child support constituted double-dipping. *Id.* at 781. We agreed that the trial court improperly included the vested stock shares as an asset to be divided between the parties and as income to the husband. We remanded to the trial court for it to "equally divide the stock upon vesting and not include the stock as income to either party, treat the stock as income to [the husband] upon vesting instead of marital property, or divide the stock upon vesting and attribute half as income to [the wife] and half as income to [the husband]." *Id.*

Here, the family court divided the vested stock as a marital asset and then based its determination of Kurt's gross income on the income to be derived from

his exclusive use of the nonvested RSRs and RPU's which will generate future income.

KRS 403.212(2)(b) (footnote omitted) defines gross income as follows:

“Gross income” includes income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers’ compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received.

Under the statutory definition, the shares that had not vested during the marriage were properly considered in determining Kurt’s gross income. Contrary to Kurt’s argument, there was simply no “double-dipping” as in *Penner*.

Having concluded that there was no error in division of marital property and debt, we consider the maintenance award to Nicolette. The family court determined Nicolette lacks sufficient property to provide for her reasonable needs. Although it found Nicolette capable of earning a minimum wage and imputed an income of \$15,080 to her, it found that she is unable to meet her reasonable needs through employment. Neither party challenges the family court’s finding that Nicolette is entitled to maintenance. However, both argue that the family court erred in the amount awarded and setting the duration of the award.

We begin with Nicolette's contention that the amount is too low and the duration too short.

KRS 403.200(2) provides that maintenance shall be in such amounts and for such period as the court deems just, after considering 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.

In awarding maintenance, the family court must first make relevant findings of fact and then determine maintenance considering those facts. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). "In order to reverse the trial court's

decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion.” *Id.*

Nicolette argues that the family court erred when it imputed income to her in the amount of \$15,080 annually in considering the amount of maintenance. Although KRS 403.200 does not explicitly permit a court to impute income to a voluntarily unemployed or underemployed spouse, a court may impute income to a voluntarily unemployed or underemployed spouse to determine both the spouse's entitlement to maintenance and duration of maintenance. *McGregor v. McGregor*, 334 S.W.3d 113, 117 (Ky.App. 2011).

The same considerations in KRS 403.212(2)(d) for imputing income for child support purposes are appropriate when determining whether income should be imputed for purposes of a maintenance award. *Id.* The family court is required to determine a spouse's potential income “based on employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.” KRS 403.212(2)(d).

Nicolette did not engage in any significant employment outside the home during the marriage and did not complete her college education. However, the family court found it significant that Nicolette obtained employment at Lowe's following the parties' separation evidencing her ability to obtain a minimum-wage job. While the family court could have refused to impute income to Nicolette, it

did not abuse its discretion in imputing income based on a forty-hour work week at minimum wage.

Nicolette argues that the family court failed to consider the tax implications of the amount awarded to her as maintenance. In *Powell v. Powell*, 107 S.W.3d 222, 226 (Ky. 2003), the Supreme Court held that a family court “should consider the after-tax income of both parties in determining the proper amount and duration of maintenance to be awarded.” The family court did just that in its post-trial order when it ruled although Nicolette’s maintenance payments are taxable, the mortgage interest deduction will offset the amount owed to some degree. The family court properly considered the entire tax consequences of the property distribution.

Nicolette submitted monthly expenses well above the amount the family court found was reasonable. As reflected in KRS 403.200, maintenance is based on reasonable living expenses. There was evidence presented that Nicolette’s expenses included amounts for the support of the parties’ adult children, children which neither party is legally obligated to support. The family court properly excluded such amounts from Nicolette’s reasonable expenses and did not err in finding that Nicolette’s reasonable monthly living expenses are \$6,232.

As to the duration of the maintenance award, Nicolette argues that the award should be permanent and not a nine-year award of declining maintenance.

Like the amount of maintenance, the duration of maintenance is within the sound discretion of the family court. *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky.App. 1994).

In this Commonwealth, maintenance is generally considered rehabilitative and limited in duration. *Leitsch v. Leitsch*, 839 S.W.2d 287, 290 (Ky.App. 1992). “The duration of maintenance must have a direct relationship to two factors: (1) the period over which the need exists, and (2) the ability to pay.” *Combs v. Combs*, 622 S.W.2d 679, 680 (Ky.App. 1981).

Nicolette is forty-eight years old, in good health, has seventy-hours college credit and expressed an intent to obtain a two-year associate degree. As the family court recognized, when the maintenance decreases in three years, the youngest child will be emancipated. Additionally, Nicolette was awarded the equity in the marital residence and Kurt was ordered to transfer to her \$39,096 in UPS stock. If Nicolette lives within her reasonable means, she will not be required to expend the marital property while becoming self-sufficient and can preserve her assets while receiving maintenance. We conclude the family court did not abuse its discretion.

The same abuse of discretion standard applies to Kurt’s argument that the maintenance award was too high and too long in duration. As the family court acknowledged, during the marriage the parties incurred substantial debt and Kurt is the only party in the position to currently pay that debt from employment income.

Unfortunately, in dissolution proceedings where the debt to marital property ratio is high, it is often the situation that neither party can, at least in the short-term, maintain the same financial lifestyle. Nevertheless, the debts must be paid. As the family court noted, Kurt's child support obligation will terminate in a short time and his maintenance obligation will gradually decrease over a nine-year period. In accordance with the property division, Kurt will have the entirety of his bonuses and RSUs and RPU's. The family court did not abuse its discretion.

We reject Nicolette's argument that the family court improperly imputed income to her for calculating child support. As stated earlier, the family court did not abuse its discretion when it imputed income to her in the amount of \$15,080 per year.

Nicolette's final argument concerns the family court's order requiring Kurt to pay \$12,000 in attorney fees in addition to \$6,000 he advanced toward the payment of Nicolette's attorneys. She argues the amount was insufficient. KRS 403.220 provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

A disparity in income between the parties in a dissolution of marriage action does not necessarily require an award of attorney fees. It is a matter entirely within the family court's discretion. *Neidlinger*, 52 S.W.3d at 519.

During the pendency of the dissolution action, Nicolette received substantial amounts from Kurt's employment including his entire paycheck and his 2014 cash bonus of over \$14,000. However, the only payment she made toward her attorney fees was \$6,000 advanced by Kurt. She now has been awarded over \$280,000 in marital property in addition to maintenance. We cannot say that the award of \$12,000 toward Nicolette's attorney fees was an abuse of discretion.

Based on the foregoing, the Oldham Family Court's finding of fact and conclusion of law and orders are affirmed.

ALL CONCUR.

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