

RENDERED: DECEMBER 7, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001544-ME

JAMES JEFFREY TUCKER

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE DOLLY W. BERRY, JUDGE  
ACTION NO. 15-CI-500077

JACQUELINE ANN TUCKER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, JONES AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James Jeffrey Tucker (Jeff), *pro se*, appeals from the findings of fact, conclusions of law and judgment of the Jefferson Family Court entered in this marital dissolution action. He argues: (1) the family court erred in the award of maintenance and in determining the amount and duration of the award; (2) the family court abused its discretion in giving greater weight to the

testimony and report of the independent court-appointed appraiser; (3) the family court abused its discretion in ordering him to pay \$20,000 in attorney fees; and (4) the family court failed to equalize the value of vehicles awarded to each party.

Within those arguments, Jeff makes various sub arguments in a somewhat rambling manner. After review of Jeff's arguments, the record and the law, we conclude the family court did not err and affirm.

Jacqueline Ann Tucker (Jackie) and Jeff married in November 1993, and have one son, born in 2000. The parties separated in 2015. In a partial settlement agreement, entered into on December 14, 2015, the parties agreed that Jeff be awarded two businesses, with Jackie to be paid \$34,595, one-half their value. The parties' retirement accounts were divided equally. It was further agreed that Jeff be awarded a 2014 F-150 truck. All other matters were left unresolved. A trial was conducted on May 27, 2016. The family court heard the following evidence pertinent to this appeal

Jeff works as a financial controller at Sypris Solutions, where he earns \$135,000 per year. He also owns two businesses, through which he manages several rental homes. The businesses currently operate at a loss, but Jeff testified he hopes they will be profitable within five to six years and he invests approximately \$1,600 per month into the businesses.

Jackie is fifty years old and works as a medical assistant earning approximately \$34,000 per year. When the parties married, she worked as a pharmaceutical sales representative earning as much as \$130,000 per year but left that employment in 2003 to stay home with the parties' son. Jackie testified it would be difficult to obtain a job in pharmaceutical sales because of her lack of recent experience and having no specialized education in the field. She also testified that the hours would limit her time with her son. A vocational expert retained by Jeff opined that Jackie would be a candidate for an entry level pharmaceutical sales position and was capable of earning \$68,000 to \$78,000 per year in that position.

The parties owned a marital residence which is not subject to a mortgage. A court-appointed appraiser, Debra Nicholson, valued the home at \$267,000 as of September 2015. Another appraiser, Ray Suell, valued the home at \$299,000 as of May 5, 2016. Between the two appraisals, four additional sales occurred in an adjacent neighborhood. The experts disagreed on whether to include those sales in the appraisal, with Suell including the sales in his appraisal and Nicholson excluding the residences from the appraisal.

The parties had a significant amount of credit card debt incurred by each party after the separation. Jackie's seven separate credit card accounts had a combined total of \$47,491, which included expenses for the parties' son's

attendance at a private school and her attorney fees. Jeff had a single credit card with a balance of \$12,437.53, largely related to the operation of his businesses.

At the time of the trial, Jackie had incurred attorney fees and cost totaling \$55,464.75, and Jeff was previously ordered to pay \$4,000 toward that expense. Jackie had an outstanding balance to her attorney of \$24,000 and another \$1,668 to Missy DeArk for calculating maintenance and income scenarios. Jeff had incurred \$14,288 in attorney fees and costs and an additional \$4,225 for real estate appraisals and \$2,500 for business valuations.

The family court found that the home's fair market value was \$299,000. Jeff was awarded the marital residence and was required to refinance the home in his name within sixty days and pay Jackie \$149,500 for her interest in the home. Jackie was awarded a 2007 Mitsubishi Endeavor with a Kelly Blue Book value of \$3,600. Jeff was awarded a 1990 Harley Davidson with a Kelly Blue Book value of \$2,180. Each party was required to pay any debt incurred in his or her individual name.

The family court found that Jackie's reasonable monthly living expenses were \$4,890.65, while Jeff's were \$6,517.20 per month and imputed income to Jackie of \$68,000 per year. The family court found that Jeff "earns \$11,250 per month, which allows him to meet his reasonable monthly living expenses with income to spare." The family court awarded Jackie maintenance in

the amount of \$860 per month for seven years to terminate upon the death of either party or Jackie's remarriage. The family court also ordered that Jeff contribute \$20,000 toward Jackie's attorney fees.

Jeff filed a motion to alter, amend or vacate the findings of fact, conclusions of law and judgment pursuant to Kentucky Rules of Civil Procedure 52.02. The motion was granted in part. As relevant to this appeal, the family court amended its judgment to reflect that Jeff's living expenses are expected to increase by the cost of his mortgage after the marital home is refinanced. However, the family court found that the amount of the mortgage could not be determined. The family court then found that Jeff "earns a gross income of \$11,250 per month, which provides him with sufficient funds, after taxes, to meet his reasonable needs and to pay maintenance and child support as ordered." This appeal followed.

We begin with our standard of review. A reviewing court cannot disturb the findings of the trial court unless those findings are clearly erroneous. *Johnson v. Johnson*, 564 S.W.2d 221, 222 (Ky.App. 1978). "A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person." *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003) (citation omitted). The ultimate decision of the family court regarding maintenance is a

matter “delegated to the sound and broad discretion of the trial court, and an appellate court will not disturb the trial court absent an abuse of discretion.” *Barbarine v. Barbarine*, 925 S.W.2d 831, 832 (Ky.App. 1996). “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)).

Kentucky Revised Statutes (KRS) 403.200(1) provides that maintenance may be granted if “the spouse seeking maintenance: (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.” Once a determination is made that a spouse is entitled to maintenance, the award shall be made in amounts and duration the family court “deems just,” and 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.

KRS 403.200(2).

For several reasons, Jeff argues that the maintenance award was erroneous. In accordance with KRS 403.200, we first address his argument that Jackie was not entitled to maintenance.

Jeff argues that Jackie is capable of earning her prior salary of \$103,410 in pharmaceutical sales and, therefore, the family court erred in only imputing \$68,000. We disagree.

Although KRS 403.200 does not explicitly permit a court to impute income to a voluntarily unemployed or underemployed spouse, “it is implicit in this statutory language that a court may impute income to a voluntarily unemployed or underemployed spouse to determine both the spouse’s entitlement to maintenance and the amount and duration of maintenance.” *McGregor v. McGregor*, 334 S.W.3d 113, 117 (Ky.App. 2011). Whether to impute income to a

spouse and the amount is within the family court's discretion. *Id.* Here, Jeff's expert testified that Jackie's earning capacity as a pharmaceutical sales person was between \$68,000 and \$79,000 per year. As Jeff's expert's testimony supported the family court's finding, it cannot be said that the family court's finding was clearly erroneous. *Hunter*, 127 S.W.3d at 659.

Although the parties had substantial income during their marriage, their marital estate consisted primarily of the businesses, which operated at a loss, and the marital residence. The total apportioned to Jackie in cash, including her interest in the marital residence and the businesses, was \$183,094. The family court heard testimony from Jackie as to her reasonable monthly expenses and found that her net income left a monthly deficit. The family court did not abuse its discretion in determining Jackie is entitled to maintenance.

Jeff argues that the family court's maintenance award was too high, and its duration was too long. His focus is primarily on his ability to pay the amount of maintenance while meeting his own reasonable needs. KRS 403.200(2)(f).

First, he contends that the family court considered his gross income rather than his net income in determining maintenance contrary to *Powell v. Powell*, 107 S.W.3d 222 (Ky. 2003). In *Powell*, the Court stated, "common sense dictates that a court consider the parties' net income when determining whether or



not the spouse seeking maintenance will be able to meet his or her needs, as well as the payor spouse's ability to continue meeting his or her own needs." *Id.* at 226.

It is true that the family court's final findings of fact, conclusions of law and judgment did not refer to Jeff's net income and stated his gross income of \$11,250 per month. However, the family court found in its temporary maintenance order that Jeff's net income was \$6,485 per month and on that basis, awarded temporary maintenance in the amount \$762 per month. Moreover, the family court's order on Jeff's motion to alter, amend or vacate clarified any ambiguity created by the use of Jeff's gross income in its findings of fact, conclusions of law and judgment. It expressly stated that "after taxes" Jeff has sufficient funds to meet his reasonable needs. While perhaps it would have been better for the family court to use the phrase "net income," it obviously considered the parties' net income in accordance with *Powell*.

Jeff next argues the family court should have included in his monthly expenses the mortgage he will have on the martial residence awarded to him after refinancing. The family court's order on Jeff's motion to alter, amend or vacate clearly states it considered that Jeff's monthly living expenses would increase after the home is refinanced. However, even considering that fact, the family court found that Jeff could meet his reasonable needs while paying child support and maintenance.

The primary point Jeff repeatedly makes in his brief is that he has substantial debt from his businesses, which he assumed as a part of the parties' agreed settlement. As a general proposition, large debt does not necessarily absolve a spouse from the duty to pay maintenance. *Carter v. Carter*, 656 S.W.2d 257, 260 (Ky.App. 1983). This is particularly true when, for the most part, the debt is voluntarily incurred or retained by the payor spouse. While Jeff will now have a mortgage on the home which he sought to be awarded, he could choose to sell the home and decrease his monthly payment or decrease his monthly expenses by other means such as not continuing to contribute to what are to this point, nonprofitable business ventures. While Jeff complains that he now is the personal guarantor of the businesses' debt totaling \$784,049, he testified at trial that he continues to incur this debt because he believes the businesses will be profitable. Again, the choice to keep or sell the business properties is his.

The family court considered the factors set forth in KRS 403.200(2) when determining the amount and duration of the maintenance award. The parties were married for twenty-two years and, while Jackie had a substantial income when the parties married, she quit that job in 2003 to stay with the parties' son and now earns \$34,000 per year. During the parties' marriage, the parties' income was more than sufficient to establish a comfortable standard of living. \$860 per month in maintenance for a period of seven years was not an abuse of discretion.

Additionally, contrary to Jeff's assertion, the family court was not required to credit Jeff for his temporary maintenance payments.

Jeff argues that the family court clearly erred when it found that marital residence's value is \$299,000 and failed to give greater weight to the opinion of the court-appointed appraiser, Nicholson. While Jeff is critical of Suell's appraisal, his complaints, including those concerning the comparables used, go to the weight to be given that appraisal. The family court was vested with the discretion of electing to believe one expert's opinion over another expert. Jeff's argument that the family court was required to adopt Nicholson's appraisal completely ignores the family court's discretion to determine the weight to be given each expert opinion. The tasks of weighing the evidence and judging the credibility of witnesses are "within the exclusive province of the [family] court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Jeff also argues that the family court was required to equalize the value of the vehicles awarded the parties. However, the family court was required to divide the marital property in "just proportions[,]" KRS 403.190(1), not to divide the property equally. *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky.App. 2007). The difference of \$1,420 in the value of the vehicles does not warrant reversal.

Finally, we address whether the trial court erred when it ordered Jeff to pay \$20,000 for Jackie's attorney fees. 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.

Jeff makes various arguments as to why the award of attorney fees should be reversed. Much of his argument mistakenly focuses on his request for relief in this Court under CR 60.02 and allegations of professional misconduct against Jackie's attorney for which he requests that this Court reprimand counsel. CR 60.02 relief is not properly requested for the first time in this Court but must be brought by motion before the trial court. Moreover, this Court does not have the authority to reprimand attorneys for ethical violations.

We have reviewed the award of attorney fees and conclude that the disparity in financial resources of the parties was properly considered by the family court and that it did not abuse its discretion. *Smith v. McGill*, 556 S.W.3d 552, 556 (Ky. 2018). Likewise, it was within the family court's sound discretion to determine the amount of an award of attorney fees. "That court [was] in the best position to observe conduct and tactics which waste the court's and attorneys' time

and must be given wide latitude to sanction or discourage such conduct.” *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990).

After review of the record, the arguments of the parties and the law, the findings of fact, conclusions of law and judgment of the Jefferson Circuit Court is affirmed.

ACREE, JUDGE, CONCURS IN RESULT ONLY.

JONES, JUDGE, DISSENTS IN PART AND FILES SEPARATE

OPINION:

JONES, JUDGE, DISSENTING IN PART: Respectfully, I dissent in part. While I agree with the bulk of the majority’s opinion, I disagree that we should affirm with respect to the amount of maintenance the trial court awarded Jackie. It appears to me that the family court’s ultimate award of maintenance is based on inconsistent, incomplete, and irreconcilable findings regarding Jeff’s net income. The majority opinion notes on page nine that the family court found in its temporary maintenance order that Jeff’s net income was \$6,485. This appears to be the only finding in the record regarding net income. This was based on Jeff’s gross income at the time of approximately \$8,000. Prior to awarding permanent maintenance, the family court determined that Jeff had reasonable monthly living expenses of \$6,517.20, which is \$32.20 more than Jeff’s prior net income. Additionally, the family court acknowledged that Jeff’s monthly living expenses

were going to increase due to refinancing of the home. While the trial court did find that Jeff's gross income increased to approximately \$11,250, it made no corresponding finding regarding the net. While we can assume Jeff's net income would realize some resulting increase, given the parties' finances it is far from certain that Jeff would realize a dollar for dollar increase in his net income. As a result, I cannot reconcile the facts of this case with the family court's conclusory statement that Jeff had "sufficient funds, after taxes, to meet his reasonable needs and to pay maintenance and child support as ordered."

An award of maintenance, perhaps even the actual amount awarded by the family court, might be supportable in this case. To properly make such a determination, however, I believe the family court must make an actual finding regarding Jeff's post-decree net income. Therefore, I would remand the maintenance issue to the family court for additional findings of fact and conclusions of law.

**BRIEFS FOR APPELLANT:**

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