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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001009-MR

PAULINE AVERY PLONSKI — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DOREEN S. GOODWIN, JUDGE
ACTION NO. 17-CI-00116

BRIAN E. PLONSKI — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: Appellant, Pauline Avery Plonski ("Wife"), appeals the Oldham Circuit Court, Family Division's judgment and supplemental order from the dissolution of her marriage to Appellee, Brian E. Plonski ("Husband"), with respect to the amount and duration of maintenance and the dissipation of marital assets. For the following reasons, we affirm.

BACKGROUND

The parties were married for twenty-four years and had three children, all of whom have reached the age of majority. Wife was a stay-at-home mother for much of the marriage. She now operates a photography business and works as a part-time fitness instructor. Husband is a pilot for United Parcel Service (UPS). When the petition for dissolution was filed, Wife earned $16,790 per year, while Husband earned $388,020 per year.

Trial was held in December 2017. During trial, Wife claimed that her living expenses were $7,322 per month. She also claimed Husband dissipated marital assets, including $50,000 from his UPS 401(k).[1] Husband did not dispute borrowing the money from his 401(k), but testified he took the loan to secure his liquidity during the dissolution proceedings and to ensure his ability to pay debts and the eldest children's college tuition.

On October 19, 2018, the family court entered a judgment dissolving the marriage and awarding Wife $3,000 per month for maintenance for thirty-six months. The family court also held that Husband would be responsible for repaying the $50,000 loan from his 401(k) because he did not submit any evidence

[1] A 401(k) plan is a retirement savings account that generally allows an employee to divert a portion of their salary into long-term investments.

to support a finding that the funds were used to pay marital expenses or for the children's college tuition.

On June 4, 2019, after hearing motions by both parties to alter, amend, or vacate the judgment, the family court entered a supplemental order addressing various issues, including three relevant to this appeal. First, the family court made additional findings regarding how Husband's $50,000 loan would be treated in the division of the 401(k). The family court concluded that the loan was a marital debt and ordered that the current balance of the 401(k) would be offset by the loan balance before dividing the remainder by Qualified Domestic Relations Order (QDRO).[2] Second, rejecting Wife's argument that she had to meet a higher standard to prove Husband dissipated marital assets, the family court found that, no matter which standard of proof is used, Wife failed to prove Husband's intent to deprive Wife of marital assets. Finally, the family court denied both parties' motions to amend the maintenance award and kept the award at $3,000 per month for thirty-six months. This appeal followed.

[2] A QDRO is a judgment, decree, or order that divides a retirement plan pursuant to state domestic relations law to pay child support, spousal support, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a plan participant. *See* 26 United States Code (U.S.C.) 414(p) and 29 U.S.C. 1056(d)(3).

ANALYSIS

Wife asserts three grounds on appeal: (1) the family court improperly considered her extramarital affairs when determining the maintenance award; (2) the family court abused its discretion by awarding her an inadequate maintenance award; and (3) the family court erred in its finding regarding Husband's $50,000 loan against the 401(k).

First, Wife argues the family court misconstrued and misapplied Kentucky Revised Statutes (KRS) 403.200 when it considered her extramarital affairs in determining her maintenance award. Specifically, she claims the Kentucky Court of Appeals, which was Kentucky's highest court at the time, misinterpreted KRS 403.200 when it decided *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973) and, thus, the family court erred when it relied on this case in determining her maintenance award. She further argues *Chapman* was decided upon a flawed application of the rules of statutory construction and its holding is inconsistent with other laws, including the no-fault statutory scheme.

In *Chapman*, the Court held that fault of a party may not be considered in determining whether a party is entitled to maintenance. *Id*. at 137. However, fault may be considered in setting the amount and duration of maintenance. *Id*. at 137-38.

While *Chapman* has been criticized, *see*, *e.g.*, *Tenner v. Tenner*, 906 S.W.2d 322, 325-26 (Ky. 1995) (Stephens, C.J., concurring) and *Platt v. Platt*, 728 S.W.2d 542 (Ky. App. 1987), it has not been overruled. *Chapman* is binding precedent for this Court to follow despite Wife's disagreement with its holding. *See* Supreme Court Rule (SCR) 1.030(8)(a). "The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor court." *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000) (citing *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986)). Pursuant to *Chapman* and KRS 403.200, the family court could consider fault when setting Wife's maintenance award.

Even though the family court could consider fault, its judgment and supplemental order does not discuss how Wife's fault had a bearing on the maintenance award. While both parties presented evidence of fault at trial, including testimony regarding Wife's infidelity and testimony regarding Husband's domestic abuse of Wife, the family court did not indicate how this evidence factored into its decision, if at all. As we will discuss below, the family court considered relevant factors in setting the award and, while evidence of fault was heard, the family court appeared to focus its decision on Wife's reasonable needs compared to her income and the property allocated to her in determining the amount and duration of the maintenance award.

This brings us to Wife's second argument that the family court abused its discretion in only awarding her $3,000 per month in maintenance for thirty-six months. Maintenance awards are governed by KRS 403.200. Under this statute, the court must first find that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for his reasonable needs. KRS 403.200(1)(a); *see also Drake v. Drake*, 721 S.W.2d 728, 730 (Ky. App. 1986). Second, the court must find that the spouse is unable to support himself through appropriate employment according to the standard of living established during the marriage. KRS 403.200(1)(b). Once that two-part determination is made, the family court considers various factors in setting the "just" amount and duration of maintenance. KRS 403.200(2). These factors include: (a) the financial resources of the party; (b) the time necessary to become sufficiently educated or trained 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 party seeking maintenance; and (f) the ability of the spouse from whom maintenance is sought to meet his reasonable needs. KRS 403.200(2)(a)-(f); *see also Gomez v. Gomez*, 168 S.W.3d 51, 57 (Ky. App. 2005).

Here, Wife contends that her salary of $1,400 per month was significantly less than Husband's salary of $32,335 per month, that no vocational expert testified she could earn an income to meet her monthly expenses, that the

$3,000 monthly award is less than ten percent of Husband's monthly income, and that the thirty-six-month-long award is only equal to one-eighth of the time they were married. Relying on *Powell v. Powell*, 107 S.W.3d 222 (Ky. 2003), in which the Kentucky Supreme Court reversed a wife's maintenance award of $3,000 per month for three years, Wife requests this Court to similarly decide that the family court abused its discretion by awarding her an unjust award.

The family court considered and made specific findings as to each of the factors enumerated in KRS 403.200(2) in determining Wife's maintenance award. As to factor (a) of KRS 403.200(2), the family court noted "an obvious disparity" in the financial resources of the parties, especially with respect to income. However, the family court also noted Wife would have significant assets and substantial property upon the division of the marital estate. As to factor (b), the family court found that Wife had a degree in teaching but never worked full-time as a teacher or maintained full-time employment at any job during the marriage. The family court believed Wife capable of obtaining the type of employment through which she may adequately support herself but noted she would be unlikely to immediately do so. As to factor (c), the family court recognized that the parties enjoyed a comfortable lifestyle during the marriage based on Husband's job as a pilot for UPS.

The family court then analyzed Wife's claimed monthly living expenses of $7,322 and found that amount to be "unsupported and significantly inflated" because Wife included $2,450 for the house payment, but Husband paid the monthly mortgage. She also included $138 per month for life insurance, but she previously cancelled the policy. Also, the family court found it unreasonable for Wife to claim $1,000 for groceries (not including restaurants), $420 in home maintenance, and $400 for clothing per month. Instead, the family court found Wife's reasonable monthly expenses to be between $3,500 and $4,000. As to factors (d) and (e), the family court recognized the parties had been married for twenty-four years and that Wife was forty-eight years old and in good physical and mental health. Finally, as to factor (f), the family court held that Husband could meet his reasonable needs while paying Wife the maintenance award. Because Wife would have a monthly deficiency of $2,600 (her reasonable monthly living expenses of $4,000, based on the higher estimate, minus her claimed monthly income of $1,400), the family court awarded her $3,000 per month in rehabilitative maintenance for thirty-six months.

In reviewing a maintenance award, we will uphold the family court's decision unless it abused its discretion or based its decision on findings of fact that are clearly erroneous. *Powell*, 107 S.W.3d at 224. Based on our review, we conclude the findings of fact were not clearly erroneous and the family court did

not abuse its discretion in awarding Wife $3,000 per month for the duration of thirty-six months. Although the parties' income differential is great, the family court appropriately considered the relevant factors of KRS 403.200(2) and analyzed Wife's reasonable needs and the property and income to be received by her before determining the maintenance award. And, while Wife complains that her maintenance award of $3,000 per month for thirty-six months is the exact same award that was reversed by the Court in *Powell*, *supra*, we find that case distinguishable.

In *Powell*, the husband was a neurosurgeon who earned approximately $565,510 per year, while the wife was a homemaker who previously worked as a nurse. In the divorce, the wife received $360,000 in the property settlement and the Domestic Relations Commissioner decided that she could rely on income generated from the investment of that sum. On appeal, the Court disagreed and concluded that the wife would need to spend a portion of that sum acquiring a new home, so the Commissioner's reliance on the flow of income from investing the property settlement was "overstated." *Id.* at 225.

In contrast, in this case, Wife received significant assets from the dissolution, including approximately $88,000 from the sale of the parties' airplane, $17,034 from the parties' insurance policies, $12,128 worth of UPS stock, and she would receive approximately $100,000 from the sale of the marital home. She will

also receive over $900,000 in defined contribution retirement funds between her Individual Retirement Account (IRA) and her interests from Husband's UPS pension plan and his UPS 401(k) savings plan. Wife also received an additional interest in Husband's defined benefit UPS retirement plan. Wife could begin drawing between $1,800 to $2,000 per month after September 2019, when Husband turned age 55, if she so elected. Or, the amount increased if she waited until Husband turned age 60.

Unlike *Powell*, Wife received significant assets in the dissolution, and she is not dependent on investing her share of the marital assets to generate income. Simply because Wife's maintenance award mirrors the *Powell* maintenance award does not mean it is unjust. "The goal of a maintenance award is to facilitate one's transition from dependence upon her former spouse to independence" and "is consistent with another goal of the dissolution process which is to sever all ties as much as possible as soon as possible." *Daunhauer v. Daunhauer*, 295 S.W.3d 154, 156 (Ky. App. 2009) (citation omitted). As stated, based on our review, the family court did not abuse its discretion in determining Wife's maintenance award.

In her final argument, Wife claims the family court erred by requiring her to prove that Husband dissipated $50,000 from his UPS 401(k). Wife focuses on the language in the supplemental order stating Wife "failed to produce evidence

(the $50,000 loan) was used for a non-marital purpose." Based on this language, Wife argues the family court confused the burden of proof with the burden of going forward with the evidence. Specifically, she relies on *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. App. 1998), which states:

> The spouse alleging dissipation should be required to present evidence establishing that the dissipation occurred. Once the dissipation is shown, placing the burden of going forward with the evidence on the spouse charged with the dissipation is reasonable because that spouse is in a better position to account for these assets.

Dissipation of marital assets is "spending funds for a nonmarital purpose . . . (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) (citations omitted). However, "a party is free to dispose of his marital assets as he sees fit so long as such disposition is not fraudulent or intended to impair the other spouse's interest such that it may properly be classified as a dissipation of the marital estate." *Ensor v. Ensor*, 431 S.W.3d 462, 472 (Ky. App. 2013) (citing *Brosick*, 974 S.W.2d 498).

Based on our review, we disagree with Wife's interpretation of the family court's ruling. The family court clearly held that Wife failed to prove the intent to deprive. In other words, she did not establish dissipation and the family court never reached the "burden of going forward with the evidence" phase. Also,

Wife attributes a quote from the family court's discussion of the loan as a marital debt to bolster her dissipation argument. However, these were separate discussions. Comparing the family court's initial judgment and supplemental order, coupled with the parties' motions to alter, amend, or vacate, may clarify the confusion.

In its initial judgment, the family court separately addressed the $50,000 loan issue and the dissipation of marital assets issue. First, the family court determined that Husband would be responsible for repaying the $50,000 loan. While Husband argued the loan was to secure his liquidity during the divorce and to pay for debts and the children's college tuition, the family court held he did not submit any evidence to support such a finding. Second, the family court found that Wife did not show that Husband's spending during the divorce was done with the intent to deprive Wife of her marital property and rejected her dissipation of marital assets argument.

Subsequently, both parties filed motions to alter, amend, or vacate. In Husband's motion, he asked the family court to make additional findings regarding the repayment of the $50,000 loan as it related to the division, by QDRO, of the UPS 401(k). In Wife's motion, she argued the family court improperly made her prove dissipation by clear and convincing evidence. She argued Husband took

several vacations with his girlfriend during the divorce and, by a preponderance of the evidence, she proved he dissipated marital assets.[3]

In its supplemental order, the family court amended its initial judgment regarding the $50,000 loan. It found the loan was a marital debt and, "[i]n the absence of proof that the loan proceeds were used for a non-marital purpose," Husband should not be solely responsible for the loan. The family court held that, while Husband "shall remain responsible for repayment of the loan," the balance of the UPS 401(k) plan would be offset by the loan balance before dividing the remainder by QDRO. In affirming its dissipation decision, the family court ruled that, no matter what standard of proof applied, Wife still failed to prove the intent to deprive. The family court found that Wife offered no evidence to show Husband's spending was so abnormal or extraordinary as to suggest it was done with the intent to deprive her of marital assets. Although Wife focused on Husband's vacations with his girlfriend during their separation, the evidence showed Wife also vacationed on a regular basis during their separation, which is something the parties often did during the marriage. Moreover, Husband testified

[3] In her motion, Wife made a general dissipation argument not limited to the $50,000 loan against the UPS 401(k). She claimed Husband spent $103,130 pending the dissolution and requested the family court to find Husband dissipated $75,000 and award her a judgment for $37,500. Record at 636. Wife's appeal, however, only addresses the dissipation of the $50,000 loan.

that their airplane, which he took on vacation, required regular operation to remain in running condition, and Wife did not dispute this.

Based on Kentucky case law, Wife was required to establish dissipation occurred before the burden shifted to Husband to prove the marital assets were not used for nonmarital purposes. *Brosick*, 974 S.W.2d at 502. Simply because Husband took a loan against the 401(k) before filing the Petition does not, in and of itself, prove dissipation.[4] Therefore, the family court did not err in requiring Wife to make a *prima facie* case that dissipation occurred.

CONCLUSION

For the foregoing reasons, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William D. Tingley
Louisville, Kentucky

Stephen H. Miller
Louisville, Kentucky

BRIEF FOR APPELLEE:

James L. Theiss
LaGrange, Kentucky

[4] Wife's brief incorrectly states that Husband took the $50,000 loan from the 401(k) *after* he filed the petition. Husband took the loan *before* filing the petition, although it was taken in anticipation of filing the petition.