MODIFIED
08/01/2017

In the
Missouri Court of Appeals
Western District

SYBIL ANNE ARCHDEKIN,

Respondent,

v.

JARRETT ALAN ARCHDEKIN,

Appellant.

WD79710

OPINION FILED:

June 27, 2017

Appeal from the Circuit Court of Buchanan County, Missouri
The Honorable Daniel Fred Kellogg, Judge

Before Division Two:
Thomas H. Newton, P.J., James Edward Welsh, and Karen King Mitchell, JJ.

Jarrett Alan Archdekin (Husband) appeals the circuit court's judgment dissolving his marriage to Sybil Anne Archdekin (Wife). Husband contests the court's decision to award maintenance to Wife. We affirm in part and vacate in part.

Factual and Procedural Background

Husband and Wife were married in May 1994. They separated a little over seventeen years later, and Wife filed a petition for dissolution of the marriage in September 2011. When the matter went to trial in 2013, the parties' three children were ages 16, 13, and 8.

The evidence at trial showed that Wife did not hold any permanent full-time employment outside the home during the marriage. Shortly before the parties separated, Wife began working as a secretary at Missouri Western State University earning $1,977 per month. Husband was a real estate developer operating under three business entities: Archdekin Investments, Inc., Earthworks Excavation Company, LLC, and The Commons Development Group, LLC. Most of the couple's assets, including their home, were owned or collateralized by the businesses, and the businesses paid their personal expenses. The businesses were joined as parties to the dissolution case and denominated Third Party Respondents.

After two days of trial, the court took the matter under advisement. Before the court pronounced judgment. The Commons Development Group filed a Chapter 11 bankruptcy, resulting in an automatic stay of any litigation related to it.

On July 23, 2013, the trial court entered an Interlocutory Judgment in which it found that the Third Party Respondents were the "alter ego" of Husband and the "corporate veil should be pierced." The court observed that Husband had represented to lending institutions that his net worth was over $7 million and that, while he reported a monthly income of $2,142, he listed no expenses for utilities, cell phone, credit card payments, or mortgages on his two homes, as those were paid by the businesses. In light of those facts, the court imputed a $5,000 monthly income to Husband and ordered him to pay $454 a month in child support.

The court divided a small amount of property owned by the parties (as opposed to the Third Party Respondents), but, due to the bankruptcy cases, and because Husband's assets were "cross-collateralized with numerous lending institutions," the court was unable to value or award any of the Third Party Respondents' assets at that time. The court "tabled" the division of the Third Party Respondents' property and assets "until the bankruptcy stay is lifted."

The trial court found that Wife could not support herself based on her income or the assets awarded to her in the dissolution.[1] After considering all relevant statutory factors, the court ordered Husband to pay to Wife "spousal maintenance in the amount of $1,500 per month commencing the 1st day of November, 2011 [the date Husband first entered his appearance in the case], until the same is modified, either party is deceased, or [Wife] remarries."

The trial court later entered a First Amended Interlocutory Judgment, adding a declaration that the judgment was "final for purposes of appeal as to all issues herein addressed." Nevertheless, this Court dismissed the appeals of Husband and the Third Party Respondents because the trial court did not also make an express finding that "there was no just reason for delay," pursuant to Rule 74.01(b). Shortly thereafter, another Third Party Respondent, Earthworks Excavation Company, filed a petition for Chapter 11 bankruptcy.

On January 14, 2014, the trial court entered a Second Amended Interlocutory Judgment, in which it corrected a clerical error and added that the judgment was final for purposes of appeal "as there is no just reason for delay." Otherwise, it was identical to the prior interlocutory judgment. This Court dismissed Husband's and the Third Party Respondents' appeals of the 2014 Second Amended Interlocutory Judgment as untimely.

In October 2015, Husband filed a "Motion to Reopen the Evidence and to Enter an Amended Order." In March 2016, the court reopened the evidence to adjudicate the unresolved property issues. It also took up Husband's motion to reopen or amend, treating it as a motion to

[1]The property awarded to Wife consisted of: a checking account with $1,500, household goods and personal goods then currently in Wife's possession of nominal value, and non-marital property consisting of a china cabinet and refrigerator acquired from Wife's grandmother. Wife was also awarded the following property that was then in Husband's possession: her grandmother's baking dishes, all baskets, a rocking chair and patio set from Wife's mother, hammock and stand from her father, silver platter from her father, the rug on the wall made by Wife, fifteen card tables, five white deck chairs, and a portable crib, as well as three baby books and approximately twenty-three children's scrapbooks that were made by Wife and "are of nominal monetary value."

modify. The parties reached an agreement on the division of property and allocation of debt, and Wife dismissed her claims against the Third Party Respondents. The parties also reached an agreement about emancipation of the oldest child and custody of the other children. As to the unresolved issues of child support, maintenance, and attorneys' fees, Wife submitted an updated Income and Expense Statement showing a monthly income of $2,100 and total expenses of over $5,000. Husband's updated Income and Expense Statement reported an income of $2,500 and expenses of $6,600.[2]

The trial court issued its "Final Judgment" on April 19, 2016, making a final distribution of all the parties' property and debts. The court found that a substantial and continuing change in circumstances justified modification of the parenting plan and child support and entered orders emancipating the oldest child and modifying custody and child support. As to the $1,500 a month maintenance award, the court found that Husband did not establish that there had been a substantial and continuing change in circumstances since 2014 and, thus, no modification should occur. The court further found that, due to Husband's "income producing capabilities," the $5,000 monthly income imputed to him had not changed. The court opined that, even if it had ***not*** treated Husband's motion as a motion to modify, his imputed income (and the corresponding maintenance award) would be unchanged.

Standard of Review

As in any court-tried case, we will affirm the circuit court's judgment in a dissolution proceeding unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron,* 536 S.W.2d 30, 32

[2]Husband's expenses included the maintenance and child support payments ordered in the 2014 Interlocutory Judgment. Both parties' expenses included their expenses for the children.

(Mo. banc 1976). We view the evidence in the light most favorable to the trial court's decision and disregard all evidence to the contrary. *Evans v. Evans*, 45 S.W.3d 523, 526 (Mo. App. 2001).

Discussion

Husband raises six points on appeal, all of which contest the award of maintenance. Section 452.335.1 RSMo,[3] sets forth a two-step process for establishing maintenance. The trial court must first determine whether the spouse seeking maintenance (1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and (2) is unable to support himself through appropriate employment. *Scruggs v. Scruggs,* 161 S.W.3d 383, 394 (Mo. App. 2005). If the court finds that a spouse has met those threshold requirements, it then considers the factors listed in section 452.335.2[4] to determine the amount and duration of the award. *See Dowell v. Dowell*, 203 S.W.3d 271, 285 (Mo. App. 2006).

"The trial court has broad discretion in awarding maintenance, and its decision will not be overturned absent an abuse of discretion." *Russum v. Russum*, 214 S.W.3d 376, 380 (Mo. App. 2007). A judgment that "is so arbitrary and unreasonable as to shock one's sense of justice"

[3]Statutory references are to the Revised Statutes of Missouri 2000, as updated by the 2013 Cumulative Supplement and the 2014 and 2015 Non-Cumulative Supplements.

[4]Section 452.335.2 lists the following factors for the trial court to consider:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently . . . ;
(2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
(3) The comparative earning capacity of each spouse;
(4) The standard of living established during the marriage;
(5) The obligations and assets, including the marital property apportioned to him and the separate property of each party;
(6) The duration of the marriage;
(7) The age, and the physical and emotional condition of the spouse seeking maintenance;
(8) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance;
(9) The conduct of the parties during the marriage; and
(10) Any other relevant factors.

constitutes an abuse of discretion. *Calhoun v. Calhoun*, 156 S.W.3d 410, 415 (Mo. App. 2005). If reasonable persons can differ about the propriety of the trial court's action, it cannot be said that the court abused its discretion. *Alberty v. Alberty*, 260 S.W.3d 856, 860 (Mo. App. 2008).

Points I and II

Husband's first two points are interrelated, and so we address them together. Husband contends in ***Point I*** that the trial court misapplied the law in declaring the 2014 Second Amended Interlocutory Judgment a final judgment from which an appeal could be taken, because it "did not dispose of all issues, including the complete division of marital property and debts."

Section 452.330.1 requires the circuit court to "make specific findings as to whether each asset before the court is marital property subject to division, is non-marital property to be set aside, or is property over which the dissolution court has no control." *Gillette v. Gillette*, 416 S.W.3d 354, 356 (Mo. App. 2013). "The court is then required to set apart to each spouse each spouse's non-marital property and to divide the marital property and debt as it deems just." *Id.* Our courts have consistently held that, where a trial court does not fully divide the property of the dissolution participants, "such decrees are not final judgments from which an appeal can be taken." *Michel v. Michel*, 94 S.W.3d 485, 488 (Mo. App. 2003).

"It is well established that finality of judgment is necessary for appellate jurisdiction, and for a judgment to be final it must dispose of all parties and all issues." *Joy v. Safeway Stores, Inc.*, 755 S.W.2d 13, 14 (Mo. App. 1988). Otherwise, it is an "interlocutory judgment" that "reserves and leaves some further question or direction for future determination and is thus not final for purposes of appeal." *Id*. In a case involving multiple claims and multiple parties, Rule

74.01(b)[5] provides an exception to the general rule regarding final judgments. *Atkins v. Jester*, 309 S.W.3d 418, 423 (Mo. App. 2010). To utilize that exception, the trial court must denominate the judgment as final for purposes of review and make an express finding that "there is no just reason for delay." *Neely v. Neely*, 169 S.W.3d 577, 579 (Mo. App. 2005). Here, the trial court made those findings in its Interlocutory Judgment, citing Rule 74.01(b).

A "trial court's certification of a judgment as final is not conclusive," however. *Huff v. Dewey & LeBoeuf, LLP*, 340 S.W.3d 623, 627 (Mo. App. 2011). We "must independently determine if such judgment actually qualifies as a final judgment." *Id*. For such certification to be proper, the trial court's decision must have completely disposed of a claim. *Id*. "A judgment that resolves fewer than all legal issues as to any single claim is not final despite the trial court's designation under Rule 74.01(b)." *Id*. In *Atkins*, 309 S.W.3d at 424, the Court listed four factors for courts to use in deciding if a judgment is final:

> (1) whether the action remains pending in the trial court as to all parties; (2) whether similar relief can be awarded in each separate count; (3) whether determination of the claims pending in the trial court would moot the claim being appealed; and (4) whether the factual underpinnings of all claims are intertwined.

Here, the trial court explained that the bankruptcy stays and the "cross-collateralization" of all the parties' assets and debts prevented it from making a full distribution of the marital property at the time of the Interlocutory Judgment; thus, "the action remained pending in the trial court as to all the parties." In addition, "the factual underpinnings of all the claims were fully intertwined," in that the Third Party Respondents were "the alter ego" of Husband, their assets were cross-collateralized with Husband and Wife's assets, and Husband and Wife had personally

[5]Rule 74.01(b) provides, in pertinent part: "When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may enter a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay."

guaranteed the Third Party Respondents' debts and liabilities. Moreover, a final maintenance award could not be properly ordered until the parties' assets and debts had been fully distributed.

Accordingly, despite the trial court's declaration that the 2014 Judgment was "final for purposes of appeal" under Rule 74.01(b), the judgment was not, in fact, final. It was simply an interlocutory judgment that reserved and left "some further question or direction for future determination." *See Joy,* 755 S.W.2d at 14.

Husband claims in ***Point II*** that the trial court misapplied the law in ordering him to pay maintenance in 2014 before the final division of property, as the division of marital property must necessarily precede the determination of whether maintenance is required.

As noted, under section 452.335.1, the trial court must *first* determine whether the party seeking maintenance lacks sufficient property, including marital property apportioned to him, to provide for his needs. *Vanderpool v. Vanderpool*, 250 S.W.3d 791, 796 (Mo. App. 2008). Accordingly, "[t]he division of marital property *must necessarily precede* the determination of whether maintenance is required." *Id*. (emphasis added).

Here, the final division of the parties' property and debts did not occur until the trial court entered its Final Judgment in 2016. Thus, we agree that the trial court could not properly determine the necessity or amount of a ***final*** maintenance award until the entry of that Final Judgment. Nevertheless, the trial court could, and did, properly enter an interlocutory order for temporary maintenance based on Wife's specific request at the initial hearing and the evidence as to the parties' income, expenses, assets, and debts presented at that time. *See Wendel v. Wendel*, 72 S.W.3d 626, 630 (Mo. App. 2002) (citing *In re Marriage of Hunt*, 933 S.W.2d 437, 441, 446-47 (Mo. App. 1996) (husband ordered during pre-dissolution hearings to pay temporary maintenance)).

With regard to Points I and II, we note that both contest matters decided in the 2014 Interlocutory Judgment, not the 2016 Final Judgment.[6] As the 2014 Interlocutory Judgment was ***not*** a final, appealable judgment, we lack the authority to rule upon the claims raised in those points. *See Michel*, 94 S.W.3d at 488-89.

Point IV

In ***Point IV***, Husband argues that, because the 2014 Interlocutory Judgment was not a final, appealable judgment, the trial court misapplied the law by applying a "modification of maintenance standard" at the 2016 hearing, as opposed to the standard in section 452.335.

Following the 2016 hearing, the trial court again imputed an income of $5,000 to Husband "due to his income-producing capabilities." Rather than employing the section 452.335 two-step process to establish maintenance, however, the trial court applied the standard for modifying maintenance found in section 452.370.1. That statute requires the party seeking a modification of maintenance to prove "changed circumstances so substantial and continuing as to make the terms unreasonable." *See* § 452.370.1 & .2.

In its Final Judgment, the trial court explained that it had

> treated [Husband]'s Motion to Reopen or Amend as a Motion to Modify, with the burden on [Husband] to establish that there has been a change in circumstances substantial and continuing since the [2014] Judgment was entered.

The court found that Husband failed to satisfy his burden of establishing a "substantial and continuing change in circumstances" since the 2014 Judgment, and, thus, no modification of maintenance should occur. This procedure would be correct only if the prior interlocutory

[6]Wife contends that ***all*** of Husband's claims seek a review of the 2014 Interlocutory Judgment, and that, because his appeal of that judgment was dismissed as untimely, all allegations of error which could have been raised in that appeal are now barred by the doctrine of "the law of the case," citing *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. banc 2007). We are not persuaded that the "law of the case" doctrine is applicable to this case.

judgment was a final judgment. As we have observed, it was not. Therefore, the court erred in holding Husband to this standard.

Significantly, the trial court also opined that, even if it had treated Husband's 2016 motion as a motion to reopen and amend, its decision to impute $5,000 monthly income to Husband would have been unchanged, and, consequently, the maintenance award that was based upon that imputed income also would be unchanged. This assessment by the court obviates Husband's argument under Point IV. Accordingly, no relief is warranted. Point IV is denied.

Points V and VI

Husband's fifth and sixth points also are closely related. In ***Point V,*** Husband contends that the trial court erred in imputing income to him because

> (A) it misapplied the law in that [his] diminished income was not an attempt to evade his support obligations and respondent provided no evidence to the contrary, and (b) it was against the weight of the evidence, in that the imputed income was not based on existing circumstances, [he] did not have the capacity to earn the imputed amount, and the family's standard of living would have been reduced whether or not the marriage dissolved.

As a threshold matter, we note that this point asserts two distinct claims of error. "[A] misapplication-of-law challenge and an against-the-weight-of-the-evidence challenge . . . are distinct claims [that] must appear in separate points relied on." *Ndiaye v. Seye*, 489 S.W.3d 887, 894 n.6 (Mo. App. 2016). Multiple claims of error in one point render the point "multifarious" and violate Rule 84.04(d). *Fastnacht v. Ge*, 488 S.W.3d 178, 184 (Mo. App. 2016). A multifarious point preserves nothing for appellate review and is subject to dismissal. *Id*.

Nevertheless, we have reviewed the record in the context of this claim, *ex gratia*, and find no error. In its Interlocutory Judgment, the trial court imputed a $5,000 monthly income to Husband, finding the amount to be "appropriate to his apparent income producing capabilities"

and reflective of the "monies expended by the Third Party Respondents for [Husband's] personal and non-business benefit." In its Final Judgment, the trial court stated that, after "having received additional evidence on March 30, 2016," it "finds again" that "the income of the Respondent was [$5,000] per month" and that such income "should be imputed to [Husband] due to his income-producing capabilities."

"[T]he imputation of income is entirely discretionary, and what constitutes appropriate circumstances to impute income will depend on the facts and must be determined on a case-by-case basis." *Aubuchon v. Hale*, 453 S.W.3d 318, 324 (Mo. App. 2014). "We defer to the trial court on matters of credibility and view the evidence in the light most favorable to its decision." *Id*. Here, there was sufficient evidence from which the trial court could have properly concluded that Husband had the ability to earn $5,000 a month. Despite his claim that "there was no evidence that any diminution in income . . . was an attempt to evade his support obligations," there was considerable evidence that Husband was supported by his businesses but failed to report that as income in his Income and Expense Statements. Absent a "manifest abuse of discretion," we will not substitute our judgment for that of the trial court on the imputation of income. *Id*. Husband does not persuade us that the circuit court abused its discretion in imputing income to him in this case. Point V is denied.

Husband asserts in ***Point VI*** that the trial court misapplied the law in determining the amount of maintenance because it improperly included certain expenses for Wife, and the amount exceeded Wife's reasonable needs and Husband's ability to pay.

As noted, the trial court has broad discretion on the issue of maintenance and is accorded great deference. *Russum*, 214 S.W.3d at 380. A trial court's decision regarding maintenance will not be reversed absent an abuse of discretion. *Id*. Moreover, we defer to trial court's judgment

even if the evidence could support a different conclusion. *Id*. The trial court's judgment is presumed valid and the burden is on the appellant to demonstrate that the judgment is incorrect. *Ferry v. Ferry*, 327 S.W.3d 599, 602 (Mo. App. 2010).

In its 2016 Final Judgment, the court "adopted by reference" the earlier award of personal property to Wife in the Interlocutory Judgment and concluded that Wife "is not capable of supporting herself through appropriate employment and the assets awarded to her in the Judgment." The court determined that Wife was entitled to $1,500 in monthly maintenance.

Husband claims that the trial court erroneously included Wife's expenses for the children and her payroll deduction for a State retirement contribution in its calculation. While we acknowledge that a "child's needs should not be included in the maintenance calculation," *Schubert v. Schubert*, 366 S.W.3d 55, 64 (Mo. App. 2012), the circuit court in this case ***made no specific findings*** as to how it arrived at the $1,500 maintenance figure. Thus, Husband's claim that the court improperly included Wife's expenses for the children is purely speculative and without merit. Likewise, we have no reason to believe that the trial court included Wife's $90 payroll deduction for her State retirement contribution in its calculation.[7] Given that the court did not make specific findings on this issue, Husband cannot substantiate either of these claims.

Husband's other claims -- *i.e.*, that the award exceeded Wife's needs and his ability to pay -- contest the sufficiency of the evidence supporting the award. Under our standard of review, we view the evidence in the light most favorable to the trial court's decision and disregard all evidence to the contrary. *Evans*, 45 S.W.3d at 526. Viewing the evidence in that light, we find

[7]While we acknowledge that a ***voluntary*** 401(k) contribution may not be deducted from net income when determining maintenance, *see, e.g.*, *Muenz v. Muenz*, 99 S.W.3d 4, 8 (Mo. App. 2002), we find nothing in the record indicating that Wife's payroll deduction for her State of Missouri retirement account was ***voluntary***.

sufficient evidence to support the trial court's decision as to the maintenance award. In Wife's 2016 Income and Expense Statement, she reported her after-tax income at slightly over $1,700 a month, and her ***own*** expenses at slightly over $3,300 (a difference of $1,600). Thus, the trial court could have reasonably arrived at the $1,500 maintenance award based on that evidence. Moreover, we have already concluded that the trial court did not err in imputing a $5,000 monthly income to Husband, and his 2016 Income and Expense Statement reported his ***own*** expenses at approximately $3,500 a month.[8] We will not disturb a trial court's award of maintenance unless the amount "is patently unwarranted or is wholly beyond the means of the spouse ordered to pay." *In re Marriage of Buchholz*, 139 S.W.3d 607, 608 (Mo. App. 2004). We find neither of those circumstances here. Point VI is denied.

Point III

Husband argues in ***Point III*** that the trial court misapplied the law, as set forth in section 452.335, in ordering him to pay retroactive maintenance.

In its 2016 Final Judgment, the trial court recounted that it had found in its Interlocutory Judgment that "the maintenance award should be entered *retroactively* to the first date of the month immediately following the Entry of Appearance in this cause by [Husband,]" which was November 1, 2011. The court did not modify that provision in the Final Judgment and, thus, implicitly ordered retroactive maintenance in that judgment as well.

As Husband points out, our courts have consistently held that section 452.335 authorizes only prospective maintenance. *See, e.g., Wendel*, 72 S.W.3d at 629. Our courts also have consistently held, however, that an award of temporary maintenance may be made retroactive "to

[8]We have excluded Husband's payments for maintenance and child support (which was effectively eliminated in 2016), as well as the children's expenses, all of which he included in his $6,600 reported expenses.

the date the motion for temporary maintenance was filed." *See id.* at 629-31; *Richmond v. Richmond*, 164 S.W.3d 176, 178 (Mo. App. 2005) (both citing § 452.315.1[9]).

Here, Husband asserts that Wife did not file a motion for temporary maintenance pursuant to section 452.315, and Wife does not dispute that. As noted in our discussion of Point II, however, Wife did make a specific request for maintenance at the initial hearing in this case, and the court properly entered an interlocutory order for maintenance based on Wife's request and the evidence presented at that hearing. *See Wendel*, 72 S.W.3d at 631 (citing *Hunt*, 933 S.W.2d at 441, 446-47, in equating an order to pay temporary maintenance in pre-dissolution proceedings to an order for temporary maintenance based on a *pendente lite* motion).

In *Hunt*, the appellate court held that a retroactive maintenance award in the amount of $400 per month was appropriate because the husband had been ordered in a pre-dissolution hearing to pay that amount in temporary maintenance. 933 S.W.2d at 446-47. The award was made retroactive to the date of the temporary maintenance order. *Id*. Similarly, here, the trial court made an interlocutory award of maintenance following the initial hearing. Thus, as in *Hunt*, that temporary award could properly have been made in that order. *See id*. The decision to award retroactive maintenance prior to the date of the Interlocutory Judgment was error.[10]

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[9]Section 452.315.1 provides:

> In a proceeding for dissolution of marriage or legal separation, either party may move for temporary maintenance and for temporary support for each child entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested. . . . .

[10]Husband cites *In re Marriage of Nardini ("Nardini II")*, 389 S.W.3d 303 (Mo. App. 2013), as "nearly identical" to this case. We disagree. There, the appellate court reversed the circuit court's order of retroactive maintenance back to the date of the trial court's original erroneous judgment. *Id*. at 304-06. No interlocutory judgment was involved in that case. *See In re Marriage of Nardini ("Nardini I")*, 306 S.W.3d 165 (Mo. App. 2010).

Consequently, we vacate that portion of the decree that awards maintenance retroactive to November 1, 2011, and remand with instructions for the trial court to revise the maintenance award to commence with the date of the first Interlocutory Judgment.

Conclusion

Based on the foregoing, we affirm the circuit court's judgment as to the necessity and amount of maintenance. We vacate the award of maintenance prior to the Interlocutory Judgment and remand with instructions for the trial court to revise the award in accordance with this opinion.

/s/ *James Edward Welsh*
James Edward Welsh, Judge

All concur.