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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002591-MR

RONALD HORVATH

APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 01-CI-01591

DARLYNN RENEE HORVATH

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; KNOPF AND POTTER, SENIOR JUDGES.¹

KNOPF, SENIOR JUDGE: Ronald Horvath (Ron) appeals from findings of fact, conclusions of law and a judgment entered by the Kenton Circuit Court on June 15, 2004, dissolving his marriage to Darlynn Renee Horvath (Renee). He argues that the trial court erred by finding that he owed a maintenance arrearage to Renee and by awarding prospective maintenance to Renee for life. We

¹ Senior Judges William L. Knopf and John W. Potter sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

question the trial court's ruling attributing the arrearage to past-due maintenance, but we conclude that Ron has failed to show how he was prejudiced by this portion of the court's ruling. As for the maintenance award, the trial court did not clearly err in finding that Renee is entitled to maintenance, but we conclude that the trial court failed to make sufficient findings supporting the amount and duration of its maintenance award to Renee. Hence, we affirm in part, reverse in part, and remand for additional findings and a new judgment on this issue.

The relevant facts of this action are as follows: Ron and Renee were married on December 9, 1963, and separated on March 30, 2001. There are no minor children of the marriage. On July 31, 2001, Renee filed a petition for dissolution of the marriage. In November 2002, the parties orally agreed that Ron would pay Renee temporary maintenance in the amount of \$1,700.00 per month. That agreement was memorialized by an order entered on July 16, 2003.

At the time that the dissolution proceeding began, Ron was employed as an independent sales representative and was in business with two partners. In February 2003, Ron sold his interest to the other partners. In exchange for his interest, Ron received \$30,000.00 in twelve quarterly payments of \$2,500.00 each. Additionally, Ron was to receive a consulting fee in the amount of \$9,375.00 per month for three years. In

March 2003, when the monthly consulting payments began, Ron ceased making the \$1,700.00 per month payments to Renee and began paying Renee half of the monthly consulting fee, less tax withholding, Renee's health insurance and half of the cost of the parties' business properties. These monthly payments varied in amount from a high of \$4,339.50 to a low of \$2,921.61, and the payments were suspended by the company for several months in early 2004.

In its final judgment and decree of dissolution, the trial court concluded that these payments were actually a division of the proceeds from the sale of marital property. Consequently, the trial court found that Ron still owed Renee maintenance in the amount of \$1,700.00 from July 16, 2003 until the date of the judgment. The trial court denied Renee's motion to hold Ron in contempt, but directed that Ron pay the arrearage within thirty days from entry of the judgment. The trial court also awarded Renee lifetime maintenance in the amount of \$1,200.00 per month. Additional facts relevant to the outcome will be set out later in this opinion.

On appeal, Ron raises two issues relating to the trial court's award of maintenance. He first argues that the trial court erred by finding that the payments which he made to Renee after March 2003 constituted a division of marital property, thus leaving him with an arrearage in his maintenance payments.

Although Ron does not expressly frame his argument in such a manner, he implicitly contends that the consulting fees which he received were income rather than part of the consideration for the sale of his partnership interest. If those fees were ordinary income, then Ron asserts, correctly, that he was entitled to pay his maintenance obligation to Renee from those funds. In its factual findings, however, the trial court concluded that the fees were part of the consideration that the partnership paid to Ron for the sale of his interest. Ron does not contend that this finding is clearly erroneous. Hence, the trial court correctly concluded that the consulting fees were a marital asset subject to division.

We have reservations about the trial court's characterization of the amount which Ron owes to Renee as a maintenance arrearage. At the times Ron made the payments to Renee, there was no court order directing distribution of the proceeds from the sale of the marital asset. The only relevant order in effect was the temporary maintenance order, and Ron was making monthly payments to Renee in excess of his maintenance obligation during this period. The trial court's ruling in this respect seems to penalize Ron based upon a later factual finding that he was unlikely to have anticipated.

But as a practical matter, the base amount that Ron owes Renee will remain the same, whether it is considered a

maintenance arrearage or proceeds from the division of marital property. Moreover, Ron will suffer no prejudice from the trial court's classification of the amount owed as a maintenance. The trial court did not order that the maintenance arrearage bear interest from the date which it was owed. Furthermore, the trial court properly declined to find Ron in contempt for failure to pay maintenance, perhaps recognizing that he was making regular payments to Renee. Consequently, even if the trial court erred by classifying the amount owed as a maintenance arrearage, Ron does not show that he was significantly aggrieved by that portion of the judgment. Therefore, we decline to modify that portion of the decree.

Ron next argues that the trial court erred by awarding permanent maintenance to Renee. KRS 403.200(1) requires a trial court to find that the spouse seeking maintenance (1) lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs; and (2) is unable to support herself through appropriate employment. Ron asserts that Renee has sufficient assets and income to meet her reasonable needs without maintenance. He notes that she has purchased a condominium worth \$158,000.00 with no mortgage. He also notes that the trial court assigned most of the marital and non-marital debt to him. In contrast, Ron points out that his

earning capacity has declined recently due to changes in his field, and that he is nearing retirement age.

The trial court did not make extensive findings concerning the parties' respective financial conditions. Prior to the evidentiary hearing, Renee submitted a list of monthly expenses totaling \$5,082.50, and she asserted that these expenses exceeded her monthly income by \$4,000.00. Ron argued that her claimed expenses were inflated, but the trial court did not make a specific finding of the amount of Renee's reasonable monthly expenses. In its factual findings, the trial court found that Ron currently earns \$45,000.000, for a monthly gross of approximately \$3,750.00, and the court did not suggest that he has any higher earning capacity at this time. On the other hand, the trial court found that Renee is capable of earning \$15,000.00 per year, but noted that Renee's health problems, limited work-history and age limit her employability. The trial court awarded Renee a total of \$510,000.00 in marital assets, but did not indicate whether any of these assets could be expected to produce income. After considering Renee's lesser earning capacity and her health problems, the trial court concluded that Renee "will not be able to maintain the parties' lifestyle without maintenance".

The decision to grant or deny a maintenance award lies within a trial court's sound discretion as it applies the

governing factors of KRS 403.200 to the parties' circumstances upon dissolution of marriage.² As an appellate court, this Court is not authorized to substitute its own judgment for that of the trial court on the weight of the evidence where the trial court's decision is supported by substantial evidence".³ We are concerned that the trial court did not fully set out its factual bases for finding that Renee lacks sufficient property and income to meet her reasonable needs. Nevertheless, Ron did not move for additional findings on this issue.⁴

Furthermore, Ron only obliquely addresses the sufficiency of the trial court's finding that Renee is entitled to maintenance. Rather, he primarily focuses on the amount of debt assigned to him. "The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance" is a factor, among others, for the trial court to consider in determining the amount and duration of maintenance.⁵ However, the trial court may only reach this part of the analysis after it determines a spouse is entitled to maintenance based on the factors set forth in KRS 403.200(1). Under the circumstances, Ron presents no compelling

² Leveridge v. Leveridge, 997 S.W.2d 1, 2 (Ky. 1999).

³ Id. citing Combs v. Combs, 787 S.W.2d 260, 262 (Ky. 1990).

⁴ CR 52.04.

⁵ KRS 403.200(2)(a)-(f).

reason to disturb the trial court's finding that Renee is entitled to maintenance.

KRS 403.200(2) provides that once it is established that maintenance is appropriate, the award "shall be in such amounts and for such periods of time as the 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.

In determining the amount of a maintenance award, KRS 403.200(2) clearly directs the trial court to consider "all relevant factors." The statute does not, however, require the court to make specific findings of fact as to each relevant factor.⁶ The amount and duration of maintenance is within the

⁶ Drake v. Drake, 721 S.W.2d 728 (Ky.App. 1986).

sound discretion of the trial court,⁷ and will not be disturbed on appeal absent a showing of clear error in its factual findings or abuse of discretion.⁸

In challenging the trial court's award of maintenance, Ron notes that the trial court assigned \$97,595.00 in marital and non-marital debt to him. Given the amount of this debt and his declining income, Ron contends that he is unable to meet his own reasonable needs while paying maintenance to Renee. Ron spends a great deal of time addressing a loan which he made to Renee during the separation. After the parties sold the marital residence, Renee used her share of the proceeds from the sale to purchase a condominium. However, after Renee discovered that she did not qualify for a mortgage, Ron agreed to loan her the balance of the purchase price from his portion of his retirement account. Ron admits that he made additional withdrawals from the retirement account to pay his other expenses and to make investments.

As a result of these withdrawals, Ron incurred taxes and penalties in excess of \$32,000.00. The trial court found that Ron's withdrawals from the retirement account were without Renee's consent and therefore the tax consequences should be his sole responsibility. The trial court also assigned to Ron the

⁷ Weldon v. Weldon, 957 S.W.2d 283, 285-286 (Ky.App. 1997); Russell v. Russell, 878 S.W.2d 24, 26 (Ky.App. 1994).

⁸ Perrine v. Christine, 833 S.W.2d 825, 826 (Ky. 1992).

credit card debts which he incurred in connection with his occupation. Ron does not challenge the trial court's division of the retirement account or its assignment of the tax and other debts to him. He does argue, however, that the court should have considered the tax and other debts in determining the amount and duration of maintenance.

We agree. While the trial court did not go into detail about its reasoning, the court appears to conflate the issues of the status of the debts as marital or non-marital with the separate question of whether the incursion of the debts constituted a dissipation of marital property. In Neidlinger v. Neidlinger,⁹ the Kentucky Supreme Court held that there is no presumption that debt incurred during a marriage is marital. The party claiming that a debt is marital has the burden of proof. In determining the status of the debt, the court should consider receipt of benefits, the extent of participation, whether the debt was incurred to purchase assets designated as marital property, whether the debt was necessary to provide for the maintenance and support of the family, and any economic circumstances bearing on the parties' respective abilities to assume the indebtedness.¹⁰ Ron, however, does not appeal the

⁹ 52 S.W.3d 513 (Ky. 2001).

¹⁰ Id. at 523.

trial court's findings that the tax and other debts are non-marital.

Dissipation, on the other hand, concerns whether a party has expended marital assets for non-marital purposes. A party may not spend marital assets or funds for non-marital purposes and then expect to receive an equal share from the diminished marital estate. Rather, the court will deem the wrongfully dissipated assets to have been received by the offending party prior to the distribution.¹¹

In its findings, the trial court stated that Ron made the withdrawals from the retirement account without Renee's consent. This finding appears to ignore the April 15, 2002 document which Renee signed accepting a \$71,580.95 loan from Ron, to be paid from her share of Ron's retirement account. Moreover, the court appears to suggest that the tax liability and the credit card debts which Ron incurred during separation constituted dissipation and may be disregarded in determining Ron's ability to meet his reasonable needs while paying maintenance to Renee. But Ron's debts should not be disregarded simply because they are classified as non-marital, nor does the fact that they were incurred during the parties' separation and without Renee's express consent render them a dissipation of marital assets. Rather, the court can find that debts incurred

¹¹ Brosick v. Brosick, 974 S.W.2d 498, 500 (Ky.App. 1998).

by one party during separation constitute a dissipation only where there was a clear intent by one party to deprive the other party of marital assets.¹² Otherwise, the trial court must consider all debts, marital and non-marital, in determining Ron's ability to meet his reasonable needs while paying maintenance to Renee.

As previously noted, the trial court did not set forth how it arrived at the amount of the maintenance award to Renee. Although Ron did not request additional findings concerning Renee's entitlement to maintenance, he did file a CR 59.05 motion asking the court to reconsider the amount and duration of the award in light of the debt assigned to him. The record may ultimately support the trial court's conclusion that Renee is entitled to \$1,200.00 a month in permanent maintenance. But because it appears that the trial court misapplied the criteria set forth in KRS 403.200(2) in setting the amount and duration of maintenance, we conclude that the trial court's failure to make findings on these issues constituted an abuse of its discretion. Consequently, we must remand this matter for additional factual findings and, if appropriate, a recalculation of the maintenance award to which Renee is entitled.

¹² Id.

Accordingly, the portion of the judgment of the Kenton Circuit Court awarding maintenance to Darlynn Renee Horvath is reversed and this matter is remanded for additional findings and a new judgment as set forth in this opinion. In all other respects, the judgment is affirmed.

COMBS, CHIEF JUDGE, CONCURS.

POTTER, SENIOR JUDGE, DISSENTS IN PART AND FILES A SEPARATE OPINION.

POTTER, SENIOR JUDGE, DISSENTING IN PART: I respectfully dissent from that portion of the majority opinion finding Mr. Horvath was not prejudiced by the trial court's failure to give him credit against his maintenance obligation for payments made. He has had to pay maintenance twice—once from marital assets during the separation and again from his separate property after the divorce. In this case prior to the divorce all assets were marital property. It made no difference whether a bank balance was the result of the deposit of a paycheck or the proceeds of the sale. The trial court seemed to hold that because the marital property used to pay maintenance could be traced to the proceeds of the sale of property instead of salary, the payments did not count. The law recognizes no such principal-income distinction. Frequently during a divorce proceeding, because the parties have not adjusted their life styles, expenses

increase, and one or both parties are forced to use their savings to meet living expenses.

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