

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

NO. 2010-CA-002246-MR

CHRISTOPHER HARDIN

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE TIMOTHY E. FEELEY, JUDGE  
ACTION NO. 09-CI-00487

TRACY HARDIN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Chris Hardin appeals from an order of the Oldham Circuit Court denying his motion to alter, amend, or vacate its prior judgment and order distributing property and debt pursuant to the dissolution of marriage. Upon review, we affirm the Oldham Circuit Court.

## **Facts**

Chris Hardin and Tracy Hardin were married on September 20, 1997.

No children were born of the marriage. Chris petitioned for dissolution on May 20, 2009. The parties, at the time of judgment, were thirty-nine and forty years old, respectively. Chris is employed by Amarr Garage Door, earning approximately \$65,000 annually, with occasional bonuses. He also works part time as a dishwasher at a country club. Tracy is permanently and totally disabled and receives Social Security benefits in the amount of approximately \$980 per month. She volunteers two to four hours per week in a golf pro shop.

The parties lived several places during the marriage, but at the time the petition was filed, they were living in the home of Tracy's mother, Paula Hildebrand, at 6004 New Cut Road (the "New Cut property") in Oldham County, Kentucky. As noted by the trial court in its judgment, difficulties arise in this case in attempting to trace the parties' numerous real estate and loan transactions, most of which included financial contribution and involvement by Tracy's mother.

The parties owned three different homes in fee simple during the marriage. The first home, located at 323 South Spring Street in Louisville, Kentucky, (the "Spring Street property"), was purchased on March 25, 1999, for \$52,000. The entire purchase price for this home was a gift from Paula. Due to the poor condition of the property upon purchase, Paula gave additional sums of approximately \$8,000 and \$10,000 to the couple to make improvements thereon.

On January 10, 2001, the parties purchased a home at 100 West Moody Lane in Crestwood, Kentucky, (the “Moody Lane property”) for \$76,000. Again, the entire amount for this purchase came from Paula. The Moody Lane property was also in poor condition and was in need of improvement. On April 16, 2001, the parties sold the Spring Street property for \$86,500. They then repaid Paula the \$52,000 she gave them to purchase the Spring Street property. Chris and Tracy took the remainder of the money and used it for improvements on the Moody Lane property. In addition, they also borrowed money for improvements. Chris and Tracy resided at the Moody Lane property until the summer of 2003.

In the summer of 2003, Tracy began having severe seizures. At that time, Chris often traveled with work, and it became impractical for Tracy to be left alone in the home frequently. After discussions between the parties and Paula, it was decided that Chris and Tracy would move into a home with Paula so that Paula could aid in caring for Tracy. In 2004, Paula purchased the New Cut property for \$550,000. The property was purchased outright, without a mortgage. The property was deeded in Paula and Tracy’s name jointly, with rights of survivorship.

When Paula purchased the New Cut property, it was with the understanding that Tracy and Chris would move into the home with her. According to testimony, the home needed to be remodeled to provide for Chris and Tracy’s privacy, and so Chris would have an office to work out of. The cost of

these improvements was \$119,000. The parties agreed that they would repay Paula this amount.

In 2005, Tracy was involved in an automobile accident while driving Paula's car and suffered injuries therefrom. The driver of the other vehicle was solely at fault. She experienced brain damage and seizures after the accident, although it is unclear what percentage of her disability is due to the accident and what percentage preexisted it. Nonetheless, Tracy and Chris continued to reside in Paula's home after the accident.

As of November of 2005, the Moody Lane property still had not sold. The loan on the property was in foreclosure. Chris and Tracy then approached Paula and communicated to her that they needed to borrow \$250,000 to pay the foreclosure amount, as well as various credit card debts. Paula agreed to allow Chris and Tracy to borrow against the house. At that time, there were no mortgages on the house as Paula had paid cash for the property.

In order for Chris and Tracy to secure a loan against the New Cut property, both of their names were required to be on the deed. Thus, Chris's name was added to the deed by a quitclaim deed dated November 2005. Approximately six months thereafter, the property was quitclaimed back solely into Paula and Tracy's names. Chris and Tracy used the \$250,000 loan to pay various debts, including the foreclosure amount. There was approximately \$18,918 left over, which neither party could seem to account for at the hearing.<sup>1</sup> The Moody Lane

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<sup>1</sup> Although Chris challenges Tracy's ability to recall information on appeal, it is of note that his own recall of their finances when questioned at the hearing was poor. He often answered that he

property sold in June of 2006 for \$175,000, of which the parties received \$160,802.

At that time, the parties had two joint accounts at Fifth Third Bank, a checking account and a savings account, hereinafter referred to as account numbers “7546” and “0599,” respectively. The \$160,802 was deposited into the savings account, 0599. Also in June of 2006, Tracy received a personal injury settlement from her automobile accident. The settlement amount of \$100,000 was deposited into account 7546. Approximately two weeks later, \$65,000 of that amount was transferred into account 0599.

The above funds remained in 0599 until they were transferred into another account opened by Paula and Chris at Fifth Third bank, “0789.” Although Chris’s name was on the account, it was essentially Paula’s account, and she was the only one who made deposits into or drew checks on the account. Paula drew a check on that account in the amount of \$92,462.55 in partial payment of the \$250,000 note executed by Chris and Tracy.

After Paula made the \$92,462.55 payment on the loan, \$109,142.98 still remained in account 0789. On November 30, 2006, Paula wrote a check to Chris and Tracy from that account for approximately \$9,142, and deposited it in their checking account 7546. This left exactly \$100,000 in account 0789, Paula’s account, which exactly equaled the amount Tracy received from her uninsured

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couldn’t “remember” or didn’t “know” in response to financial questions during the hearing.

motorist/personal injury case. This entire amount was retained by Paula as repayment toward the \$119,000 addition on the New Cut property.

Thereafter, although the parties' note (secured by the New Cut property) was paid down to approximately \$150,000, Chris decided that he wanted to buy a new truck. Thus, he and Tracy refinanced the note on the New Cut property in the amount of \$175,000. Chris purchased a Ford F-150 truck from a dealership for \$24,200. However, in order to refinance the loan, Chris's name had to be added to the deed once again. Thus, by a deed dated October 30, 2006, Chris's name was placed on the title to the real property, again, for the sole purpose of obtaining financing. The new loan was dated November 21, 2006.

At that point, the parties had paid Paula \$100,000 toward the debt on the addition to the New Cut property from Tracy's settlement and \$6,000 in other payments from marital funds. Deducting for both of these amounts, only \$13,000 remained due and owing on the initial \$119,000 debt to Paula for the addition. The parties eventually repaid Paula \$10,000 of the remaining \$13,000 due on the debt, leaving only \$3,000 due and owing.

On December 9, 2008, the parties yet again refinanced the loan on the New Cut property in the amount of \$177,000. As of April 1, 2010, the payoff on that loan was \$175,194.08. None of the monies from the three debts taken out by Chris or Tracy on the New Cut property went toward the purchase price of the home, or for any additions or improvements on the property. Rather, the New Cut

property was simply used as collateral by the parties with Paula's consent for the parties' unrelated debts.

Prior to the refinancing in December of 2008, the loan payments included escrow payments for insurance and taxes on the property. After the December 2008 refinancing, no monies were escrowed for the payment of insurance or taxes. Thus, in December of 2008, Paula opened a separate account to which she contributed \$300 each month toward the payment of taxes and insurance and the parties also contributed \$300 each month. Paula testified at trial, however, that this amount was still inadequate to cover the actual cost of taxes and insurance on the home. Approximately six months after the refinancing of the property, Chris filed for divorce. His name was still on the deed at that time. As of the date of trial, the parties were in arrears in the amount of \$770 in financing their half of the account for the payment of insurance and taxes.

In its findings of fact, the trial court found that Paula and Tracy resided together at the New Cut property and that neither Tracy nor Paula wished to sell the property. The trial court also found that the only reason Chris's name was on the deed was so that Chris and Tracy could use the property as collateral to obtain a loan, and subsequently, to refinance that loan. The trial court found that the parties were in possession of all non-marital personal property that was brought into the marriage, and that all marital personal property had been divided amicably except for a Ford F-150 truck, a Cub Cadet lawn tractor, and a nail gun.

The trial court found that since the money from Tracy's personal injury settlement was applied toward the \$119,000 debt to Paula on the New Cut property for the addition, that Tracy had adequately traced a non-marital contribution to the property in the amount of \$100,000. The trial court found that the parties' marital contributions to the property of \$6,000 and \$10,000, resulted in a \$16,000 marital interest in the property.

The trial court awarded the parties' \$16,000 marital interest in the New Cut property to Tracy and ordered Chris to execute a quitclaim deed, deeding back his interest in the property to her. The trial court awarded the parties' Ford F-150 truck, valued at \$18,175 to Chris, free and clear of any claim by Tracy. The trial court further ordered that the parties split the value of the Cub Cadet and the nail gun. Further, Chris's retirement account was split equally between the parties.

As for the division of marital debt, the trial court ordered Chris to make the monthly payments on the \$175,000 debt still owed to Fifth Third Bank for a term of thirty-six months, during which time he was also ordered to keep current a decreasing term life insurance policy on himself for the principal amount (with Tracy named as the beneficiary). At the end of thirty-six months' time, the trial court ordered that both parties would be responsible for the remaining debt, and each would be responsible for one-half of the monthly payment.

The trial court stated in its order that the payment of the debt would be characterized as maintenance for the first thirty-six months, and thereafter would simply be division of marital debt. Chris was further ordered to continue funding



the insurance and tax account with \$350 per month until such time as the \$175,000 mortgage was completely released from the property. This monthly \$350 payment was also characterized as maintenance by the trial court.

In addition, Chris was also ordered to pay Tracy an additional amount of maintenance in the amount of \$200 per month. This resulted in a total monthly maintenance payment of \$1,585 for the first thirty-six months.

Chris filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate concerning Paula's testimony at the hearing, the order that he solely make the monthly mortgage payment on the parties' debt for thirty-six months while receiving no equity in the New Cut property, and the award of maintenance. The trial court entered an order denying the motion. The trial court recognized in its order that the burden placed on Chris was significant. However, the trial court found that it was just and equitable under the circumstances, given the duration of the marriage, the inability of Tracy to earn income through employment, as well as the unique nature of the financial dealings between the parties and Tracy's mother.

Chris now appeals to this Court.

### **Analysis**

On appeal, Chris alleges that the trial court's failure to find Tracy incompetent before allowing Paula to testify on her behalf violated the Kentucky Rules of Evidence (KRE) and relevant caselaw, that the trial court abused its discretion in ordering him to pay Tracy maintenance, that the trial court failed to

classify and divide the marital property in just proportions, and that the trial court abused its discretion in the allocation of debt.

***Failure to Deem Tracy Incompetent Before Allowing Paula to Testify***

We first consider Chris's argument that the trial court erred, in contravention of the KRE and relevant caselaw, in allowing Paula to testify on Tracy's behalf without first finding her incompetent.

Testimony indicated that Tracy began having seizures and loss of short-term memory in 2002 or 2003. By 2004, her seizures were reasonably under control. Testimony indicated that she was working part-time in 2005 when she was involved in the motor vehicle accident, that she suffers from brain damage and seizures, and that she receives Social Security disability benefits.

From the start, we must point out that Tracy did, in fact, testify during the hearing. Indeed, Chris's counsel called her as his first witness. Tracy was able to answer a significant number of questions posed by counsel, including questions about her name, age, address, the marriage, the amount of her Social Security benefits, and the fact that she tries to pay her mother rent each month. There was never any indication that Tracy was incompetent, or had any difficulties in expressing herself or in perceiving or telling the truth. Rather, Tracy's difficulties stemmed from her ability to recall information. Although Tracy did become tearful at points, when she was unable to recall information during examination, she clearly testified "I don't remember" at those points. It is of note that even Chris testified he "didn't remember" in response to many questions about the loans

the parties took out and how they were used. No one moved to have Tracy declared incompetent to testify at trial.

Thus, the only remaining question concerns Paula's testimony. Chris alleges that Paula was allowed to testify "on Tracy's behalf." It is clear from our review of the video record, however, that Paula did not testify on Tracy's behalf. Rather, an objection was made early-on during Paula's testimony concerning hearsay when she was testifying about a particular loan taken by the parties and the trial judge indicated he would allow her to testify as to her knowledge because the finances between her and the parties were so intertwined. Paula's testimony concerned her own knowledge of the parties themselves (as they had lived in her home for three years) and their finances (as she provided the financial means and collateral for most of the parties' significant financial transactions).

Tracy was presumed competent under KRE 601(a). No party challenged her competency under KRE 601(b). Indeed, as Chris points out, KRE 601 only permits the disqualification of a witness "upon proof of incompetency." *Price v. Commonwealth*, 31 S.W.3d 885, 891 (Ky. 2000). In the present case, Tracy testified on her own behalf and was able to reasonably respond to many of counsel's questions. Although Paula also testified, she did not testify on Tracy's behalf, but as to her own personal knowledge. Thus, we find no error concerning Paula's testimony.

### ***Maintenance Award***

We next consider Chris's argument that the trial court abused its discretion by awarding Tracy maintenance. An award of maintenance is within the sound discretion of the trial court. *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky. App. 1982). Thus, we will not reverse an award of maintenance unless the "trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Under Kentucky Revised Statutes (KRS) 403.200(1)(a)(b), a trial court may award maintenance to a spouse upon a finding that the spouse "[l]acks sufficient property . . . to provide for [her] reasonable needs" and "[i]s unable to support [her]self through appropriate employment[.]" In making this determination, the court shall consider other relevant factors, as outlined in KRS 403.200(2)(d)(e), including "the duration of the marriage" and "[t]he age, and the physical . . . condition of the spouse."

In the present case, the testimony was uncontroverted that Tracy is disabled and receives a check from Social Security each month for permanent and total disability. The trial court found that Tracy was unable to earn income through employment. In awarding maintenance, the trial court also considered the parties' income and the duration of the marriage.

Chris alleges that the trial court erred in its award of maintenance because (1) Tracy did not testify that she was unable to support herself or lacked sufficient property to meet her reasonable needs, (2) because it did not consider Tracy's alleged infidelity, and (3) because it did not consider his inability to pay.

We first address Chris's argument that Tracy failed to meet her burden of proof for maintenance because she did not testify that she was unable to support herself or lacked sufficient property to meet her reasonable needs under KRS 403.200(1). Our standard on review of an award of maintenance is abuse of discretion. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

We cannot abide with Chris's assertion that only Tracy's testimony could establish the necessary factors under KRS 403.200(1). The evidence relied upon by the trial court for its maintenance determination was clear from the testimony of Tracy, Chris and Paula, as well as the documentary evidence of record. The record established that the parties were married for over twelve years, that Tracy was forty years old, that she had been out of the workforce since 2005, that Chris was the primary breadwinner, and that Tracy had been deemed permanently and totally disabled by the Social Security Administration since 2006. Further, the evidence showed that Tracy had no other income or income producing property. Hence, there was ample evidence for the trial court to make the requisite findings under KRS 403.200(1). We find no abuse.

Accordingly, we turn to Chris's second argument, that the trial court failed to consider Tracy's alleged infidelity. As to the question of fidelity, a trial court is required to consider any factors it deems relevant under KRS 403.200(2) after determining that a party lacks sufficient property to provide for their reasonable needs under KRS 403.200(1). While a trial court "may" consider infidelity with other relevant factors in determining an award of maintenance, that

is a decision within the trial court's discretion. *See, e.g., Tenner v. Tenner*, 906 S.W.2d 322 (Ky. 1995); *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973). As it was within the trial court's broad discretion, we find no error in the trial court's failure to consider the allegation.

Finally, we address Chris's allegation that the trial court failed to consider his ability to pay. Chris alleges that he was essentially ordered to pay \$1,585 per month in maintenance, despite a monthly income of \$2,694. However, although Chris testified his income was only \$2,694, the trial court actually found that his income was much greater. Indeed, the trial court found that Chris's income was \$65,078 annually. Upon a review of the tax returns present in the record, it appears to this Court that the trial court's finding was supported by substantial evidence. Factual findings of a trial court will not be set aside unless clearly erroneous, *i.e.*, unsupported by substantial evidence. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986).

When divided over a twelve month period, Chris's salary equates to roughly \$5,400 per month. Thus, we find no merit to Chris's argument that he is unable to pay because he only earns \$2,694 per month. Accordingly, we affirm the trial court's award of maintenance.

### ***Division of Marital Property***

We next consider Chris's argument that the trial court erred in its division of marital property. Chris argues that the trial court did not classify his

interest in the New Cut property. He argues, instead, that the trial court merely ordered him to quitclaim his interest to Tracy without classifying it.

We disagree with this characterization. Rather, a review of the judgment and order makes clear that the trial court did classify the marital and non-marital interests in the property. It classified a \$16,000 marital interest in the property and a \$100,000 non-marital interest in the property. Although the trial court did not *divide* the \$16,000 marital interest in the New Cut property between the parties, neither did the trial court divide the amount of marital interest in the Ford F-150 pickup truck, which was valued at \$18,175 at the time of dissolution (and was awarded solely to Chris). There is no presumption that property must be divided equally, only that it be divided in just proportions. KRS 403.190; *Stipp v. St. Charles*, 291 S.W.3d 720, 726 (Ky. App. 2009).

Chris also argues that Tracy failed to meet her burden to show that the \$100,000 injury settlement was non-marital. In Kentucky, any funds received to compensate pain and suffering are deemed non-marital property. *Weakley v. Weakley*, 731 S.W.2d 243, 244 (Ky. 1987). However, to the extent that a personal injury award is for loss of earnings or impairment of the ability to earn money, it is marital. *Id.* However, the Supreme Court stated as follows in *Weakley*:

We do not attempt to decide the proper procedure for the allocation between marital and nonmarital property of a personal injury award for an injury sustained during the marriage where the settlement or judgment does not indicate what portion of the award applied to earning capacity and what portion is allocated to pain and suffering.

*Id.* at 245. In the present case, we are presented with the very situation contemplated, but left unresolved, in *Weakley*, where it is unclear what portion of a settlement is for personal injury and what portion, if any, is for lost wages or impairment of earning capacity. *Id.*

Tracy argues that the full amount of the settlement was for personal injury, because she had been disabled and basically unemployed since 2003. Nonetheless, the testimony at trial indicated that she was commuting to or from “work” when the crash occurred in October of 2005. Chris testified that Tracy was working as a golf shop clerk at the time. A review of the parties 2006 tax returns shows that Tracy earned a total of \$1,864 in 2005 while working in this position.

However, this small amount of work is minimal, and likely reflects little more than the three or four hours per week she currently volunteers in the golf shop. In *Reeves v. Reeves*, 753 S.W.2d 301 (Ky. App. 1988), a prior case of this Court considering a settlement where damages were not specifically allocated, we considered the equities involved and noted that the marriage was of a short duration and that one party to the marriage was left disabled while the other was left able-bodied. Given the circumstances of the parties in the present case, where Chris is able-bodied and Tracy is disabled, and given the fact that Tracy was “barely” working in the years before the accident occurred,<sup>2</sup> we conclude that the

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<sup>2</sup> Such that lost wages or impaired earning capacity would likely have been negligible in the settlement amount anyway.



trial court did not clearly err in finding the full amount of the settlement to be non-marital.

Accordingly, we affirm the trial court's division of marital property.

### ***Division of Marital Debt***

We now reach Chris's final argument, that the trial court abused its discretion in the allocation of marital debt. Chris argues that typically, the party who receives the property in a divorce should also receive any debt associated with that property.

However, Chris's argument with respect to the marital debt is built upon the false characterization of the marital debt as a regular mortgage on real property. That is not the case here. In the present case, Paula owned the property, free and clear of any mortgage, before the parties ever moved in. She paid cash for the property and owed no amount thereon. Later, when the parties found themselves in financial trouble, Paula (perhaps unwisely) allowed them to borrow against the property. The monies received by Chris and Tracy were never enjoyed by Paula and were used only to pay the parties' personal debts. We agree with the trial court that, in this situation, Paula merely allowed the parties to use the house as collateral.

Thus, the \$1,035 "mortgage" payment per month is nothing other than the payment of a debt for which Chris and Tracy are solely responsible. It is not building "equity" in the property in the traditional sense. As stated hereinabove, the \$250,000 they borrowed was used to pay off their own debts and any excess

was otherwise retained for their own purposes. Under these set of facts, Chris and Tracy could expect no interest in the property through the loan payments. The payments on the note are merely payments made on an unrelated debt.

Further, the trial court was within its discretion to award Chris the lion's share of responsibility for the marital debt for the first few years, given the fact that Tracy is unemployed and disabled and Chris is the sole breadwinner. *See, e.g., Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001)(*Court may consider economic circumstances of the parties and its bearing on their respective abilities to assume indebtedness, and there is no presumption that debt be divided equally*).

Moreover, for the first three years, the payment is not division of debt, but is actually maintenance. After the expiration of thirty-six months, Tracy will share the burden of the debt equally with Chris. Therefore, Chris's argument regarding the division of debt is not well taken. We find no error in the trial court's choice to stagger the debt for the first three years as maintenance.

Hence, we affirm the Oldham Circuit Court.

ALL CONCUR.

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