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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001559-MR

JERRY ALVIN DAVISSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 14-CI-01903

MELANIE LA VERNE DAVISSON

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, MAZE, AND STUMBO,¹ JUDGES.

MAZE, JUDGE: Jerry Alvin Davisson (Jerry) appeals from a judgment of the Fayette Circuit Court dissolving his marriage to Melanie La Verne Davisson (Melanie). Jerry contends that the trial court erred in its classification of his non-marital retirement funds, assignment of debt, and calculation of child support.

¹ Judge Janet Stumbo dissented in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

Under the circumstances presented in this case, we conclude that the trial court's assignment of the retirement account and its calculation of child support did not amount to an abuse of discretion. But while the trial court did not abuse its discretion by assigning the debt to Jerry, we conclude that the trial court abused its discretion to the extent that it separately included that debt in its calculation of the equalization payment. Hence, we affirm in part, reverse in part, and remand for additional proceedings.

Jerry and Melanie were married in 2001 and separated in 2011. The union produced two children. Jerry is in active military service in the United States Air Force, and is currently stationed in San Antonio, Texas. Melanie resides in Kentucky with the children.

In 2014, Melanie filed the current petition for dissolution of the marriage. The court heard proof and a final hearing was held on June 1-2, 2015. On July 13, 2015, the trial court entered Findings of Fact, Conclusions of Law, and a Decree of Dissolution of Marriage. In pertinent part, the Decree awarded the parties joint custody of the children, with their primary residence being with Melanie. The court also ordered Jerry to pay \$1,407.60 per month in child support. The trial court also assigned the parties' real and personal property and debt. To equalize the division of marital assets, the trial court ordered Jerry to pay Melanie \$37,512.

Thereafter, Jerry filed a Motion to Alter, Amend or Vacate the Decree, and Melanie moved to correct clerical errors. After considering the motions, the trial court sustained Melanie's motion and amended the judgment to correct certain clerical errors which are not related to this appeal. However, the trial court denied Jerry's motion. This appeal followed.

Jerry first argues that the trial court erred in finding that he had waived his pre-marital claim to certain retirement funds, and in classifying those funds as marital. He directs our attention to a Franklin Templeton account which contained 995.287 shares prior to the parties' marriage. The trial court noted, and Jerry does not dispute, that he failed to list this asset as non-marital in his Preliminary or Final Verified Disclosure Statements. Jerry states that he presented proof showing the pre-marital contribution to the account, and Melanie did not dispute that evidence. Consequently, Jerry maintains that the trial court erred in classifying the account as entirely marital.

The definition of marital property in KRS² 403.190(2) excludes any property acquired by either spouse prior to the marriage. However, Jerry bore the burden of establishing his non-marital interest in the account. *Sexton v. Sexton*, 125 S.W.3d 258, 266-67 (Ky. 2004). In his Disclosure Statements, Jerry identified seventy items in which he claimed a non-marital interest, but he did not identify the Franklin Templeton account. In a separate interrogatory answer, Jerry stated

² Kentucky Revised Statutes.

that he had opened the account two months prior to the marriage, but again, he did not list a non-marital contribution to that account.

Considering the large number of non-marital items set out in the Disclosure Statements, Jerry's failure to identify the account as non-marital appears to have been inadvertent. Nevertheless, the trial court has broad discretion to enforce its pre-trial discovery orders. *See Berrier v. Bizer*, 57 S.W.3d 271, 278 (Ky. 2001). While the result seems harsh, we must conclude that the trial court did not abuse its discretion in finding that Jerry's failure to timely disclose the account amounted to a waiver of his non-marital claim.

Jerry next argues that the trial court erred in its assignment of debt and in its calculation of the equalization payment due to Melanie. The debt and equalization payment issues arise from Jerry's use of marital funds toward real estate in Greensburg, Kentucky and San Antonio, Texas. The trial court found that Jerry had made "unilateral expenditures" of marital funds toward these properties in the amount of \$75,024. Consequently, the trial court directed Jerry to pay half this amount, or \$37,512, to Melanie to reimburse her for these expenditures. The trial court separately directed that Jerry would be responsible for the parties' outstanding credit card debt, totaling approximately \$48,825.

The court found that Jerry had expended \$14,542 in marital funds toward the purchase or improvement of non-marital properties in Greensburg.

Jerry does not dispute this determination. The issue in this case concerns the marital funds and debt which Jerry incurred toward the San Antonio property.

In 2011, after the parties' separation, Jerry purchased a residence in San Antonio, near his new assignment. The trial court found that Melanie did not agree to the purchase or the expenditure of marital funds on that residence.

Consequently, the trial court assigned the equity and debt in that property to Jerry.

The trial court also found that Jerry had expended marital funds and incurred debt on an upstairs addition to the San Antonio residence. Jerry spent \$9,413 in funds from a marital bank account on materials and labor related to the addition. More significantly to this appeal, the trial court found that "Jerry has spent \$51,069 from the marital USAA Bank on materials and labor related to the upstairs addition, either directly to the supplier or through credit card payments for charges to the supplier." The court listed charges totaling \$26,949 in either direct or credit-card payments to the suppliers, and \$18,115 in payments of marital funds to the credit card accounts used to fund these improvements.

As an initial matter, the trial court's listing of these expenditures only totals \$45,064, leaving some \$6,005 unaccounted for. However, Jerry has not raised this discrepancy as a basis for relief. Rather, Jerry notes that the trial court separately assigned him all of the outstanding credit card debt, which includes a significant portion of the amounts set out as payments to the suppliers. As a result,

Jerry contends that the trial court's calculation of the equalization payments counts the credit card debt against him twice.

With respect to the assignment of debt, there is no statutory presumption that debts incurred during the marriage are marital. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). Consequently, the party incurring the debt has the burden to prove that it was incurred for a marital purpose. *Id.* If the debt is marital, then the trial court may assign the debt in "just proportions," which need not be in the same proportion as the division of other marital property. *Id.* But if the debt is non-marital, then it must be assigned to the party who incurred it.

In the current case, the trial court found that Jerry incurred the credit card debt to improve the non-marital San Antonio residence. The trial court did not set out what portions of the credit card debt were non-marital and what portions were marital. But regardless of the characterization of the debt, the trial court was within its discretion to assign all of the debt, marital and non-marital, to Jerry. Indeed, Jerry does not dispute that portion of the trial court's judgment.

However, the issue is relevant to the trial court's calculation of the equalization payment. Although the trial court did not characterize it as such, the court's analysis and conclusion essentially amounted to a finding that he dissipated marital assets. The party claiming dissipation must prove, by a preponderance of the evidence, that dissipation occurred and the value of the property. *Brosick v. Brosick*, 974 S.W.2d 498 (Ky. App. 1998). "Once the party alleging dissipation

establishes a prima facie case, the burden shifts to the party charged with the dissipation to produce evidence sufficient to show that the expenditures were appropriate.” *Id.* at 502. If a party is proven to have dissipated marital assets, “the court will deem the wrongfully dissipated assets to have been received by the offending party prior to the distribution.” *Id.* at 500.

In this case, the trial court found that Jerry had expended \$75,024 in marital funds to purchase or improve non-marital property. In its division of assets, the trial court concluded that Jerry had already received those funds, and it ordered him to pay Melanie half that amount to equalize the division of assets. As discussed above, the trial court’s calculation of the equalization payment includes Jerry’s payments made directly from marital assets, and Jerry’s use of marital assets to pay off non-marital credit card debt. Since Jerry made these expenditures of marital funds prior to the entry of the Decree, the court properly included these amounts in its calculation of the equalization payment.

But the problem arises because it appears that the trial court also included Jerry’s credit card payments to suppliers and contractors for the San Antonio residence. Although the court’s factual findings are not entirely clear on this point, its listing of the \$51,069 in expenditures on the San Antonio residence expressly includes credit card charges to suppliers. To the extent that these charges remained outstanding as of the entry of the Decree, they were reflected in the trial court’s separate assignment of the credit card debt to Jerry. By also

including those amounts in the equalization payment, the trial court seems to have charged Jerry twice for the same amounts.

We recognize that KRS 403.190(1) requires that the division of marital assets be in “just proportions,” but not necessarily equal. *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). Furthermore, the trial court had broad discretion to divide marital assets, and its determination of what constitutes a just division will not be disturbed absent an abuse of that discretion. *Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky. App. 2012). But in this case, it appears likely that the trial court’s calculations rest upon a clearly erroneous factual finding. A division of marital assets based upon an erroneous finding would amount to a clear abuse of the court’s discretion.

Consequently, we must remand this matter for additional factual findings. If the trial court’s calculation of the equalization payment duplicates any amounts separately charged to Jerry in its assignment of the credit card debt, then the court shall recalculate the payment to exclude those amounts. On the other hand, if the trial court finds that the equalization payment does not include any of the outstanding credit card debt, then the court’s original calculation of the equalization payment should stand.

Finally, Jerry argues that the trial court erred in failing to allocate his child support obligation for periods when the children are residing with him. The trial court designated Melanie as the children’s primary residential custodian, but

also provided that the children will reside with him for at least eight weeks during the summer. When other extended visitation periods are considered, Jerry notes that the children will be living with him for a minimum of eleven weeks per year. Consequently, he contends that the trial court abused its discretion by failing to credit his child support obligation for those periods.

We disagree. The period of time during which the children reside with each parent may be considered in determining child support, and a relatively equal division of physical custody may constitute valid grounds for deviating from the guidelines. *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007). But the trial court is not obligated to do so even when the parents' physical possession of the children is relatively equal. *Downey v. Rogers*, 847 S.W.2d 63, 64-65 (Ky. App. 1993).

The trial court's custody order still affords Melanie with most of the parenting time throughout the year. As such, she will continue to incur many of the expenses necessary to maintaining the children's residence even when they are with Jerry. Furthermore, the trial court was also entitled to consider that Jerry earns a substantially higher income than Melanie. *Plattner*, 228 S.W.3d at 580. Under the circumstances, we conclude that the trial court did not abuse its discretion by denying Jerry's request to credit his child support obligation for the periods when the children are with him.

Accordingly, we affirm the judgment of the Fayette Circuit Court with respect to its division of the retirement account, calculation of child support, and allocation of debt. However, we reverse the trial court's calculation of the equalization payment owed to Melanie, and we remand for a re-calculation of that payment as set forth in this opinion.

CLAYTON, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS WITHOUT A SEPARATE
OPINION.

BRIEF FOR APPELLANT:

Donald J. Sharp
Greensburg, Kentucky

BRIEF FOR APPELLEE:

Catherine Ann Monzingo
Lexington, Kentucky