

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001970-MR

ROBIN ANN SCHUPANITZ

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 14-CI-00088

CRAIG SCOTT SCHUPANITZ

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, DIXON, AND K. THOMPSON, JUDGES.

ACREE, JUDGE: Robin Schupanitz appeals the findings of fact, conclusions of law and decree of the Whitley Circuit Court. She argues the trial court abused its discretion by: (1) determining that Craig Schupanitz did not intentionally dissipate marital assets; (2) its inequitable division of marital debt and property; and (3) its denial of maintenance. After review, we affirm.

BACKGROUND

Robin Schupanitz and Craig Schupanitz married on October 16, 1993. The parties briefly separated in 2007 but reconciled. In the end, reconciliation was unsuccessful. The parties separated again on February 1, 2014, and ended their twenty-two-year marriage. On February 19, 2014, Robin filed a petition in Whitley Circuit Court to dissolve the marriage. There were two children born of the marriage, one of which emancipated during the pendency of this action.

The trial court ordered the parties to share joint custody and ordered Craig to pay child support of \$850.26 per month. The trial court also entered a status quo order that prohibited either party from transferring, incurring, paying, or dissipating any assets, except as necessary to pay reasonable living expenses.

Robin soon filed a motion to hold Craig in contempt because he failed to pay child support as ordered. The court granted the motion and awarded Robin a \$3,071.37 judgment with interest at twelve percent until paid in full.

On June 13, 2014, Robin filed a motion for maintenance. When she filed her preliminary verified disclosure statement (PVDS), she discovered certain joint federal tax returns had not been filed timely, and that the IRS required other returns to be amended because Craig failed to report withdrawals from the marital retirement accounts as income. Craig's PVDS attached tax forms but noted he was "working with a CPA to resolve some back taxes." Robin filed an "Innocent

Spouse” petition with the IRS claiming she had no knowledge that Craig withdrew over \$175,000 from the marital retirement account and no knowledge that he failed to report the withdrawals as taxable income. The trial court bifurcated the proceedings and entered a limited decree of dissolution on February 2, 2015. The decree reserved issues regarding division of property and debt.

Robin filed several motions for a final hearing to resolve the remaining issues, all of which were postponed because Craig had many attorneys, each of whom withdrew after the court scheduled hearings. After these multiple failed attempts, Robin filed a motion requesting the trial court to allow submission of the matter by deposition. The trial court granted the motion.

On September 14, 2017, the trial court adopted and entered Craig’s proposed findings of fact and conclusions of law. Robin moved to alter, amend, or vacate the judgment. The trial court denied her motion. Robin appealed.

STANDARD OF REVIEW

If the trial court’s factual findings are supported by substantial evidence and the law correctly applied, a trial court’s decision will not be disturbed, absent an abuse of discretion. *McVicker v McVicker*, 461 S.W.3d 404 (Ky. App. 2015). “[T]he amount and duration of maintenance is within the sound discretion of the trial court.” *Brosnan v. Brosnan*, 359 S.W.3d 480, 485 (Ky. App. 2012) (citation omitted). We will not disturb a maintenance ruling absent a trial

court's abuse of discretion or clearly erroneous fact finding. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). "An abuse of discretion generally 'implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" *Rice v. Rice*, 372 S.W.3d 449, 452 (Ky. App. 2012) (citation omitted). However, this Court's review of related legal issues and questions of law is *de novo*. *Hunter v. Hunter*, 127 S.W.3d 656, 659, (Ky. App. 2003).

ANALYSIS

Dissipation of Marital Assets

Robin makes a preliminary argument that the trial court incorrectly interpreted the burden of proof required by *Brosick v Brosick*, 974 S.W.2d 498 (Ky. App. 1998), by ruling she bore the initial burden of proving whether Craig dissipated marital assets. We address this argument first.

A spouse dissipates the marital estate when he or she uses marital assets for a nonmarital purpose. *Id.* at 502. The spouse who alleges dissipation must present evidence establishing that the dissipation occurred. *Id.* "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." *Id.* We apply this standard here.

Before the burden could be shifted to Craig, Robin had to demonstrate "dissipation" occurred by proof of two things. First, she needed to present proof

that Craig used marital funds “during a period when there is a separation or dissolution impending[.]” *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987). Second, Robin was required to show Craig’s “clear . . . intent to deprive [her] of . . . her proportionate share of the marital property.” *Id.* Robin failed to prove Craig spent the withdrawn \$175,000 during their separation or in contemplation of a divorce. The proof indicated otherwise.

Neither party disputed that in 2007 there was: (1) \$128,979.17 in a Vanguard Account; (2) \$42,280 in the Fidelity account; and (3) \$3,191 in the American Life Insurance Roth IRA. Nor is there dispute that one month before Robin filed the dissolution petition the accounts were at zero. At no time did Craig deny withdrawing \$175,000 but said the money was used to pay marital bills. Robin admitted she left the marital bill-paying and matters of finance to Craig, so she was unaware of the parties’ expenditures. Further, their CPA testified he knew of no evidence of unusual transactions on Craig’s part that would suggest he dissipated the marital assets to his own benefit. No other probative evidence having been presented, the trial court found the use of the marital funds were at times other than while the parties were separated or contemplating divorce. Furthermore, the trial court found the money was used to pay marital expenses.

We find the trial court’s ruling on this issue sound. Because Robin could not establish this first element, we will only briefly address Robin’s evidence

that Craig used the money for nonmarital purposes with intent to deprive her of her marital share.

Robin contends there is clear evidence of intentional dissipation because: (1) Craig opened a “secret” post office box 50 miles from their marital residence; (2) Craig failed to report withdrawals of the accounts on the parties’ tax returns; and (3) she knew nothing about the withdrawals. The trial court was unpersuaded by this evidence but found it was not inconsistent with Craig’s evidence that he withdrew retirement funds to placate Robin’s demands for money and to maintain the parties’ unsustainable lifestyle. (R. 525).

We agree with the trial court that Robin failed to provide evidence consistent with a clear intent on Craig’s part to deprive her of her proportionate share of the marital property. In fact, the record shows no evidence of any transactions on Craig’s part while the parties contemplated divorce in 2007. The same can be said for the more recent period of separation and the divorce proceedings. We affirm the trial court’s ruling on dissipation.

Innocent Spouse Claim

Robin argues that the trial court erred by assigning her any of the tax liability because she is an innocent spouse. It is undisputed that Craig withdrew significant amounts of money from the marital accounts, accruing a \$24,000 tax liability. Robin claimed she had no knowledge of the withdrawals, so she filed for

innocent spouse protection under 26 U.S.C.¹ §6015. We note, however, there is no evidence in the record that the IRS granted Robin's innocent spouse claim.

Robin relies on this Court's ruling in *Dobson v. Dobson*, 159 S.W.3d 335 (Ky. App. 2004). In that case, this Court implied that if "money the family had as a result of [tax fraud] was not spent on family expenses" that an innocent spouse under the federal statute might have an argument. *Id.* at 337. However, without such proof in *Dobson*, the Court said, "[Mrs. Dobson] is simply being required to pay taxes that she would have been responsible for had [Mr. Dobson] not [committed tax fraud by] tak[ing] the deductions which were later disallowed." *Id.* We say something similar here. Robin could not establish that the undeclared income from retirement funds withdrawals "was not spent on family expenses." Nor could she establish the money Craig saved by not paying taxes on the undeclared income "was not spent on family expenses." Consequently, Robin is simply being required to pay taxes for which she would have been responsible had Craig not committed tax fraud by under-reporting the family's income.

KRS² 403.190 says debts of a marriage are presumed marital. Taxes are debts. To be clear, "income tax liability incurred during the marriage is one of

¹ United States Code.

² Kentucky Revised Statutes.

the accepted costs of producing marital income, and therefore is generally held to be treated as marital.” *Dobson*, 159 S.W.3d at 338. And so it is in this case.

Nevertheless, Robin argues she had no knowledge that Craig withdrew the money from their marital accounts. While that may be true, it does not factor into our analysis. The trial court found Craig used the money to support the parties’ unsustainable lifestyle. There is nothing in the record to indicate this is a nonmarital debt, nor will we reverse a trial court’s determination when it is based upon substantial evidence. Robin needed to overcome that burden and failed.

Maintenance

KRS 403.200 governs maintenance awards in a two-step analysis: (1) determine whether the party seeking maintenance is entitled to it, KRS 403.200(1); and (2) if so, set a proper amount of the award. KRS 403.200(2).

In the first step, the party must demonstrate he “[l]acks sufficient property, including marital property apportioned to him, to provide for his reasonable needs[.]” KRS 403.200(1)(a). And he also must demonstrate he “[i]s unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.” KRS 403.200(1)(b). The trial court may move to the second step only if both criteria are met. *Atwood v. Atwood*, 643 S.W.2d 263, 265 (Ky. App. 1982).

In this case, the trial court did not reach the second step – calculating a maintenance amount – because “Robin . . . failed to prove the elements necessary to justify an award of maintenance” (R. 531). The court focused primarily on Robin’s inability to meet the requirement of KRS 403.200(1)(b) regarding her ability to support herself through appropriate employment. Said the trial court:

She is employed as a phlebotomist, . . . now earning \$18.26 per hour, full time . . . and receives \$850.26 in monthly child support from Craig Robin filed a Chapter 7 Bankruptcy petition and received a discharge on January 31, 2017, thereby discharging her legal responsibility for most of the debts that she has claimed in this case, thereby providing a fresh start for her. Robin has been able to live comfortably, renting an apartment and even having enough surplus funds to purchase a \$5,000.00 car for her daughter, paying cash for same last year Robin testified that she is current on her bills, further testifying “I’m not late on my expenses” and [is] able to pay her bills, further testifying “I’m not late. I’ve not been late on any of my bills. I also pay” [w]hen she was interrupted by her attorney Clearly, Robin is able to provide for her own needs with her wages, with a history of her paying her bills on time and is current on her bills . . . and the court so finds. . . . [T]he Court has also determined that Robin has a proper education to do her current job and has not testified to any plans to acquire sufficient education or training to enable her to find . . . better employment

That with a sufficient period of time for Robin to reside outside the marital home [from July 2014 when she moved out of the marital home until September 2017 when the decree was entered], and her discharge in bankruptcy, and her trading motor vehicles, including paying cash in the amount of \$5,000.00 to purchase a car for her daughter, the Court finds that Robin has

demonstrated that she can sufficiently provide for herself and the children

(R. 528-30). The trial court then held she was not entitled to maintenance.

Robin argues the trial court did not consider the elements of KRS 403.200(2). For example, she stated the parties enjoyed a twenty-two-year marriage and, after Craig depleted the retirement accounts, the only asset remaining was the marital home which had a large tax lien and two mortgages. Robin contends the trial court erred by not weighing these factors. But this Court finds review of those elements unnecessary.

In accordance with *Atwood*, the court must first find that the party seeking maintenance satisfies both elements of KRS 403.200(1). *Atwood*, 643 S.W.2d at 265. Here, the trial court found Robin was not entitled to maintenance because she did not satisfy the requirement of KRS 403.200(1)(b). Given such circumstances, a trial court is not required to further consider the question of maintenance.³

Robin argues, in effect, that insufficient property was distributed to her to satisfy KRS 403.200(1)(a). But that does not matter. Again, we note she was required to satisfy both subsections of KRS 403.200(1). She failed to do so.

³ The trial court did reference some of the KRS 403.200(2) factors, but not favorably to Robin.

The trial court considered the relevant statutory measures not to award Robin maintenance. The trial court neither abused its discretion nor based its decision on findings of fact that are clearly erroneous.

CONCLUSION

For the foregoing reasons, we affirm the findings of fact, conclusions of law and decree of the Whitley Circuit Court.

ALL CONCUR.

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