

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000963-MR

BRENDA C. TRAYNER;
MICHAEL L. JUDY

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 96-CI-00184

LYNN A. TRAYNER

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** *

BEFORE: COMBS, McANULTY, and PAISLEY, Judges.

COMBS, JUDGE. Brenda Trayner appeals from the Decree of Dissolution and Final Order of the Boyle Circuit Court entered on February 6, 2002. She contests three aspects of the order: (1) the finding that she dissipated marital funds; (2) the denial of her request for permanent maintenance; and (3) an award of only \$1,500 to reimburse her for costs and attorney's fees totaling approximately \$60,000. The appellee, Lynn Trayer, has not filed a brief in this Court. After reviewing the

record, we conclude that the trial court erred in failing to award maintenance to the appellant. We reverse that portion of the judgment and remand this case for an appropriate award. In all other respects, we affirm.

The parties were married in 1969, and they separated in April of 1998. During their thirty-year marriage, they accumulated assets worth nearly \$1,000,000 and enjoyed a comfortable life-style. The primary source of Lynn's income came from Trayner Welding, Inc., a business that was wholly owned by the parties. During the last twelve years of the marriage, Brenda performed bookkeeping services for the business for which she received a salary of \$300 per week. The parties had additional income from a farming operation and from investment dividends. Their gross income for the last three years of the marriage can be summarized as follows:

Year	Lynn's income	Brenda's income
1996	\$ 106,590	\$ 19,840
1997	140,189	20,190
1998	121,700	6,022

Brenda's income for 1998 was greatly reduced because her employment with Trayner Welding was terminated upon her separation from Lynn. Three years intervened between the separation and the final hearing in January 2001. During that time, Brenda was not employed on a full-time basis. She worked

part time as a sales clerk during the 1998 holiday season, but she was unable to find suitable full-time employment.

Accordingly, she was awarded maintenance *pendente lite* in the sum of \$1,250 per month. However, she had to make frequent motions in the trial court to collect her award.

In March 1999, the parties agreed to the equal division of the following portion of their assets: retirement and pension funds, mutual funds, stocks, the cash surrender value of a life insurance policy, and a vacation fund. However, they could not agree on the division of the realty or any of the remaining items of personalty. Therefore, the trial court ordered that the remaining marital property be sold at auction.

The auction resulted in approximately \$260,000 in proceeds. Lynn purchased \$219,000 worth of property representing: the marital residence, household furnishings, business equipment, and a fully furnished recreational vehicle. Brenda purchased about \$40,000 worth of personalty. In order to equalize the distribution of the property, the trial court awarded Brenda \$200,000 of the \$260,000 proceeds of the sale. The remainder was placed in escrow. Subsequently, the trial court addressed complaints by both parties that the other had failed to bring numerous items of personal property to the auction to be sold. The legal battle was long and acrimonious.

In November 2000 and in January 2001, the domestic relations commissioner conducted a hearing on the remaining issues. Among the several claims he considered were Lynn's contentions: (1) that Brenda failed to account for the proceeds of a dividend check for \$65,000 received by the parties in March 1998; (2) that she failed to account for two certificates of deposit (CDs) for \$30,000 each that were owned jointly prior to the separation; and (3) that she dissipated the marital estate in the amount of several thousand dollars by purchasing jewelry, furs, and designer clothes immediately prior to the separation. The parties also presented proof as to Brenda's claim for permanent maintenance and for her costs and attorney's fees.

Instead of filing a formal report containing his recommendations to the trial court, the Commissioner announced his rulings at the end of the hearing and filed his notes into the record. He found that Brenda failed to prove that she was unable to find suitable employment or that she had insufficient funds to meet her reasonable needs. Thus, he concluded that Brenda was not entitled either to maintenance or to reimbursement for her attorney's fees and costs. He also found that Brenda had taken marital funds upon leaving the marital home and that she had dissipated marital funds immediately prior to the separation. Finding \$72,000 to be approximately one-half of the total amount secreted or dissipated, he deducted that

amount from her share of the remaining marital property being held in escrow.

The Commissioner allowed Lynn to raise issues at the final hearing that were not included on the agenda -- including Lynn's claim that Brenda had appropriated the \$60,000 in CDs. In order to give Brenda the opportunity to document her counterclaim that the funds had been spent on marital enterprises, the Commissioner allowed an additional sixty days for offering proof. Nonetheless, the Commissioner did not change his recommendations, and both parties took exceptions to several of his rulings. The trial court affirmed the Commissioner's rulings and incorporated them into its final order with one exception: it awarded Brenda \$1,500 for her attorney's fees. This appeal followed.

As a preliminary point, we note that Lynn failed to file a brief. Procedurally, we would be justified in imposing sanctions against Lynn as provided in CR¹ 76.12(8)(c), as follows:

- (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

¹ Kentucky Rules of Civil Procedure.

Since Brenda has not invoked the rule to seek a penalty, we shall avoid either extreme of summarily reversing the trial court or accepting *in toto* Brenda's version of the facts. See, Scott v. Scott, Ky.App., 80 S.W.3d 447 (2002), and Whicker v. Whicker, Ky.App., 711 S.W.2d 857 (1986). Instead, we have reviewed the record in its entirety and have elected to address the issues on their merits.

Brenda first argues that the trial court abused its discretion in charging against her share of the marital estate the sum of \$72,000 -- one-half of the amount that the Commissioner determined she diverted from the estate for her own use. Our review of the record reveals no error on this point.

Brenda did not take any exceptions to the Commissioner's finding that she took \$15,000 from a dividend check in the amount of \$25,000 received by the parties in April 1998. Thus, the trial court's deduction of \$7,500 (her share) was not preserved for our review.

We also find no error with respect to the remaining amounts secreted -- the two CDs worth \$60,000 and the \$65,000 dividend check received by the parties in March 1998. Brenda acknowledged taking the \$65,000 check and putting the funds in her own name. She testified that she put \$20,000 in their joint checking account from which the parties paid their 1997 income taxes. The Commissioner gave her credit for that amount. She

also testified that she paid \$5,000 in cash toward a debt owed to a relative. The Commissioner declined to give her any credit for that amount because she had no receipt or other documentation to verify her claim. She testified that she used the remaining amount to pay attorney's fees and costs incurred in the dissolution. Thus, of the \$45,000 remaining after payment of taxes, the court deducted \$22,625 from her share of the marital estate. We find no abuse of discretion in holding Brenda accountable for these funds and in charging her share of the escrow amount accordingly.

We also find no error with respect to the court's treatment of the two CDs. As with the check for \$65,000, there is no dispute that Brenda cashed the CDs and placed the \$60,000 in her own name. She attempted to show that she put \$20,000 of the proceeds in a joint checking account and that she had spent the remaining \$40,000 to build and furnish a new sunroom in the marital home earlier in the year. However, she offered no documentation to support these contentions. We have examined the record (including the documentation Brenda filed after the hearing), and we are not persuaded that any portions of these funds were spent for a marital purpose.

Finally, with respect to the property issues, we find no error in the trial court's determination that Brenda dissipated \$22,520 -- one-half the amount which it found she

spent on clothes, jewelry, and furs during March and April of 1998. Brenda distinguishes her behavior from that of the dissipating spouse in arguing that she did not gamble the money away in Las Vegas or spend it on a cruise. [Barringer v. Barringer, Ky., 514 S.W.2d 114 (1974)]. However, dissipation broadly encompasses spending funds for any non-marital purpose in contemplation of divorce with the intent to deprive a spouse of marital property. Robinette v. Robinette, Ky.App., 736 S.W.2d 351, 354 (1987).

The evidence supports the court's finding that Brenda's expenditures constituted a dissipation of the marital estate. Her purchases were all made within a month or two of the separation. She admitted that she went on a spending spree **after** she learned that her husband was having an affair with a woman in Ohio and at a time when she was contemplating leaving the marriage. Parenthetically, she did not select items that arguably could be used or enjoyed by both of the parties. Instead, her purchases virtually illustrated Robinette's definition of "dissipation."

As a set-off, Brenda alluded to several lavish expenditures made by Lynn shortly before the separation. The court properly credited Brenda for those items as to which she offered proof. Brenda presented no evidence to support her allegation that Lynn had expended funds in order to maintain the

extra-marital affair. We conclude that the findings of the trial court are supported by the record, and we find no abuse of the court's discretion in charging \$72,000 against Brenda's share of the estate. See, Perrine v. Christine, Ky., 833 S.W.2d 825, (1982).

Brenda also argues that the trial court erred in failing to award permanent maintenance to her. The court wholly accepted the Commissioner's unsubstantiated finding that Brenda failed to establish her entitlement to maintenance. It does not appear that either the Commissioner or the trial court conducted a careful analysis of the factors as set forth at KRS² 403.200 prior to ruling on the issue of maintenance. We recognize that the statute leaves "[t]he amount and duration of maintenance . . . within the sound discretion of the trial court." Russell v. Russell, Ky.App., 878 S.W.2d 24, 26 (1994). We cannot disturb a determination of the court with respect to maintenance unless the discretion is "absolutely abused." Platt v. Platt, Ky.App., 728 S.W.2d 542, 543 (1987). Nevertheless, we are compelled to agree with the appellant that the court did indeed abuse its discretion in this case with respect to the issue of maintenance.

This case presents a classic situation with respect to an award of maintenance. Combs v. Combs, Ky.App., 622 S.W.2d

² Kentucky Revised Statutes.

679 (1981). The marriage was long term and entailed a high standard of living for both parties. Lynn owns a successful business; historically, he has earned a six-figure income. In contrast, Brenda, who was fifty-two years of age at the time of the hearing, is both unemployed and essentially unemployable. She presented evidence that she suffers from a series of medical conditions, including fibromyalgia, depression, anxiety, and venous varicosities. Even if the trial court found that these medical conditions would not prevent her from working, Brenda would not qualify for anything other than an entry-level position. She has a high school education with no specialized skills. Other than keeping the books for the family business, she had no significant work-related experience.

The Commissioner emphasized that Brenda received \$425,000 in cash; he believed that to be an amount that would suffice to meet her needs. However, Brenda testified that she had to use most of that money to purchase and furnish a home and to meet her expenses during the period of three years between the parties' separation and the final hearing -- expenses that far exceeded her temporary maintenance award of \$1,250 per month. In addition, she incurred costs involved in the dissolution proceeding. Brenda testified that she had only \$50,000 remaining from the division of marital property. Consequently, she is unable to meet her reasonable needs --

needs which include hundreds of dollars each month in health insurance premiums, co-pays, and prescription drugs alone. She must support these expenses on a minimum wage salary and the interest from her investments.

Lynn did not provide evidence of his current income -- nor did he file any statement of his current living expenses. Other than testifying that he "couldn't afford" to pay maintenance, he presented no substantive evidence of his alleged inability to do so. On remand, we direct the trial court to enter an award guided by a consideration of all the relevant factors set forth at KRS 403.200, justifying its final award with appropriate findings in light of that statute.

Brenda argues that the trial court erred in failing to make a greater award for her attorney's fees and costs. She emphasizes that because of Lynn's vexatious and harassing behavior, she was required to make several motions before the court to compel him to pay the temporary maintenance as ordered.

Brenda paid her attorney more than \$40,000. She spent an additional sum in excess of \$15,000 on experts and appraisers. The record reveals the parties to be equally intransigent, contentious, and litigious. They both made heavy demands on the trial court, requiring its resolution of numerous matters of lesser import. Their credibility toward each other and the court was frequently strained.

The allocation of attorney's fees is entirely within the discretion of the court. Moss v. Moss, Ky.App., 639 S.W.2d 370, 373 (1982); Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975). We are not persuaded that the trial court abused its discretion.

The judgment of the Boyle Circuit Court is reversed with respect to the maintenance issue alone, and the case is remanded with directions that the trial court enter an appropriate award in favor of the appellant. In all other respects, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael L. Judy
Frankfort, Kentucky

No brief filed for appellee