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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-001502-MR
AND
NO. 2005-CA-000282-MR

THOMAS L. VELTEN

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 00-FC-008395

LYNN PEERS WELCH

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: These appeals arise from the dissolution of the marriage of Thomas Velten (Velten) and Lynn Peers Welch (Welch). The Jefferson County Family Court entered a judgment dissolving the marriage on March 18, 2002. On August 1, 2002, the family court entered a judgment resolving issues related to the parties' property and debts.

Both Velten and Welch filed motions to alter, vacate, or amend that judgment. On December 2, 2002, the family court entered a second judgment, partially modifying its August 1, 2002, judgment and Velten again filed a motion to alter, vacate, or amend. On June 27, 2003, the family court denied Velten's motion. Velten timely filed an appeal from that order. While that appeal was pending, the parties continued to litigate issues related to payment of the judgment before the family court. On July 28, 2004, the family court entered an order assessing interest against Velten on the past due judgment. Velten timely filed an appeal from that order. This Court consolidated Velten's appeals, which raise the following issues: (1) whether the family court made a clear mathematical error in its December 2002 judgment; (2) whether the family court abused its discretion by awarding Welch an inequitable share of the marital property in lieu of maintenance; (3) whether the family court abused its discretion and failed to fairly apportion the parties' retirement accounts and other marital property; and (4) whether the family court's award of post-judgment interest was arbitrary and capricious. For the reasons set forth below, we affirm in part, reverse in part, and remand.

PROCEDURAL BACKGROUND ON APPEAL

At the outset, we note that this appeal was placed in abeyance on December 13, 2004, pending resolution of a procedural issue by the Supreme Court. That issue,

which concerned the timeliness of Welch's cross-appeal, is not pertinent to this appeal and will not be discussed in the body of this opinion.¹

On June 1, 2006, Welch's counsel moved to withdraw. On June 15, 2006, this Court returned this appeal to its active docket and granted Welch's counsel leave to withdraw. Following several procedural motions, Velten ultimately filed his brief and perfected his appeal. Welch did not file a brief, and Velten filed a motion for "confession of error and reversal of judgment" under CR 76.12(8)(c)(iii) and 76.34(6). In response to this Court's Show Cause Order and to Velten's motion, Welch stated that she could not file a brief because she was not represented by counsel. However, Welch did state that she disagreed with Velten's position on appeal, and she requested that this Court not reverse the family court.

The Civil Rules cited by Velten permit this Court to impose sanctions on Welch, up to and including reversing the family court without considering the merits of his appeal. Having reviewed the record, we will address the merits of the appeal; however, where the record reflects a dispute as to a fact, we will accept Velten's version of that fact. CR 76.12(8)(c)(i).

FACTS

Welch and Velten were married on October 14, 1995. During the marriage, both parties worked, Welch as a social worker for the Kentucky Cabinet for Families and

¹ This Court dismissed Welch's cross-appeal as untimely filed. The Supreme Court reversed this Court, finding that the cross-appeal had been timely filed. Subsequently, this Court again dismissed Welch's cross-appeal when she failed to file a brief. Welch did not appeal from that order of dismissal.

Children, and Velten as a computer repairman for Compaq. Welch maintained a separate checking account into which she deposited her earnings and child support she received for her child born from a previous marriage. The parties also maintained a joint checking account into which Velten deposited his earnings. Welch used the funds in the joint account to pay for food and other items for the household, although she deposited very little of her earnings into that account. Welch also used funds from her own account to pay for household items and for the care of her child. Velten used the funds in the joint account to pay bills, the mortgage on the parties' house, and for other expenses. In terms of daily responsibilities, Welch performed the majority of the "domestic chores", i.e. cleaning, cooking, laundry, etc., while Velten performed the majority of the yard work and maintenance on the marital home.

At the time of their marriage, Welch owned a house in Louisville, Kentucky, on Shady Lane (the Shady Lane house) jointly with her mother, Judge Olga Peers (Judge Peers). Velten was the sole owner of a house in Louisville, Kentucky, on Ledges Drive (the Ledges Drive house). On October 23, 1995, Judge Peers executed a quitclaim deed, deeding the Shady Lane house to Welch and Velten. In that deed, Velten, Welch, and Judge Peers certified that the fair market value of the property was \$67,460. That same day, Velten and Welch borrowed \$95,000 against the Shady Lane house. They used the proceeds from the loan to pay off the existing mortgage of \$38,794.99 on the Shady Lane house and to pay Judge Peers \$16,205.01 for amounts owed to her by Welch. The parties then made a down payment on another house in Louisville, Kentucky, on

Parkland Court (the Parkland Court house). They used the remaining loan proceeds of \$35,213.92 plus \$10,000.00 Velten borrowed from his mother and additional funds already in his possession for the down payment. Velten ultimately sold the Ledges Drive house, and he deposited the \$41,179.61 in proceeds from that sale into the parties' joint checking account and repaid his mother for the \$10,000 loan used as part of the down payment on the Parkland Court house. The parties retained the Shady Lane house, and Velten made the mortgage payments on that house until the parties began renting it in May of 1997. The parties continued to rent the Shady Lane house until after they separated. Approximately a year after they separated, Welch returned to live in the Shady Lane house, where she continues to reside. Prior to the dissolution, the parties stipulated that the Shady Lane house had a value of \$105,000. Following the separation, Velten continued to reside in the Parkland Court house until the parties sold it on September 28, 2003, for \$240,000, realizing a profit of \$65,306.32. The family court ordered Velten's attorney to hold those funds in his escrow account, pending final judgment. Because of the commingling of marital and nonmarital funds, as well as Velten's claim of "sweat equity" in both the Shady Lane and Parkland Court houses, the parties were not able to agree to a division of these assets.

In addition to the Shady Lane and Parkland Court houses, the parties had retirement accounts and personalty. Following some dispute, the parties essentially agreed to divide the personalty without intervention from the family court. However, the parties could not agree on the division of Welch's retirement account through the

Commonwealth of Kentucky and Velten's various retirement accounts. These accounts will be discussed in more detail in the Analysis portion of this opinion.

During the course of litigation, Welch requested temporary maintenance. On July 6, 2001, the domestic relations commissioner (the DRC) found that Welch lacked sufficient funds to provide for her reasonable needs. Therefore, the DRC recommended that Welch be awarded temporary maintenance in the amount of \$1,000 per month, retroactive to November of 2000. The family court adopted the DRC's findings and ordered Velten to pay Welch \$1,000 per month in maintenance, pending final judgment. Velten has objected to this award since its inception, arguing that he lacked the funds from which to make the required payments and that Welch had sufficient means to support herself. However, when faced with contempt of court and possible incarceration, Velten paid the past due amount and began making the required monthly payments.

As noted above, after the family court entered its June 2003 order denying Velten's second motion to vacate, alter, or amend, Velten filed an appeal. However, Velten did not post a supersedeas bond. Therefore, Welch undertook various means to collect on the judgment, including garnishing Velten's bank accounts and wages as well as the proceeds from the sale of the Parkland Court house held by Velten's attorney. In addition to disputes regarding the appropriateness of these garnishments and whether Velten could post a supersedeas bond after filing his appeal, the parties disagreed as to how much, if any, interest was due on the judgment. In response to a motion by Velten, the family court entered an order on July 28, 2004, finding that interest began to

accumulate at the rate of 12% beginning on August 1, 2002, the date of the initial judgment. Velten filed an appeal from this order, which was consolidated with his appeal of the judgment.

Ultimately, Velten's attorney, faced with possible contempt of court for failing to comply with the order of garnishment, issued a check to Welch and her attorney for the remainder of the principal due on the judgment. At that time, the parties agreed that the entire principal of the judgment had been satisfied; however, they continued to dispute the amount of interest.

As noted above, the family court issued a judgment in August 2002 and an amended judgment in December 2002. For purposes of this appeal, we note that the family court made two significant changes in its amended judgment: (1) the court recalculated the amount of Welch's marital contribution to the Parkland Court house; and (2) the court recalculated the marital interest in Velten's retirement accounts. These changes will be discussed as necessary below.

With this factual and procedural background in mind, we will address the issues raised by Velten on appeal. In doing so, we will provide additional facts as necessary.

STANDARD OF REVIEW

Under CR 52.01, in an action tried without a jury, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts

them, shall be considered as the findings of the court.” See also *Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, Ky., 602 S.W.2d 427 (1980). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, Ky., 976 S.W.2d 409, 414 (1998); *Uninsured Employers' Fund v. Garland*, Ky., 805 S.W.2d 116, 117 (1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. *Golightly*, 976 S.W.2d at 414; *Sherfey v. Sherfey*, Ky.App., 74 S.W.3d 777, 782 (2002). An appellate court, however, reviews legal issues *de novo*. See, e.g., *Carroll v. Meredith*, Ky.App., 59 S.W.3d 484, 489 (2001). (Footnote omitted).

Hunter v. Hunter, 127 S.W.3d 656, 659 (Ky.App. 2003).

With these standards in mind, we will address the issues raised by Velten.

1. Maintenance

It appears from his brief that Velten is arguing that the family court started with the premise that Welch was entitled to maintenance and then crafted an award that allotted to Welch an inequitable amount of marital property in lieu of maintenance. However, both the August 1, 2002, and the December 3, 2002, judgments refute that argument. In both of its judgments, the family court first classified the property as marital and nonmarital and then divided that property before addressing the issue of maintenance. Furthermore, in the August 1, 2002, judgment, the family court stated as follows:

The trial court is empowered with the ability to award maintenance to either side in a proceeding for the dissolution of marriage in order to alleviate some of the economic pressures of divorce. "The primary thrust of maintenance is towards economic stability. Compensation is allowed to the claiming spouse for loss of marital support and maintenance

which will allow him or her to become self-sufficient." *Moss v. Moss*, Ky. App., 639 S.W.2d 370, 373 (1982). However, the power to award maintenance is contingent upon the Court finding, according to KRS 403.200(1), "that the spouse seeking maintenance: (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (b) Is unable to support himself through appropriate employment." Thus, in order to award maintenance the trial court must find that the spouse lacks sufficient income generating property to provide a sustainable level of financial security and the claiming spouse must also be unable to find employment which would provide this requisite level of economic security.

In this present case, Lynn is making a claim for maintenance in the amount of \$1,000.00 per month for a period of three years, one-half of the duration of the parties' marriage. This Court found above that Lynn has an income of \$30,455.28 per year, or \$2,537.94 per month and reasonable monthly expenses in the amount of \$2,843.40. However, this Court also found that Lynn has a substantial amount of marital and nonmarital assets being awarded to her in the amount of \$92,978.27. Therefore, this Court finds that Lynn has sufficient property to provide for her reasonable needs and is fully able to support herself through proper employment, as such, it would be inappropriate to Order any further spousal maintenance on her behalf.

In the December 2, 2002, judgment, the family court stated as follows:

Lynn has requested this Court reconsider its finding that she is no longer entitled to receive spousal maintenance from Tom on the grounds that the Court found that her monthly income is less than her reasonable monthly needs. However, this Court further found that Lynn was going to receive a great deal of the marital assets and that would compensate her for the discrepancy between her monthly income and her monthly expenses. Throughout the deliberation process, this Court was mindful of the effects of the distribution of property on Lynn's need for maintenance. This Court was also mindful that this was a marriage of

relatively short duration and that Lynn's income has increased during the marriage. Therefore, this Court is sufficiently convinced that Lynn has sufficient resources to meet her reasonable needs.

Lynn has also asserted a further claim for maintenance under the auspices of KRS 403.200(2)(e) in that she has asserted that she has a medical condition that may impact her earning capacity. Not only did Lynn fail to provide any evidence regarding her physical condition, but the factors enumerated in KRS 403.200(2) are only to be considered after the Court finds that a spouse qualifies for maintenance under KRS 403.200(1). Therefore, since this Court has already found that, under KRS 403.200(1), Lynn is able to meet her reasonable needs there is no need [to] consider her medical condition.

The preceding findings by the family court clearly indicate that it undertook the proper analysis in determining Welch's entitlement to maintenance vis-à-vis the division of property. Based on the above, we hold that the family court conducted the proper analysis in determining Welch's entitlement to maintenance.

The only language in either judgment that gives credence to Velten's argument is the following from the family court's December 1, 2002, judgment:

In this present case, the Court balanced Lynn's need for maintenance against her percentage of the marital estate and determined that if she was denied maintenance it would be imperative that she be given a reasonable portion of the marital estate. As a result, this Court found that Lynn was entitled to 45% of the marital estate and Tom was entitled to 55%.

As noted by the family court, when dividing marital property, the court should consider not only the contribution each made to the acquisition of the marital

property but also the "[e]conomic circumstances of each spouse when the division of property is to become effective[.]" KRS 403.190(1)(d). Taking the language in both judgments as a whole, it is clear that the family court did what was required by KRS 403.190(1), i.e., it took into account Welch's economic status when dividing the marital property. Therefore, we discern no error in the family court's reasoning.

Finally, on this issue, Velten argues to this Court that "Ms. Welch also received \$8,000.00 in additional *pendente lite* maintenance to cover her alleged period of recovery during which she was not otherwise going to be receiving compensation from the state. . . . [T]hat representation proved to be false." However, the record reveals that Welch was not paid any additional amount for the time she was off work following her surgery. In fact, the DRC's report, which was adopted by the family court, specifically stated that, "Your commissioner declines to recommend an increased amount of maintenance for the weeks Ms. Welch anticipates being off for surgery. However, she recommends that any arrearage which has accrued in temporary maintenance payments from the November 6, 2000, filing of Ms. Welch's motion to the date of the Court's Order shall be paid to Ms. Welch during the time she is off work for her surgery." The \$8,000 payment to which Velten apparently is referring was not an additional payment, but simply the payment of any arrearage. The fact that the arrearage was ordered to be paid when Welch was off work did not increase the amount of the obligation. It only effected when that obligation became due.

2. Apportionment of Retirement Accounts and Other Marital Property

In its August 2002 judgment, the family court found that Velten had three retirement accounts with a marital value of \$82,211.69 and that Welch had two retirement accounts with a marital value of \$11,960.61. Because of Welch's status as an employee of the Commonwealth, the family court found that the proceeds in her retirement accounts were exempt from division as marital property. Therefore, pursuant to KRS 403.190(4), the family court deducted \$11,960.61 from the marital portion of Velten's retirement accounts, leaving \$70,251.08 of those accounts subject to division. The family court then divided those accounts, giving 45% to Welch and 55% to Velten. In its December 2002 judgment, the family court kept the percentages in place; however, it applied those percentages to the entire \$82,211.69 marital portion of Velten's retirement accounts.

Velten argues that the family court made a clear mathematical error in its December 2002 judgment when it calculated the divisible portion of his retirement accounts. We agree. In its August 2002 judgment, the family court correctly gave Velten credit for the amount of Welch's retirement account that was not subject to division. However, the family court did not give Velten that credit in its December 2002 judgment. Furthermore, the family court did not provide any rationale for its failure to give Velten the statutorily mandated credit in its December 2002 judgment. Therefore, we reverse and remand that portion of the family court's December 2002 judgment awarding Welch a \$36,995.26 interest in Velten's retirement accounts. On remand, the family court must

give Velten the proper credit for the amount in Welch's retirement accounts that is not subject to division as marital property.

We note Velten's argument that the family court's order that he buy out Welch's interest in his retirement accounts was arbitrary and capricious. Velten has not pointed to any case law in support of his argument. Furthermore, given the animosity between the parties, we hold that the family court's remedy was neither arbitrary nor capricious, as it provided for immediate finality rather than the delayed finality the award of a percentage available on retirement would have provided. Finally, we note that this remedy by the family court took into consideration Welch's immediate financial needs, one factor to be used in determining the division of marital property.

3. Division of Marital Property

Velten argues that the family court's division of marital property on a 45/55 percentage basis was arbitrary and capricious. In support of his argument, Velten notes the court's finding that his income during the marriage "was used for 90% of the parties' necessary expenses." Velten also points to his contributions to the maintenance of the marital estate both during the marriage and after the separation.

As noted above, KRS 403.190(1) sets forth several factors the court must consider when dividing marital property. Those factors are:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;

(c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective

Velten would have preferred that the family court place greater weight on the parties' contribution to the acquisition of the marital property than on the other factors. However, as the family court noted in its December 2002 judgment, contribution to the acquisition of marital assets is not the sole factor. It is clear from even a cursory reading of the family court's judgments that the court took all of the statutory factors into consideration. Therefore, we hold that the family court's findings regarding the division of marital assets was correct based on the facts as the family court presented them.

4. Interest

Welch undertook a number of steps to enforce the judgment, including garnishing Velten's bank accounts and salary as well as his attorney's escrow account. During the ensuing litigation, Velten moved the family court for a determination regarding the rate of post-judgment interest and the date when interest began to accrue. The family court held that interest began to accrue at the rate of 12% per annum beginning on the date of the first judgment, August 1, 2002. Velten appeals those findings by the family court, arguing that the damages were not liquidated and he was entitled to a hearing prior to the assessment of interest; that the assessment of interest was inequitable; and that interest should not have begun to accrue until June of 2003, when

the family court ruled on Velten's second motion to alter, vacate, or amend. We will address these issues in the same order.

In its order assessing interest, the family court stated that

KRS 360.040, which provides that . . . 'a judgment shall bear twelve percent interest compounded annually . . . ' is mandatory and provides no leeway [sic] as to the rate of interest. . . .

The Court is not convinced by the Respondent's argument that it is not logical to calculate interest until the judgment was final for all purposes. At this point in time it is even possible to obtain pre-judgment interest in appropriate situations.

This Court rendered a judgment on August 1, 2002 on a trial held in March 2002. The judgment was described as final. It was the intention of the Court that interest begin to run at the point of the judgment. Having considered arguments of both parties, it is hereby ordered that interest at the rate of twelve percent per annum ran and began to run from the date of the entry of the judgment on August 1, 2002.

KRS 360.040 provides that

[a] judgment shall bear twelve percent (12%) interest compounded annually from its date. . . . Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%). All interested parties must have due notice of said hearing.

Liquidated damages are those damages fixed by operation of law or by agreement. *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136 (Ky. 1991).

In this case the damages, the amount Velten owes under the family court's final judgment, were not liquidated. There was no agreement between Velten and Welch regarding the amount of damages and those damages were not fixed by operation of law. Therefore, the family court could have set interest at 12% or a lesser rate, and the family court's finding that it had no leeway in assessing the interest rate is in error.

As to Velten's entitlement to a hearing on the issue of interest, the family court held such a hearing on March 15, 2004. During that hearing, the parties discussed the issue of interest at length with the family court and the court gave the parties additional time to file response and reply briefs as they might believe necessary. No additional evidence was presented; however, neither party requested the opportunity to present any additional evidence. Therefore, we hold that the family court met its obligation to hold a hearing on the issue of interest.

Based on the above, we reverse the family court's finding that interest shall accrue at 12% and remand this matter to the family court for a determination of whether that interest rate is appropriate as set forth in KRS 360.040. In making that determination, the family court must take into account whether the award of interest is inequitable as provided in *Guthrie v. Guthrie*, 429 S.W.2d 32 (Ky. 1968); *Young v. Young*, 479 S.W.2d 20 (Ky. 1972); *Courtenay v. Wilhoit*, 655 S.W.2d 41 (Ky.App. 1983); and *Hoskins v. Hoskins*, 15 S.W.3d 733 (Ky.App. 2000). However, the family court need not hold any additional hearings on this issue.

As to when interest began to accrue, we hold that the family court correctly found that interest began accruing as of the date of the first judgment. Although this case differs procedurally from *Stephens v. Stephens*, 300 Ky. 769, 190 S.W.2d 327 (1945), we find the reasoning in that case to be persuasive if not controlling. In *Stephens*, the trial court entered a judgment in the amount of \$2,702.28. On appeal, the former Court of Appeals reduced the judgment amount to \$1,658.28. On remand, the trial court "refused to allow interest from the date of the original judgment." *Id.* at 327. A second appeal was filed and the Court held that

[t]he effect of the decision on the first appeal was to uphold the judgment of the lower Court to the extent of \$1,658.28; and, since interest runs from the date of the judgment, interest on this amount should have been allowed in the judgment entered by the Special Judge. KRS 360.040.

Id. See also *Waterbury v. Waterbury*, 281 Ky. 107, 134 S.W.2d 1009 (1939); and *Elpers v. Johnson*, 386 S.W.2d 267 (Ky. 1965).

As with the appeal in *Stephens*, the family court reduced the amount of the judgment when it recalculated the marital interest in the proceeds from the refinancing of the Shady Lane house and in Velten's retirement accounts. While those recalculations changed the total amount due Welch, as noted by the Court in *Stephens*, the interest on the reduced amounts began accruing as of the date of the judgment. Therefore, we perceive no error in the family court's award of interest on the judgment dating from the initial judgment.

CONCLUSION

As set forth above, we hold as follows:

1. The family court did not commit error in its analysis regarding Welch's entitlement to marital property vis-à-vis her entitlement to maintenance.

2. The family court did commit error regarding the characterization of Velten's retirement accounts. Therefore, the family court is reversed as to this issue and this case is remanded for the family court to recalculate the marital portion of Velten's retirement accounts, taking into account KRS 403.190(4).

3. The family court erred when it held that the 12% interest rate in KRS 360.040 is mandatory. Therefore, the family court is reversed on that issue and this matter is remanded so that the family court can make findings regarding whether the assessment of interest is inequitable and at what rate interest should accrue, if at all. The family court's finding that interest, at whatever rate, began accruing on the date of the first judgment is correct and we affirm the family court on that issue.

For the foregoing reasons, the judgment of the Jefferson Family Court is affirmed in part and reversed in part. and this matter is remanded for procedures consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

J. Fox DeMoisey
Louisville, Kentucky