

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000022-MR

MARC H. JONES

APPELLANT

v. APPEAL FROM WARREN FAMILY COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 03-CI-01364

WENDY LEIGH JACOBS JONES

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TACKETT, JUDGE: Marc Jones appeals from a judgment of the Warren Family Court ordering him to pay maintenance and child support and to file taxes for the years 1999 through 2003 as "married, filing separately" and pay any tax liability that results. Marc argues that the trial court erred in requiring him to pay his ex-wife \$1,500.00 per month for five years because the lifestyle enjoyed by the parties was largely subsidized by his parents and because his ex-wife has the ability to quickly complete a

college degree and support herself. He further contends that the amount of child support was incorrectly calculated. Finally, he argues that it was improper to require him to file back taxes as "married, filing separately" because that would result in a higher tax liability than filing jointly with his ex-wife. We disagree and affirm the trial court's decision.

Prior to her marriage, Wendy Jones spent five years in the Air Force and came within nine credit hours of earning her college degree. She married Marc on September 11, 1992, and the marriage lasted twelve years. After their first child was born, Marc and Wendy moved into a duplex owned by his parents. They paid rent the first six months, but continued to live in the duplex for about four years. In 1997, Marc and Wendy moved into a farmhouse, also owned by his parents. Marc's father helped the couple build a deck and make cosmetic changes to the home. Marc worked outside the home, sometimes as many as four jobs at once, while Wendy stayed home to care for their two children. Except for a brief stint where she kept other children in their home, Wendy did not earn money during the marriage.

Marc's income fluctuated dramatically with his highest and lowest yearly salaries being \$212,871.00 and \$13,055.00 respectively. Nevertheless, the couple enjoyed a very comfortable lifestyle. They owned two show horses, a truck, and a horse trailer. Their sons attended private school, and Wendy

had several cosmetic procedures. The parties separated in April 2003 and, during their separation, Marc bought Wendy a new truck which cost approximately \$30,000.00. Wendy asked for and received temporary maintenance in the amount of \$3,200.00 per month. Prior to entering a decree of dissolution, the trial court held a hearing and heard evidence from both parties and their witnesses.

The final decree was entered on September 24, 2004. The trial court restored each party's non-marital property, divided up marital property and marital debt, granted Marc and Wendy joint custody of their minor sons (aged eleven and seven), set child support and maintenance obligations, and ordered Marc to file taxes and pay any liability for the years 1999 through 2003. Marc filed a motion to alter or amend the trial court's order which was denied. This appeal followed.

Marc presents three grounds for invalidating the trial court's award of maintenance to Wendy. First, he argues that he should not be required to pay maintenance because the standard of living established during the marriage largely resulted from his parents' generosity to the couple. In addition, he claims that Wendy is better able to earn an income than he is because she lacks only nine hours to complete her college degree. Finally, he argues that her maintenance should be reduced due to

marital fault. Kentucky Revised Statute (KRS) 403.200 outlines the following conditions governing maintenance awards:

- (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds 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 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.
- (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
 - (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
 - (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
 - (c) The standard of living established during the marriage;
 - (d) The duration of the marriage;

- (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

The standard of review on appeal is abuse of discretion.

At the time of this action, Wendy was forty years old and had been out of the work force for over a decade. She had submitted monthly expenses totaling over \$9,000.00. The trial court found that many of these expenses were extravagant; nevertheless, the order also stated that Wendy did not have enough marital property to support her reasonable needs. Because she was able-bodied and her children were not infants, the trial court determined that Wendy was able to work outside the home; however, her lack of employment experience and job skills left her unable to support herself. Having established that Wendy met the requirements of KRS 403.200(1) to receive an award of maintenance, the trial court proceeded to consider the factors under KRS 403.200(2) in setting the amount and duration of the award.

Wendy was awarded \$1,500.00 per month for five years with the award terminating in the event that she remarried. This sum was less than half the amount that Marc had been paying in temporary maintenance. The trial court's order listed each factor found in KRS 403.200(2) and explained how those factors

impacted its decision. Marc argues that the trial court gave insufficient weight to subsection (2)(b) which considers the amount of time necessary for Wendy to earn a degree and support herself. The trial court found that Wendy could complete her degree in electrical engineering technology in approximately one year. The remaining years of maintenance represent a period of time when she would be establishing herself professionally, as opposed to Marc who has years of experience in his chosen career.

Marc also contends that the trial court gave too much weight to the couple's marital standard of living because their lifestyle was heavily subsidized by his parents. He argues that the trial court's order would require his parents to support his ex-wife in order to prevent him from being jailed for contempt for failure to pay maintenance. We disagree. During the last five years of their marriage, Marc's income fluctuated wildly; nevertheless, he stated that he should be able to earn between fifty and sixty thousand dollars a year. The trial court, after finding Marc to be underemployed, agreed with this assessment and imputed him with additional income. Based on what Marc should have been earning, he would have an income of \$4,167.00 per month, and the expenses he submitted totaled only \$1,760.00. Deducting his child support, left Marc with \$1,626.00, and his maintenance obligation was set at \$1,500.00. Thus, the trial

court found that Marc was able to meet his own needs while paying maintenance to Wendy. KRS 403.200(2)(f). Marc has failed to show that the amount or duration of the maintenance awarded to his ex-wife after a twelve-year marriage was an abuse of the trial court's discretion. He makes one last argument relating to maintenance: that the award should be reduced due to marital fault because of Wendy's alleged failure to allow marital relations for months at a time and her failure to do his laundry. We find this argument to be thoroughly meritless and decline to consider it in any more detail.

Marc next argues that the trial court erred with regard to the amount of child support he was ordered to pay. Since both parents were found to be underemployed, the trial court imputed additional income to the parties. Due to her lack of job experience, Wendy was imputed minimum wage earnings. To arrive at a figure for Marc, the trial court averaged the salaries he had earned for the previous five years and imputed an income of \$63,783.00. The income used to arrive at that figure was as follows:

1999	\$ 27,191.00
2000	\$ 70,913.00
2001	\$212,871.00
2002	\$ 48,791.00
2003	\$ 13,055.00

Marc now argues that it was error for the trial court to include his income from 2001 since it over inflated his imputed income.

Accepting his argument would have reduced his imputed income to \$34,000.00. Wendy points out that excluding the years 1999 and 2003, when her ex-husband earned comparatively little, would increase his imputed to \$110,858.00 with a monthly income of \$9,238.19, which more closely matched the parties' household expenses. The imputed income of \$63,783.00 is close to the \$60,000.00 figure which was accepted as reasonable by Marc in his testimony. Thus, he fails to prove it was error for the trial court to use the average of his previous five years' earnings to determine an imputed income.

Finally, Marc argues that the trial court erred by requiring him to file taxes for the years 1999 through 2003 as "married, filing separately." In support of this position, he presented testimony from an accountant that filing separately would increase his liability by thirty percent over filing jointly. While acknowledging that possibility, the trial court noted filing jointly would impose joint liability on Wendy to pay the back taxes. Wendy stated that she knew little about their financial affairs and was unaware that her husband had not filed their taxes for five years. Since Marc was the only member of the household earning an income during that time, we disagree with his assertion that Wendy should be jointly liable for his failure to file taxes.

For the foregoing reasons, the judgment of the Warren Family Court is affirmed.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

TAYLOR, JUDGE: I concur with the majority opinion except as pertains to the filing of taxes for tax years 1999 through 2003, to which I respectfully dissent. I believe the family court should have ordered the filing of the tax returns in the manner that would have resulted in the least amount of tax owed by the parties, regardless of the IRS liability issue. Under KRS 403.190(3) the income earned is clearly marital property. Accordingly, since both parties benefited from this income, the tax liability is a marital debt. Gipson v. Gipson, 702 S.W.2d 54 (Ky.App. 1985).

Once the tax debt was determined, the family court should have allocated the payment obligation between the parties like any other marital debt. The family court ignored the fact that the tax debt was marital. Instead, the controlling factor cited in the family court's findings on this issue was whether appellee would have personal liability to the IRS. I believe the family court clearly abused its discretion in this regard. See Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001).

Appellee benefited from the marital income when earned and thus, should not be immune from being responsible for her

joint liability for the tax to the IRS, assuming filing jointly resulted in the least amount of tax owed. Even if filing separately had resulted in less tax owed, the debt is still marital in my opinion.

Therefore, the fact that appellee may have been jointly liable for payment of the tax with the petitioner to the IRS should not be relevant in determining how the returns should be filed and in allocating tax liability as a marital debt. The family court's finding is both unreasonable and unfair under the circumstances in my opinion. See Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002).

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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