

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001086-MR

BRIAN CHRISTOPHER HERRICK

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 10-CI-00198

KATHY JEAN HERRICK

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: Brian Christopher Herrick appeals the trial court's orders of March 10, 2011, and May 19, 2011, whereby the court divided the parties' property and debt, ordered maintenance and made an award of attorney's fees in a dissolution of marriage proceeding. After a review of Brian's argument, the record, and the applicable law, we agree that the trial court exceeded its discretion

and accordingly, reverse and remand this matter, in its entirety to the trial court for further proceedings.

The parties were married for approximately twenty-four years prior to the dissolution of marriage. During this time, Kathy worked as a nail technician with a taxable income of less than minimum wage. Brian worked as an electrician and in the later years of the marriage, purchased his father's electric company, Eastern Suburban Electric ("ESE"), which primarily did work for convenience stores and gas stations, in addition to selling products necessary to operate a gas station. In 2008, ESE provided Brian with a gross income of \$288,000.00. Thereafter, with the national economic downturn, the disruption of sales of the product line, and work being moved in-house with larger gasoline chains, ESE fell on hard times.

In 2009, Brian's gross income fell to \$92,000.00; in 2010, his income was \$30,000.00. During the time period that ESE was very profitable, the parties lived lavishly. As their income diminished, Brian sold many of the items that had been purchased during the better times including gold coins, Sea Doos, and collectible cars. According to Brian, during the hard times Kathy did not curtail her spending. At the time of the dissolution of marriage, the parties had no savings account, no retirement account, no life insurance policy, and very few assets, all overlain with sizable debt. The trial court held multiple hearings and entertained multiple motions related to this dissolution of marriage. After the evidence was presented, the court entered two orders on March 10, 2011, and May 19, 2011,

whereby the court divided the parties' property and debt, ordered maintenance and made an award of attorney's fees.

In so doing, the court found that Brian's current income to be \$30,000, or \$2,500 per month, which was significantly less than he earned in the past years. The court, at that time, then made a finding that the national economy would improve and that ESE would become profitable again and, thereupon, ordered maintenance. In ordering maintenance,¹ the court noted that it was through no fault of Kathy's that Brian suffered a loss of income and that Brian, who owns a business that was successful in the past and is beginning to be profitable again, has the advantage to potentially increase income.² Thus, the court originally ordered maintenance in the amount of \$3,000 per month for ten years, reduced to \$1,000 per month for five years. This was modified subsequently to \$2,200 per month for ten years and \$1,000 per month for five additional years, in light of Brian's argument that his maintenance obligation was more than he currently made per month. The court concluded that Kathy could not expect a lifestyle equal to that which the parties had grown accustomed to in the years leading up to the separation and that she needed an incentive to increase her own personal earnings.

¹ The court concluded that maintenance was appropriate given the parties' lengthy marriage, her inability to earn a reasonable living through appropriate employment even though the court imputed minimum wage income to Kathy, and the standard of living established during the marriage.

² The trial court was presented evidence to the contrary of this at the April 21, 2011, hearing when counsel for Brian notified the court that Brian was contemplating bankruptcy.

The court then ordered the marital residence to be sold with any net proceeds awarded to Kathy so that she could obtain appropriate housing, in light of Brian's failure to timely comply with court orders mandating that he pay the mortgages and utilities and his ability to maintain a higher standard of living as the owner of a formerly successful business. If the sale of the marital residence resulted in a financial loss, Brian was to be solely responsible for same. Additionally, Brian was awarded only the personal property he removed from the marital residence; the remaining property was awarded to Kathy.³

The court then assigned all of the parties' credit card debt to Brian. The court found that Kathy did not have knowledge of Brian's credit cards during the marriage⁴ and, thus, that debt belonged to him. The court assigned all of Kathy's credit card debt to Brian as well, reasoning that Kathy had incurred said debt, in part, because of Brian's failure to provide for her as he had previously during the twenty-four years of their marriage. Thus, all of Kathy's debt obtained during the parties' separation was assigned to Brian.

The court then noted that Brian on several occasions violated court orders and determined that he should be responsible for Kathy's attorney's fees. The court stated that Brian could purge the contempt of court by paying the

³ Brian argues that this too was erroneous. On remand, the trial court will have the opportunity to address this matter by valuing the property and applying the statute and applicable case law in its division.

⁴ We note that within the opinion the court stated that Kathy was given access to credit cards on page 10 and yet on page 8 the court says that she did not have access to these accounts and was not given a card for any account and thus did not incur any of the debt. On remand, the trial court can clarify this matter.

attorney's fees and costs as ordered. In so ordering, the court noted that parties' financial resources imbalance and ordered Brian to pay Kathy's attorney's fees and costs in the amount of \$20,000. It is from these orders that Brian now appeals.

On appeal, Brian presents three arguments, which he maintains necessitate reversal of the trial court's orders. First, Brian argues that the court erred in the division of the parties' property including the marital house and the debt. Second, Brian argues that the trial court erred in its award of maintenance to Kathy. Third, Brian argues that that court erred in its award of attorney's fees.⁵ Kathy has not filed an appellee brief. With Brian's arguments in mind we turn to our applicable jurisprudence.

In dividing marital property and debt equitably, a trial court has wide latitude, and absent an abuse of discretion we shall not disturb the trial court's ruling. *See Smith v. Smith*, 235 S.W.3d 1 (Ky.App. 2006), and *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Similarly, in maintenance awards, the trial court is afforded a wide range of discretion, which is reviewed under an abuse of discretion standard. *See Platt v. Platt*, 728 S.W.2d 542, 543 (Ky.App. 1987). Abuse of discretion is that which is arbitrary or capricious, or at least an unreasonable and unfair decision. *See Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). However, the trial court's conclusions of law are reviewed *de novo*. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky.App. 2009).

⁵ Additionally, Brian argues that the court impermissibly disallowed testimony at the CR 59.05 hearing regarding the current financial state of the parties. We believe this to be moot in light of our reversal and remand.

As his first basis for appeal, Brian argues that the court erred in the division of the parties' property including the marital house and the debt. Brian additionally argues that the trial court erred in its evaluation, or lack thereof, of ESE. The trial court awarded Brian all of ESE in lieu of a portion of the marital residence. We agree with Brian that the trial court abused its discretion in dividing the marital assets in light of the assets and debts of the parties.

The division of marital property, in this case the marital residence, is controlled by KRS 403.190 which states:

In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (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, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

Our courts have interpreted KRS 403.190 to require a three-step process. As stated in *Hunter v. Hunter*, 127 S.W.3d 656, 659-60 (Ky.App. 2003), “The trial court's division of property involves a three-step process: (1) characterizing each item of property as marital or nonmarital; (2) assigning each

party's nonmarital property to that party; and (3) equitably dividing the marital property between the parties.” (Internal citations omitted).

Necessarily, KRS 403.190 requires a court to place a value on all the parties' property in order to equitably divide the parties' marital estate. *See Gaskill v. Robbins*, 282 S.W.3d 306, 315 (Ky. 2009) (“The trial court must fix a value, and there should be an evidence-based articulation for why that is the value used.”). *See also Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky.App. 2007) (KRS 403.190 requires a court to divide the marital property in “just proportions” which is not necessarily equally.).

Sub judice, we agree with Brian that the trial court exceeded its discretion in dividing and awarding the marital property; such is reversible error. Simply stated, the court must first have placed a value on the parties’ property, including the marital residence and ESE, before it could assess an equitable division of the parties’ marital estate.

We likewise agree with Brian that the trial court abused its discretion in dividing the parties’ debt. As stated in *Guffey, infra*,

Although Kentucky Revised Statute[s] (KRS) 403.190 creates a presumption that property acquired during a marriage is marital, no such presumption exists for debt acquired during a marriage. *Bodie v. Bodie*, 590 S.W.2d 895, 896 (Ky.App. 1979). When assigning marital debt, trial courts should consider:

1) whether the debt was incurred purchasing marital assets; 2) whether it was necessary for maintenance and support of the family; 3) economic circumstances of the parties; 4) extent of participation and receipt of benefits.

Neidlinger v. Neidlinger, 52 S.W.3d 513, 523 (Ky. 2001)
(internal citations omitted).

Guffey v. Guffey, 323 S.W.3d 369, 373 (Ky.App. 2010). *Sub judice*, the trial court did not fully consider the factors set forth in *Guffey*. This, again, is grounds for reversal.

As his second basis for appeal Brian argues that the trial court erred in its' award of maintenance to Kathy. Again, we agree.

KRS 403.200(1) provides that a court may grant maintenance only if it finds the spouse seeking it: (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.

An award of maintenance is appropriate when a party is not able to support himself or herself in accord with the standard of living enjoyed during the marriage, and the property awarded upon dissolution of marriage is insufficient to provide for his reasonable needs. *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky.App. 1994).

Once the trial court has decided that maintenance is appropriate, it must then consider all relevant factors in determining the amount and duration of maintenance pursuant to KRS 403.200(2). Such factors include the spouse's financial resources, the time needed to obtain sufficient education or training, the standard of living during the marriage, the duration of the marriage, the age and

condition of the spouse seeking maintenance, as well as the ability of the paying spouse to meet his or her needs.

Sub judice the trial court ordered maintenance in the amount \$2,200 per month for ten years and \$1,000 per month for five additional years, even though Brian currently earns \$2,500 per month. The trial court reasoned that the national economy would improve and, thus, ESE would become profitable again justifying the large amount of maintenance relative to Brian's current income. We find such reasoning to be in error.

First, we disagree with the trial court's assumption that ESE will become profitable. Even if the national economy recovers, this does not guarantee ESE to be profitable once again. Without expert testimony to such economic forecasts and projections for the profitability of ESE, the trial court erred in making such a finding.⁶ Additionally, we fail to see how the statutory factor enumerated in KRS 403.200(2)(f), "The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance" was considered given that the award of maintenance leaves Brian with \$300 at his current income. Without such consideration, based on the evidence within the record, we must reverse the award of maintenance.

⁶ However, "the court can certainly take judicial notice of our area's present high unemployment rate and economic recession." *Dotson v. Dotson*, 864 S.W.2d 900, 902 (Ky. 1993).

Third, Brian argues that that court erred in its' award of attorney's fees.⁷ KRS 403.220 states:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

Per statute a court *may* award attorney's fees, but *must* consider the financial resources of both parties.

An award of attorney's fees under KRS 403.220 is only supported by an imbalance in the financial resources of the parties. *Lampton v. Lampton*, 721 S.W.2d 736, 739 (Ky.App. 1986) (internal citations omitted). *Sub judice*, the trial court's motivation for an award of attorney's fees appears to be for contempt. We believe that this should properly be considered pursuant to the court's contempt powers rather than made under KRS 403.220.⁸ Indeed, in *Lampton, supra* this Court noted the inherent power of the court to assess attorney fees under CR 37 in a dissolution of marriage proceeding:

An allowance of attorney's fees is authorized by KRS 403.220 only when it is supported by an imbalance in the

⁷ In ordering Brian to pay Kathy's attorney's fees, the court stated that it "may" consider the financial resources of both parties and require one party to pay the fees and costs incurred by the other when there is a demonstrable imbalance in the parties' financial resources. This statement was grammatical in nature as KRS 403.220 mandates such a consideration.

⁸ On remand, the trial court may consider KRS 403.220 and conclude that an imbalance in the financial resources of the parties exists and appropriately award attorney fees.

financial resources of the respective parties. *Sullivan v. Levin*, Ky., 555 S.W.2d 261, 263 (1977). *Accord, Bishir v. Bishir*, Ky., 698 S.W.2d 823, 826 (1985). Since the resources of the parties here were approximately equal, an award of attorney fees under the statute was an abuse of discretion under the circumstances.

However, the circuit court's award of attorney fees appears to have been motivated, at least in part, by appellant's obstruction of and refusal to cooperate with discovery. On remand, the circuit court should determine what portion of appellee's attorney fees were the result of such obstruction and make an appropriate award under CR 37.

Lampton at 739.⁹

Without a proper valuation of the parties' financial resources, i.e., a value placed on the assets, the trial court could not properly consider the financial resources of the parties per statute.¹⁰

⁹ See also *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990) wherein the Kentucky Supreme Court discussed KRS 403.220 and CR 37.01:

The amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct....

We agree that many of the costs and fees were unnecessary in the sense that a good deal of the court's time and a substantial part of the costs and fees assessed could have been avoided by candor and cooperation. Under such circumstances, there is no abuse of discretion nor any inequity in requiring the party whose conduct caused the unnecessary expense to pay it. CR 37.01.

In *Bishir v. Bishir*, Ky., 698 S.W.2d 823 (1985), this court specifically held it was proper to award fees incurred by the wife in a post judgment CR 60.02 proceeding, even though, in that case, the wife's motion was overruled. The disparity of financial resources was sufficient grounds. In this instance, financial inequality justifies the award, KRS 403.220. Tom's obstructive tactics and conduct, which multiplied the record and the proceedings, justify both the fact and the amount of the award. KRS 403.220, CR 37.01.

¹⁰ *Sexton v. Sexton*, lists other considerations for a trial court:

In addition to the parties' financial resources, the trial court should consider other relevant factors, including those set forth by our predecessor in *Boden v. Boden*:

- (a) Amount and character of services rendered.
- (b) Labor, time, and trouble involved.

As such, on remand, the trial court will have to assess the appropriateness of an award of attorney's fees in light of our jurisprudence.

In light of the aforementioned, we reverse and remand this matter in its entirety to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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(c) Nature and importance of the litigation or business in which the services were rendered.

(d) Responsibility imposed.

(e) The amount of money or the value of property affected by the controversy, or involved in the employment.

(f) Skill and experience called for in the performance of the services.

(g) The professional character and standing of the attorneys.

(h) The results secured.

Additionally, "obstructive tactics and conduct, which multiplied the record and the proceedings" are proper considerations "justify[ing] both the fact and the amount of the award."

Sexton v. Sexton, 125 S.W.3d 258, 272-73 (Ky. 2004) (internal citations omitted).