



In the Missouri Court of Appeals Eastern District

DIVISION TWO

DMITRIY DUBROVENSKIY,	)	No. ED108836
	)	
Petitioner/Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
v.	)	
	)	
YELENA VAKULA,	)	Honorable Ellen W. Dunne
	)	
Respondent/Respondent.	)	Filed: April 13, 2021

Introduction

Dmitriy Dubrovenskiy (Husband) appeals from the trial court's amended judgment of dissolution of marriage. Husband raises five points on appeal, challenging the trial court's granting of nominal modifiable maintenance, division of two savings accounts, assignment of the child tax exemption, order requiring Husband to pay a portion of Yelena Vakula's (Wife) attorney's fees, and unequal division of marital property. We affirm.

Factual and Procedural Background

Husband and Wife were married on August 14, 2013. Their only child together was born in 2015. On June 22, 2017, Husband filed a Petition for Dissolution of Marriage. Several weeks later, Wife filed a Counter Petition for Dissolution of Marriage. A hearing was held, and the court entered a Judgment Pendente Lite (JPL) in January 2018. The JPL ordered Husband to pay temporary maintenance and child support to Wife and awarded him limited custody of the minor child.

Both Husband and Wife filed motions to amend the JPL. Following a hearing, the court issued an Amended JPL, modifying its findings as to Husband's and Wife's reasonable needs. Husband appealed the Amended JPL and this Court affirmed. See Dubrovenskiy v. Vakula, 574 S.W.3d 287 (Mo. App. E.D. 2019). Husband also filed a motion seeking additional custody. In November 2018, the trial court granted Husband's motion, awarding him 50 percent custody of the minor child. Thereafter, the parties entered into a Stipulated Parenting Plan that provided for joint legal custody and joint physical custody.

Trial occurred in May 2019. In addition to the Stipulated Parenting Plan, the court also incorporated a Trial Stipulation that identified the separate property of Husband and Wife. At trial, the court received numerous exhibits and heard testimony from both Husband and Wife. Significantly, Wife testified to having held numerous contract-based jobs during the marriage. She also testified to having had several periods of unemployment during the marriage, and to typically being paid a much lower hourly rate than she was being paid at her current job.

The trial court entered its judgment on November 18, 2019. After considering the parties' changed employment circumstances, the court found Husband's reasonable needs to be \$2,876 per month. The court found Husband's net monthly income to be \$3,523.73, leaving him with a surplus of \$647.73. Likewise, the court found Wife's reasonable needs to be \$3,359.32 and her net monthly income to be \$3,647.37, leaving her with a monthly surplus of \$288.05. After analyzing and weighing each factor under section 452.335.2 RSMo, the court found "Wife is able to meet her reasonable needs and therefore denies Wife's request for maintenance."

The court also found there had "been some level of domestic violence against Wife." However, the court stated, "Wife engaged in some abusive behavior to Husband" and Wife likely exaggerated the extent of the abuse. Notably, the court awarded Wife 51 percent of the parties' marital property and awarded Husband 49 percent of their marital property. The court then

detailed what it considered to be marital property and explained how it reached its calculations. Specifically, the court ruled favorably to Wife regarding the division of Fidelity and JP Morgan accounts acquired by Husband before their marriage. The court held Husband failed to show the appreciation attributable to the account's nonmarital component, and therefore the court sided with Wife in finding a larger portion of both accounts to be marital property.

The court ruled Wife was entitled to take the tax exemption for the minor child each year. The court then considered Wife's request for Husband to pay her attorney's fees. Acknowledging Husband already paid \$12,500 to Wife in attorney's fees as ordered in the JPL, the court ordered Husband to pay an additional \$15,000 of Wife's attorney's fees.

Following the judgment, Husband filed a Motion to Amend, Modify or Correct Judgment or for New Trial. In his motion, Husband challenged the court's determinations regarding the division of the bank accounts, arguing the court should have found a smaller amount of each account to be considered marital property. Additionally, Husband requested the court eliminate his obligation to pay \$15,000 of Wife's attorney's fees.

Similarly, Wife filed a Motion to Amend Judgment of Dissolution. In her motion, Wife requested the court award her \$1 per month in statutory, modifiable maintenance because she was a contractual employee and therefore may not be continuously employed and may not continue to make the same hourly rate. Wife also requested the court award her additional attorney's fees.

On March 17, 2020, the court entered both an Amended Judgment of Dissolution of Marriage and an Order and Judgment Concerning Motions to Amend. In response to Husband's citations to Gambrel v. Gambrel, 943 S.W.2d 314, 315 (Mo. App. E.D. 1997) and Pruitt v. Pruitt, 94 S.W.3d 429, 434 (Mo. App. E.D. 2003), the court utilized the method from those cases in determining the portions of the Fidelity account that were marital versus nonmarital property.

Accordingly, the court amended the judgment to reduce the marital portion of the Fidelity account. However, the court did not reduce the marital allocation of the JP Morgan Account because Husband provided no evidence as to the length of time he held the account before their marriage.

In response to Wife's motion, the court awarded Wife nominal modifiable maintenance of \$1 per year, largely because of Wife's uncertain employment prospects and reduced award of marital property. Again noting the reduced marital property award to Wife and her uncertain employment prospects, the court ordered Husband to pay \$27,500 in attorney's fees to Wife.

This appeal follows.

Points Relied On

Husband raises five points on appeal. In his first point, Husband contends the trial court erred in awarding Wife nominal modifiable maintenance. In his second point, Husband argues the court erred in awarding Wife 15 percent of the Fidelity account and 17 percent of the JP Morgan account. In his third point, Husband contends the court erred in awarding Wife the tax exemption for the minor child. In his fourth point, Husband argues the court erred in ordering him to pay a portion of Wife's attorney's fees. Finally, in his fifth point, Husband claims the court erred by awarding an unequal division of the marital property.

Point I - Nominal Modifiable Maintenance

Standard of Review

In a court-tried case, we will affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976).

Significantly, "[a]ppellate courts must affirm the award of maintenance unless there is no substantial evidence to support it." Valentine v. Valentine, 400 S.W.3d 14, 20 (Mo. App. E.D.

2013). We grant the trial court significant discretion in awarding maintenance, and to prevail, the appellant must show an abuse of that discretion. Id. “An abuse of discretion occurs where the trial court’s determination is so arbitrary and unreasonable that it shocks the sense of justice and indicates lack of careful consideration.” Ferry v. Ferry, 327 S.W.3d 599, 602 (Mo. App. E.D. 2010).

The trial court’s judgment is presumed to be valid and the appellant bears the burden of demonstrating the trial court’s judgment is incorrect. Id. “Further, we view the evidence as favorable to the decree, disregarding contrary evidence and deferring to the trial court even if the evidence could support a different conclusion.” Whitworth v. Whitworth, 878 S.W.2d 479, 483 (Mo. App. W.D. 1994).

Discussion

In his first point on appeal, Husband argues the trial court abused its discretion in awarding Wife \$1 per year in nominal modifiable maintenance. Husband contends the award of nominal modifiable maintenance was not supported by substantial evidence because Wife has a degree, a clear history of employment, and no impairment that would limit her future earning capacity.

Contrary to Husband’s claims, the court’s decision to award Wife nominal modifiable maintenance was supported by the evidence. Specifically, Wife’s testimony regarding her employment history indicated her employment contract would expire in the near future. Moreover, Wife provided evidence of several periods of unemployment. Wife’s testimony and evidence indicated Wife typically earned far less than her current hourly pay of \$30 per hour. Furthermore, the court emphasized Wife was now receiving substantially less marital property.

Husband also criticizes the trial court’s citation to Green v. Green, 770 S.W.2d 489 (Mo. App. E.D. 1989). In Green, this Court awarded nominal modifiable maintenance in light of the

party's uncertain future employment prospects. Id. at 491. Husband contends the current case is dissimilar to Green because here, Wife has a current monthly surplus, a degree, a well-paying job, and no physical ailments. However, Husband's arguments fail to acknowledge that Wife's employment contract was expiring two months from the time of judgment, creating uncertainty as to her future employment prospects and ability to be self-sustaining. Husband also overlooks evidence of Wife's employment history showing she typically did not earn enough to support herself and often underwent periods of unemployment.

As the trial court explained by citing Green and Graves, nominal modifiable maintenance is appropriate in situations where one spouse's ability to remain self-supporting in the future is in substantial jeopardy. See, e.g., Graves v. Graves, 967 S.W.2d 632, 638-39 (Mo. App. W.D. 1998); Bushhammer v. Bushhammer, 816 S.W.2d 271 (Mo. App. W.D. 1991); Bell v. Bell, 641 S.W.2d 854 (Mo. App. W.D. 1982). Here, we find substantial evidence did support the trial court's determination to grant Wife nominal modifiable maintenance. Husband's arguments fail to properly consider the evidence the trial court relied upon and fall short of overcoming the deferential standard of review granted to that court.

The trial court's nominal modifiable maintenance award was supported by the evidence. Point I is denied.

Point II - Division of Fidelity and JP Morgan Accounts

Standard of Review

In a court-tried case, we will affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy, 536 S.W.2d at 32. We afford the trial court broad discretion in identifying and dividing marital property and will only interfere with the trial court's decision if it constitutes an abuse of discretion. Cule v. Cule, 457 S.W.3d 858, 864-65 (Mo. App. E.D.

2015). “We presume the trial court’s division of property to be correct, and the party challenging the division has the burden of overcoming this presumption.” Id. at 865.

Fidelity 401(k) Account

Husband contends the trial court misapplied the law in awarding Wife 15 percent of the Fidelity account. Husband argues the account was funded entirely prior to their marriage, and therefore the court should have only considered a small portion of the account to be marital property. In support of his contention, Husband cites section 452.330.4 RSMo, which states, “Property which would otherwise be nonmarital property shall not become marital property solely because it may have become commingled with marital property.” Notably, Husband challenges the trial court’s use of the method described in Gambrel and Pruitt, contending that method is erroneous and should not have been applied because his retirement plan is composed entirely of stocks and is not a pension plan.

Tellingly, Husband introduced the Gambrel method of dividing his account that he now contends was erroneous. Husband’s Motion to Amend cites to Gambrel and Pruitt, stating:

Even if this Court did not accept that the plan administrator was an appropriate expert to testify, it still should have analyzed the separate and marital components of the Fidelity Account. Pruitt v. Pruitt, 94 S.W.3d 429, 434 (Mo. App. E.D. 2003) (holding that the trial court should have determined what portion of the company retirement account was separate when Husband testified he has worked for company since two years before the marriage, no mention of any other evidence); Gambrel v. Gambrel, 943 S.W.2d 314, 315 (Mo. App. E.D. 1997) (holding that the trial court should have determined the marital and nonmarital portion of a retirement account based only on Husband’s testimony).

Following Husband’s motion, the court utilized the method described in Gambrel to determine Wife’s portion of the Fidelity account.

“A party on appeal generally must stand or fall by the theory on which he tried and submitted his case in the court below.” Slavens v. Slavens, 379 S.W.3d 900, 904 (Mo. App. W.D. 2012) (internal quotation marks and citations omitted). Here, in Husband’s Motion to

Amend, he claimed the trial court should have analyzed the separate components of the account pursuant to Gambrel and Pruitt. In response to his motion, the court did just that and followed the formula from Gambrel to divide the Fidelity account. We cannot now allow Husband to complain of the very division method which he requested. See Taylor v. Taylor, 525 S.W.3d 608, 613 (Mo. App. S.D. 2017) (“a party cannot lead a trial court into error and then employ the error as a source of complaint on appeal”). “[W]hether or not the trial court’s classification of these assets as marital was in error is irrelevant because even if the classifications were error, they were ‘invited error.’” Workman v. Workman, 293 S.W.3d 89, 101 (Mo. App. E.D. 2009).

However, even if this point were preserved for our review, Husband’s argument is not availing because the trial court did not abuse its discretion. In Gambrel, the trial court was tasked with dividing pension benefits between marital and nonmarital property. The court used a formula to divide the benefits, stating:

Husband testified that he had accumulated twenty-seven years in his pension program—ten [years] since the marriage and seventeen before the marriage. Based on the evidence before the trial court, only thirty-seven percent of husband’s pension benefits accumulated at the time of dissolution were marital property. Accordingly, we modify the judgment of the trial court and award wife one-half of thirty-seven percent of husband’s pension benefits accumulated at the time of dissolution.

Gambrel, 943 S.W.2d at 315-16.

Following Gambrel, here the trial court considered the amount of years Husband held the Fidelity account before marriage against the total amount of years he held the account. The court found Husband held the account for 21 years, 15 of which preceded his marriage. Accordingly, the court held 71 percent of the Fidelity account to be nonmarital property and 29 percent to be marital property. The court then found 29 percent of the account was \$80,928.74. Accordingly, the court awarded Wife 51 percent of the marital portion.

Notably, the Missouri Supreme Court has implicitly approved the formula from Gambrel, stating “a worker is considered to have earned a ratable proportion of his or her pension as that person works, so that if a spouse was married for one-half of his or her working life, the former spouse would be entitled to a proportionate share of one-half of the pension benefits.” Mo. Prosecuting Attys. v. Barton Cty., 311 S.W.3d 737, 743 (Mo. banc 2010). Likewise, in Kelly v. Kelly, the Western District held the trial court did not abuse its discretion by dividing a savings plan based upon the length of the marriage versus the length of employment. 340 S.W.3d 673, 680 (Mo. App. W.D. 2011). The trial court found the husband had worked for 26 years, 3 of which he was married. Id. at 679. Accordingly, the trial court held 11.5 percent of the account balance to be marital property ($3/26 = 11.54\%$). Id. The trial court then granted the wife 50 percent of the 11.5 percent. Id. In affirming the trial court’s judgment, the Western District explained “in these circumstances, and lacking information to make a more precise allocation, we cannot say that the circuit court abused its discretion in setting apart a portion of the Thrift Savings Plan account as non-marital based on the percentage of Husband’s HUD employment which occurred prior to his marriage to Wife.” Id. at 680.

Here, the trial court’s use of Gambrel to divide Husband’s Fidelity account was not an abuse of discretion. Husband provided the court with no evidence regarding the tracing of marital and nonmarital components of the account. The court did, however, know the amount of years Husband held the account before the marriage and calculated accordingly. We find no reason why such a method would be considered an abuse of discretion, especially considering Husband failed to provide any additional information to allow for a more exact calculation.

Husband also argues the trial court erred in its calculations, reflecting an inconsistent judgment. However, as conceded by Husband, if the trial court's calculations were inaccurate at all, they were off by \$586.03 at most. "Even assuming the trial court erred in its calculations and that it intended to make an equal property division, we find no reason to disturb the trial court's property division for such a small miscalculation." Lee v. Lee, 967 S.W.2d 82, 87 (Mo. App. W.D. 1998). We will only reverse the trial court's decision if the error materially impacts the overall distribution of marital property. Halupa v. Halupa, 943 S.W.2d 272, 278 (Mo. App. E.D. 1997). Husband has not shown how such a small potential miscalculation impacts the overall distribution of marital property. Given the relative insignificance of the trial court's potential miscalculation, Husband was not prejudiced.

JP Morgan Account

Husband also contends the trial court misapplied the law in awarding Wife 17 percent of the JP Morgan account.¹ Specifically, Husband alleges the trial court's mathematical error in dividing this account was even more significant, as the court used a total value of 110 percent of the account.

However, Husband's brief entirely fails to acknowledge the trial court resolved its miscalculation in its Order and Judgment Concerning Motions to Amend. Specifically, the order states "the court finds that Husband's separate interest in the JP Morgan account is \$7871.46 or 66% of the total and the marital portion is \$3971.56 or 34% of the total." Accordingly, the trial court corrected its error and Husband's contentions are moot. Moreover, to the extent the court incorrectly rounded its percentages, Husband again fails to show how such a small figure impacts the overall distribution of the marital property.

¹ The trial court did not apply the Gambrel formula to the JP Morgan account and instead declined to amend its previous determinations because, among other things, Husband failed to provide evidence establishing the length of time he had the account before the marriage.

Accordingly, the court did not abuse its discretion as to the division of either account. Point II is denied.

Point III - Tax Exemption

Standard of Review

“The trial court has broad discretion in the allocation of the dependent tax exemption.” Lenger v. Lenger, 939 S.W.2d 11, 14 (Mo. App. W.D. 1997). See also Hoffman v. Hoffman, 870 S.W.2d 480, 484 (Mo. App. E.D. 1994). In cases where the presumption of who gets the tax exemption is difficult to apply, the trial court has discretion to award the exemption to either parent. Simon-Harris v. Harris, 138 S.W.3d 170, 183 (Mo. App. W.D. 2004).

Discussion

In his third point on appeal, Husband claims the trial court abused its discretion in awarding Wife the tax exemption for the minor child every year. Husband claims he should have at minimum been awarded the tax exemption every other year because he possesses equal physical custody of the child and he is paying child support.

In support of his claims, Husband cites Jordan v. Jordan, 984 S.W.2d 878 (Mo. App. W.D. 1999) for the proposition that courts have allowed a child’s father to claim the tax exemption, even when the mother was the custodial parent and the father was paying child support. Noticeably, Jordan does not stand for what Husband claims. If anything, Jordan illustrates the broad discretion held by the trial court in awarding the exemption and shows how we will not overturn the trial court’s decision absent an abuse of discretion.

Here, the record and judgment show the trial court considered the financial positions of the parties and their custody determinations. Further, the court’s judgment shows Wife was to receive child support. As stated in Form 14 and Conrad v. Conrad, 76 S.W.3d 305, 313 (Mo. App. W.D. 2002), “The schedule of basic child support obligations assumes that the parent

entitled to receive support claims the tax exemption for the children entitled to support.” Accordingly, the trial court did not abuse its discretion in awarding Wife the child tax exemption. Point III is denied.

Point IV - Attorney’s Fees

Standard of Review

As we stated in Short v. Short:

In awarding attorney’s fees, the court considers any relevant factors, including the spouses’ financial resources and any unreasonable conduct of a spouse during the dissolution proceeding that may have increased the other spouse’s attorney’s fees and expenses. Furthermore, the trial court is, of course, an expert on the issue of attorney’s fees and may independently determine and award such fees as it deems appropriate. With respect to such an award, we will not reverse a trial court’s decision as to an award of attorney’s fees, unless we find that the court abused its discretion.

Short v. Short, 356 S.W.3d 235, 248 (Mo. App. E.D. 2011) (internal quotation marks and citations omitted). “The trial court has broad discretion in awarding attorney’s fees, and this court will affirm an award for attorney’s fees unless it is so arbitrary or unreasonable that it indicates indifference and lack of proper judicial consideration.” Gendron v. Gendron, 996 S.W.2d 668, 672 (Mo. App. W.D. 1999).

Discussion

In his fourth point on appeal, Husband contends the court abused its discretion in ordering him to pay an additional \$27,500 of Wife’s attorney’s fees. Husband argues Wife needlessly increased the cost of litigation by refusing a past custody agreement that proposed 50/50 custody and a distribution of property that was similar to the result reached. Husband also argues the court failed to adequately consider misconduct by Wife that increased the cost of litigation.

Section 452.355 RSMo allows the trial court to award attorney’s fees from “time to time after considering all relevant factors including the financial resources of the parties, the merits of

the case and the actions of the parties during the pendency of the action.” Section 452.355.1. Here, the record and judgment show the court considered these factors before awarding attorney’s fees.

Specifically, the trial court noted: (1) Wife’s gross monthly income was less than Husband’s; (2) Wife had some financial resources to pay her attorney’s fees; (3) some of the parties’ attorney’s fees may have been unnecessarily incurred; (4) Wife suffered some domestic violence; and (5) there was a period where Wife was unemployed and required support, providing justification for her pendente lite motions. Significantly, the trial court also considered Husband’s higher earning potential, his significant separate property, and the almost equal marital property distribution that was ordered, even while Wife had very little separate property.

In light of the trial court’s considerations, we do not find the court abused its discretion in awarding attorney’s fees. Husband has solely focused upon the factors he believes show attorney’s fees were not warranted. However, as described above, the trial court relied upon numerous factors justifying the award of attorney’s fees. Accordingly, Husband has failed to show an abuse of discretion. See Valentine, 400 S.W.3d at 31.

In light of the factors relied upon by the trial court, an award covering a portion of Wife’s total attorney’s fees is not “against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice. . . . We find nothing in the record to support a finding that the trial court’s allocation of fees and expenses was against the logic of the circumstances before it.” Short, 356 S.W.3d at 248. Point IV is denied.

Point V - Unequal Division of Marital Property

Standard of Review

The trial court is vested with considerable discretion in dividing marital property and we review its decision with deference. Lagermann v. Lagermann, 109 S.W.3d 239, 242 (Mo. App.

E.D. 2003). “Appellate courts will interfere only if the division of property is so heavily and unduly weighted in favor of one party as to amount to an abuse of discretion. It is not *per se* an abuse of discretion if the trial court awards one party a considerably higher percentage of the marital property than it awarded the other party.” Workman, 293 S.W.3d at 95-96 (internal quotation marks and citations omitted). The trial court’s division need not be equal as long as it is both fair and equitable under the circumstances. Plager v. Plager, 426 S.W.3d 689, 694 (Mo. App. E.D. 2014). We presume the trial court’s division of property to be correct and the party challenging the division bears the burden of overcoming the presumption. Souci v. Souci, 284 S.W.3d 749, 754 (Mo. App. S.D. 2009).

Discussion

In his fifth point on appeal, Husband argues the trial court abused its discretion by considering Wife’s debt when granting an unequal division of the marital property in Wife’s favor because the court already considered her debt in determining to award Wife attorney’s fees.

In reaching a just division, trial courts should consider “all relevant factors,” including “the economic circumstances of each spouse, the contribution of each spouse to the acquisition of the marital property, the value of the nonmarital property, the conduct of the parties during the marriage, and the custodial arrangements for any minor children.” Plager, 426 S.W.3d at 693, citing section 452.330.1(1)-(5). However, the factors listed in section 452.330.1 “are not exhaustive, and the trial court has great flexibility and far-reaching power in dividing the marital property.” Souci, 284 S.W.3d at 754 (internal quotation marks and citations omitted). “Disparity in the value of marital property awarded each spouse is justified if any of the relevant factors, statutory or otherwise, justify an unequal division.” Id.

Initially, we note Husband has pointed to no caselaw suggesting it is inappropriate for a court to award both attorney's fees and an unequal division of marital property. Additionally, the court underwent a lengthy analysis of the parties' circumstances, conduct, and custodial arrangements. Numerous factors supported the trial court's decision to grant Wife a slightly larger portion of their marital property, including Wife's periodic unemployment, the upcoming expiration of her employment contract, her hourly pay was typically substantially lower, and her significant debt. Additionally, Husband has significant non-marital property and Husband was found to be abusive at times. In light of these considerations justifying an unequal division of marital property, the trial court did not abuse its discretion in considering Wife's financial circumstances and awarding her 51 percent of marital property. Point V is denied.

Conclusion

We affirm the judgment of the trial court.

A handwritten signature in blue ink, reading "Sherri B. Sullivan". The signature is fluid and cursive, with a horizontal line drawn underneath it.

SHERRI B. SULLIVAN, J.

Robin Ransom, P.J., and
Lisa P. Page, J., concur.