20CA0384 Marriage of Cowdrey 03-18-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA0384
Douglas County District Court No. 17DR915
Honorable Eric White, Judge

In re the Marriage of

Chanda Yvonne Woods Cowdrey,

Appellant,

and

Bradley Stephen Cowdrey,

Appellee.

APPEAL DISMISSED IN PART,
JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE GOMEZ
Dunn and Rothenberg*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 18, 2021

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 In this dissolution of marriage proceeding involving Chanda Yvonne Wood Cowdrey (wife) and Bradley Stephen Cowdrey (husband), wife appeals the property division and child support provisions of the trial court's permanent orders judgment. She also appeals the trial court's apparent denial of her request for post-trial relief under C.R.C.P. 60(a) and (b)(2). We dismiss the appeal as it relates to wife's C.R.C.P. 60(b)(2) request, affirm the judgment in part, reverse it in part, and remand the case for further proceedings.

I. Background

¶ 2 The parties, who were married in 1998 and have four children, jointly petitioned to dissolve their marriage in November 2017. At that time, wife, after several years of being a full-time homemaker and stay-at-home parent, had started working a minimum wage job. Husband had recently closed his business — which, before it failed, had been very successful and brought the family a substantial income — and was unemployed.

¶ 3 A year later, in November 2018, the trial court entered temporary orders. The court ordered, among other things, that husband pay wife spousal maintenance of $7,500 per month and

that wife pay the mortgage and utilities on the marital residence where she was residing with the children.

¶ 4 In October 2019, the trial court dissolved the marriage and entered permanent orders. The court made the following relevant findings of fact and conclusions of law:

- During the marriage, the family enjoyed an extravagant lifestyle.
- Husband didn't dissipate funds from the marital estate because the funds in question were "used by each party as well as for joint and marital purposes."
- It was in the children's best interests to grant wife sole decision-making responsibility for all major areas.
- By that time, husband was earning $10,000 per month while wife was earning $2,573 per month.
- Husband must pay wife monthly child support of $1,418.
- The child support statute precludes the consideration of the children's ongoing or future extracurricular expenses.
- Husband was $4,942 in arrears on his temporary maintenance obligation for payments owed between November 2018 and August 2019.

¶ 5 Seeking post-trial relief, wife filed a combined C.R.C.P. 59 and 60 motion. As pertinent here, she requested that the trial court (1) fix a clerical error with regard to the amount of husband's temporary maintenance arrears under C.R.C.P. 60(a); and (2) set aside the permanent orders judgment under C.R.C.P. 60(b)(2) because it was a product of husband's allegedly fraudulent testimony. The trial court didn't rule on the motion.

¶ 6 Wife now appeals.

II. Permanent Orders

A. Dissipation of Marital Assets

¶ 7 Wife contends that the trial court erred in rejecting her claim that husband dissipated marital assets. We are not persuaded.

¶ 8 When dividing marital assets, a trial court may not consider marital fault or misconduct. *See* § 14-10-113(1), C.R.S. 2020; *In re Marriage of Jorgenson*, 143 P.3d 1169, 1173 (Colo. App. 2006). But the court may consider economic fault, such as a spouse's dissipation of marital assets. *Jorgenson*, 143 P.3d at 1173. Dissipation occurs when a spouse uses marital funds for improper or illegitimate purposes in contemplation of dissolution. *See In re Marriage of Campbell*, 140 P.3d 320, 322 (Colo. App. 2006); *In re*

Marriage of Finer, 920 P.2d 325, 331 (Colo. App. 1996). Marital assets that have been dissipated will be added back to the marital estate and valued as of the date they last existed. *See Campbell*, 140 P.3d at 322; *Finer*, 920 P.2d at 331.

¶ 9 Whether there has been an improper dissipation of marital assets is a question of fact. *See In re Marriage of Martinez*, 77 P.3d 827, 830-31 (Colo. App. 2003). We review a trial court's factual findings only for clear error and won't disturb them unless there is no support for them in the record. *Van Gundy v. Van Gundy*, 2012 COA 194, ¶ 12. Still, dissipation should be reserved for extreme cases and "must be strictly confined so as not to circumvent the prohibition against consideration of marital fault." *Jorgenson*, 143 P.3d at 1173; *see also Campbell*, 140 P.3d at 322.

¶ 10 In this case, wife asked the trial court to charge husband about $408,000 against his equitable share of the property division, alleging that he had dissipated the following marital assets:

Marital Asset	Value and Date of Valuation	Value at the October 2019 Permanent Orders Hearing	Alleged Dissipated Amount
First Bank Checking Account #3682	$23,393 on May 1, 2019	$0	$23,393

First Bank Certificate of Deposit #7539	$52,174 on February 22, 2018	$0	$52,174
First Bank Certificate of Deposit #1089	$21,642 on February 22, 2018	$0	$21,642
Husband's Hartford Life Insurance Policy	$135,569 on February 22, 2018	$20,422	$135,569
Husband's Retirement Account	$91,930 on February 22, 2018	$0	$91,930
Bitcoin Investment Account	$83,422 on February 22, 2018	$0	$83,422
TOTAL			$408,130

Wife was unable to specify on what the disputed funds were spent.

¶ 11 For his part, husband repeatedly denied that he hid or dissipated any marital funds during the two-year dissolution action. He explained that given his lengthy period of unemployment and wife's minimal earnings, he had no option but to liquidate some of the parties' assets to meet their living expenses. He testified that the liquidated funds and a $21,640 paycheck were either deposited or transferred into the #3682 checking account, to which wife had access. He then indicated that the checking account was used to pay family expenses, including (1) health, auto, home, life, and disability insurance; (2) the mortgage and utilities on the marital residence, which wife agreed to but failed to maintain; (3) cleaning expenses for the marital residence; (4) cell phone expenses; (5) his

employment search costs; (6) the parties' car lease and other car expenses; (7) the children's school fees; (8) temporary maintenance; and (9) his past and current rent along with utilities and insurance. He further testified that the parties used counter checks to withdraw $76,489 from the account, the "vast majority" of which were written by wife, and made ATM cash withdrawals from the account totaling $8,312.

¶ 12 Husband also transferred, for wife's benefit, $9,724 from the #3682 checking account to a #9653 joint checking account. He stated that the #9653 account was similarly used for marital expenses. According to him, wife made debit card purchases, wrote several checks, and withdrew cash from the #9653 account.

¶ 13 In siding with husband, the trial court said the following:

> The Court finds that both parties, both Wife and Husband, did utilize some of these [disputed] funds. That they were used individually for their own purposes, but they were also used to benefit the parties jointly. Therefore in this instance . . . based upon what I believe, and find credible, that the money was used by each party as well as for joint and marital purposes in the dissolution of their marriage. I'm not going to go back and to try to reapportion how these funds went where. I think the record is ample that funds were used for both parties' joint benefit as

> funds of . . . the relationship. Therefore I'm just going to divide what's left of these bank accounts.

¶ 14 Wife argues, relying solely on *Finer*, that the trial court erred in failing to make specific findings on "amounts [husband] spent on luxurious travel and jewelry, expenses that were clearly not enjoyed nor for the benefit of the marriage." In *Finer*, a division of this court reversed the trial court's property division because the trial court failed to make a specific dissipation finding before it included nonexistent funds in the marital estate. 920 P.2d at 331. But the trial court here didn't charge husband a dissipated amount against his share of the property division as a means to compensate wife. Thus, in our view, *Finer* is inapposite.

¶ 15 Here, we are able to fully understand the basis for the trial court's decision. *See In re Marriage of Rozzi*, 190 P.3d 815, 822 (Colo. App. 2008) ("A trial court's order must contain findings of fact and conclusions of law sufficiently explicit to give an appellate court a clear understanding of the basis of its order and to enable the appellate court to determine the grounds upon which it rendered its decision."). And the record provides enough support for the trial court's decision.

¶ 16 The trial court, as fact finder, had discretion to credit husband's evidence over wife's, especially in view of the fact that wife didn't clearly and expressly explain how the disputed funds were used. *See In re Marriage of Farr*, 228 P.3d 267, 270 (Colo. App. 2010) ("[I]t is the province of the trial court to determine the credibility of the witnesses and to resolve conflicting evidence."); *see also Martinez*, 77 P.3d at 830-31 (upholding trial court's finding that the husband dissipated funds because the trial court as fact finder was free to believe all, any part, or none of his testimony that his expenditures were for proper purposes); *In re Marriage of Riley-Cunningham*, 7 P.3d 992, 995 (Colo. App. 1999) (upholding trial court's decision not to value allegedly dissipated assets because the appellant hadn't provided any evidence of dissipation).

¶ 17 Because the record supports the trial court's credibility finding and its ultimate determination that the assets in question benefited the marital estate and that any alleged dissipation by husband was offset by wife's actions, we will not disturb them. *See Van Gundy*, ¶ 12; *Farr*, 228 P.3d at 270; § 14-10-107(4)(b)(I)(A), C.R.S. 2020 (during a pending dissolution, a spouse may spend marital funds for the necessities of life).

¶ 18 Nor are we persuaded by wife's argument that the trial court, when resolving her dissipation claim, failed to consider "hundreds of pages of [husband's] . . . credit card statements showing the extravagant lifestyle he was living and that he was funding that lifestyle with marital assets." We may presume that the court, in reaching its decision, considered all the evidence before it, even if it didn't make express findings on each piece of evidence. *See In re Marriage of Udis*, 780 P.2d 499, 504 (Colo. 1989).

¶ 19 In sum, we cannot say the trial court abused its discretion in rejecting wife's dissipation claim and concluding that she wasn't entitled to recover any of those funds in the property division.

B. Child Support

¶ 20 Wife also contends that the trial court erred in ruling that the child support statute barred it from considering the children's extracurricular activity expenses. We agree.

¶ 21 We generally review a trial court's child support order for an abuse of discretion. *In re Marriage of Wells*, 252 P.3d 1212, 1213 (Colo. App. 2011). But the issue of whether the trial court applied the correct legal standard presents a question of law that we review de novo. *In re Marriage of Boettcher*, 2019 CO 81, ¶ 12.

¶ 22 Here, the record reflects that (1) during the marriage, the children benefitted from an extravagant standard of living, which included their participation in extracurricular activities; (2) following the parties' separation, the children continued to participate in activities such as volleyball, baseball, basketball, flag football, and aerial acrobatics; and (3) wife spent about $13,000 toward those activities during the pendency of the case. Wife testified that the activities were in the children's best interests. In the end, she requested that the children's past and future activities expenses be split in proportion to the parties' incomes.

¶ 23 In denying wife's request, the trial court simply said, "I don't think the statute currently allows for it; I'm not going to order it."

¶ 24 True, the child support statute in effect at the time of the permanent orders hearing didn't expressly address the issue of expenses for extracurricular activities. But our case law recognizes that such expenses can either qualify as educational expenses under section 14-10-115(11)(a)(I), C.R.S. 2019, or provide a basis for deviating from the presumed amount of support under section 14-10-115(8)(e). *See Wells*, 252 P.3d at 1214 (a trial court has discretion to deviate from the guidelines and schedule if their

application would be inequitable, unjust, or inappropriate, provided the court makes findings explaining the reasons for deviation); *In re Marriage of West*, 94 P.3d 1248, 1252 (Colo. App. 2004) (a trial court may require a parent to contribute toward a child's athletic activities, considering, among other factors, the child's particular needs and pre-dissolution standard of living); *In re Marriage of Laughlin*, 932 P.2d 858, 862 (Colo. App. 1997) (the trial court properly included a child's ice skating fees in the child support calculation as an educational expense); *In re Marriage of Ansay*, 839 P.2d 527, 528-29 (Colo. App. 1992) (the children's expenses for cheerleading, driver's education, volleyball, debate, and gymnastics may qualify as educational expenses or provide a basis for deviation from the presumed support amount).

¶ 25 We also reject husband's assertion that the newly added definition of "mandatory school fees" found in section 14-10-115(3)(c.5), C.R.S. 2020, excluded the court from considering the children's extracurricular activity fees. Section 14-10-115(3)(c.5) didn't become effective until July 1, 2020, and expressly applies only to orders entered on or after that date. Ch. 270, sec. 9, 2019

Colo. Sess. Laws 2555-56. Thus, it didn't apply to the trial court's order entered prior to the effective date.

¶ 26 The trial court therefore erred in concluding that it was foreclosed from considering the children's extracurricular expenses when determining child support. Accordingly, we reverse this portion of the judgment and remand the case for the court to reconsider the issue.[1]

C. Maintenance Arrears

¶ 27 Citing C.R.C.P. 60(a), wife contends that the trial court committed a "clerical mistake" when calculating husband's temporary maintenance arrears. We need not address that issue because we agree with her alternative argument that the court's findings are insufficient.

¶ 28 In November 2018, the trial court ordered husband to pay wife temporary maintenance in the amount of $7,500 per month. Following the permanent orders hearing in October 2019, the court, without explanation, determined that husband was in temporary maintenance arrears in the amount of $4,942 for the time period

[1] We do not opine on whether and how the 2020 statutory amendment will apply to the trial court's ruling on remand.

from November 2018 through August 2019. We cannot decipher the basis for that amount. Consequently, the court on remand should clarify this portion of the permanent orders and make additional, specific findings explaining its determination. *See Rozzi*, 190 P.3d at 822.

III. C.R.C.P. 60(b)(2)

¶ 29 Last, wife contends that the trial court erred in "denying" her relief under C.R.C.P. 60(b)(2) because newly discovered evidence in the form of a letter from First Bank proves that husband committed perjury during the permanent orders hearing. Because the court has not yet decided the issue, we dismiss this part of the appeal as premature.

¶ 30 Wife appealed without waiting for a final ruling on her C.R.C.P. 60(b)(2) request. Contrary to her assertion, a C.R.C.P. 60 motion, unlike a C.R.C.P. 59 motion, is not subject to being denied by operation of law. *See* C.R.C.P. 59(j) ("The court shall determine any post-trial motion within 63 days (9 weeks) of the date of the filing of the motion. . . . Any post-trial motion that has not been decided within the 63-day determination period shall, without further action by the court, be deemed denied for all purposes

including Rule 4(a) of the Colorado Appellate Rules and time for appeal shall commence as of that date."); *Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 34 ("The C.R.C.P. 59(j) time limit does not affect motions that are properly filed under C.R.C.P. 60.") (emphasis omitted); *Cont'l Bank, N.A. v. Rowe*, 817 P.2d 620, 623-24 (Colo. App. 1991) (stating that C.R.C.P. 59(j) didn't apply to the appellant's C.R.C.P. 60 motion, which "sought relief that was not clearly available under C.R.C.P. 59" and thus was properly filed under C.R.C.P. 60).

¶ 31 As a result, though wife's C.R.C.P. 59 request was deemed denied, her request pursuant to C.R.C.P. 60(b)(2) remains pending and has not yet been addressed by the trial court. Accordingly, we must dismiss this part of the appeal, without prejudice, for lack of a final order. *See* § 13-4-102(1), C.R.S. 2020 (court of appeals shall have jurisdiction over appeals from final judgments); *see also* C.A.R. 1(a)(1); *Baldwin v. Bright Mortg. Co.*, 757 P.2d 1072, 1073 (Colo. 1988) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988))).

IV. Conclusion

¶ 32 The portions of the permanent orders regarding the children's extracurricular activity expenses and husband's temporary maintenance arears are reversed and remanded for further proceedings. The judgment is otherwise affirmed.

¶ 33 Because the trial court had yet to rule on wife's request for relief under C.R.C.P. 60(b)(2) before she filed her notice of appeal, we dismiss that part of the appeal as premature.

JUDGE DUNN and JUDGE ROTHENBERG concur.