

Commonwealth Of Kentucky

Court Of Appeals

1998-CA-000723-MR

MARILYN REA ROBERSON
and CHESTER I. BAYS

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN MINTON, JUDGE
ACTION NO. 90-CI-00294

RICHARD S. ROBERSON

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON, and JOHNSON, Judges.

BUCKINGHAM, JUDGE. This is a divorce case in which litigation has been pending in the Kentucky courts for nine years. Marilyn Rea Roberson (Marilyn) and Richard Roberson (Richard) were married in 1984, they separated in March 1990, and Richard filed a petition in the Warren Circuit Court the following month seeking to dissolve the marriage. The parties were divorced by final decree in March 1991, and the decree provided that Marilyn would not receive maintenance. The trial court also issued an order directing Richard to pay \$450 of Marilyn's attorney fees for the services of her attorney, Chester I. Bays (Bays).

Marilyn then appealed from the decree and from the order denying

her motion for additional attorney fees. In September 1992, this court issued an opinion in which it affirmed the trial court's award of attorney fees but reversed the trial court's denial of maintenance and remanded the matter for further proceedings.

In July 1995, nearly three years after this court's opinion became final, Marilyn filed a motion for maintenance retroactive to April 1990, the date on which she first requested maintenance. This motion also sought to have Richard pay all costs of the action, including an attorney fee of at least \$4,000 to Bays.

A new domestic relations commissioner (DRC) heard Marilyn's motions and issued a report in October 1995 recommending that Marilyn be awarded maintenance of \$300 per month until Richard retired. The DRC further found that Marilyn was entitled to maintenance from March 1991, the date the trial court issued its decree of dissolution of marriage in which it denied Marilyn maintenance. This resulted in an accrued maintenance obligation of \$15,900, which the DRC recommended that Richard pay off at the rate of \$150 per month without interest due to Marilyn's delay in filing a motion for maintenance following this court's opinion. Richard filed exceptions to the DRC's report, but Marilyn did not. The trial court issued an order in January 1996 adopting the DRC's report in its entirety.

In September 1996, Richard filed a motion to modify or terminate maintenance due to his retirement. A special DRC issued a report in October 1997, recommending that the temporary maintenance award be terminated and recommending that Bays'

motion for attorney fees be denied. Marilyn then filed exceptions to the DRC's report, but the trial court adopted the report in its entirety in December 1997. After Marilyn's motion to alter, amend, or vacate was denied by the trial court, Marilyn appealed to this court from the January 1996 order adopting the DRC's report concerning temporary maintenance and from the December 1997 order adopting the special DRC's report concerning the termination of maintenance and the denial of Bays' motion for attorney fees.

Marilyn's first argument is that the trial court erred in its January 1996 order adopting the DRC's report which fixed maintenance at only \$300 per month. She also contends that this maintenance award should have been made retroactive to the date on which she first requested maintenance rather than to the date of the decree. However, as Marilyn did not file exceptions to the DRC's report prior to its adoption by the trial court, she is "precluded from questioning on appeal the action of the circuit court in confirming the commissioner's report." Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997). Therefore, we may not consider whether the \$300-per-month maintenance award was a proper level of maintenance, nor may we consider whether the award should have been made retroactive to the date Marilyn first requested maintenance rather than the date the trial court issued its decree denying maintenance.

Marilyn's second argument is that the trial court erred and abused its discretion in terminating maintenance in its December 1997 order. Kentucky Revised Statute (KRS) 403.250(1)

provides that a maintenance award "may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." The special DRC found that Richard's post-retirement income was \$2,728.77 per month and that his monthly expenses were approximately \$1,850.00 per month. The special DRC also noted that Richard suffered from "an extreme case of emphysema, and is on oxygen and unable to work." The DRC noted that Marilyn collected \$568 per month in social security disability benefits and that she received a \$7 per month rent subsidy, \$150 per month from Richard's retirement benefits, \$450 per month in maintenance (\$300 per month in maintenance and an additional \$150 per month in accrued maintenance payments), and at least \$225 per month from a part-time job at a flea market. Discounting any sums Marilyn received in maintenance, her monthly income would be \$950 per month. Marilyn's monthly expenses were found to be \$850 per month.

"The determination of questions regarding maintenance is a matter which has traditionally been delegated to the sound and broad discretion of the trial court, and an appellate court will not disturb the trial court absent an abuse of discretion." Barbarine v. Barbarine, Ky. App., 925 S.W.2d 831, 832 (1996). Furthermore, "[a]n appellate court is not authorized to substitute its own judgment for that of the trial court where the trial court's decision is supported by substantial evidence." Id. We conclude that there was substantial evidence to support the trial court's decision to terminate the maintenance award in this case.

As we have noted previously, the parties were married for approximately seven years. Furthermore, although Marilyn did not begin receiving maintenance payments until several years after the dissolution proceedings began due to appellate court proceedings and her subsequent delay in moving the trial court for maintenance, she ultimately received an award which obligated Richard to pay maintenance from March 1991 until late 1997. We also note that the \$300 maintenance award was characterized in the trial court's January 1996 order as "temporary only" and was to be reviewed after Richard retired.

We conclude that there was substantial evidence to support the trial court's decision to terminate maintenance. Richard's income had decreased following his retirement, and Marilyn's income had increased due to her receiving a portion of Richard's retirement benefits and due to her employment at the flea market which resulted in income of \$225 per month.¹ Furthermore, the initial maintenance award of \$300 per month was not in the nature of a permanent award but was "temporary only" until Richard's retirement. We conclude that the trial court acted within its discretion and that we should not substitute our judgment for that of the trial court. See Barbarine, supra at 832.

Marilyn's third argument is that the trial court erred in denying her an attorney fee award. When this court considered

¹ Marilyn testified that her income from the flea market was approximately \$50 per month. However, Richard's counsel had subpoenaed Marilyn's payroll records which indicated a monthly gross income of at least \$225 per month. The DRC found that Marilyn had not been truthful concerning this income.

the attorney fee issue in its September 1992 opinion, it upheld the trial court's \$450 award for Marilyn's attorney's fee. There has been considerable litigation since that time, and Marilyn's attorney (Bays) and Marilyn maintain that the trial court should have ordered Richard to pay those fees.

An award of attorney fees is governed by KRS 403.220, which states in relevant part that a court "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" The only requirement for an award of attorney fees is a "disparity" in the parties' financial resources. Gentry v. Gentry, Ky., 798 S.W.2d 928, 937 (1990). The decision of whether to award attorney fees, and the amount of any such award, is within the trial court's discretion and will not be overturned on appeal absent an abuse of that discretion. Id. at 938; Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616, 620-21 (1994). We conclude that the trial court did not abuse its discretion in denying an award of attorney fees.

The orders of the Warren Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Chester I. Bays
Bowling Green, KY

BRIEF FOR APPELLEE:

Joseph R. Kirwin
Bowling Green, KY