

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001835-MR

ETTA MARIE HURLEY PRATER

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 94-CI-01263

EDDIE DEAN HURLEY

APPELLEE

AND NO. 2000-CA-001912-MR

EDDIE DEAN HURLEY

CROSS-APPELLANT

v. CROSS-APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 94-CI-01263

ETTA MARIE HURLEY PRATER

CROSS-APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING
AS TO CASE NO. 2000-CA-001835-MR AND AFFIRMING AS TO
CASE NO. 2000-CA-001912-MR

** ** * * * * *

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal and cross-appeal from an order denying appellant/cross-appellee maintenance and awarding a judgment against appellee/cross-appellant for arrearage. Upon

reviewing the record and applicable law, we affirm in part, vacate in part, and remand on appeal and affirm on cross-appeal.

Appellant/cross-appellee, Etta Marie Hurley (now Prater), and appellee/cross-appellant, Eddie Dean Hurley, were married in January of 1976. In September of 1994, Etta filed a petition for dissolution of marriage. At the time, Etta was 35 years old, Eddie was 39, and the parties had one child who was 15. The parties were granted a partial decree of dissolution on December 15, 1994. On November 2, 1995, the court entered its findings of fact, conclusions of law, and supplemental decree. The decree awarded joint custody of the child, designating Etta as the custodial parent. The marital residence in Kentucky, valued at \$40,000, was awarded to Etta, and two lots in Tennessee upon which there was a mobile home to Eddie, the fair market value of which the court found to be \$35,000. The court found that Eddie was not currently employed due to an automobile accident of April 12, 1995, but that he was a coal miner capable of making \$120 per day if he worked regularly. The court found Etta to have a ninth grade education, and having worked only as a housecleaner. The court found that Etta was entitled to maintenance, and ordered Eddie to pay \$400.00 per month to Etta until she remarried or cohabitated.

On November 9, 1995, Eddie moved the circuit court to alter, amend or vacate its November 2, 1995 decree. Eddie contended that the award of maintenance was not supported by the evidence, in that he had been left without the ability to meet his own needs while paying maintenance. The motion stated that

he was unemployed due to an automobile accident, while Etta was working. Eddie additionally raised issues regarding division of property. In an order of February 6, 1996, the court found that Eddie's unemployment due to the automobile accident was a change in circumstances warranting a decrease in maintenance. In the February 6, 1996 order, the court reduced maintenance to \$200 per month retroactive to November 1995, and awarded Etta a \$3,400.00 arrearage judgment. The order required Eddie to report any change in his disability or his work status. On August 26, 1996, the court entered another arrearage judgment against Eddie in the amount of \$4,400.00 representing total arrearage through that date. Eddie appealed, and this Court affirmed on the issue of maintenance, but reversed and remanded to the trial court on other issues.¹ On remand, on November 19, 1998, the court entered its amended findings of fact, conclusions of law, and supplemental decree, which awarded the Kentucky residence to Eddie, and the Tennessee property to Etta. Etta appealed on the issue of division of property, and this Court affirmed the November 19, 1998 order.²

On September 6, 1996, Eddie filed a CR 60.02 motion, in which he moved the court to set aside the February 6, 1996 and August 26, 1996 judgments on grounds that he had newly discovered evidence that Etta had been working during times she had testified she did not. On February 15, 1999, the Commissioner filed his report and recommendations. The Commissioner found

¹ 1996-CA-0082-MR.

² 1998-CA-003053-MR.

that Etta was employed at Hornet's Restaurant possibly for a short period of time in late 1995 and during parts of 1996 and 1997, and that her W-2's for Hornet's Restaurant showed an income of \$1,910.25 in 1996 and \$1,332.50 for 1997. The Commissioner further found that Etta was employed by the Pike County School System, having income for 1996 and 1997 of approximately \$400.00. Exceptions were filed. Following a hearing on May 19, 2000, on July 7, 2000, the trial court entered its findings of fact, conclusions of law, and order, which denied maintenance to Etta retroactive to September 6, 1996. The findings of fact stated, in part:

1. Etta received intermittent income from the Hornet's Nest Restaurant and the Pike County School System from 1995 through 1997. She is currently working full time as a clerk at a food mart. The parties' child is of age and emancipated.

2. Eddie did not work after he was injured in a [sic] automobile wreck until he returned to work as a coal miner on January 8, 1999. He earns \$13.60 per hour and generally works 40 hours per week. He recovered \$8,000.00 in settlement of an automobile accident claim. He has made no payment of maintenance since the last judgment was entered.

3. The Court finds that no maintenance should have been awarded from November 1995, because Eddie had been injured in a car wreck and Etta was employed. However, the Court will not disturb its earlier judgment for arrearage, but it will consider Eddie's CR 60.02 motion as a motion to modify temporary maintenance. No additional maintenance will be charged to Eddie as of the date of that motion, September 6, 1996. The February 6, 1996 judgment indicated that Eddie had an arrearage of \$3,400.00 through January 1996. Through September 1996, he would owe a total of \$5,000.00. [emphasis added].

. . . .

5. The Petitioner has found appropriate employment and is able to support herself and meet her needs. The Petitioner also has adequate marital property awarded to her to meet her needs. Therefore, the Court FINDS that future award of maintenance is not appropriate.

The court entered judgment against Eddie in the amount of \$5,000.00 representing total arrearage due through September of 1996, and vacated the judgments of February 6, 1996 and August 26, 1996. Etta appealed and Eddie cross-appealed from the July 7, 2000 order.

On appeal, Etta first contends that the trial court abused its discretion in granting relief to Eddie under CR 60.02 because there was no proof of newly discovered evidence, as the facts alleged by Eddie in the CR 60.02 motion regarding Etta's employment were known to him prior to the November, 1995 decree. Etta does not cite to the record where this argument was preserved. CR 76.12(4)(c)(iv) provides that an appellant's brief shall contain ample supportive references to the record and a statement showing where in the record the issue was properly preserved for review and, if so, in what manner. Nevertheless, we have reviewed the record, which indicates that this issue was not raised in or decided by the trial court. Hence, it is precluded from our review. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

Etta next argues that the trial court abused its discretion in denying her maintenance past September 6, 1996. Eddie argues otherwise in his cross-appeal. Under KRS 403.200(1)(a) and (b), a court may award maintenance only if it

finds that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for her reasonable needs and is unable to support herself through appropriate employment. KRS 403.200(1) is construed to require a level of support according to the standard of living established during the marriage. Casper v. Casper, Ky., 510 S.W.2d 253, 255 (1974).

In determining the amount and length of maintenance, the court must consider all relevant factors including those set out in KRS 403.200(2):

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently . . .
- (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.

In Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992), the Kentucky Supreme Court stated:

Under [KRS 403.200], the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision,

a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion.

A review of the record reveals that before the divorce, the couple enjoyed a standard of living based on a coal miner's wages. They had two residences and raised a child. After the divorce, both were out of work except for the pittance Etta received for various jobs. The accident's effect on Eddie's ability to work was considered and maintenance was temporarily reduced accordingly, with instructions to Eddie to report to the court when he returned to work.³ When the court heard Eddie's September 6, 1996, CR 60.02 motion, both were employed, although not equally. Eddie again enjoys a coal miner's wages while Etta works full-time at a food mart, where she sometimes works double shifts. Eddie enjoys the standard of living established during the marriage while Etta does not. The trial court was clearly erroneous in finding that Etta has adequate marital property and appropriate employment to support herself and meet her needs. Therefore, we vacate that part of the July 7, 2000, judgment which terminates future maintenance and remand for further consideration of the above factors for the amount and duration of maintenance from September 6, 1996, forward.

Eddie's argument in his cross-appeal that the trial court's finding that no future maintenance should have been awarded means that the February, 1996 and August, 1996 judgments

³ That judgment was appealed before, and final after, the CR 60.02 motion was filed and becomes the law of the case, including the finding that Etta did not have sufficient property to support herself and was entitled to maintenance. (1996-CA-0082-MR)

should have been vacated, is also without merit and moot. Eddie contends there was no order, only a Commissioner's recommendation for maintenance, from April to October, 1995. The February 6, 1996, order states that "Respondent was ordered on a temporary basis to pay maintenance in the sum of \$400.00 per month and has made no payments since March of 1995." Appeal No. 1996-CA-0082-MR is final, and that there was an order for maintenance from April to October, 1995 became the law of the case. Any defects should have been argued in the earlier appeal. See Appalachian Stave Co. v. Pickard, 266 Ky. 55, 99 S.W.2d 472 (1936); Stephens v. Stephens, 300 Ky. 769, 190 S.W.2d 327 (1945).

Eddie's second part to his argument is that Etta was working and because she lied about it she should forfeit any future maintenance. Etta's employment before September 6, 1996, was a pittance and with the law of the case we are not looking behind September 6, 1996. However, the trial court will consider Etta's employment since September 6, 1996, as a factor, as well as her wages, in awarding future maintenance.

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed in part, vacated in part, and remanded for further consideration in accordance with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Lawrence R. Webster
Pikeville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Kathryn Burke
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