

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001127-MR

PRUDENCE PRISCILLA TUFTS

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 98-CI-00828

JAMES H. TUFTS

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Prudence Priscilla Tufts (Priscilla) brings this appeal from an April 5, 2000, order of the Boyd Circuit Court. We affirm.

Priscilla and James Tufts were married on April 20, 1985. No children were born of the marriage. This was the third marriage for Priscilla, and the fourth marriage for James. Prior to the marriage, Priscilla owned real property on Mill Road, in Ohio. Prior to the marriage, James owned real property on Music Branch, in Kentucky. At the time of dissolution, Music Branch was the parties' marital home, and Mill Road was rented out for \$800.00 per month. During the marriage, James was employed by AK

Steel, earning approximately \$45,000.00 per year. Priscilla worked briefly in a retail clothing store at some time during the marriage. She also periodically traveled to various locations to sell crafts.

On August 24, 1998, James filed a Petition for Dissolution in the Boyd Circuit Court. The matter was heard before a Domestic Relations Commissioner (DRC) on March 17, 1999. The DRC recommended, *inter alia*, that James pay Priscilla's health insurance premiums for six months; that Priscilla was not entitled to maintenance; that the parties be restored to their premarital real properties; and that Priscilla was not entitled to attorney fees. Priscilla filed exceptions to the latter three recommendations. The circuit court referred the case back to the DRC for rehearing.

The DRC filed another report on October 18, 1999, concluding that the previous disposition of real property was correct; that Priscilla was not entitled to attorney fees; and Priscilla was entitled to maintenance in the amount of \$350.00 per month for two years, in addition to the health insurance premiums. This report was adopted by order of the circuit court dated October 29, 1999. The court nevertheless gave the parties additional time to file exceptions. James objected to the maintenance award. Priscilla again objected to the property valuation, and denial of attorney fees. The circuit court ruled that Priscilla was not entitled to attorney fees or maintenance, and that the property valuation was appropriate. A motion by Priscilla to alter, amend, or vacate was overruled and a final

decree of dissolution entered April 5, 2000. This appeal followed.

Priscilla asserts the circuit court abused its discretion in assigning the marital and nonmarital values to the Music Branch, Kentucky, and Mill Road, Ohio, properties. The circuit court found that at the time of dissolution, the Music Branch, Kentucky property was worth approximately \$90,000.00. The property carried a mortgage of approximately \$29,000.00, leaving roughly \$61,000.00 in equity. The court found that at the time of dissolution, the Mill Road, Ohio property was worth approximately \$95,000.00. The property carried a mortgage of approximately \$27,000.00, leaving roughly \$68,000.00 in equity. James was awarded Music Branch, his premarital property. Priscilla was awarded Mill Road, her premarital property. As the marital contributions on the premarital properties were very close, the circuit court found that restoring the parties to their premarital residences constituted a division of property in just proportions under KRS 403.190.

Priscilla complains that as to the Mill Road, Ohio property the circuit court did not properly apply the "Brandenburg formula" as set out in Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981). The Brandenburg formula is merely a guideline for calculating marital and nonmarital values of property in a dissolution action. It is by no means an exclusive formula. In Brandenburg, the Court stated:

We do not intend to imply by the adoption of this formula that this Court will not approve other procedures utilized by the lower courts in arriving at an equitable division of

property as long as the relationship between the contributions of the parties is established.

Id. At 873. As such, we are of the opinion that absent abuse of discretion or clear error, whether or how the Brandenburg formula was used is immaterial.

We now consider whether the circuit court abused its discretion or was clearly erroneous. The circuit court is in the best position to judge the circumstances in an action for dissolution. Peterson v. Peterson, Ky. App., 583 S.W.2d 707 (1979). The properties had similar values in equity. If anything, it appears Priscilla's property was worth some \$7,000.00 more than James'. Each property was restored to its premarital owner. Though Priscilla claims she made improvements on Music Branch with nonmarital funds, she offered no evidence to support her claim. As such, we perceive no abuse of discretion or clear error on the part of the circuit court in assigning marital and nonmarital values to the Music Branch or Mill Road properties.

Next, Priscilla asserts the circuit court erred by reversing its previous order awarding her temporary maintenance. Specifically, she complains that the circuit court heard exceptions to the DRC's report after the report had been adopted by the court. The DRC's report was filed October 18, 1999, and adopted by the circuit court on October 29, 1999. The court gave the parties until November 8, 1999, to file exceptions. We observe that the circuit court's extension of time appears in the record as an agreed order signed by attorneys for both parties.

Generally, a party has ten days after being served with notice of the filing of the DRC's report to file exceptions. Ky. R. Civ. P. (CR) 53.06(2). Priscilla argues that CR 53.06(2) precludes the circuit court from enlarging the time to file exceptions. Where a court has already considered exceptions, such consideration may be assumed to be a proper enlargement of time under CR 6.02. Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997). As such, the court did not err in extending the time for exceptions.

We now consider whether the circuit court abused its discretion in determining Priscilla was not entitled to maintenance. Kentucky Revised Statute (KRS) 403.200 sets out the factors to be considered in awarding maintenance and reads, in pertinent part as follows:

- (1) [T]he court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
  - (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. . . .
- (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
  - . . . .
  - (f) The ability of the spouse from whom maintenance is sought to meet his needs

while meeting those of the spouse seeking maintenance.

The circuit court is in the best position to judge the circumstances in an action for dissolution. Peterson, Id. The circuit court considered substantial evidence as to the parties' respective financial situations. The court found James was unable to pay the \$350.00 per month maintenance, plus the \$285.00 health insurance premium, and reasonably provide for his own needs. Each party was awarded valuable real property, in addition to adequate personal property. The court also determined Priscilla was able to work and support herself. Thus, we do not believe the circuit court abused its discretion by not awarding maintenance to Priscilla.

Finally, Priscilla contends the circuit court erred in not awarding her attorney fees. In order to preserve the issue of attorney fees for review, the attorney must be included as a party on appeal. Davis v. Davis, Ky. App., 775 S.W.2d 942 (1989). Neither of Priscilla's attorneys was made a party to this appeal. Thus, we may not review this assignment of error. We note even if Priscilla had made her counsel a party, we would have reached the same result. An award of attorney fees is entirely within the discretion of the trial court. KRS 403.220; Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975). Upon examination of the record herein, we are of the opinion the circuit court's judgment was supported by substantial evidence, and there was no abuse of discretion.

Upon the whole of this case, we perceive no error.

For the foregoing reasons, the judgment of the Boyd  
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodney S. Justice  
Ashland, Kentucky

BRIEF FOR APPELLEE:

Sharon Easthom Rowsey  
Ashland, Kentucky