

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000569-MR

DORIS POWELL

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 98-CI-00089

JAMES SCOTT POWELL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from that portion of a domestic order awarding appellant maintenance. Appellant argues that the court did not make specific enough findings regarding maintenance and that the amount and duration of maintenance was clearly erroneous on its face. We disagree, and thus affirm.

Appellant, Doris Powell, and appellee, James Powell, were married in 1980 with one child born of the marriage, Sarah, born in 1986. At the time the parties met, Doris was a nursing instructor and James was in his last year of medical school. During that time, Doris was the sole support of the family. Doris continued to work full-time while James completed his

internship and residency in neurosurgery. In 1987, shortly after Sarah was born, Doris quit working outside the home to be a full-time homemaker and raise the parties' child. The parties moved to Ashland in 1987 where Dr. Powell began working in private practice as a neurosurgeon.

On January 19, 1998, the parties separated, and on January 27, 1998, Doris filed a petition for dissolution of marriage. On April 3, 1998, an interlocutory decree of dissolution was entered dissolving the marriage and reserving all other issues for further litigation. Doris was initially given temporary custody of the child, but that order was later modified to give temporary custody to James.

A hearing on the matter was held on January 12, 2000, before the Domestic Relations Commissioner. At this hearing, the parties announced that they had entered into an agreement and stipulation as to all property and custody issues, leaving only the issues of maintenance, attorney fees, and costs for resolution. In the agreement, the parties agreed to share joint custody of the child, with James being the primary residential custodian. As to the division of marital property, the parties agreed that James would receive certain investment property in Greenup County, the Ford Explorer, a 1990 Jeep, his medical practice, the cash value of his life insurance policy, the income tax refund for 1999, a certificate of deposit, and one-half of his pension. Pursuant to the agreement, Doris would receive the 1996 Volvo, the 1990 Jaguar, the other half of the pension, the personal property in the marital residence, and \$360,000.

\$150,000 of the latter sum was to be paid when the life insurance policy was cashed, and the remaining \$210,000 was to be paid over three years. The parties' marital residence was to be sold and the equity therein divided equally. Until the property was sold, Doris would be allowed to reside in the house while James would continue to pay the mortgage payment, the insurance thereon, the property taxes, and necessary maintenance. Further, James was to be responsible for the credit card debts and the debt owed to the church.

In his report and recommendations entered on January 28, 2000, the Domestic Relations Commissioner incorporated the terms of the parties' agreement. As to maintenance, the Commissioner noted that Doris was 48 years of age, had a Bachelor's and Master's degree in nursing, and had been employed in the past as a surgical scrub nurse, a nursing home charge nurse, and a nursing instructor. The Commissioner further noted from the testimony of Doris herself as well as another witness that it would take approximately 150 hours of continuing education in order for Doris to again become employable as a nursing instructor or nurse earning anywhere from \$20,000 to \$45,000 a year. The Commissioner also recognized that Doris presented a budget showing \$5,400 per month in expenses. As to James, the Commissioner found that "for year 1999 through November of said year, he grossed \$938,758.77 with him receiving a salary of \$565,510.52" and that he "introduced a monthly budget showing expenses of \$34,087.00 per month." The Commissioner's remaining findings were as follows:

The Commissioner hereby finds that the Respondent should pay to the Petitioner the sum of \$3,000 per month as maintenance for a period of three years. The Court makes this recommendation based upon the factors set forth in KRS 403.200. The Court finds that the Petitioner has sufficient property which has been apportioned to her to provide for her reasonable needs and is able to support herself through appropriate employment. . . . The evidence before the Commissioner, when taking into consideration the agreement reached between the parties in regards to the property division wherein the Respondent is to pay to the Petitioner the sum of \$360,000.00 in quarterly payments over the next three years and the income that she could earn from investment of said money, along with the \$3,000.00 per month recommendation contained herein, that the Petitioner should be able to adequately maintain herself in accordance with the budget presented by her to this Court. The Commissioner further finds that the Petitioner has done nothing in the past two years to put herself in a position to become immediately employable, even though she could have done so. The Commissioner finds that the Petitioner has a Master's degree in nursing and can become employable once she completes 150 hours of Continuing Education, which can be done in a year or less. The amount of money that she can earn from this employment, along with the money that she could earn from investment of her division of the marital estate is sufficient to maintain her.

Doris filed exceptions to the above findings. On February 8, 2000, the court entered its order overruling the exceptions and adopting the recommendations of the Commissioner. From that order, Doris now appeals.

Doris first argues that the court made insufficient findings of fact to support its decision regarding the amount and duration of maintenance. CR 52.01 requires that in cases tried by the court, the court must make specific findings of fact. KRS

403.200(1) provides that in order for a court to make an award of maintenance, the court must first find 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. . . .

KRS 403.200(2) provides:

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:

- (a) The financial resources of the parties 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 reviewing the Commissioner's report, we see that the Commissioner made the specific findings required by KRS 403.200(1) and determined that a maintenance award of \$3,000 per month for three years would be sufficient to allow her to meet her monthly expenses. In support of these findings, the Commissioner looked at the property received by Doris pursuant to the parties' agreement, particularly the \$360,000 and the income that could be derived therefrom, and the fact that Doris is capable of being employed as a nurse after 150 hours of

continuing education. Clearly, the Commissioner felt that after three years, Doris should be able to fully support herself through her earnings as a nurse and the property awarded her in the agreement, although the Commissioner did not specifically say so.

Doris also complains that the Commissioner did not make any findings as to James's income and the reasonableness of his listed expenses. It can be inferred from the Commissioner's acceptance of both parties' budgets that he found both to be reasonable. As to James's income, the Commissioner specifically found that his business grossed \$938,758 in 1999 and he received a salary of \$565,510.

Finally, Doris contends that the Commissioner did not specifically state Doris's income-earning potential or what he considered to be Doris's investments and the rate of return thereon. As to available investments, the Commissioner specifically stated that he was considering the \$360,000 and the income she could earn thereon, which one could infer was a reasonable interest rate thereon. Relative to Doris's income-earning potential, the Commissioner noted the evidence that Doris could earn anywhere from \$20,000 to \$30,000 or up to \$45,000 per year, depending on the type of employment she obtained. We do not believe the Commissioner is required to be more specific than that. In sum, we believe all of the Commissioner's findings were sufficiently specific so as not to be in error.

Doris next argues that the amount and duration of maintenance awarded was clearly erroneous on its face. The

decision to award maintenance is within the discretion of the trial court. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). Findings regarding a maintenance award will be upheld if they are supported by substantial evidence. Adams v. Adams, Ky. App., 565 S.W.2d 169 (1978). Doris maintains that the \$3,000 a month is not sufficient to meet her needs and that, even if she earns \$45,000 a year after the three years, that income would also be insufficient to meet her needs. In particular, Doris complains that the Commissioner failed to take into account the tax implications of the award and any future salary.

Although had we tried the case, we may have awarded Doris more maintenance or for a longer period, we cannot say the trial court abused its discretion in its award in this case. Doris was 48 years of age at the time of the dissolution and has a Master's Degree in nursing and significant experience working in that field. The Commissioner properly relied on evidence that it would take only one year or less to complete the continuing education necessary for her to procure a job as a nurse or nursing instructor earning up to \$45,000 a year. At that point, Doris would be able to support herself through appropriate employment pursuant to KRS 403.200. Hence we cannot say that the three-year duration of the award was in error. The \$3,000 a month, in addition to the \$360,000 Doris received, should allow her to meet her listed monthly expenses of \$5,400 a month for the three years of the award. As to the tax implications, we know of no requirement that the court must consider net income in making maintenance determinations.

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

MILLER, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, JUDGE, DISSENTING. I respectfully dissent. I cannot agree with the opinion of the majority that the trial court did not abuse its discretion. The basic principles on which we determine the amount and term of maintenance are clearly set out in KRS 403.200(2). Every single factor set out in (a) through (f) practically mandates a considerably higher maintenance award. The case ought to be remanded directing the trial court to so find.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Jeffrey L. Preston
Catlettsburg, Kentucky