

RENDERED: July 19, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000282-MR

WILLIAM BENNY MENEAR

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 98-CI-00136

BRENDA SUE MENEAR

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: William Benny Menear has appealed from an order entered by the Hardin Circuit Court on January 10, 2000, which ordered that he pay his former wife, Brenda Sue Menear, maintenance in the sum of \$300.00 per month and "that said award shall be permanent." Having concluded that the circuit court's factual findings were supported by substantial evidence and that it did not abuse its discretion in setting the amount and the duration of the maintenance, we affirm.

Benny and Brenda were married on April 29, 1977. When Brenda filed her petition for decree of legal separation on January 28, 1998, she was 38 years of age and Benny was 43. The parties' marriage produced two children, but when they separated only one minor child remained in the household. That child became emancipated for child support purposes in June 1999.¹

On June 25, 1998, after considering a motion filed by Benny seeking a dissolution of the marriage which alleged that the marriage was irretrievably broken, and after finding that Brenda had not requested a reconciliation conference, the Domestic Relations Commissioner (DRC) filed a report recommending that the circuit court enter a decree of dissolution of marriage rather than a decree of legal separation. On July 9, 1998, the circuit court entered a final decree dissolving the parties' marriage and ordered them to submit proof on all remaining issues.

After hearing the parties' proof, the DRC filed a report on October 23, 1998. Neither party filed objections. The circuit court entered an order on November 4, 1998, adopting the DRC's recommended findings of fact and conclusions of law. The circuit court ordered a division of the parties' marital assets

¹The child turned 18 years of age on September 20, 1998, but pursuant to Kentucky Revised Statutes (KRS) 403.213(3) child support continued until her graduation from high school in June 1999.

and debts and ordered Benny to pay Brenda maintenance of \$500.00 per month until the marital residence was sold.²

On August 26, 1999, the marital residence was sold and each party received the sum of \$6,396.42, representing one-half of the net sales proceeds. On November 17, 1999, the DRC filed recommended findings of fact and conclusions of law recommending that Benny pay Brenda maintenance of \$300.00 per month for a period of 36 months beginning December 1, 1999. Benny and Brenda both filed objections to the DRC's report. Following a hearing, the circuit court sustained Brenda's objections to the DRC's report and ordered that Benny pay her permanent maintenance of \$300.00 per month.³ This appeal followed.

In his brief, Benny set forth the following issues: (1) "The presumption of maintenance for life or until remarriage in Kentucky should be overturned[;]" and (2) "The January 7th [sic], 2000 order requiring that the appellant pay a permanent maintenance award should be modified to provide for a 'rehabilitative maintenance' award as recommended by the domestic relations commissioner." We do not completely agree with Benny's characterization of the status of Kentucky law concerning maintenance; and we believe the sole issue on appeal can more accurately be stated as whether the trial court abused its

²The court allowed Brenda to remain in the marital residence while the youngest child completed her senior year of high school.

³The remainder of the DRC's recommendations were adopted by the circuit court and are not at issue on appeal.

discretion in ordering Benny to pay permanent maintenance to Brenda instead of following the DRC's recommendation of "rehabilitative maintenance" for a period of 36 months.

We begin our legal analysis of this issue with a review of the applicable law, quoting extensively from this Court's decision in Russell v. Russell:⁴

The amount and duration of maintenance is within the sound discretion of the trial court. Gentry v. Gentry, Ky., 798 S.W.2d 928, 937 (1990); Combs v. Combs, Ky.App., 622 S.W.2d 679, 680 (1981), citing KRS 403.200(2) and Browning v. Browning, Ky.App., 551 S.W.2d 823 (1977). It is within the trial court's discretion to terminate a maintenance award upon the recipient's "death or remarriage." Van Bussum v. Van Bussum, Ky.App., 728 S.W.2d 538, 539 (1987). . . .

KRS 403.200 provides that:

- (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 or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
- (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:
 - (a) The financial resources of the party seeking maintenance, including marital property

⁴Ky.App., 878 S.W.2d 24, 26 (1994).

apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for the party as custodian;

- (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 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 (1992), the Supreme Court stated:

Under this statute, 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. 833 S.W.2d at 826.

It is appropriate to award maintenance when a party is not able to support themselves in accord with the same standard of living which they enjoyed during marriage and the property awarded to them is not sufficient to provide for their reasonable needs. Robbins v. Robbins, Ky.App., 849 S.W.2d 571, 572 (1993); and Atwood v. Atwood, Ky.App., 643 S.W.2d 263, 265-66 (1982). Furthermore, where a former spouse is not able to produce enough income to meet their reasonable needs, it is appropriate to award maintenance. Id.[;] and Calloway v.

Calloway, Ky.App., 832 S.W.2d 890, 894
(1992).

A circuit court's authority to modify an open-end award of maintenance is limited by KRS 403.250 to "a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." In cases involving a fixed and determinable award of maintenance, the award is viewed as "alimony in gross and has the finality of a judgment, and thus, is not subject to modification on the basis of a change in circumstances. . . ." ⁵ In Low v. Low, ⁶ our Supreme Court stated that its "decision should not be read as a significant departure from Dame [; and that] [i]n ordinary circumstances parties may continue to rely upon the finality of a lump sum maintenance award." The Supreme Court continued by stating that "upon the occurrence . . . of an event causing manifest inequity, Dame may not be used as a shield to prevent restoration of the underlying purpose of the decree." Thus, the duration of the "permanent" maintenance in the case sub judice does have limits. Pursuant to KRS 403.250(2), "the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." Furthermore, under KRS 403.250(1), an open-end award of maintenance "may be modified upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable."

⁵Dame v. Dame, Ky., 628 S.W.2d 625, 627 (1982) (quoting In Re Marriage of Gallegos, Colo.App., 580 P.2d 838 (1978)).

⁶Ky., 777 S.W.2d 936, 938 (1989).

In the case sub judice, the DRC recommended in part the following factual findings:

The parties were married on April 29, 1977. Brenda quit high school to stay at home with the parties' first child. The parties enjoyed a comfortable lifestyle during their marriage. They raised their two children in a nice three-bedroom home located in a quiet neighborhood. . . .

Brenda currently resides in an efficiency apartment on Illinois Road in Radcliff, Kentucky, which is owned by her church. She pays no rent in exchange for her cleaning the church two times each week.

Brenda has been employed by the Hardin County Board of Education for the last three years. Her annual contract salary is \$7,785.96, which calculates to a gross monthly income of \$648.83. After deductions for tax withholdings and insurance, Brenda has a net monthly income of \$512 from that employment [citation to record omitted]. Brenda also cleans houses for people and earns an additional \$150 per month. She will receive approximately \$498 as her share of military retirement benefits, for a total disposable monthly income of \$1,160. As mentioned, Brenda also received \$6,397 from the sale of the marital residence, but she spent this money on furniture and outstanding bills. She also receives in-kind income equal to the value of her apartment.

Brenda is not opposed to looking for more suitable employment. She maintains that her time spent in church activities does not preclude her from finding a job. Brenda has attempted to obtain her GED and failed the test three times during the parties' marriage. Brenda has a problem with comprehension and retention. Before her job with the Hardin County School Board, she worked at K-Mart Department Store for 13 years. She left that job when Benny was assigned to an unaccompanied tour of duty in Korea because she did not want to leave the children at home alone at night. Brenda

earned between \$80 and \$120 per week while working at K-Mart.

Brenda tendered a list of her monthly expenses totaling \$1,974. Of these expenses, the health insurance and payroll taxes are deducted as monthly withholdings. These expenses have already been considered when calculating Brenda's net monthly income. Although Brenda does not pay rent at the present time, she does not intend to forever remain in her current efficiency apartment. Brenda also pays a monthly storage rental fee of \$70. Therefore, after reviewing Brenda's Exhibit P-1 and her testimony, this Commissioner finds that Brenda has reasonable monthly expenses of \$1,500.

This Commissioner finds that Brenda is unable to support herself through her present employment. It is obvious that she needs to find a better job. This Commissioner finds that Brenda is in need of maintenance for a period of time to allow her to find suitable employment.

. . .

Benny is residing in an apartment at 106 Virgil Court, Radcliff, Kentucky with his daughter and a girlfriend. He is employed by the U.S. Postal Service. His pay stubs show year-to-date earnings of \$27,688.17 through October 1, 1999. This computes to a gross monthly income of \$3,076.46. This Commissioner has deducted his tax withholdings and finds that Benny has a net monthly income of approximately \$2,403 [citation to record omitted]. Benny will receive monthly military benefits of approximately \$638 after Brenda's share has been deducted. This gives Benny a total net monthly income of \$3,041.

Benny has approximately \$1,640 remaining from his share of the sale of the marital residence. He used the bulk of the proceeds to purchase a car for his daughter, to pay for tuition and books for his daughter, to purchase a new bed and to rebuild his truck motor.

Benny tendered a list of his monthly living expenses totaling \$2,420. He also listed the amounts he contributes to his daughter's support and education [citation to record omitted]. The \$110 monthly lawyer fee itemized in his list of expenses has now been paid in full. The parties' daughter, who is now emancipated, has been living with Benny since July 1999. Benny's girlfriend, Cindy, who also resides in the home, contributes to the rent, utilities and food expenses. The Commissioner finds that Benny has no legal obligation to support his daughter, who is now emancipated. The Commissioner further finds that Benny's monthly living expenses are shared with his girlfriend.

The circuit court adopted these factual findings as recommended by the DRC, and there is no claim that the findings were not supported by substantial evidence. Benny's contention on appeal is that the circuit court abused its discretion in ordering the maintenance to be "permanent" as opposed to being fixed for a period of 36 months as recommended by the DRC. The maintenance order indicates that in making the award the circuit court properly considered the standard of living established during this 21-year marriage, the disparity in the parties' earnings potential, the property awarded to each party and their ability to meet their basic living expenses. We hold that the circuit court properly exercised its discretion in making an open-end maintenance award to Brenda at \$300.00 per month.⁷ While the DRC accepted Benny's argument that Brenda was entitled

⁷ "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." . . . "The exercise of discretion must be legally sound." Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

only to "rehabilitative maintenance," the circuit court disagreed. While the circuit court did cite Combs, supra, for the "holding that there is a presumption of maintenance for life or until remarriage[,]" we do not read the circuit court's order as indicating that it did not have the discretion to set the maintenance for a term of years had it chosen to do so. We believe the circuit court correctly weighed the various factors and properly exercised its discretion in setting the amount and the duration of the maintenance.

Accordingly, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David T. Wilson, II
Radcliff, Kentucky

BRIEF FOR APPELLEE:

Russell L. Crusott
Radcliff, Kentucky