

RENDERED: SEPTEMBER 29, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001307-MR

TAMRA BALINDA LEWIS

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 04-CI-00169

GORDON NATHAN LEWIS

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; MILLER,¹ SPECIAL JUDGE.

TAYLOR, JUDGE: Tamra Balinda Lewis appeals from a June 3, 2005, order of the Calloway Circuit Court awarding her maintenance of \$900.00 per month for ten years. We affirm in part, reverse in part, and remand.

Tamra and Gordon Nathan Lewis were married for over twenty years. The couple was married December 15, 1984, and

¹ Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

divorced by Interlocutory Decree of Dissolution of Marriage entered in the Calloway Circuit Court on February 15, 2005. The matter was subsequently referred to the Domestic Relations Commissioner to address all remaining disputed issues, including the amount and duration of maintenance. Ky. R. Civ. P. (CR) 53.03. On March 3, 2005, the Commissioner entered Findings of Fact, Conclusions of Law and Recommendations. The recommendations included a stipulation by the parties "that Tamra is totally disabled, is unable to be gainfully employed for the purposes of KRS 403.200 and that her only source of income at that time was Social Security benefits." The Commissioner ultimately recommended that Tamra be awarded maintenance of \$900.00 per month for ten years.

Both parties filed exceptions to the Commissioner's recommendations. CR 53.06. Tamra also filed a motion pursuant to CR 52 requesting the circuit court to make specific findings of fact and state separately its conclusions of law. By order entered June 3, 2005, the circuit court adopted the Commissioner's recommendations but modified it in part. As to the award of maintenance, the circuit court fully adopted the Commissioner's recommendation and awarded Tamra maintenance of \$900.00 per month for ten years. This appeal follows.

Tamra contends the circuit court erred as to the amount and duration of the maintenance award. Tamra

specifically contends the award of maintenance should have been permanent and that the amount of maintenance awarded was inadequate.

It is axiomatic that amount and duration of a maintenance award is within the sound discretion of the circuit court. Gentry v. Gentry, 798 S.W.2d 928 (Ky. 1990). However, an award of maintenance may be reversed where there is a clear abuse of discretion. Combs v. Combs, 622 S.W.2d 679 (Ky.App. 1981).

When determining the amount and duration of a maintenance award, Kentucky Revised Statutes (KRS) 403.200(2) requires the circuit court to consider "all relevant factors," including:

- (a) The financial resources of the party seeking maintenance, including marital property 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 that 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 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.

We shall initially consider whether the duration of the maintenance award was proper. In this Commonwealth, maintenance is considered rehabilitative in nature and thus, normally limited in duration. Leitsch v. Leitsch, 839 S.W.2d 287 (Ky.App. 1992). Where rehabilitation of a spouse is not possible, the statutory scheme then operates to prevent a “‘drastic change’ in the standard of living” established during the marriage. Id. at 290 (citations omitted). Generally, the duration of a maintenance award is dependant upon two factors: “(1) the period over which the need exists, and (2) the ability to pay.” Combs, 622 S.W.2d at 680.

In the case *sub judice*, the uncontroverted evidence indicated that Tamra was forty-five years old at the time of dissolution, was totally disabled, and would never achieve gainful employment. Additionally, the evidence established that Tamra’s income was limited to the nominal amount of \$435.80 per month in social security benefits, plus miscellaneous government benefits for housing and food. Based upon the above undisputed evidence, it is evident that Tamra is incapable of being rehabilitated and her income is limited in the foreseeable future to social security benefits. Conversely, the evidence reflected that Gordon was employed full time and earning approximately \$58,000.00 in 2004. His monthly expenses amounted

to approximately \$2,900.00. During the marriage, Gordon's salary constituted the primary source of income for the family.

Under these circumstances, we believe "[t]he unfairness of this situation is evident." Leitsch, 839 S.W.2d at 290 (quoting Atwood v. Atwood, 643 S.W.2d 263, 266 (Ky.App. 1982)). In ten years, at the approximate age of fifty-five, Tamara will be required to live on \$435.80 per month (plus cost of living adjustments), absent a drastic change in circumstances. Considering the duration of the marriage, the protracted nature of Tamra's need, the financial ability of Gordon to meet that need, and Tamara's lack of financial resources, we are of the opinion the evidence compels an award of permanent maintenance. Accordingly, we hold the circuit court abused its discretion by awarding maintenance for a period of only ten years.

As to the amount of the maintenance awarded, we believe it was proper. The circuit court correctly considered the factors set forth in KRS 403.200(2) when it awarded Tamra maintenance. Specifically, the court considered Tamra's limited income of \$435.80 per month, the small amount of marital property apportioned to her, Tamra's inability to be rehabilitated, the parties twenty-year marriage, and Gordon's ability to meet his monthly expenses of \$2,900.00 per month, while also meeting Tamra's expenses of \$2,489.00 per month. As

such, we do not believe the circuit court abused its discretion upon the amount of maintenance awarded.

In sum, we conclude the circuit court erred as to the duration of the maintenance award. Under the unique circumstances presented, we believe that the award of maintenance should be permanent.² As a permanent maintenance award, the award is considered "open-ended" and, as a result, subject to modification under KRS 403.250(1).³ See 16 Graham & Keller, Kentucky Practice, § 16.21 (2d ed. 1997). We further conclude that the amount of maintenance awarded was proper.

For the foregoing reasons, the order of the Calloway Circuit Court is affirmed in part, reversed in part, and this cause is remanded for entry of a permanent maintenance award in the amount of \$900.00 per month.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

Stephen C. Sanders
Murray, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Ricky A. Lamkin
Murray, Kentucky

² Of course, the maintenance would be subject to termination upon the death of either party or Tamra's remarriage. See Kentucky Revised Statutes (KRS) 403.250(2).

³ Under KRS 403.250(1), a maintenance award may be modified "upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable."

