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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001972-MR

PAULA KAY LEWIS ECTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 04-CI-03344

WALTER GUERRANT ECTON, JR.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER¹ AND DIXON, JUDGES; PAISLEY,² SENIOR JUDGE.

BARBER, JUDGE: This appeal is from a dissolution of marriage proceeding in Fayette County, Kentucky. On August 13, 2004, Appellant, Paula Kay Lewis Ecton, filed for a divorce from Appellee, Walter Guerrant Ecton, Jr., following a lengthy marriage. Both parties are well-educated. Walter is an

¹ Judge David A. Barber completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

attorney practicing in Richmond and Paula has a Master's degree in education.³

The parties were married on September 28, 1979. In 1987, the parties had a son and Paula stayed at home to be a full-time mother. During this time, she actively participated in various charitable and school events. The parties separated in late 2003 and Paula moved to Lexington with their son. Divorce proceedings began shortly thereafter.

The question for our court is whether the trial court erred or abused its discretion when it declined to award maintenance to Paula. Following a review of the record, we affirm.

Procedural Background

The parties signed a separation agreement on April 29, 2005, which settled all matters except maintenance. A hearing was held by the trial court on the issue of maintenance in July 2005. In its Supplemental Findings of Fact and Conclusions of Law, the trial court found that an award of maintenance was not warranted. Paula filed a motion requesting the trial court to vacate its findings or, alternatively, to amend or supplement its findings. The trial court issued Amended Findings of Fact and Conclusions of Law which again denied Paula's maintenance claim. It is from these orders, which Paula appeals.

³ Paula had a Bachelor of Arts degree in English when the parties married, then subsequently earned her masters degree during the marriage.

Standard of Review

While the award of maintenance comes within the sound discretion of the trial court, a reviewing court will not uphold the award if it finds the trial court abused its discretion or based its decision on findings that are clearly erroneous. Powell v. Powell, 107 S.W.3d 222, 224 (Ky. 2003), (citing Perrine v. Christine, 833 S.W.2d 825, 826 (Ky. 1992)).

Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954, 956 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000). Further, the test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004), (citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)). We now turn to Paula's arguments.

Legal Authorities and Analysis

Paula argues that the trial court abused its discretion when it failed to award maintenance to her after a twenty-six year marriage.

The determination of whether to award maintenance is highly discretionary with the trial court after its consideration of the dictates of KRS 403.200. Beckner v. Beckner, 903 S.W.2d 528, 530 (Ky.App. 1995), (citing Browning v. Browning, 551 S.W.2d 823 (Ky.App. 1977)). For a party to establish a need for maintenance, both subsections of KRS 403.200(1) must first be met. Drake v. Drake, 721 S.W.2d 728, 730 (Ky.App. 1986). The trial court must find that the party: (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. Gentry v. Gentry, 798 S.W.2d 928, 936-937 (Ky. 1990), (citing KRS 403.200(1)).

In relation to Paula's maintenance claim, the trial court found the following:

Supplemental Findings of Fact and Conclusions of Law
Findings of Fact

. . . .

6. The marital estate exceeds \$2 million. In accordance with the agreement, each party will receive assets of approximately \$1 million. [Paula] will receive a home in Lexington, worth approximately \$200,000,⁴ and nearly \$840,000 in additional marital assets⁵. . . .

. . . .

10. Both parties['] expenses as presented seemed reasonable to the Court.

. . . .

Conclusions of Law

. . . .

A. Financial Resources of [Paula] - [Paula] will receive . . . child support for . . . approximately one more year. Her ability to work will be limited. However, [Paula] leaves this marriage as a "millionaire". It is true that being a millionaire is not what it used to be - nevertheless, her assets are considerable and seem sufficient to provide for the needs of most people in the long term.

. . . .

C. Standard of Living - [Paula's] home in Lexington and assets from the marital division should enable her to continue with a similar lifestyle to that enjoyed during the marriage.

D. Duration of the Marriage - This was a 26 year marriage and clearly meets the maintenance criteria in this regard.

. . . .

⁴ Paula's home was non-marital property.

⁵ Cash received from their Hilliard Lyons account to equalize settlement allocations.

Based on the findings of fact made by this Court during the hearing on this issue, and set out above, an award of maintenance to [Paula] is not appropriate under the circumstances. The assets awarded to [Paula] in the marital settlement are sufficient to allow her to support herself, even according to the relatively high standard of living established during the marriage. . . . [Paula] will be able to earn sufficient income from investments on the nearly \$840,000 of additional assets that she has received from the parties['] settlement agreement to meet her needs. . . .

The Court is not fully convinced that [Paula] can work, even at a part-time job. . . . However, because the Court has found that [Paula] is able to support herself through the income she will receive from her share of the marital property, this disqualifies her for an award of maintenance. . . . Because [Paula] was not able to prove that she lacked sufficient property to provide for her reasonable needs, the Court overrules her motion for an award of maintenance.

Amended Findings of Fact and Conclusions of Law

2) (Finding request omitted) - The court finds that [Paula's] income from investments will reasonably be consistent with the sums detailed by Harry L. (Jack) Russell⁶. . . . [Paula] should earn \$50,000 annually from investments.

. . . .

The fact that [Walter's] income was substantial enabled the parties to build a marital estate in excess of \$2 million. [Paula's] portion of that estate will enable [Paula] to live in a similar style to the marriage. Her educational background and work opportunities solidify the court's conclusion

⁶ Mr. Russell was a financial advisor who testified as an expert witness on behalf of Walter regarding investment of Paula's marital settlement proceeds. A summary of his conclusions was entered into evidence as Respondent's exhibit 4.

that maintenance is not proper, despite her medical issues.

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 for their reasonable needs. Id., (citing Robbins v. Robbins, 849 S.W.2d 571, 572 (Ky.App. 1993)). The trial court found that Paula received property sufficient to provide for her reasonable needs and allow her to live at a comparable standard of living.

Walter produced an expert witness, Mr. Russell, who testified what Paula could earn on an investment with minimal risk. Paula testified that she disagreed with Mr. Russell's conclusions, but provided no expert testimony to support her assertions.

Relying primarily upon Mr. Russell's testimony, the trial court concluded Paula had property sufficient to meet her reasonable needs⁷ and maintain a comparable lifestyle. Because the only expert testimony provided was by Mr. Russell, we do not believe the finding was in error. Thus, Paula failed to satisfy a threshold requirement for an award of maintenance, i.e. KRS

⁷ Paula also included items associated with the parties' son in her expense list submitted to the trial court. The trial court properly disregarded these expenses. Children's expenses are proper to consider when awarding child support, not maintenance. We note that the parties had agreed to amounts of child support in their separation agreement and their son turned 18 in 2005.

403.200(1)(a). The trial court's denial of maintenance was proper.

Conclusion

The trial court was not clearly erroneous nor abused its discretion when it found that Paula was able to support herself with marital property she acquired and denied her maintenance claim. Therefore, we affirm the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dwight Preston
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Suzanne Baumgardner
Lexington, Kentucky