

RENDERED: NOVEMBER 30, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001604-MR; 2005-CA-002253-MR;
AND 2005-CA-002460-MR

LESIA LYNN HORSLEY AND
STEPHEN R. MCGINNIS

APPELLANTS/CROSS-APPELLEES

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CI-00120

PAUL EDWARD HORSLEY

APPELLEE/CROSS-APPELLANT

AND:

NO. 2005-CA-002298-MR

PAUL E. HORSLEY

CROSS-APPELLANT/APPELLEE

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CI-00120

LESIA HORSLEY

CROSS-APPELLEE/APPELLANT

OPINION
VACATING IN PART AND
REVERSING AND REMANDING IN PART

** ** *

BEFORE: COMBS, CHIEF JUDGE; HOWARD, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Lesia Lynn Horsley (“Lesia”) and Paul Edward Horsley (“Paul”) appeal, individually, various orders of the Greenup Circuit Court in their dissolution of marriage action. We vacate in part and reverse and remand in part.

The parties were married on January 7, 1978, and separated on February 8, 2004. Lesia dropped out of school in the ninth grade but did obtain her GED. During the marriage, Paul was the primary breadwinner and Lesia worked very little. Two children were born of the marriage, now adults, with whom Lesia stayed home and raised.

The case was heard in front of a Domestic Relations Commissioner (“DRC”) who then entered a report on June 7, 2005. In his report, the DRC recommended a maintenance award of \$750.00 per month for Lesia. At the time of the final hearing, the marital estate was approximately \$20,000 in personal property and the parties did not own any real estate. Paul was working a full-time job and earned approximately over \$60,000 in 2005. Lesia was not employed. The DRC recommended that Paul's pension plan be divided between the parties via a Qualified Domestic Relations Order. All personal property remaining after paying off debts was to be

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

divided in a roughly 50/50 split between the parties. The court incorporated the DRC's recommendations in an order entered July 8, 2005.

On July 25, 2005, Paul filed a motion to alter, amend or vacate the July 8, 2005, order. Lesia filed a notice of appeal of the July 8, 2005, order.² She also moved the circuit court to dismiss Paul's motion as untimely. The court found that it had the authority to hear the motion and, after hearing arguments from both parties, entered an order on October 10, 2005, pertaining to personal property and attorney's fees. An agreed order was entered on October 25, 2005, amending the October 10, 2005, order. Lesia filed a new notice of appeal to include the October 10, 2005, and October 25, 2005, orders.³ On November 1, 2005, the circuit court entered a Decree of Dissolution of Marriage incorporating the DRC's report of June 7, 2005, and orders of July 8, 2005, October 10, 2005, and October 25, 2005. It was the first order identified as a final judgment. Paul filed his cross-appeal to the decree.⁴ Lesia filed her third and final appeal to also include the decree.⁵ This court has consolidated the four appeals. The only issues before this court are the timeliness of Paul's July 25, 2005, motion to alter, amend or vacate and maintenance.

Motions to alter, amend or vacate must be served no more than 10 days after the entry of the judgment. Paul's motion was filed July 25, 2005, and served, via fax and mail, on July 21, 2005. The motion was not served until 13 days after the July 8,

² 2005-CA-001604-MR

³ 2005-CA-002253-MR

⁴ 2005-CA-002298-MR

⁵ 2005-CA-002460-MR

2005, order and the trial court was without jurisdiction to hear it. Therefore, the October 10, 2005, order is hereby vacated. Because the October 25, 2005, order was entered to amend the October 10, 2005, order it is also vacated.

Maintenance awards are left to the discretion of the trial court but will not be upheld by a reviewing court if found to be an abuse of discretion or based on clearly erroneous findings of facts. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992).

Maintenance may be granted in a dissolution of marriage proceeding if the spouse seeking maintenance lacks sufficient property to provide for his/her reasonable needs and is either unable to support himself or is the custodian of a child whose needs require the custodian to not work outside the home. KRS⁶ 403.200(1). Lesia maintains that the \$750.00 per month award is insufficient to meet her needs and should be raised. Paul argues that the award is excessive in amount and duration.

KRS 403.200(2) sets out the factors to be considered by the court when determining an amount and duration of a maintenance award. They are: the financial resources of the party seeking maintenance; the time necessary to acquire sufficient education or training to find appropriate employment; the standard of living established during the marriage; the duration of the marriage; the age, and the physical and emotional condition of the spouse seeking maintenance; and the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the other spouse.

⁶ Kentucky Revised Statutes.

Lesia claims that she is entitled to a higher maintenance award for several reasons. They are: her lack of personal property; her limited skills; her lack of work experience; the duration of the marriage; her contribution in raising the children; her significant health problems; her inability to meet her needs with the amount awarded; and the disparate lifestyles the couples will maintain since Paul's gross income will be more than three times hers after paying maintenance.

Paul cites several reasons the maintenance award is excessive. They are: Lesia's failure to prove lack of sufficient property or inability to support herself through appropriate employment and the court's failure to consider an anticipated settlement from a personal injury lawsuit.

Foremost, any amounts Lesia expects to receive from her personal injury action are purely speculative. It was appropriate for the circuit court not to consider those sums at this time as there is no way to determine what they may be. In the future, receipt of any settlement would create a situation in which maintenance may be reconsidered pursuant to KRS 403.250.

The extent of the property owned by the parties was disclosed during the dissolution process. If Paul believed Lesia owned property which she was not disclosing to the court, then it was Paul's duty to prove so. Both parties received approximately \$10,000 worth of personal property from the divorce. For Lesia, this included household items and a trailer. It is unrealistic to expect her to sell any of those items in an effort to support herself. Additionally, Lesia's award of part of Paul's pension will not be

accessible for some time. It is clear, as the DRC found and the circuit court affirmed, that Lesia lacks sufficient property to provide for her reasonable needs and therefore satisfies the first prong of KRS 403.200(1).

Because there are no children of which she is a guardian, we must next look to her ability to support herself through employment. As noted before, Lesia has a GED and not much of a work history. There is some dispute regarding her ability to work due to physical injuries sustained in a car accident. A review of the record fails to reveal any language from the court regarding Lesia's ability to work. While the DRC states that her best prospects are for a minimum wage job, he does not make a finding of whether she is *capable* of doing such. Furthermore, when directly addressing the issue of maintenance in his report, the DRC only addresses her lack of sufficient property to reasonably meet her needs. The circuit court fails to make further findings regarding the issue of maintenance except to incorporate the DRC's report in its July 8, 2005, order and make the DRC report part of the November 1, 2005, decree. We are not satisfied that the maintenance award is based on complete findings of fact. It does not address Lesia's ability to work to support herself pursuant to KRS 403.200(1) and fails to make any findings regarding those factors to be considered under KRS 403.200(2). We therefore reverse those portions of the on the July 8, 2005, and November 1, 2005, orders pertaining to maintenance and remand the issue back to the circuit court.

For the foregoing reasons, the October 10, 2005, order and October 25, 2005, order amending are hereby vacated and any language pertaining to maintenance in

the July 8, 2005, order and the November 1, 2005, decree or incorporated therein is hereby reversed and remanded to the trial court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-
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BRIEF FOR APPELLEE/CROSS-
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