

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001854-MR

JAMES L. TICE

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 04-CI-00222

REBECCA TICE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: James Tice appeals from a Logan Circuit Court judgment confirming the property division and maintenance award recommendations of the Domestic Relations Commissioner (the “Commissioner”). Following a careful review of the record and applicable case law, we find no error in the judgment and, thus, affirm the Logan Circuit Court.

## Factual Background

For the majority of their twenty-two year marriage, James and Rebecca Tice lived in Florida. Rebecca moved to Kentucky in 2003 and, on May 14, 2004, petitioned the Logan Circuit Court for dissolution of her marriage to James.

Financial disclosures and affidavits submitted by the parties showed that their marital income varied from year to year. The Commissioner found that James's income ranged from \$45,000 to \$225,000. Rebecca, who is disabled, received a monthly income of \$709.40 which was derived from social security benefits and a pension benefit.

At the time of Rebecca's dissolution petition, Rebecca and James owned various marital assets, including cash, equity in their home, automobiles, retirement plans, life insurance, and personal belongings, valued at approximately \$247,101.65. Rebecca and James had debts, including a home mortgage, outstanding credit card balances, and automobile loans, totaling \$181,058.84.

## Procedural History

Based on Rebecca's testimony that she had approximately \$2,200 of monthly living expenses, on August 9, 2004, the Commissioner recommended that James pay Rebecca a temporary maintenance award of \$2,500 per month. James filed Exceptions to the Recommendation. Following a hearing on the matter, the trial court affirmed the Recommendation.

On December 7, 2005, the trial court entered an interlocutory decree which dissolved the parties' marriage but reserved the issues of property division and permanent maintenance awards to be determined at a later date. On September 13, 2007, the Commissioner entered a Recommendation dividing marital assets and debts. Based upon the property division, the Commissioner also amended James's maintenance obligation from \$2,500 to \$1,000 per month. On October 2, 2007, the trial court entered an order confirming the Commissioner's Recommendation.<sup>1</sup>

On October 5, 2009, James filed a notice to appeal the September 16, 2009, order. His appeal primarily concerns his maintenance obligation.

#### Maintenance Award

The trial court has broad discretion to evaluate and assess maintenance. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). A reviewing court will not disturb the trial court's decision absent an abuse of discretion. *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky. App. 1987). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

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<sup>1</sup> The October 2, 2007, order was set aside pending review of James's motion to reconsider, alter, amend, or vacate the recommendation. On November 7, 2007, the Commissioner recommended denial of James's motion. The circuit court confirmed the Commissioner's Recommendation on September 16, 2009.

KRS 403.200 (1) provides for maintenance only if the court 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.

Given Rebecca's documented disability, limited income, monthly expenses, and the standard of living she enjoyed during the marriage, the trial court had ample evidence on which to conclude that she was unable to provide for her needs and unable to maintain employment.

James claims, however, that the court erred by failing to consider his diminished assets and income during the maintenance assessment. In the Commissioner's September 13, 2007, Recommendations, the temporary maintenance award of \$2,500 was decreased to \$1,000 based on Rebecca's award of marital assets and James's decrease in income during the pendency of the proceeding. The Commissioner concluded, and the trial court later affirmed, that Rebecca was nonetheless entitled to the maintenance pursuant to Kentucky Revised Statutes ("KRS") 403.200.

KRS 403.200 (2) provides trial courts a list of factors for trial courts to consider when determining the amount and duration of maintenance:

- (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.

This list is neither exhaustive nor exclusive. The trial court may consider any and all factors it deems relevant and assign degrees of weight to the factors. Although recently James has earned a lesser income than in previous years, Rebecca's inability to earn income and the lifestyle enjoyed by the parties over the course of their marriage support the trial court's award.

James also claims that the trial court erred by refusing to consider evidence of Rebecca's extramarital affair as a factor in its maintenance determination. Although fault may not be considered when determining whether a spouse is entitled to maintenance, fault may be considered when determining the amount and duration of the maintenance award. *Chapman v. Chapman*, 498

S.W.2d 134, 138 (Ky. 1973). Nonetheless, there is no requirement that an extramarital affair, or other type of fault, must be considered as a factor in the trial court's determination of the amount of maintenance.

Accordingly, the Logan Circuit Court judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred G. Greene  
Russellville, Kentucky

BRIEF FOR APPELLEE:

J. Stewart Wheeler  
Russellville, Kentucky