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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000973-MR

NITA JO MINIARD REZEK — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 10-CI-00486

CURTIS BERNARD REZEK — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: This is an action for marital dissolution between Nita Jo Miniard Rezek and Curtis Bernard Rezek. Nita appeals from the findings of fact, conclusions of law, and judgment of the Harlan Circuit Court and presents the following issues: (1) whether the award of maintenance to her was inadequate; (2) whether income from Curtis's former part-time employment should have been

imputed to Curtis; and (3) whether the circuit court erred when it did not award her a portion of Curtis's 401K plan. We reverse and remand the case to the circuit court for clarification of that part of the judgment awarding maintenance. In all other respects, we affirm.

This case was heard by a domestic relations commissioner (DRC) who found during the parties' 30-year marriage Curtis was employed by the CSX Railroad as an engineer and earned a net income of $2,248.52 per month. Additionally, during the marriage, he was a part-time pastor and earned $1,200 per month. Curtis presented evidence that pursuant to the Southern Baptist Association Guidelines, because of the dissolution of the marriage he could no longer hold his position as a pastor and resigned. The DRC did not impute the $1,200 per month to Curtis as Nita requested. Although Nita has a college degree and has held several teaching positions, she was unemployed during much of the marriage.

The parties owned a marital residence, which the DRC found was valued at $90,000 and encumbered by two mortgages in the total amount of $133,000. Additionally, the parties had incurred $11,000 additional debt. The DRC awarded the home and the marital debt to Curtis.

The DRC found it was undisputed when the parties separated, Nita removed $12,000 from the parties' savings account and $1,000 from the parties' checking account at Bank of Harlan. The only other significant asset was $14,000

in Curtis's 401K plan. Because Nita withdrew $13,000 in marital funds during the parties' separation, Curtis was awarded the entire 401K plan.

After dividing the marital property and assigning all marital debt to Curtis, the DRC found an award of maintenance was warranted. Considering the factors set forth in KRS 403.200, including Curtis's ability to provide for himself while paying maintenance, the DRC recommended $600 per month in maintenance be awarded to Nita until she dies, remarries, or becomes employed.

Nita filed exceptions to the DRC's report, including a challenge to the adequacy of the maintenance award. The Harlan Circuit Court entered an order stating as follows:

> **NOW THEREFORE IT IS ORDERED:**
>
> That the Commissioner's Findings of Fact and Conclusions of Law entered on February 14, 2012, are incorporated herein verbatim with the exception of paragraph 12 wherein the Respondent shall be awarded maintenance in the amount of $750 (seven hundred, fifty dollars) per month.

That order was entered on April 27, 2012. However, the increase in the maintenance award was not included in the final findings of fact, conclusions of law, and judgment entered on May 3, 2012, which recited Nita was awarded $600 per month in maintenance.

Nita maintains the maintenance award is inadequate. Our standard of review of maintenance awards is well established: The amount and duration of maintenance is within the trial court's sound discretion. *Gentry v. Gentry,* 798

S.W.2d 928, 937 (Ky. 1990). The award of maintenance is governed by KRS 403.200, which states in part:

> (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 . . . to provide for his reasonable needs; and
>
> (b) Is unable to support himself through appropriate employment . . .
>
> (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 . . . ;
>
> (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.

In *Perrine v. Christine,* 833 S.W.2d 825, 826 (Ky. 1992), our 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.

As stated in *Russell v. Russell,* 878 S.W.2d 24, 26 (Ky.App. 1994):

> 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. Furthermore, where a former spouse is not able to produce enough income to meet their reasonable needs, it is appropriate to award maintenance.

(citations omitted).

Curtis does not dispute that Nita is entitled to maintenance. The only challenge to the award is made by Nita, who argues she is entitled to a greater amount than awarded. The obvious difficulty with applying our standard of review is the circuit court granted Nita's exception to the maintenance award and awarded $750 per month. However, the final judgment states she was awarded a lesser amount, and one that may be viewed as inadequate, of $600 per month. Consequently, we remand this case to the circuit court for clarification of what appears to be a clerical oversight by the circuit court.

We are not persuaded that any additional income should have been imputed to Curtis because he resigned from his position as pastor. In *Gossett v. Gossett,* 32 S.W.3d 109 (Ky.App. 2000), this Court addressed whether income should have been imputed to a parent who quit a part-time job after the parties' separation but continued to work a 40-hour work week. Quoting *Cochran v. Cochran,* 14

Va.App. 827, 419 S.E.2d 419 (1992), the Court set forth the general rule that "a court should not impute to a person income from more than one job." *Id*. at 112. However, the rule is not to be applied as a matter of law:

> Depending upon the circumstances peculiar to each case, particularly where there is a history of a spouse having had two jobs, the trial court may find it appropriate to consider imputing to a spouse income from more than one job. The court should consider the previous history of employment, the occupational qualifications, the extent to which the parent may be under employed in the primary job, the health of the individual, the needs of the family, the rigors of the primary job and the second job, and all other circumstances.

Id. We conclude the same analysis is appropriate when determining a spouse's income for maintenance purposes.

Although Curtis worked part-time as a pastor, the evidence demonstrated that pursuant to guidelines of the Southern Baptist Association, a divorced man cannot serve as a pastor. He continues to work full-time for CSX. We conclude the circuit court did not abuse its discretion when it refused to impute income to Curtis.

Like maintenance, the division of marital property is within the trial court's discretion. *Heskett v. Heskett,* 245 S.W.3d 222, 228 (Ky.App. 2008). Nita alleges the circuit court erred when it did not award her a one-half interest in the 401K plan. KRS 403.190(1) requires courts to divide marital property "in just proportions," but it does not require an equal division of marital property. "In fact,

there is not even a presumption that marital property be equally divided in a marriage dissolution proceeding." *Id.*

Curtis was ordered to pay the mortgages on the marital residence and a substantial amount of marital debt but received minimal marital assets. The record established that Nita withdrew $13,000 from the marital accounts after the separation. Under the circumstances, we cannot say the circuit court abused its discretion.

Based on the foregoing, we affirm the findings of fact, conclusions of law, and judgment of the Harlan Circuit Court except that we reverse and remand for clarification regarding the amount of maintenance awarded.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert M. Melvin
Harlan, Kentucky

BRIEF FOR APPELLEE:

Kellie D. Wilson
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