

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002979-MR

ALFRED MASIELLO

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN MINTON, JUDGE  
ACTION NO. 97-CI-00817

KELLY MASIELLO (NOW BURCH)

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Alfred Masiello (Masiello) appeals a lump sum maintenance award contending that the trial court clearly abused its discretion by awarding maintenance of \$600 a month for five years to his former spouse, Kelly Masiello (now Burch) (Burch). We affirm.

Masiello and Burch were married June 25, 1991, and separated in February, 1996. No children were born of the marriage. After the parties separated, Burch moved to Bowling Green, Kentucky, and completed a master's degree program in Mental Health Counseling while living with her parents. She has since been accepted into a doctoral program at an out-of-state

university. Burch claimed she is unable to maintain full-time employment while in school, lacks necessary funds to maintain herself and that Masiello has sufficient income to meet his needs and pay maintenance to her while she completes that educational program.

Masiello argues that Burch is a healthy, well-educated, young woman who can fully and adequately support herself and does not meet the requirements set forth in KRS 403.200 to be eligible for maintenance. He contends that he has no objection to her furthering her education but that he should not have to pay for it, especially, in light of the short duration of the marriage and her ability to work.

After the parties separated in February, 1996, Burch lived with her parents and attended school at Western Kentucky University. She filed for divorce on July 21, 1997, and was granted a decree of dissolution of marriage on February 6, 1998. The court reserved on all other pending issues and referred the matter to the Domestic Relations Commissioner (DRC). The DRC conducted a hearing on June 30, 1998, and filed his report on October 9, 1998. Masiello timely filed exceptions to the DRC report. After a hearing, the trial court overruled Masiello's exceptions and confirmed the DRC report. This appeal followed.

The only issue before this court is whether the trial court's granting of lump sum maintenance is clearly erroneous. Masiello contends Burch failed to meet her burden of proof under KRS 403.200(1) in that she is in good health, highly-educated and is able to support herself through appropriate employment. The

DRC found and the court adopted his finding that "Burch is not able to support herself through suitable employment and lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs". (DRC's trial report p. 8) KRS 403.200(1) in relevant part states:

In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse the court may grant a maintenance order for either spouse, only if it finds 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. . .

Masiello did not file exceptions as to the finding that Burch lacks sufficient property nor is it raised as an issue on appeal. Masiello only argues that Burch is able to support herself.

The DRC imputed gross income of at least \$4,000.00 to \$5,000.00 per month to Masiello based upon his previous employment history and retirement/disability income from the military. This translates to annual income of between \$48,000 and \$60,000. Burch testified and the DRC found her maximum earning capacity to be \$22,000 annually, but that while attending the Ph. D program she would receive only a stipend as a teaching assistant of \$3,000.00 annually. It was also found that Burch's reasonable monthly expenses totaled \$1,483.00. Based upon testimony and evidence presented to the DRC and the specific

circumstances of this case, we believe the trial court's order as to maintenance is neither clearly erroneous nor an abuse of discretion.

The parties were married for seven years (although separated the last two years). They maintained a relatively high standard of living during their marriage, perhaps higher than they could actually afford considering the amount of debts listed in Masiello's bankruptcy petition. They owned real estate in both New Hampshire and South Carolina. Burch worked only occasionally during the marriage and no evidence of her earnings was presented. After separating Burch decided to continue her education and has been supported mainly by her parents. To achieve the maximum potential in her field of mental health counseling it was testified that a Ph. D. is required rather than merely a master's degree. Based upon these and other factors considered by the DRC, we do not believe that the trial court's findings were clearly erroneous.

In Van Bussum v. Van Bussum, Ky. App., 728 S.W.2d 38 (1987) this court found that a spouse's desire to obtain additional education and to use the maintenance award as a means of assisting her financially in this endeavor was entirely proper. In Casper v. Casper, Ky., 510 S.W.2d 253(1974), the court held that the trial court is to determine whether the spouse seeking maintenance lacks sufficient property to meet her reasonable needs and is unable to support herself through appropriate employment according to the standard of living established during the marriage. Under either scenario-Burch

going to school and earning \$3,000 per year or quitting school and working for \$22,000 annually-she could not support herself at the standard of living established during the marriage. While it is true Burch is young, in good health and has a good education it is equally true that she had no job at the time of separation or dissolution, a scanty employment history during the marriage, and virtually no assets. See Beckner v. Beckner, Ky. App., 903 S.W.528 (1995).

The determination of whether to award maintenance is highly discretionary with the trial court after its consideration of the dictates of KRS 403.200. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). 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. Perrine v. Christine, Ky., 833 S.W.2d 825 (1995). We find neither to be present in this case and, hence, we affirm.

COMBS, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Hon. D. Bailey Walton  
Bowling Green, KY

BRIEF FOR APPELLEE:

David F. Broderick  
Bowling Green, KY

Kenneth P. O' Brien  
Bowling Green, KY