RENDERED: JULY 21, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000638-MR
AND
NO. 1999-CA-001088-MR

RICHARD I. ST. ONGE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS STEPHENS, JUDGE
ACTION NO. 98-CI-00222

DIANE ST. ONGE — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, DYCHE AND GUIDUGLI, JUDGES.

BARBER, JUDGE: Appellant contends that the circuit court erred in awarding Appellee $3,300 per month maintenance for four years to enable her to attend law school on a part-time basis. Appellant submits that the award of maintenance, in addition to the agreed upon child support of $1,200 per month exceeds two-thirds of Appellant's net income, so that he is unable to provide for his reasonable needs. We reverse and remand for further findings.

The Appellant, Richard St. Onge, Jr. and the Appellee, Diane St. Onge, were married on June 23, 1984. They have two

children, a son born June 18, 1988 and a daughter born May 14, 1991. By "Letter Agreement" dated August 26, 1998, the marital estate was divided equally between the parties. The parties agreed that they would have joint custody and the children would primarily reside with Diane (in the marital residence, kept by Diane). It was agreed that Richard would pay $1,200 per month child support. The parties had reached no agreement on maintenance or attorney's fees. It was agreed that these issues would be resolved by the court or by subsequent negotiation. For the purposes of eliminating a hearing on those issues, the parties stipulated the admissibility of the reports of George Parsons, Ph.D. (Richard's expert) and Harold L. Bryant, Ph.D. (Diane's expert).

Parsons met with Diane on August 21, 1998 to evaluate her residual functional capacity to work and her power to earn. At the time, Diane was 42 years old. She had received a B.A. in 1977 from the University of Santa Clara with a dual major in business and philosophy, and an M.A. in 1983 from John F. Kennedy University in experimental psychology (parapsychology). She had completed one semester of law school at the University of Akron. Diane was currently enrolled at Chase Law School and was seeking a law degree. Parsons noted that Diane had a real estate license and a certification as an independent insurance agent in Ohio. [In her brief, Diane contends that these licenses are no longer in effect; however, she provides no citation to the record and we will not search for it]. Diane had related that she had had very little work activity and essentially no earnings of any

significance since 1987. Parson stated, "To say the least, she has been woefully underemployed given the characteristics of her education." Parsons noted a series of accomplishments attached to Diane's resume which included having written a chapter in a professional journal and having authored several science publications. Parsons reviewed a letter of recommendation regarding Diane's collaboration on an anthropological research paper and book.

A history taken during the interview revealed no medical, psychological or psychiatric reason why Diane could not perform work activity. A vocational interest test (Self Directed Search) was administered. Results produced a final letter code of "ISE" consistent with individuals who are much more cerebral in orientation than physical. Occupations with the same or similar "code" included research worker, nurse supervisor, customs import specialist, chief psychologist, product safety engineer, cardiologist. Parsons stated that although Diane would most likely be able to complete a law degree, her vocational interests appeared to be in other fields. A General Aptitude Test Battery (GATB) reflected above average intellectual ability.

Parsons concluded that based upon Diane's scores and vocational interests, she was best suited for positions she had performed in the past, particularly as they relate to research, communication and technical writing. Parsons thought Diane would do very well in positions which could be found at a University Medical Center, as well a major corporations, where she could work on projects as a coordinator or director. He noted that she

would also do well in production management with her undergrad business background. She would work well as an expediter research coordinator. Parsons stated that he saw no reason why Diane was not capable of returning to gainful work activity. It was his professional opinion that she could immediately compete for positions in the research area, both as a data manager or as a project coordinator, earning between $38,000 to $45,000 per year.

Harold Bryant, Ph.D. also prepared a report to evaluate the parties' future capacities to earn money. Bryant noted that both parties were college educated, but he believed that Diane's degrees did not readily translate into prospects for gainful employment at a salary level that would allow her to approach the standard of living achieved when the couple functioned together as a complete family. Bryant stated that Diane might re-enter the labor force as an unskilled legal assistance. He noted that Diane had some academic training and that she might be able to find a starting salary of $20,000 with a package of fringe benefits valued at 25 percent of her annual salary including health insurance, some pension, as well as government-mandated benefits. Bryant noted that Diane did not have paralegal certification or experience. [Diane had enrolled in paralegal school in 1997; however, she stopped that to attend Chase Law School in the fall of 1998. This is apparently in addition to the first year of law school she had previously completed at the University of Akron]. In Bryant's opinion, Diane might progress to a maximum salary of $30,000 per year as a legal assistant in

five to six years, by age 47, if she entered the labor force in the summer of 1998. If Diane completed law school successfully, Bryant projected that she would earn $20,000 in wages in 2002, $45,000 in wages in 2003, her second year out of law school at age 47, reaching maximum wages of $65,000 a year at age 52 and continuing at that wage until age 64.

The issue of maintenance was submitted to the court for decision. The judge made his findings on the record on August 28, 1998. The transcript of the video reflects the following:

> Based upon what I know, and I have to admit that there is a certain uncertainty in my mind exactly what her degrees are and exactly what those disciplines are and exactly what that qualifies you for in the real world. Recognizing that there is a certain uncertainty, if I understand generally what her background is, what her education is what her work skill, work experience are, if I understand her reasons noted for improving herself educationally. Accepting those as I understand them, I think that she is making a decision based upon her best interest and the best interest of her child, her children, and not upon an inappropriate or unreasonable motive or unfair motive. So, I am going to award her sufficient maintenance to allow her to complete her education.

The court rendered written findings and conclusions entered August 28, 1998. The court found that "The husband's earning capacity is $99,000.00/year/gross; The wife's earning capacity is unknown." The court incorporated the parties' August 26, 1998 "Letter Agreement" and all of its terms into the decree of dissolution, entered August 28, 1998. The decree directs that the "Petitioner shall pay maintenance to respondent, in the amount of $3,300.00 per month, effective September, 1998. The court shall review maintenance in April 1999."

Richard filed a motion for a new trial, to alter, amend or vacate and for additional finding. A copy of the motion, stamped "filed Kenton Circuit/District Court," dated September 8, 1998, is attached as Appendix "E" to Appellant's Brief; however, the motion, itself, does not appear to be included in the record from the circuit court. In support of the motion, Richard filed, by notice, a monthly pay analysis prepared by a C.P.A., R. Daniel Fales. The Fales analysis reflects that Richard's projected monthly income, after his support obligations and taxes, is insufficient to cover his monthly expenses. The motion was denied by order entered February 18, 1999. Notice of Appeal was filed March 18, 1999 (No. 1999-CA-638-MR). Pursuant to the Decree of Dissolution, a status conference was noticed for April 19, 1999 to review the maintenance provision. Evidence presented included a cash flow analysis for September 1998-March 1999 which reflected Richard's gross income was $57,409.25. His net pay after taxes was $46,192.89. After paying $8,400.00 in child support and $23,100.00 in maintenance, Richard was left with $14,692.89. His expenses totaled $21,351.00, leaving him with a shortfall of $6,658.11. By order entered May 4, 1999, the circuit court ordered that the amount of maintenance awarded in the Decree "shall not be modified at this time." A Notice of Appeal from that order was filed May 7, 1999 (No. 1999-CA-1088-MR). The two appeals were consolidated by order entered July 2, 1999.

On appeal, Richard contends that the circuit court abused its discretion by failing to consider his ability to meet

his own needs while meeting those of the spouse seeking maintenance under KRS 403.200(2)(f). Diane contends that she meets the criteria of the maintenance statute, KRS 403.200(1), because she lacks sufficient property to provide for her reasonable needs and that she is unable to support herself.

The statute provides:

> 403.200 Maintenance - Court may grant order for either spouse.
> (1) 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 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 circumstance make it appropriate that the custodian not be required to seek employment outside the home.
> (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, 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.

In Perrine v. Christine, Ky., 833 S.W.2d 835, 826 (1992), our Supreme Court held:

> 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.

Cochran v. Cochran, Ky. App., 746 S.W.2d 568 (1988) remanded the issue of maintenance to the trial court for reconsideration, where the trial court failed to make a finding on the question of the wife's ability to support herself through appropriate employment. The trial court was directed to reconsider the amount of maintenance to be awarded according to KRS 403.200(2) in the event it concluded that an award of maintenance was still appropriate after considering the wife's property and ability to support herself.

Here, evidence was submitted by both parties regarding Diane's ability to support herself. It was uncontroverted that she was able to return to gainful work activity and that she had a present earning capacity. There was evidence submitted regarding her educational background, experience and aptitude/vocational interests. There was expert opinion that Diane could re-enter the work force earning $20,000, plus $5,000 worth of benefits, as a legal assistant, with gradual increases each year to $30,000, plus $7,500 worth of benefits by 2003.

There was also expert opinion that Diane could immediately compete for positions in the research area date manager or project coordinator earning $38,000 to $45,000. [The maintenance awarded was $39,600 per year]. Despite the evidence presented, the circuit court found that Diane's earning capacity was "unknown." The court was admittedly uncertain in its understanding of what Diane's degrees qualified her for in the "real world", despite expert vocational opinion on this issue. The court ordered Richard to pay $3,300 per month maintenance, not knowing Diane's ability to generate income. "The rights of litigants in courts of justice are not determined by guesswork, surmise, or speculation." Chesapeake & Ohio Railroad Company, et al v. Crider, 199 Ky. 60, 250 S.W.2d 499, 502 (1923).

We believe that the circuit court's findings that Diane's earning capacity is "unknown" is clearly erroneous and lacks a substantial evidentiary foundation. It was an abuse of discretion to award maintenance without first determining Diane's ability to support herself.[1] We, therefore, remand the issue of maintenance to the trial court, albeit reluctantly. We recognize that it would be in everyone's best interest to resolve this matter without further expenditure of time and money; nevertheless, until a finding of Diane's ability to support

[1]Diane requested her attorney's fees incurred in defending the appeal. She has already been awarded $5,000 in attorney fees by the trial court. Any financial disparity between the parties that might justify the award of additional attorney's fees would be better addressed after a determination of Diane's earning capacity is made upon remand.

herself through appropriate employment is made, as required by KRS 403.200(1)(b), the issue of maintenance cannot be determined.

We agree with Richard's argument that KRS 403.200(1)(b) requires consideration of "appropriate employment," rather than "optimum" employment. "[I]t is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there." Gateway Construction Company v. Wallbaum, Ky., 356 S.W.2d 247, 248 (1962). We believe that the reasoning in Sayre v. Sayre, Ky. App., 675 S.W.2d 647 (1984) is applicable. There, the wife's income, as a nurse in a doctor's office was $10,000 and the husband's income was $30,000. The wife had acknowledged that she could probably earn substantially more money in a hospital or other setting, but preferred to continue in her present employment. This Court held that the determinative factor in that case was the wife's personal choice to remain at a lower paying job. The Court explained that "since that is a matter of purely personal choice," an award of maintenance was not required. Id. at p. 648. Here, the decision to return to school was a matter of personal choice. Diane already had a post-graduate degree, had completed one semester of law school at the University of Akron and had substantially completed a paralegal degree, when she decided to enroll in Chase Law School on a part-time, four year basis. It was uncontroverted that Diane could have immediately competed for jobs paying $38,000 to $45,000 per year. According to her expert's projections, it would take Diane until the year 2003 to

earn $45,000 as a lawyer. It was a matter of personal choice that she decided to go back to school.

On remand, the trial court is directed to make a finding of Diane's earning capacity, in light of the testimony presented. Should the trial court conclude that an award of maintenance is still appropriate, it shall reconsider the amount of maintenance according to KRS 403.200(2), taking into account Richard's ability to meet his own needs while meeting those of Diane under KRS 403.200(2)(f).

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Beverly R. Storm Covington, Kentucky	Timothy B. Theissen Covington, Kentucky