

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000934-MR

ROBERTA DITTOE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CI-01226

GREGG DITTOE

APPELLEE

OPINION
VACATING & REMANDING
** **

BEFORE: BARBER, GUIDUGLI, AND TACKETT, JUDGES.

TACKETT, JUDGE: Roberta Dittoe appeals from an order of the Kenton Circuit Court in a dissolution of marriage action claiming the trial court erred when it failed to include all of her former husband, Gregg Dittoe's income in the child support calculation, and further that the trial court's maintenance decision was flawed with respect to both duration and amount of maintenance. Because the trial court failed to consider Gregg's bonus income when determining child support and maintenance, we vacate and remand for a redetermination of those awards.

The parties were married in July of 1983 and have two minor children, Nicole and Anna. On June 24, 1998, Roberta filed a petition to dissolve the marriage and the parties subsequently entered into an agreed order which, among other things, provided for Gregg to pay Roberta child support of \$1,500.00 per month, and maintenance of \$2,000.00 per month.

In April of 1999, the trial court entered the decree wherein it awarded Roberta child support of \$1,687.00 per month, and maintenance of \$2,000.00 per month to be paid by Gregg through July 2000. Roberta filed a motion to alter, amend, or vacate which objected to the trial court's award of child support and maintenance. Later the trial court entered an amended decree addressing various issues, but none relevant to this appeal. Finally on March 15, 2000, the trial court entered an order and a second amended decree which overruled Roberta's motion to modify the child support award, and extended the term of the \$2,000.00 monthly maintenance award until June 2001. This appeal followed.

First, Roberta contends the trial court erred when it refused to include all of Gregg's income in its base child support calculation. Specifically, Roberta contends that the trial court should have included Gregg's bonus income in its calculation of Gregg's child support obligation.

In its original findings of fact and conclusions of law entered in April 1999 with regard to child support, the trial court stated as follows:

Father currently earned approximately \$165,000 excluding his year-end bonus. In 1998, Father earned a bonus of approximately \$92,000. That bonus is based on performance

and fluctuates from year to year. In all, Father's income for 1998 was \$258,629.

Mother is unemployed, and her only source of income other than maintenance and child support is rental income and dividends and interest she receives from the investments in her name. The rental income is \$1,000 a month, and the interest and dividend income over the past year totaled approximately \$16,000.

The combined adjusted parental gross income is figured using Father's base salary only. Using the guidelines set out in KRS 403, the monthly adjusted parental gross income is \$15,226. Mother makes approximately 8.5% of that income. Using the chart in Chapter 403 of KRS, Father's monthly support obligations come to \$1,687 a month.

This obligation was calculated using the Father's base salary only. As mentioned above, a substantial part of Father's income has been his bonus. Because this bonus is anticipated but not predictable, and based on Father's ability to earn, which would add \$9,200 to child support, the Court will require Father to continue payment of tuition, uniforms, fees, and music lessons. The alternative, which the Court finds as undesirable, is to attribute ten per cent of the bonus to child support at the time received which causes a windfall to the children as opposed to support.

KRS 403.212 provides, in relevant part, as follows:

(2) For the purposes of the child support guidelines:

(a) "Income" means actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed.

(b) "Gross income" includes income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities,

capital gains, Social Security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received. Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to public assistance as defined under Title IV-A of the Federal Social Security Act, and food stamps. (emphasis added.)

KRS 403.212(2) (b) unambiguously requires bonuses to be included in gross income for purposes of determining child support. As noted by the trial court, a substantial part of Gregg's income has been his bonus. Gregg's income exhibit reflected the following income information for the years 1993 through 1998:

Year	Base Salary	Car Allowance	Performance Bonus	Bonus/ Stock Sales	Total W-2 Income
1993	143,500	4,800	4,051	66,010	218,361
1994	152,700	5,400	43,896	129,588	331,584
1995	158,800	5,400	43,518	58,523	266,241
1996	88,000	2,250	0	187,768	278,018
1997	144,000	5,400	50,410	0	199,810
1998	149,300	5,400	91,917	0	246,617 ¹
Average	139,383	4,775	38,965	73,648	256,771

The above table reflects that Gregg had a mean average of over \$112,000 in "Performance Bonus" and "Bonus/Stock Sales"

¹The income exhibit incorrectly reflects a total of \$258,629.00 for the 1998 line.

income.² These amounts comprised approximately 43.5% of his income during the period of 1993 to 1998. Keplinger v. Keplinger, Ky. App., 839 S.W.2d 566, 569 (1992) held that

KRS 403.212(2) (a) must be read as creating a presumption that future income will be on a par with the worker's most recent experience. The party who wants the trial court to use a different income level in applying the child support guidelines bears the burden of presenting evidence which would support the requested finding. Cf. In re Marriage of Scafuri, 203 Ill.App.3d 385, 149 Ill.Dec. 124, 561 N.E.2d 402 (1990) (Child support guidelines establish beginning point for analysis and shift burden of presenting evidence to parent asking court to deviate from guidelines).

The trial court noted that the bonus "fluctuates from year to year" and "is anticipated but not predictable," but otherwise provided no justification for disregarding the bonus income. Gregg attempts to justify the trial court's disregard of his bonus income by explaining how his bonus is calculated and the unpredictable nature of the bonus.

We are not persuaded. Gregg has failed to overcome the presumption that his future bonus income will be on par with his most recent income. Accordingly, we reverse the trial court's child support award and remand for a determination of child support under the assumption that Gregg's future bonus income will be on par with his most recent bonus income pursuant to Keplinger.

²The record does not readily reflect the portion of the income related to capital gains from stock sales. However, the same principle applies - KRS 403.212 requires capital gains to be included in gross income.

Gregg notes that the combined parental income as calculated by the trial court exceeded the maximum income as listed in the child support guideline tables and that in such cases KRS 403.212(5) confers the trial court with discretion to determine an appropriate child support award. Further, the trial court also required Gregg to pay for private school tuition, uniforms, fees, and music lessons. The original award includes a fundamental error in computing Gregg's gross income, and we are unable to conclude that this error was harmless error.

Roberta also contends that the trial court's maintenance award was flawed with respect to both the duration and the amount of maintenance ordered. She alleges that the maintenance award will not allow her to maintain the standard of living she became accustomed to during the marriage, and that a more equitable award would be an award of \$4,000.00 to \$5,000.00 in maintenance for an additional three years (until June 2004), when she could be expected to substantially complete her post-graduate education, and some lesser amount for an additional period of three to five years until she could become comfortably established in her career.

In its original findings of fact and conclusions of law with regard to maintenance, the trial court stated as follows:

Husband currently has a net income of approximately \$9,000 a month in base salary. (D. Ex. 1 and 5.) In addition, Husband has investments which earn additional income as well as the potential to receive a rather sizable bonus. Because Husband's bonus is evaluated annually and his investments are speculative, his income could and has varied from year to year.

Wife currently earns \$1,000 a month in rental income. In addition, this dissolution will provide her with other income-producing assets. Wife has a high school diploma. She has not worked outside of the home during the parties' 15-year marriage. Wife is currently attending college and hopes to secure full-time employment upon graduation. Wife expects to receive her degree in May, 2000. Upon graduation, Wife believes her earning potential will be in the mid \$20,000s.

During their marriage, the parties had become accustomed to a very comfortable lifestyle. This lifestyle includes a private home with a membership to a private club, vacations as well as other luxuries.

Wife has presented a budget of approximately \$4,700 a month. Husband has presented a monthly budget of approximately \$9,950. Husband's budget includes \$3,500 for maintenance and child support as previously ordered by the Court. Husband's budget also includes an expense of \$900 for the educational expenses of the children and Wife. Husband is no longer obligated to pay the educational expenses of Wife as this was considered when determining the amount to award as maintenance.

The Court finds that continuing the payment of \$2,000 a month is appropriate. This payment will be continued through July, 2000. This should provide Wife with enough time to attain her college degree and obtain gainful employment. This should also give Wife sufficient time to gain benefit from the investment property she received through the disbursement of marital property.

As previously noted, the trial court granted Roberta's motion to alter, amend, or vacate the original decree and extended the \$2,000.00 maintenance award for one additional year until June 2001.

KRS 403.200 provides that

(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 circumstances 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.

The amount and duration of maintenance is within the sound discretion of the trial court. Weldon v. Weldon, Ky. App., 957 S.W.2d 283, 285-286 (1997); Russell v. Russell, Ky. App., 878 S.W.2d 24, 26 (1994). Furthermore, in matters of such discretion, "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb [its] findings" Id. (emphasis original); See also Clark v. Clark, Ky. App., 782 S.W.2d 56, 60 (1990); Platt v. Platt, Ky. App., 728 S.W.2d 542 (1987); and Moss v. Moss, Ky. App., 639 S.W.2d 370 (1982). "In order to reverse the trial court's decision, a reviewing court must find . . . that . . . the trial court has abused its discretion." Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992).

In the April 22, 1999, findings of fact and conclusions of law, the trial court's discussion disclosed that, as with child support, it based its maintenance award on base salary and did not consider Gregg's bonus income. For the same reasons we vacated the child support award, we conclude that it is necessary to vacate the maintenance award. The trial court should have considered bonus income in its determination of reasonable maintenance. See Leveridge v. Leveridge, Ky., 997 S.W.2d 1 (1999). While Keplinger was limited to the issue of child support in requiring a presumption that future income will be on par with the worker's most recent experience in deriving the child support calculation, we hold the same presumption applies when setting the amount and duration of maintenance. On remand, the trial court should consider Gregg's bonus income in

establishing proper maintenance award in accordance with KRS 403.200.

For the foregoing reasons the judgment of the Kenton Circuit Court is vacated and remanded for additional proceedings consistent with this opinion.³

ALL CONCUR.

BRIEF FOR APPELLANT:

Suzanne Cassidy
Covington, Kentucky

BRIEF FOR APPELLEE:

Beverly R. Storm
Covington, Kentucky

³In their briefs, both Roberta and Gregg submitted updated employment and education information extraneous to the trial record. Such extraneous information is not proper for inclusion in an appellate brief, Rankin v. Blue Grass Boys Ranch, Inc., Ky. 469 S.W.2d 767, 769 (1971), and accordingly, we have not considered this information. To the extent that the updated information is relevant to establishing the proper amount of child support and maintenance, the parties should address this information to the trial court.