

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001912-MR

IRENE HALE

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 96-CI-00090

LINDBERG HALE

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Irene Hale has appealed from the findings of fact, conclusions of law, order and judgment entered by the Magoffin Circuit Court on August 3, 2001, which divided the parties' marital assets and debts and denied her claim for maintenance.¹ Having concluded that the trial court did not erroneously deprive Irene of a mandatory CR² 53.06(2) hearing concerning her written objections to the Domestic Relations

¹By agreement of the parties, this matter was bifurcated and the trial court entered a decree dissolving the marriage on July 25, 2000.

²Kentucky Rules of Civil Procedure.

Commissioner's recommendations, and that the trial court did not abuse its discretion by denying her request for a maintenance award, we affirm.

On April 15, 1996, Irene petitioned the Magoffin Circuit Court to dissolve her 40-year marriage to Lindberg Hale. The trial court referred this matter to a Domestic Relations Commissioner to hear the evidence and to make recommendations. On October 8, 1997, after examining all of the evidence, including the testimony of both parties at a hearing, the Commissioner issued her recommended findings of fact, conclusions of law, order and judgment.

The Commissioner recommended that Lindberg be awarded the marital residence, a 1988 GMC truck, a 1993 Chevrolet Caprice, half of the parties' gun and coin collection and all of the farm equipment the parties purchased over the course of the marriage. Additionally, the Commissioner recommended that Lindberg be awarded 216 shares of Conrail stock, a savings account containing approximately \$9,000.00 and the furnishings found within the marital home. The Commissioner recommended that Irene be awarded three parcels of land, a 1996 GMC truck, half of the guns and coins, a credit union account containing approximately \$48,000.00, savings bonds valued at \$14,065.12, 216 shares of Conrail stock, and her IRA and 401K accounts. It was also recommended that Irene be awarded income from the parties' rental property, valued at \$190.00 per month, and that she be awarded maintenance of \$200.00 per month.

Both parties filed written objections to the Commissioner's report. Irene's objections alleged that since Lindberg was awarded more total assets, she should be awarded the savings account containing approximately \$9,000.00, a tractor, a tobacco setter and a tiller. Irene also argued that since Lindberg receives income of \$1,673.00 per month compared with Irene's income of \$390.00 per month that her maintenance award should begin immediately. Lindberg's objections focused on the Commissioner's recommended valuation of the real property, farm equipment and the gun collection. Lindberg also objected to the Commissioner's recommended award of the savings bonds, savings accounts and maintenance to Irene. The parties' respective written objections were noticed for a hearing before the trial court on October 16, 1997.³

On June 1, 2001, almost three years after the objections were filed, the trial court held a final hearing in this matter. At that final hearing, the trial court indicated that by agreement of the parties the case would be bifurcated and the marriage would be dissolved by separate decree. The trial court reserved its ruling on the issues concerning the division of property and debts and the award of maintenance. Thereafter, Lindberg submitted a brief, which only objected to the recommended valuation of the real property and the recommended maintenance award. Lindberg also moved the trial court to

³The case history index sheet reflects that this hearing was held as scheduled on October 16, 1997. However, no transcript or videotape of this hearing was included in the record.

schedule a hearing concerning his objections. Irene filed a response to Lindberg's brief, arguing that the trial court should fully adopt the Commissioner's recommendations. At no time did Irene move the trial court for another hearing concerning her objections, nor did she ever revive or submit additional objections to the Commissioner's recommendations.

On August 3, 2001, the trial court entered its findings of fact, conclusions of law, order and judgment in this matter. The trial court deviated from the Commissioner's recommendations by awarding Lindberg all of the guns and the savings account containing \$48,000.00, while Irene received the savings account containing over \$9,000.00. Further, contrary to the Commissioner's recommendations, the trial court refused to award Irene maintenance. This appeal followed.

First, we address Irene's claim that the trial court erroneously deprived her of a hearing on her objections pursuant to CR 53.06(2).⁴ CR 53.06(2) requires that the trial court afford the parties an opportunity for oral argument before ruling on the objections.⁵ Although Irene maintains that the trial court failed to conduct a hearing, the record indicates otherwise.⁶ While there is no specific order sustaining or

⁴See Kelley v. Fedde, Ky., 64 S.W.3d 812 (2002).

⁵Haley v. Haley, Ky.App., 573 S.W.2d 354 (1978).

⁶Lindberg's appellate counsel has included in the appendix to Lindberg's brief the trial judge's docket sheets for April 6, 2000, June 1, 2000, and April 4, 2001, to support Lindberg's assertion that Irene waived her right to an oral argument concerning her objections at these three hearings. These signed docket sheets were not included in the original record. New

(continued...)

overruling any of the objections, the August 3, 2001, order states that the trial court did conduct a hearing and considered all proof contained in the record. The August 3, 2001, order also specifically states that the trial court considered Lindberg's objections, which, we presume, were those objections listed in his brief filed with the trial court on November 8, 2000.

Our review of the record reveals that both Irene and Lindberg filed objections in October 1997 and both parties noticed a hearing concerning these objections for October 16, 1997. The case history index sheet in the record reveals that the trial court held a hearing on that day. No transcript or videotape of the October 16, 1997, hearing was found in the record, nor does either party mention this hearing. In fact, after this date, Irene did not file a motion with the trial court requesting a hearing concerning her objections. Additionally, after October 16, 1997, Irene never again brought forward any objections to the Commissioner's recommendations, and Lindberg only raised objections to the Commissioner's recommended award of maintenance and the recommended value assigned to the couple's real property.

⁶(...continued)
material not found within the official record may not properly be considered by an appellate court. Triplett v. Commonwealth, Ky., 439 S.W.2d 944, 945 (1969). Moreover, CR 76.12(4)(c)(vii) clearly dictates that "materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." While Irene did not object to the inclusion of this new evidence, we caution Lindberg's counsel to avoid such action in the future.

The record also reveals that the trial court commenced a final hearing on June 1, 2000. No transcript or videotape of this hearing was included in the record, but as a result of that hearing, the trial court entered an order dissolving this marriage and reserving the property settlement issues. After this hearing, Lindberg filed a brief which only objected to the Commissioner's recommended valuation of the farmland and Irene's recommended maintenance award. Lindberg also filed several motions for hearings on these objections. On February 26, 2001, Irene filed a brief arguing that the Commissioner's recommendations should be accepted by the trial court and adopted in their entirety. Irene did not file a motion requesting a hearing.

These facts are significant because Irene's failure to request an additional hearing concerning her objections, coupled with her failure to revive her objections after October 16, 1997, and Lindberg's failure to reassert all of his October 1997 objections, support the fact that a hearing concerning objections to the report did occur either on October 16, 1997, or on June 1, 2000, or on both dates. CR 53.06(2) only requires an opportunity for one hearing. From our review of the record, it appears that the trial court in fact held two hearings--one on October 16, 1997, and a second hearing on June 1, 2000. Additionally, Irene's February 26, 2001, brief fully supporting the Commissioner's recommendations completely discredits her claim that she was prejudiced because of the trial court's alleged failure to conduct a hearing concerning the objections. It would

appear at that point that Irene was fully satisfied with the Commissioner's recommendations, that she no longer had any objections pending, and that she did not desire a hearing.

Irene also claims that the trial court abused its discretion by rejecting the Commissioner's recommendations and by denying her a maintenance award. We disagree. The law is clear that the trial court has "complete discretion" in its use of a Commissioner's report.⁷ The trial court may adopt, modify or reject the Commissioner's recommendations.⁸ The trial court is not compelled to give the findings of the Commissioner any deference, and may even "receive further evidence" on an issue.⁹ Additionally, maintenance awards are matters within the discretion of the trial court.¹⁰ In order for this Court to reverse the decision of the trial court, we must find either that its findings of fact are clearly erroneous or that the trial court abused its discretion.¹¹

In deciding a question of an award of maintenance, KRS 403.200 provides a two-prong test. First, the trial court must decide whether the spouse seeking maintenance "[l]acks sufficient property, including marital property apportioned to him, to

⁷CR 53.06; See Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997); and Haley, supra.

⁸Basham v. Wilkins, Ky.App., 851 S.W.2d 491 (1993).

⁹CR 53.06(2).

¹⁰Gentry v. Gentry, Ky., 798 S.W.2d 928 (1990); Browning v. Browning, Ky.App., 551 S.W.2d 823 (1977).

¹¹Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992).

provide for his reasonable needs[.]”¹² Next, the trial court must determine whether the spouse seeking maintenance “[i]s 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.”¹³ Maintenance can only be awarded if there is a finding that both of the above provisions of KRS 403.200 have been met.¹⁴

In light of the evidence presented to the trial court, we cannot conclude that it abused its discretion by refusing to award maintenance to Irene. The trial court awarded Irene income producing real estate, personal property, bank accounts, stocks and savings bonds containing substantial funds. After considering the property awarded to Irene, the trial court specifically determined that she possessed sufficient property and assets to provide for her reasonable needs. Moreover, the trial court, consistent with the Commissioner’s recommended findings, found that Irene was not disabled and that she possessed the ability to support herself through appropriate employment. Since the trial court was not clearly erroneous in making factual findings that these two statutory elements which are required for a maintenance award were not present, we cannot conclude that it abused its discretion by denying Irene a maintenance award.

¹²KRS 403.200(1)(a).

¹³KRS 403.200(1)(b).

¹⁴McGowan v. McGowan, Ky.App., 663 S.W.2d 219 (1983).

For the foregoing reasons, the judgment of the Magoffin
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery N. Lovely
Salyersville, Kentucky

BRIEF FOR APPELLEE:

John C. Collins
Salyersville, Kentucky