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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002133-MR
AND
NO. 2003-CA-002199-MR

ROBERTA DITTOE AND HER ATTORNEY,
SUZANNE CASSIDY, ESQ. APPELLANTS/CROSS-APPELLEES

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

GREGG DITTOE APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Roberta Dittoe has appealed from orders entered by the Kenton Circuit Court following remand from this Court for the trial court to consider the appellee/cross-appellant Gregg Dittoe's employment bonus income in calculating child support and awarding maintenance. Roberta has also appealed the trial

court's distribution of Gregg's non-qualified pension fund[1] and denial of her motion for additional attorney's fees. Gregg has filed a protective cross-appeal, which is moot since we affirm the trial court on all issues in Roberta's appeal.

The parties were married on July 23, 1983. Two children were born of the marriage, namely Nicole, born January 3, 1985, and Anna, born February 14, 1990. Roberta filed a petition to dissolve the marriage on June 24, 1998, and an agreed order was entered on August 12, 1998, which provided that Gregg would pay Roberta child support of $1,500.00 per month and maintenance of $2,000.00 per month, pendente lite.

At the final hearing, Roberta presented evidence that the reasonable expenses for her and the children were $4,697.00 per month. On April 22, 1999, the trial court entered the decree dissolving the parties' marriage and awarded Roberta child support of $1,687.00 per month and maintenance of $2,000.00 per month to be paid through July 2000. The trial court based the child support award on Gregg's base salary and investment income, but it did not include Gregg's employment bonus income for 1998 of $92,000.00 in its calculations, characterizing such an award as "a windfall to the children as opposed to support." Rather, the trial court required Gregg to

[1] This was not an issue in the original appeal. However, at the time of the remand hearing, this fund had not been divided and Gregg was holding the money received from this fund in his checking account.

pay the costs of the children's private school tuition, uniforms, fees, and music lessons, in addition to his child support payments. On April 29, 1999, Roberta filed a motion to alter, amend, or vacate the trial court's order as to child support and maintenance. The trial court entered an amended decree on September 1, 1999, but the issues addressed therein are not relevant to this appeal. On March 15, 2000, the trial court entered a second amended conclusions of law and decree of dissolution which denied Roberta's motion to modify the child support award, but extended the term of the $2,000.00 monthly maintenance award until June 2001. Roberta then filed a notice of appeal on April 14, 2000.[2] This Court rendered an Opinion on October 12, 2001, vacating the trial court's orders for failure to consider Gregg's bonus income in determining child support and maintenance and remanding for additional findings.[3] Gregg

[2] Case No. 2000-CA-000934-MR.

[3] In December 2000, due to Gregg's increased income, the parties agreed to modify his child support obligation. Since the appeal of the initial determination was pending, the parties agreed to utilize his same income figures in recalculating the support. The modified agreement was entered on December 21, 2000, and provided that Gregg would pay from January 1, 2001, to June 30, 2001, $1,983.00 per month, plus $234.00 for activity fees; and beginning July 1, 2001, he would pay $2,391.00 per month, plus $234.00 for activity fees. During this time, Gregg continued to pay Catholic school tuition for the children, as well as sports-related fees and other costs. The parties agreed to share other discretionary spending for the children in proportion to their incomes, which at the time varied from a 70/30 ratio to a 80/20 ratio. Other than this voluntary change, Gregg never sought a review of his support obligation due to changed economic circumstances. However, Roberta filed motions for modification of child support on May 30, 2002, and July 11, 2002.

filed a motion for discretionary review with our Supreme Court, which was denied on June 6, 2002.

On remand, the trial court held a hearing on October 15, 2002, at which time it addressed the issues that are the subject of this appeal and cross-appeal. The trial court entered an order and judgment on May 13, 2003, which provided that Roberta did not qualify for an extended duration of maintenance as she had received her Bachelor of Arts degree in May 2000, among other educational endeavors. However, the trial court increased the original maintenance award to $4,000.00 per month for the entire duration of the award.

The trial court also increased the child support award to $2,554.00 per month from the date of dissolution, April 22, 1999, through June 2001; the sum of $3,129.00 per month from July 2001 through February 2002; and the sum of $978.00 per month from March 2002 through May 2003. The trial court went further to establish the amount of child support to be paid beginning June 2003 upon emancipation of the parties' oldest child, reducing the award to $671.00 per month. In ordering the increases in the maintenance and child support, the trial court gave Gregg credit for all prior maintenance and child support paid, including the monies paid in lieu of child support by Gregg for Catholic school tuition, uniforms, fees, and music lessons, that had been based on his bonus income.

On May 23, 2003, Roberta filed a motion to alter, amend, or vacate asking the trial court to order Gregg to transfer one-half of the value of his non-qualified pension fund as of the date of dissolution to Roberta; to modify the effective date and amount of the child support award that the trial court ordered to begin March 1, 2002; to vacate the child support award the Court ordered to begin June 1, 2003, until proof is offered as to the parties' current earning capacities; to modify the credits Gregg received for payments for the children outside of the child support award, to only those deductions in proportion to the parties' respective incomes during the applicable periods; and to modify the maintenance award as to amount and duration. The trial court entered an order on September 9, 2003, awarding Roberta one-half of the value of Gregg's non-qualified pension fund as of April 22, 1999, and establishing the value on that date as $48,283.00.[4] The trial court further found that Roberta was entitled to one-half of any growth occurring in the pension fund after the date on which she would have been able to have the benefit of it had it been paid to her at that time, but that she was not entitled to any portion of the fund contributed from Gregg's non-marital

[4] The trial court had originally awarded Roberta one-half of the value of this account and established that value as $34,167.00 as of April 22, 1999. Additional evidence was provided to the trial court at a later hearing that the actual value on the date of the divorce was greater than originally disclosed and the trial court amended its orders accordingly.

funds. Once the value of Roberta's one-half interest in the fund was established, Gregg was to receive a credit for one-half of the taxes which Gregg had been required by federal law to pay on his receipt of the distribution.

The trial court concluded that it had discretion to revise the original child support award on remand based on this Court's Opinion rendered October 12, 2001. The trial court concluded that the additional evidence of the parties' then current financial status merited an amendment of the revised child support award from March 2002 through May 2003 to $1,286.00 per month and beginning in June 2003 to $867.00 per month.[5] The trial court again allowed Gregg to offset past-due child support amounts by the amounts he had paid under the original decree for school tuition, school fees, including book and lunch charges; but excluding charitable contributions to the schools, school uniforms, tutoring, and music lessons.[6] The trial court further declined to reconsider its revised maintenance award and denied Roberta's motion for attorney's fees. This appeal and cross-appeal followed.

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[5] There was no amendment to the revised award of child support from April 22, 1999, through February 2002, by the trial court on Roberta's motion to alter, amend, or vacate.

[6] The trial court further prohibited Gregg from deducting amounts paid for any other expenses, including sports fees, photographs, cell phones, cars, and clothing as they were considered gifts and were not included in the original order of the trial court as items to be paid as support from Gregg's bonus income.

During the marriage, Gregg had a successful career, and at the time of divorce, he was president of national network development for his employer, Advo. Except for a period early in the marriage, Roberta did not work outside the home. During the marriage, the parties had a very comfortable lifestyle including, a private home, membership to a private club, and vacations. The parties' children attended private schools and participated in various extra-curricular and social activities. The parties had approximately $1.2 million in assets, and debt in the approximate amount of $530,000.00 on their real estate. At the time of the divorce, Gregg was earning approximately $21,500.00 per month, including regular annual bonuses and a car allowance, with all travel expenses reimbursed by his employer.

In the four years following the parties' divorce, Roberta's income was $13,910.00 in 1999, $27,202.00 in 2000, $49,239.00 in 2001 (which included her maintenance, which ended June 30, 2001), and $26,805.00 in 2002. Roberta graduated from college in June 2002, obtained a real estate license, and attended court reporter school. In her first job out of college, she earned $27,000.00 annually, but it required significant travel. Her subsequent employer went out of business in May 2002, and at the time of the hearing in May 2003, she was receiving $341.00 a week in unemployment benefits. Her supplemental income from rent and dividends remained at the

same level as existed at the time of the divorce, which was $12,000.00 annually in rental income and approximately $16,000.00 annually in interest and dividend income. During this same time, Gregg's income based on his tax returns was $219,083.00 in 1999, $320,126.00 in 2000, and somewhere between $378,411.00 and $400,108.00 in 2001[7]. In 2000 Gregg lost his employment at Advo because of a company restructuring. He received a salary that year, a severance package, and a one-time-only stock award. He then found employment at Mail South, but lost this job in February 2002 due to a "political" disagreement with the direction of the company. He testified that his anticipated 2002 earnings were $70,000.00.[8] However, in a later hearing, upon production of his 2002 tax return, it was determined that his income was considerably greater for 2002, being approximately $100,000.00 to $150,000.00. He testified that he had decided not to travel as much so he could spend more time with his children and he chose not to look for jobs outside the area for this reason, despite the fact that he remarried in 2002 and his current wife resides in California.

[7] Gregg's actual 2001 income is disputed and the trial court made no specific finding regarding it. His 2001 tax return indicates income of $400,108.00 and his 2001 amended tax return indicates income of $389,907.00. However, he claims that his 2001 income was $378,411.00.

[8] Gregg received a stock certificate valued at $113,500.00, which he paid taxes on in 2001, but did not receive its value until 2002. It is unclear if the trial court treated this as income for 2001 or 2002. It appears on Gregg's 2002 tax return as a tax-free event, since he paid the taxes on it in 2001.

CHILD SUPPORT

Roberta raises three issues regarding the trial court's award of child support. First, she argues that the trial court's modification of child support effective March 1, 2002, is not supported by the evidence and the reduction as of that date is contrary to the facts and the law. Second, Roberta argues that because there was no motion to modify future child support, the trial court erred in setting a child support award effective June 1, 2003, and that the award was not based on the parties' earning capacities. Third, Roberta argues that the trial court erred when it granted Gregg 100% credit against his back child support for his prior payments of school-related fees for the children, as ordered by the trial court in its April 22, 1999, order. It is important to note that Roberta is not contesting the trial court's revised child support award from the date of the parties' divorce through February 2002. Thus, this appeal only involves the child support award from March 1, 2002, to present.

KRS[9] 403.211 and KRS 403.212 provide the guidelines for calculating child support. KRS 403.212(5) states that "the court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table."

[9] Kentucky Revised Statutes.

This level is a combined adjusted parental gross monthly income of $15,000.00.[10] KRS 403.211(3)(e) requires the trial court to make a written finding or specific finding on the record of any adjustment to the guideline amount when the combined monthly adjusted parental gross income is in excess of the Kentucky child support guidelines. In this case, it was specifically found that the parties' monthly adjusted parental gross income was approximately $23,500.00, justifying the deviation from the guidelines.

Since this Court in its 2001 Opinion vacated the trial court's 2000 judgment, on remand the trial court made its determinations as if the parties had been granted a new trial.[11] "When a judgment is reversed on direct appeal, it is as though it never existed."[12] Thus, the trial court was not required to wait for one of the parties to file a motion to set the child support award. Roberta argues that the trial court, after setting the revised child support award upon remand, went a step further and modified this award effective March 1, 2002, and June 1, 2003, without a motion by either of the parties. Since Roberta's motion to modify child support was filed on May 30,

[10] KRS 403.212(7).

[11] Gill v. Wall, 239 S.W.2d 235, 236 (Ky. 1951).

[12] Clay v. Clay, 707 S.W.2d 352, 353 (Ky.App. 1986) (citing Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969 (1933); and Knight's Adm'r v. Illinois Central R. Co., 143 Ky. 418, 136 S.W. 874 (1911)).

2002,[13] she argues under Price v. Price,[14] that the earliest effective date for the trial court's modification of its original child support order upon remand would be the date she filed her motion for modification. The trial court in its May 13, 2003, order set Gregg's child support effective the next month, June 1, 2003, after acknowledging that the parties' oldest child, who was eighteen at the time, was to graduate from high school during May 2003. Gregg argues that when the case was remanded, the trial court could make new awards, both retrospective and prospective, for child support and that the law in Price is not applicable to this case. We agree.

The Court in Price stated that "'[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of a motion for modification and only upon a showing of material change in circumstances that is substantial and continuing.'"[15] But since the trial court was allowed on remand to start from the beginning in setting the child support award, there was no award to modify. The trial court was correct in using the historical account of the parties' incomes and potential for income, rather

[13] Roberta states in her brief that the motion was filed on July 11, 2002. While there was a motion for modification of child support filed on that date, the record shows that she had filed one on May 30, 2002.

[14] 912 S.W.2d 44 (Ky. 1995).

[15] Id. at 46 (quoting KRS 403.213).

than having to rely on estimations of projected income. It was proper for the trial court to set child support from the date of dissolution through the present. Thus, the trial court, in starting over, correctly used this information to set equitable child support for the children based on the instructions from this Court.

Roberta further argues that the modification was made without the trial court's consideration of the parties' current incomes or earning capacities. In reviewing the record, it appears that the trial court had income information on the parties through 2002 and undisputed testimony of the parties' projected 2003 incomes. Further, there was extensive testimony as to the parties' monthly expenses and the children's reasonable needs. Therefore, the trial court properly considered the parties' incomes and earning capacities in making the child support award on remand.

In reviewing a child support award, "an appellate court will not disturb the trial court absent an abuse of discretion. An appellate court is not authorized to substitute its own judgment for that of the trial court where the trial court's decision is supported by substantial evidence" [footnote omitted].[16] The trial court heard the testimony of the parties, including their ability to financially support their children

[16] Bickel v. Bickel, 95 S.W.3d 925, 928 (Ky.App. 2002).

and to provide for the children's reasonable needs, and then made findings that were supported by substantial evidence. We do not find an abuse of discretion and affirm the trial court's award of child support upon remand.

The trial court originally ordered Gregg to pay the children's school-related expenses in lieu of additional child support based on his bonus income. Neither Gregg nor Roberta cite any legal authority in their briefs to this Court to support or refute this action by the trial court. Because the trial court on remand included Gregg's bonus income in the child support award, which we find to be supported by substantial evidence, we affirm the credit given by the trial court to Gregg for these payments. Otherwise, Roberta would be receiving a "double recovery" from Gregg's bonus income--once as income for child support purposes and again as payment of other expenses.

MAINTENANCE AWARD

Roberta argues that the trial court's award of maintenance upon remand should have been based on the formula found in Atwood v. Atwood.[17] However, we agree with Gregg that the method provided in Atwood is only a recommendation and following this formula is not required in making a maintenance determination.[18] The final determination on maintenance is a

[17] 643 S.W.2d 263 (Ky.App. 1982).

[18] Id. at 266.

matter of discretion for the trial court.[19] Both, the amount and duration award of maintenance, are within the trial court's sound discretion. This Court will uphold the award unless we conclude that the trial court abused its discretion or based its decision on factual findings that were clearly erroneous.[20] "[U]nless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge."[21] Roberta fails to demonstrate that the trial court abused its discretion in setting the duration of the maintenance award.

Under KRS 403.200(1), a trial court has discretion to award maintenance where a spouse lacks sufficient property, including marital property apportioned to her, for her reasonable needs, and is unable to support herself through appropriate employment. If a spouse is entitled to a maintenance award, factors relevant to determining the amount of the award include the financial resources of the party seeking maintenance, the time necessary to acquire education and training to find employment, the standard of living established during the marriage, the duration of the marriage, the age and

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[19] KRS 403.200.

[20] Russell v. Russell, 878 S.W.2d 24, 26 (Ky.App. 1994).

[21] Clark v. Clark, 782 S.W.2d 56, 60 (Ky.App. 1990) (citing Platt v. Platt, 728 S.W.2d 542, 543 (Ky.App. 1987); and Moss v. Moss, 639 S.W.2d 370, 373 (Ky.App. 1982)).

physical and emotional condition of the spouse seeking maintenance, and the ability of the paying spouse to meet his needs.[22] A trial court has broad discretion in deciding whether to award maintenance in the first instance, as well as in determining the amount and duration of a maintenance award.[23]

In this case, the trial court found that Roberta had a gross yearly income of approximately $28,000.00 from rental income and dividend and investment income and Gregg had a net income of $9,000.00 per month. Roberta was awarded approximately $703,712.00 in marital property, with approximately $195,000.00 in debts. She was unemployed for most of the marriage, but was attending college and expected to receive her degree in May 2000. Her monthly expenses were found to be approximately $4,700.00. The parties were married for 15 years and enjoyed a very comfortable lifestyle. Gregg was awarded approximately $877,093.00 in marital property, with approximately $335,000.00 in debts. His monthly expenses were found to be $9,950.00, which included maintenance and child support payments. Roberta was 40 years of age and Gregg was 45 years of age on the date of the divorce and there was no evidence that either was in poor health. Under the circumstances of this case, we cannot conclude that the trial

[22] KRS 403.200(2).

[23] Leveridge v. Leveridge, 997 S.W.2d 1, 2 (Ky. 1999); Gentry v. Gentry, 798 S.W.2d 928, 937 (Ky. 1990)).

court's award of maintenance of $4,000.00 per month for two years and one month to Roberta was an abuse of discretion.

The trial court determined that Roberta was entitled to an award of maintenance from Gregg because she met the requirements of KRS 403.200(1). Specifically, the trial court found that she lacked sufficient property, including marital property apportioned to her, to provide for her reasonable needs and that she was unable to support herself at the time through appropriate employment. However, in May 2000 Roberta received a college degree and certainly was in a much better position to support herself through appropriate employment. Thus, we conclude there was no abuse in discretion in the duration of the maintenance award as it extended for one year after Roberta's graduation from college and we affirm the trial court's maintenance award.

DIVISION OF NON-QUALIFIED PENSION PLAN

In the original decree of dissolution, the trial court awarded Roberta one-half of Gregg's "Continuation 401k plan."[24] The findings of fact entered on April 22, 1999, indicated that the value of this asset was $34,167.00. Following the dissolution, it was determined that the asset could not be divided by QDRO,[25] since it was a non-qualified plan. Because

[24] This plan is also referred to throughout the record and this Opinion as Gregg's non-qualified pension fund.
[25] Qualified Domestic Relations Order.

Gregg was subsequently terminated from Advo, his former employer distributed the full amount of the funds in the plan to Gregg, withholding taxes in the amount of 28% for federal and 6% for state. The net distribution totaled $70,244.01, which Gregg deposited into his checking account. The trial court found that each party was entitled to one-half of the net value of this account.

Roberta raises two issues regarding the distribution of this pension fund. First, she argues that her share of the distribution should be taxed at her marginal rate which was 15% at the time the money should have been distributed. Roberta asserts that she should not be penalized by having to pay taxes on the funds at a significantly higher rate. Gregg testified that this plan was cashed out to him because he was terminated from his employment. Upon that event, federal law required that it be paid out to only the holder of the account and taxed at the applicable rate. Because this was not a tax-free distribution but treated as income to Gregg, we agree that Roberta is entitled to receive only her share of the after-tax value of the fund, as that was the net value of the asset Gregg received.

At the October 15, 2002, hearing an issue arose as to the actual value of the funds to be distributed. The trial court directed the parties to brief the issue regarding the

valuation date of the asset. Roberta submitted authority to the trial court, relying on Armstrong v. Armstrong,[26] which stated that the valuation date of the account should be the date of dissolution. It does not appear that Gregg provided any support for the valuation date. This Court in Armstrong stated, "'a trial court retains broad discretion in valuing pension rights and dividing them between parties in a divorce proceeding, so long as it does not abuse its discretion in so doing. . . .'"[27] We hold that the trial court correctly determined the valuation date of the asset to be the date of dissolution of the marriage, April 22, 1999, and thereafter correctly valued the asset.

Gregg paid Roberta $14,967.14 from the proceeds of the fund at the end of the July 2003 hearing, as that amount was not in dispute. During the hearing on July 15, 2003, Roberta stipulated that the total marital portion of the undistributed, non-qualified plan, after taxes, was $60,877.80. This sum included the marital contribution noted by the trial court and the growth of the marital portion of the fund between the date of the parties' decree and the distribution of the fund in a lump sum to Roberta. The trial court ruled that Roberta was entitled to receive $30,438.90, less the $14,967.14 she had already received, or $15,471.76. The trial court further

[26] 34 S.W.3d 83, 86 (Ky.App. 2000).

[27] Id. at 87. (quoting Duncan v. Duncan, 724 S.W.2d 231, 234-35 (Ky.App. 1987)).

directed Gregg to pay Roberta at that time 34% of this $15,471.76, leaving a balance owed of $10,211.36. We disagree with Roberta's assertion that she should receive $13,151.00, which is the balance owed less her 15% marginal tax rate. We conclude that the trial court did not abuse its discretion in dividing the pension fund and affirm on this issue.

ATTORNEY'S FEES

Prior to the hearings in July 2003, Roberta filed a motion to compel discovery, in which she also asked for attorney's fees. She had previously been awarded $2,000.00 in attorney's fees by the trial court. She also requested additional attorney's fees at the hearing and the trial court stated that it would take it into consideration. In its order entered on September 9, 2003, the trial court denied this request.

Under KRS 403.220, a trial court in a dissolution action may order one party to pay a "reasonable amount" for the attorney's fees of the other party if there is a disparity in the financial resources of the parties. "But even if a disparity exists, whether to make such an assignment and, if so, the amount to be assigned is within the discretion of the trial judge" [citations omitted].[28] In this case, the decree divided the marital property equitably. As anticipated in the decree,

[28] Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001).

Roberta has received a college degree and she also received significant income producing property as the result of the parties' asset division. Roberta has not shown that the trial court's failure to award her additional attorney's fees constituted an abuse of discretion. Thus, we affirm.

GREGG'S CROSS APPEAL

Since we are affirming on all issues raised by Roberta, Gregg's protective cross-appeal is moot.

Based on the foregoing reasons, the orders of the Kenton Circuit Court are affirmed.

ALL CONCUR.

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