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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000102-MR

WILLIAM D. GOLDEY

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT  
HONORABLE JO ANN WISE, JUDGE  
ACTION NO. 03-CI-00992

REBECCA F. GOLDEY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: William D. Goldey has appealed from the decree of dissolution of marriage entered by the Fayette Family Court on December 24, 2003. Having concluded that the family court failed to make adequate findings of fact, and failed to comply with the procedural requirements of KRS<sup>1</sup> 403.200 in awarding maintenance to the appellee, Rebecca F. Goldey, we vacate that

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<sup>1</sup> Kentucky Revised Statutes.

portion of the decree of dissolution of marriage and remand this matter for further proceedings.

William and Rebecca were married on August 22, 1980.<sup>2</sup> There were three children born of the marriage, and at the time of the parties' divorce all were emancipated. The date of physical separation of the parties was March 2003, following a domestic altercation.<sup>3</sup> William filed a petition to dissolve the marriage on March 10, 2003, and Rebecca filed her response on March 18, 2003, and requested maintenance.

During the marriage, William was employed as a police officer<sup>4</sup> and also worked a second job as a security guard at bingo halls in Lexington. Rebecca worked part-time during the marriage as a hair stylist. She testified that when the parties' children got older, she worked five days a week. After the parties' separation, Rebecca obtained full-time employment as a receptionist at St. Joseph's hospital,<sup>5</sup> and continued to work part-time as a hair stylist.

At the final hearing, William strongly contested

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<sup>2</sup> The parties were first married in June 1977, but divorced approximately one year later. They were remarried in 1980.

<sup>3</sup> William was charged with assault in the fourth degree, but the charge was dismissed.

<sup>4</sup> William received some overtime from this employment.

<sup>5</sup> Rebecca testified that she obtained this position because she was unable to work as a hair stylist for a few months after the injury resulting from the parties' altercation in March 2003, and also in order to obtain health insurance.

the accuracy of Rebecca's income as shown on their joint tax returns. He introduced Rebecca's appointment books for the years 1999, 2000, 2002, and 2003.<sup>6</sup> William argued that if \$10.00 had been charged for every service Rebecca rendered, which was the minimum she charged for any service, then her income during those years should have been between \$23,000.00 to \$24,000.00.<sup>7</sup> However, it is undisputed that William signed the tax returns showing Rebecca's income for those years.

At the time of the final hearing, William was not receiving income from the security guard position at the bingo halls. After the altercation between the parties, William was placed on light-duty status and was removed from the security guard position. The assault charge was dismissed on November 25, 2003, and William was reinstated to his original status at the police department; however, by this time the security guard position was unavailable. William testified that he requested the opportunity to return to this position if it ever became available, but at the time of the final hearing it had not. William further testified that, as a police officer, he was restricted to what types of additional employment he could obtain.

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<sup>6</sup> Rebecca's appointment book for 2001 was not available for inspection.

<sup>7</sup> Rebecca did testify that she did not keep up with how much she made in tips each year.

At the final hearing on December 3, 2003, the family court made oral findings of fact, which were followed by written findings. The decree of dissolution of marriage was entered on December 24, 2003. In the decree, the family court made a division of marital property and marital debt, assigned non-marital debt, and awarded Rebecca lifetime maintenance in the amount of \$800.00 per month. This appeal followed.

The family court's oral findings<sup>8</sup> included that Rebecca earned a net income of \$1,311.00 per month from her full-time employment at St. Joseph's Hospital and \$800.00 per month as a part-time hair stylist, for a total of \$2,111.00 net monthly income. The family court found that Rebecca was "employed to her fullest abilities and cannot reasonably earn any other income." The family court found that Rebecca's reasonable expenses were \$2,900.00 per month. The family court also found that William's net income from his full-time employment at the Lexington-Fayette Urban County Government as a police officer

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<sup>8</sup> The family court's oral findings and the decree of dissolution of marriage included an almost equal division of the marital property and marital debt and assigned certain non-marital debt to William. Rebecca received, as her part of the division of marital property, equity in the parties' marital real estate in the amount of \$42,627.00, various items of personal property, including a leased automobile, and one-half the value of William's accumulated sick pay earned in 2003, his 401k, his 457 deferred compensation account, and his retirement benefits from his employment. Rebecca was also awarded \$3,500.00 in attorney's fees. William was awarded a portion of the marital real estate, and personal property, including an automobile, and one-half the value of his 401k, his 457 deferred compensation account, his retirement benefits, and his sick pay for 2003. Each party was assigned various marital debts in almost equal proportions.

was \$2,329.00 per month. The family court further found that William had the capacity to earn an additional \$10,000.00 per year, approximately \$833.00 per month, in self-employment as he did during the marriage. The family court found William had a net monthly income of approximately \$3,162.33. He argues that his income should not have been based on what he could earn if he received income from a second job, if Rebecca's income was not based on what she could earn if she worked full-time as a hair stylist, which would be more than she currently earns.<sup>9</sup>

The family court then found that because Rebecca's reasonable expenses exceeded her income, she was entitled to maintenance and she was awarded \$800.00 per month permanent maintenance, except, of course, upon the death of either party, their remarriage, or their cohabitation as contemplated by Combs v. Combs.<sup>10</sup> The family court's written findings were made on a standardized form. The only findings significant to maintenance were the date of the parties' marriage and their ages. In the written conclusions of law, the family court stated that Rebecca was awarded maintenance of \$800.00 per month. These written and

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<sup>9</sup> William argues that the parties' incomes in this case should be treated as those in Sayre v. Sayre, 675 S.W.2d 647 (Ky.App. 1984). In Sayre, the party seeking maintenance chose to remain at a lower paying job, and this Court held that there was "no necessary reason for her to fail to pursue a higher paying job." Id. at 648. Because it was a matter of personal choice, it did not justify a maintenance award. Id.

<sup>10</sup> 622 S.W.2d 679 (Ky.App. 1981).

oral findings were incorporated into the December 24, 2003, decree, wherein the family court stated as follows:

It is the finding of this Court that [Rebecca] meets the criteria of KRS 403.200(1) in her request for maintenance and after consideration of the factors set forth in KRS 403.200(2) this Court awards [Rebecca] permanent maintenance in the amount of \$800.00 per month until [Rebecca's] death or remarriage, whichever event occurs first.

William argues that the family court's findings of fact are clearly erroneous; that the amount and duration of the award of maintenance was an abuse of discretion; and that even if the family court awarded Rebecca maintenance, it should be a nominal amount.<sup>11</sup>

CR<sup>12</sup> 52.01 provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [family] court to judge the credibility of the witnesses." "[T]he test is not whether [this Court] would have decided [the issue] differently, but whether the findings of the [family] court judge were clearly erroneous or that [the family court] abused [its] discretion."<sup>13</sup> Absolute

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<sup>11</sup> Rebecca argues that because the maintenance award is for life, it is modifiable and that upon retirement, William can move the family court for modification.

<sup>12</sup> Kentucky Rules of Civil Procedure.

<sup>13</sup> Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

abuse must be shown for the appellate court to disturb the family court's findings.<sup>14</sup>

Under the statutory scheme, the family court was required to consider whether Rebecca had a need for maintenance under KRS 403.200(1)(a) and (b), before determining the amount and duration pursuant to the remainder of the statute.<sup>15</sup> For a party to establish a need for maintenance, both subsections of KRS 403.200(1) must be met.<sup>16</sup> Rebecca would have established a need for maintenance if the family court determined that she "lack[ed] sufficient property, including marital property apportioned to her, to provide for [her] reasonable needs[,]"<sup>17</sup> and, that she was "unable to support [herself] through appropriate employment."<sup>18</sup> Pursuant to case law, the reasonable needs in KRS 401.200(1)(b) are based on the "standard of living established during the marriage."<sup>19</sup>

The family court made findings as to the parties' date of marriage, their ages, the division of property, the parties'

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<sup>14</sup> 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)).

<sup>15</sup> Sayre, 675 S.W.2d at 648.

<sup>16</sup> Drake v. Drake, 721 S.W.2d 728, 730 (Ky.App. 1986); Atwood v. Atwood, 643 S.W.2d 263, 265 (Ky.App. 1982) (citing Inman v. Inman, 578 S.W.2d 266, 270 (Ky.App. 1979)).

<sup>17</sup> KRS 403.200(1)(a).

<sup>18</sup> KRS 403.200(1)(b).

<sup>19</sup> Drake, 721 S.W.2d at 730 (citing Lovett v. Lovett, 688 S.W.2d 329, 332 (Ky. 1985)). See also Casper v. Casper, 510 S.W.2d 253, 255 (Ky. 1974).

incomes or potential incomes, and Rebecca's reasonable expenses. In reviewing the record, we determine that there was substantial evidence to support the family court's findings as to the marital property apportioned to Rebecca, her reasonable expenses, her income, her ability to earn money, and the parties' standard of living established during the marriage, and that the family court made adequate findings to support its conclusions that Rebecca was entitled to maintenance under the first part of KRS 403.200.

Although we defer to the family court's findings and conclusions of law that pursuant to KRS 403.200(1)(a) and (b) Rebecca is in need of maintenance, we are convinced that it erred in setting the amount and duration of the award. After determining Rebecca had a need for maintenance, the family court should have then considered "all relevant factors"<sup>20</sup> including those set forth in KRS 403.200(2), in determining, within its sound discretion, the amount and duration of the award.<sup>21</sup>

Factors relevant to this determination include:

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently[;]

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<sup>20</sup> KRS 403.200(2).

<sup>21</sup> Russell v. Russell, 878 S.W.2d 24, 26 (Ky.App. 1994); and Drake, 721 S.W.2d at 730 (stating that the appellate court "must consider whether the amount awarded herein constitutes an abuse of discretion").



- (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.<sup>22</sup>

Although the family court stated that it considered the factors set out in KRS 403.200(2), its findings are not adequate to permit this Court to review the propriety of the amount and the duration of Rebecca's maintenance award.<sup>23</sup> The family court fell short in conducting its analysis under KRS 403.200(2) as it failed to consider "all relevant factors."<sup>24</sup> There were no findings regarding the physical<sup>25</sup> and emotional condition of the parties. Further, the family court made no findings as to William's reasonable needs. While the testimony

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<sup>22</sup> KRS 403.200(2).

<sup>23</sup> See CR 52.01.

<sup>24</sup> See KRS 403.200(2).

<sup>25</sup> Rebecca testified that she had a thyroid condition; however, she did not testify if this affected her ability to work.

of his monthly expenses was undisputed, the family court failed to make findings of his ability to meet his needs.<sup>26</sup>

Additionally, there were not sufficient findings as to William's ability to pay \$800.00 per month, as required by statute. William argues that the family court erred in basing this award on the contingency that he would be disabled before he retired, and thus under the case of Holman v. Holman,<sup>27</sup> Rebecca would be denied any of his retirement benefits.<sup>28</sup> This contingency is not one of the factors to be considered under KRS 403.200(2), nor do we find it relevant, and upon remand, the family court is instructed not to consider this contingency in setting the amount and duration of Rebecca's maintenance award, if it did so previously.<sup>29</sup> The documentary evidence as to both

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<sup>26</sup> Dotson v. Dotson, 864 S.W.2d 900, 902-03 (Ky. 1993) (noting that the family court must consider the husband's ability to meet his needs while at the same time meeting the wife's needs).

<sup>27</sup> 84 S.W.3d 903 (Ky. 2002). The Supreme Court in Holman stated that the husband's "future, post-dissolution disability retirement benefits, which replace his future nonmarital earnings as a firefighter, constitute [his] separate nonmarital property." Id. at 904.

<sup>28</sup> William informed the family court that he would sign away his rights under Holman if he was to become disabled, and he would agree that Rebecca would begin to receive one-half the monthly benefits from his retirement when she reached age 62. Rebecca argued that she should not have to wait until reaching age 62 to receive the benefits, should William become disabled.

<sup>29</sup> While there was no proof that William was going to become disabled, Rebecca's attorney specifically asked the family court to award Rebecca lifetime maintenance to protect her in case William did become disabled. There is no proof that the family court based its award on this reasoning; however, the amount of the award is essentially the same as the amount of the monthly retirement benefits that Rebecca would receive, approximately \$800.00. However, the family court also awarded Rebecca one-half of William's retirement, but made no mention of reducing the maintenance award upon his retirement.

parties' net pay does not support a finding that Rebecca is entitled to \$800.00 per month maintenance, which actually would give her a greater monthly income than William. Therefore, we conclude that this portion of the award must be vacated and this matter must be remanded for specific findings as to William's ability to pay maintenance to Rebecca and, if so, in what amount.

William further contends that there was no justification for the family court's award to Rebecca of lifetime maintenance. Maintenance is presumed to be for life, or until remarriage, unless rebutted.<sup>30</sup> "The duration of maintenance must have a direct relationship to two factors: (1) the period over which the need exists, and (2) the ability to pay."<sup>31</sup> This Court noted in Weldon v. Weldon,<sup>32</sup> the possibility that such presumption can be rebutted when it found that the trial court abused its discretion in awarding the wife maintenance past her retirement age of 65.<sup>33</sup> The parties in Weldon were in their forties, just as William and Rebecca. The disparity in the parties' gross income in Weldon was

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<sup>30</sup> Combs, 622 S.W.2d at 680.

<sup>31</sup> Id.

<sup>32</sup> 957 S.W.2d 283, 286 (Ky.App. 1997).

<sup>33</sup> Id.

approximately \$53,000.00 per year.<sup>34</sup> The disparity in net income between William and Rebecca was found to be \$12,612.00 per year. In Weldon, the parties had been married for 22 years, compared to the 23-year marriage of William and Rebecca. The division of marital property was similar.<sup>35</sup>

The wife in Weldon was awarded permanent maintenance of \$750.00<sup>36</sup> per month for her life, until she died, remarried, or cohabitated.<sup>37</sup> This Court found that in the next 20 years, before the wife reached 65, she would receive almost \$250,000.00 in maintenance.<sup>38</sup> Similarly, in this case, over the next 20 years, William would pay Rebecca almost \$192,000.00 in maintenance payments. This Court held in Weldon that, while being mindful that the duration of the award was in the trial court's discretion, the trial court "absolutely abused [its] discretion by awarding maintenance to [the wife] past her retirement age of 65."<sup>39</sup> This Court went on to state: "Assuming that [the wife] reaches age 65 without remarrying or cohabiting, then she will have received maintenance in a substantial amount

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<sup>34</sup> Weldon, 957 S.W.2d at 284.

<sup>35</sup> Id. at 284-86.

<sup>36</sup> This would be increased to \$1,200.00 per month when the husband's child support obligation ceased. Id.

<sup>37</sup> Id. at 284.

<sup>38</sup> Id. at 285.

<sup>39</sup> Id. at 286.

for a 20-year period. Furthermore, the parties' income levels will be more equal since she will be entitled to half of [the husband's] pension . . . ." <sup>40</sup> In the case before us, we hold that the abuse of discretion was great because the family court did not consider that Rebecca would also receive an additional \$800.00 per month upon William's retirement, nor did it determine William's ability to pay. The presumption of lifetime maintenance was rebutted by the evidence presented in this case, just as it was in Weldon, and therefore, we conclude that the family court abused its discretion in making a lifetime award of maintenance to Rebecca.

There is no magic formula that the family court must use when setting maintenance, nor is it required to quote the language of KRS 403.200 to support its award. However, we do expect the family court to comply with the procedural requirements of the statute, and we conclude that in this case it did not. Determination that a spouse is entitled to maintenance under KRS 403.200 is just the first step in the statutory process. In this case the family court's findings are insufficient and its conclusions concerning the amount and duration of a maintenance award are not supported by the record. Thus, we are thus compelled to vacate the judgment and to remand this matter for further proceedings and adequate findings which

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<sup>40</sup> Weldon, 957 S.W.2d at 286.

comply with KRS 403.200(2) and for the setting of an amount and duration of the maintenance award based upon those findings.

For the foregoing reasons, we vacate that portion of the family court's December 23, 2003, decree awarding Rebecca maintenance in the amount of \$800.00 per month for her life, and remand this matter for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Martha A. Rosenberg  
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