RENDERED: AUGUST 5, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: AUGUST 19, 2005; 10:00 A.M.

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001108-MR

TROY GENE CRAIG — APPELLANT

v.

APPEAL FROM TRIMBLE FAMILY COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 01-CI-00042

TERESA ANN CRAIG — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Troy Gene Craig appeals from the March 5, 2004, and May 7, 2004, orders of the Trimble Family Court, dividing the parties' marital property and awarding Teresa maintenance. We affirm.

Troy and Teresa Ann Craig were married on January 26, 1979. The parties' marriage was dissolved by decree of dissolution entered in Trimble Family Court on March 11, 2003.

All other issues raised by the pleadings were reserved for future adjudication. On March 5, 2004, the family court's order dividing the parties' marital property and awarding Teresa maintenance was entered. Both parties filed Motions to Alter, Amend or Vacate. The family court's order granting the parties' motions in part and denying in part, was entered on May 7, 2004. This appeal follows.

Troy argues the family court did not make the specific findings of fact required by KRS 403.200(1) to support an award of maintenance. Specifically, Troy asserts the court did not find whether Teresa had sufficient property to provide for her own reasonable needs and whether she was able to support herself through appropriate employment.

It is well-established that before the family court may award maintenance, it must make findings of fact pursuant to KRS 403.200(1). Perrine v. Christine, 833 S.W.2d 825 (Ky. 1992). KRS 403.200(1) states as follows:

> (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. [Emphasis added].

In the case sub judice, the family court made the following findings relevant to the award of maintenance:

> The court finds that [Teresa] does not have sufficient property including marital property set aside for her nor sufficient income available to her from disability and further finds that [Troy] has financial resources sufficient to assist her in her support.

In support of its findings, the family court noted that Teresa suffered from fibromyalgia, depression, and generalized anxiety disorder. The court noted that Teresa "was declared totally and permanently disabled by the Social Security Administration by a decision entered July 26, 2000, . . . [and] [t]he outlook further employment is dim." The court also recognized the marital property apportioned to Teresa and even imputed interest income to her based upon the amount Troy was ordered to pay her to equalize the division of marital property.

A review of the record reveals that the family court engaged in a thorough analysis and made the findings necessary under KRS 403.200(1). The court made specific findings regarding the sufficiency of the property apportioned to Teresa

and her ability to support herself through appropriate employment. As such, we believe the family court made the necessary findings of fact pursuant to KRS 403.200(1) to support its award of maintenance to Teresa.

Troy next contends the family court erred as to the amount of maintenance awarded to Teresa. Troy asserts that "while the trial court listed the factors of KRS 403.200, no specific findings were made for each of those factors."

KRS 403.200(2) states as follows:

> (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 determining the amount of a maintenance award, KRS 403.200(2) clearly directs the court to consider "all relevant factors." The statute does not, however, require the court to make specific findings of fact as to each relevant factor. Drake v. Drake, 721 S.W.2d 728 (Ky.App. 1986). After the court makes the findings of fact required under KRS 403.200(1) to determine whether an award of maintenance is proper, the amount of that award is within the family court's discretion. Drake, 721 S.W.2d 728. Absent an abuse of that discretion, the amount of the maintenance award will not be disturbed on appeal. Id.

The family court clearly considered the factors relevant to the amount of maintenance. The court discussed Teresa's financial resources, as well as Troy's ability to meet his needs while paying maintenance to Teresa. The court also considered Troy's monthly income from Gallatin Steel of $7,129.00 and Teresa's monthly income from disability of $916.00. The court obviously considered that the parties were married for some twenty-four years, as well as, Teresa's age and poor physical condition. We, thus, believe that the family court did not abuse its discretion in awarding Teresa maintenance of $1,500.00 per month. See Drake, 721 S.W.2d 728.

Troy next argues the family court erred by ordering that he "pay Teresa a separate sum of money for the farm's tobacco base." Troy was awarded the "homeplace farm" and ordered to pay Teresa an amount equal to her marital share. Troy asserts that the value of the farm included the 4,552 pound tobacco base. Troy argues that by requiring him to pay Teresa separately for her marital share of the tobacco base, he is essentially paying her twice for the same asset.

The family court found that the appraisal of the homeplace farm did not include the tobacco base. A review of the appraisal reveals that it utilized a comparable sales approach, rather than an income or cost approach. The appraisal did not indicate that a tobacco base was included; moreover, there was no mention of a tobacco base on any of the comparable property. Considering the evidence as whole, we believe the family court's finding that the appraisal did not include the tobacco base was not clearly erroneous. We, thus, reject Troy's argument that the family court erred by requiring him to pay a separate sum for Teresa's marital share of the tobacco base on the homeplace farm.[1]

[1] We note that the family court sent a "letter" to the parties indicating that the tobacco base would be valued at $2.00 per pound and requesting Troy's counsel to respond if this amount was not acceptable. The civil rules do not authorize this type of communication and we suggest that a *sua sponte* order regarding the court's intentions would have been more appropriate under the circumstances.

Troy also contends the family court abused its discretion by awarding Teresa attorney's fees and costs of $4,000.00. Specifically, Troy asserts the family court "made no 'findings' as to the 'financial resources' of the parties."

KRS 403.220 provides as follows:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

The language of KRS 403.220 is clear - the family court is to consider the financial resources of the parties. The court is not required, however, to make specific findings of fact regarding those resources. Hollingsworth v. Hollingsworth, 798 S.W.2d 145 (Ky.App. 1990); Tucker v. Hill, 763 S.W.2d 144 (Ky.App. 1988). As an award of attorney's fees and costs is "entirely within the discretion of the court" and will not be disturbed on appeal absent an abuse of that discretion. Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001). Abuse of discretion "implies arbitrary action or capricious disposition under the circumstances . . . ." Sherfey v. Sherfey, 74 S.W.3d 777, 783 (Ky.App. 2002).

In the case at hand, the family court discussed the financial resources of both parties and specifically pointed out the vast disparity in their respective income. We are of the opinion that the family court did not abuse its discretion by ordering Troy to pay a portion of Teresa's attorney's fees.

Finally, Troy contends the family court erred by ordering that the judgment in favor of Teresa would bear interest at the rate of 12%, retroactive to March 5, 2004. Troy specifically contends that the family court abused its discretion by ordering interest to be paid on the judgment. The court, upon review after both parties filed Ky. R. Civ. P. 59 motions, granted Teresa a judgment of $8,039.00 to equalize the division of assets between the parties. This judgment, for the purpose of accrual of interest, was effective from the date of entry of the original judgment, March 5, 2004. Troy asserts that interest on a money judgment in a dissolution proceeding is not mandatory and was inappropriate in this case. Troy argues: "Teresa received her share of the assets at the same time Troy received his. Thus, he had no 'advantage over Teresa', nor was he withholding funds in which she was entitled to receive one-half." Teresa responds that during the pendency of the proceeding Troy had the benefit of residing at the marital residence and the benefit of the income produced by the farm.

Interest on a judgment in a dissolution proceeding is appropriate, unless there are factors making it inequitable to require payments of interest. Young v. Young, 479 S.W.2d 20 (Ky.App. 1972). As Troy had exclusive possession and use of the parties' primary marital asset during the pendency of the proceeding, we believe an award of interest was proper.

Troy alternatively argues that even if the award of interest was proper, it was improper to award interest at a rate of 12%, retroactive to March 5, 2004.

The law is clear that if interest is awarded, the rate shall be that established by statute. Courtenay v. Wilhoit, 655 S.W.2d 41 (Ky.App. 1983). KRS 360.040 establishes that a judgment shall bear interest at the rate of 12%. It is equally clear that:

> [N]o distinction can be made between a judgment based upon a claim for alimony or maintenance and a judgment based upon any other legal right. After the judgment is entered, although it may be subject to modification at a subsequent date, it is binding and final until modified; and any payments which may have become due previous to such modification constitute a fixed and liquidated debt . . . .

Whitby v. Whitby, 306 Ky. 355, 208 S.W.2d 68, 69 (1948) *overruled on other grounds by* Knight v. Knight, 341 S.W.2d 59 (Ky. 1960). Thus, we believe that the interest rate of 12% retroactive to March 5, 2004, the date of entry of the family

court's findings of fact, conclusions of law and judgment was proper.

For the foregoing reasons, the orders of the Trimble Family Court are affirmed.

VANMETER, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: While I agree with much of the reasoning and the result reached by the majority opinion, I write separately to raise several additional points and to discuss the matters relating to interest in this case. With regard to maintenance, a trial court should first determine a party's entitlement to maintenance under the standards set forth in KRS 403.200(1), and then apply the factors set out in KRS 403.200(2) to determine the amount and duration of maintenance. In this case, the trial court did the analysis in reverse order. Nevertheless, the trial court found that Teresa lacks sufficient property and sufficient income to provide for her reasonable needs. Because the trial court made the necessary findings and they are supported by substantial evidence, I agree with the majority that the award of maintenance should not be disturbed.

I am more concerned with the trial court's findings regarding the value of the tobacco base. There was no evidence presented at the hearing that the tobacco base had a value apart from the appraised value of the real property. That evidence

came to the court in a letter written by Teresa's counsel. This was not a proper method for introducing evidence. Furthermore, counsel related hearsay evidence regarding an offer made to purchase the tobacco base.

But while this evidence should only have been introduced by a witness under oath, Troy was aware that the trial court had requested this information and he never objected to the manner in which the evidence was presented to the court. Consequently, he is barred from raising the issue for the first time on appeal. However, I would strongly urge the trial court to refrain from such practices in the future.

The matter involving interest has proven to be the most complex and troublesome issue in this case. While it is not entirely clear from the parties' briefs, there were two distinct matters in the case below which involved an award of post-judgment interest. Only one of those matters is raised in this appeal. The first matter involves the trial court's October 24, 2004 order finding that Troy owed Teresa $95,243.46 as her share in the marital real estate and ordering him to pay post-judgment interest on this amount from March 5, 2004. The trial court's findings and adjustments support the amount of interest owed, although I question whether the award should have been designated as retroactive. Moreover, Troy does not challenge the award of interest on this amount. But on the other hand, the benefit

which Troy received from residing in the marital residence and receiving income from the farm is not directly relevant to the question of interest raised in this appeal.

Rather, Troy challenges the trial court's retroactive award of post-judgment interest on the equalization payment ordered by the trial court in its May 7, 2004 order. In its March 5 order, the trial court made findings of fact concerning the value of the tobacco base, the marital income received by Troy from crop sales, the value of the bank accounts, and the value of certain marital farm equipment. But the trial court neglected to enter a judgment against Troy for an amount to equalize the division of these assets. Teresa brought this oversight to the court's attention in her CR 59.05 and, in its May 7 order, the trial court entered a judgment against Troy for $8,039.00 to equalize the division of these assets.

As the majority correctly points out, the trial court's March 5, 2004 order was final and appealable. Furthermore, fixed and liquidated debts in dissolution cases bear interest at the legal rate under KRS 360.040 until paid.[2] However, the May 7, 2004 order partially granted CR 59.05 relief and altered the court's prior judgment. Troy makes a compelling argument that the equalization amount was not fixed and liquidated until the

[2] Johnson v. Johnson, 564 S.W.2d 221 (Ky.App. 1978).

judgment was entered on May 7. Thus, he reasonably asserts that post-judgment interest should only run from the later date.

If the trial court had failed to make findings on the value of these assets in its March 5 order, then I would agree with Troy that the May 7 judgment would be the final and appealable order from which post-judgment interest would run. But since the trial court did make those findings in its initial order, its May 7 judgment merely included the equalization amount determined but not included in the earlier judgment. Thus, the May 7 judgment could relate back to the date of the March 5 order. Consequently, post-judgment interest was properly payable on the judgment from the earlier date. Accordingly, I agree with the majority's conclusion affirming the award of post-judgment interest on this amount.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Ruth H. Baxter CRAWFORD & BAXTER, P.S.C. Carrollton, Kentucky	James L. Theiss WILLIAMSON, SIMPSON & THEISS LaGrange, Kentucky