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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000874-MR

JAMES VERNON HARMON, JR.

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 02-CI-00350

KAREN JEAN SMITH HARMON;
AND HON. DAVID GOIN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND MINTON,¹ JUDGES, HUDDLESTON,² SENIOR JUDGE.

BARBER, JUDGE: This appeal is brought from a dissolution of marriage proceeding originating in Allen County, Kentucky. On September 18, 2002, Appellee, Karen Jean Smith Harmon (Karen) filed for a divorce from Appellant, James Vernon Harmon, Jr. (James).

¹ Judge John D. Minton, Jr. concurred in this opinion prior to his resignation effective July 25, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The parties were married June 15, 1985, in Mississippi. During the early years of the marriage, both parties worked full-time outside the home. In 1990, Karen temporarily left her job due to pregnancy. Following the birth of their daughter, she returned briefly to work. Karen again quit after the couple moved to Kentucky in early 1991. She wanted to be a full-time mother and homemaker. Karen's employment status soon became a point of contention between the parties. At the time of the parties' separation in 2002, Karen still had not returned full-time to the work force.

A final hearing began before the Domestic Relations Commissioner (DRC) on March 4, 2004, recessed and completed on April 5, 2004. At the time of the final hearing, Karen worked one day a week at a Nashville, Tennessee dry cleaner.³ Jay had a salaried position with Arvin-Meritor.⁴ Following the hearing, the DRC issued his Final Trial Report on October 22, 2004.

Each party filed a motion to reconsider with the DRC. Karen requested reconsideration on the issue of an award of attorney fees to her. This issue had been omitted from the Final Trial Report despite it having been raised at the hearing.

³ Karen drove to the dry cleaner from Allen County. She earned \$8.50 per hour and worked an average of 10-11 hours on the day she worked. Karen had also been employed part-time by H & R Block at the time of the March 4, 2004 hearing date, but this position had ended by the April 5, 2004 hearing date.

⁴ James began working for Bowling Green Metalforming on April 12, 2004. He testified to the same at the April 5, 2004 hearing. His salary at his new position was to be \$53,000 per year.

James requested reconsideration on the issues of visitation, marital debt, property allocations, and maintenance. Said motions were heard on December 16, 2004. The DRC granted Karen's motion and awarded her \$1,000.00 for attorney fees. James' motion was denied except for his request related to visitation of the parties' child.

The parties then filed exceptions with the circuit court. Karen took exception to the amount and duration of maintenance. She also took exception to the amount of attorney fees awarded her attorney. James took exception to the maintenance award and the marital debt and property allocations. The exceptions were heard March 21, 2005. The circuit court overruled both parties' exceptions per order entered March 31, 2005. The court concluded that the DRC's recommended Findings of Fact were "supported by substantial probative evidence and that his recommended conclusions of law reflect[ed] a correct application of the law" and adopted them in their entirety. Accordingly, the Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage was entered March 31, 2005. James now appeals to our court.

Kentucky Rule of Civil Procedure 52.01 states in pertinent part, for actions tried without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." As a result, when the trial court adopts the recommendations of the Commissioner, those recommendations fall under the same standard of review as applied to a trial court's findings. See Greater Cincinnati Marine Service, Inc. v. City of Ludlow, 602 S.W.2d 427, 429, (Ky. 1980) and Wells v. Sanor, 151 S.W.3d 819, 822 (Ky.App. 2004). Our court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous. Cochran v. Cochran, 746 S.W.2d 568, 569, 570, (Ky.App. 1988), (citing Johnson v. Johnson, 564 S.W.2d 221 (Ky.App. 1978)), see also Rife v. Fleming, 339 S.W.2d 650, 652, (Ky. 1960).

We first examine James' arguments. Four arguments are raised by James: (1) The trial court erred by awarding Karen maintenance; (2) the trial court erred and abused its discretion in the amount and duration of maintenance awarded; (3) the trial court abused its discretion by not requiring Karen to refinance the mortgage on the marital home; and (4) the trial court abused its discretion by awarding attorney fees to Karen. We first examine James' arguments related to the trial court's award of maintenance to Karen.

Maintenance is governed by KRS 403.200, which states:

(1) In a proceeding for dissolution of marriage . . . 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 the 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.

Under this statute, the trial court has dual responsibilities: One, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. Perrine v. Christine, 833 S.W.2d 825, 826 (Ky. 1992). A trial court's decision regarding maintenance will not be reversed unless the trial court abused its discretion or based its decision on findings of fact that are clearly erroneous. Powell v. Powell, 107 S.W.3d 222, 224 (Ky. 2003).

Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000). Further, the test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. With the foregoing in mind, we turn to the DRC's Final Trial Report which was adopted by the circuit court in its entirety.

The Final Trial Report stated, in pertinent part:

When considering whether or not to award maintenance in this case, the Commissioner must first find that Karen meets the standard requirements for maintenance set forth in KRS 403.200(1). She must lack sufficient property to provide for her reasonable needs and be unable to support herself through appropriate employment. Karen has not been a full time member of the work force for a number of years and the property awarded to her is not income producing. Should there be a finding that she meets the standard, then KRS 403.200(2) directs a Court to consider a number of relevant factors. This is a marriage of long duration, and [James]; by virtue of his past history and experience in the work place will always have the ability to earn much greater income. The parties have incurred some credit card debt, but it is not extraordinary and a great deal of that debt should be eliminated from the proceeds of the sale of the john boat. The Commissioner gathers from the evidence as a whole that the parties' lifestyle has not be (sic) extravagant, but rather could be described as comfortable.

The Commissioner **Concludes and Finds** that Karen does meet the requirements of KRS 403.200(1). The Commissioner **Finds** that [James] should pay maintenance in an amount of \$500.00 per month for a period of eight years, through and including October, 2012. In reaching this conclusion, the Commissioner is also factoring in the **Finding** that Karen should be responsible for making the mortgage payment on the marital residence.⁵ The marital residence should be awarded to Karen and at some point in time, no later than coinciding with the last maintenance payment, [James] should execute a Quitclaim Deed conveying to Karen all of his right, title and interest in and to the

⁵ The monthly mortgage payment on the marital home was \$387.00 according to Karen's Sworn Asset and Liabilities Statement filed October 10, 2003, contained in the record.

real estate and Karen should make her best efforts to refinance and remove [James'] name from the mortgage unless she sells the real estate.

The Commissioner is also factoring in the **Finding** that Karen is awarded a one-half interest in [James'] 401K account at Arvin Meritor and counsel should prepare the appropriate Qualified Domestic Relations Order for approval by the Court. The balance of [James'] retirement accounts are awarded to him as his marital property.

In making these findings, the Commissioner has reviewed the income and expenses of the parties as well as giving consideration of the debt assigned hereinabove.

We believe that the DRC failed to make proper findings of fact related to whether Karen satisfied KRS 403.200(1)(a). Specifically, he failed to find whether Karen was unable to support herself through appropriate employment. However, we can reasonably infer from the DRC's findings that he found that Karen was unable to do the same at the time of the final hearing. We then turn our attention to the amount and duration of the maintenance award.

We believe the amount and duration of the maintenance awarded was neither erroneous nor an abuse of discretion. Karen was awarded \$519.00 per month in child support and averaged \$405.17 per month from her dry-cleaning job. Based on these figures, Karen's monthly expenses, her recent re-entry into the workforce, her level of attained education and training, and the

long duration of the marriage, we believe the amount and duration of maintenance award was appropriate. The trial court properly considered all factors of KRS 403.200(2) and the record in rendering its decision and thus did not abuse its discretion nor base its decision on findings of fact that were clearly erroneous.

James' next argument is that the trial court abused its discretion by not requiring Karen to refinance the joint debt on the parties' marital home. Karen was awarded the marital home in its entirety, as well as, the mortgage attached thereto.⁶ However, there were no definite timelines established related to transfer of title and the refinancing of the mortgage. It was found that these acts should occur "at some point in time, no later than coinciding with the last maintenance payment." While not ideal, we do not believe the court abused its discretion. There is no statutory requirement that an individual who is awarded the marital home in its entirety remove their former spouse from the mortgage attached to the marital home. Given the parties' circumstances, we believe the trial court's decision on this issue was neither unreasonable nor unfair.

James' final argument is that the trial court abused its discretion by awarding attorney fees of \$1,000.00 to Karen.

⁶ For some reason, this award was contained within the Maintenance section of the DRC's Final Trial Report.

We disagree. An award of attorney fees in a dissolution proceeding is permitted pursuant to KRS 403.220. Such an award is entirely within the trial court's discretion. Glidewell v. Glidewell, 859 S.W.2d 675, 679 (Ky.App. 1993). The only requirement is that there be a disparity in the financial resources of the parties. Id. It has been held an abuse of discretion to award attorney fees against one party when the parties' financial resources are roughly equal. Drake, supra, 809 S.W.2d at 715. Karen earned less than \$500.00 per month while James earned more than \$4,000.00. In this instance, financial inequality justified the award. Therefore, we affirm the trial court's award of attorney fees to Karen.

For the reasons set forth above, we affirm the Allen Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

D. Bailey Walton
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

David Goin
Scottsville, Kentucky