

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000982-MR
AND
NO. 2005-CA-001116-MR

ROBERT A. LEVENSON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 04-CI-03887

CHERYL LYNN LEVENSON

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,¹ SPECIAL JUDGE.

GUIDUGLI, JUDGE: Robert A. Levenson (hereinafter "Andy")

appeals from an order of the Fayette Circuit Court in a dissolution of marriage proceeding. Andy claims that the award of maintenance was excessive in that his former wife Cheryl can meet her reasonable needs, and she is therefore not entitled to maintenance. Cheryl Levenson cross-appeals, arguing that if maintenance is reduced she is entitled to additional marital

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

property. She also seeks attorney fees. For the reasons stated below, we affirm the order on appeal.

Andy and Cheryl were married in 1982. The marriage produced two sons - Andrew, who now is approximately 22 years old, and Joseph, who is about 17 years old. Andy and Cheryl separated in 2004, and Andy subsequently filed a petition in Fayette Circuit Court seeking dissolution of marriage.

On April 29, 2005, the circuit court entered an order styled "findings of fact and conclusions of law." It noted that the parties agreed to issues regarding custody, timesharing and child support. It also addressed property valuation and division, and spousal maintenance. On the latter issue, the court found that Cheryl's monthly income from her job at Kroger, combined with child support of \$1,098 yielded a monthly income of approximately \$2,350. As to Cheryl's claim of \$8,000 in monthly expenses, the court opined that she "will have to learn to live on less."

Andy's gross monthly income was found to be somewhere in the range of \$15,000 per month, with a net of about \$10,700 per month. Andy was also found to receive other corporate perks including a luxury automobile. By agreement of the parties, the court interviewed a certified public accountant, after which the court concluded that Andy's actual take-home salary might be 20%

less than the \$10,700 figure. The circuit court accepted Andy's claim of monthly expenses in the amount of \$4636.

On the issue of maintenance, the court undertook the KRS Chapter 403 analysis, looking to whether Cheryl could meet her reasonable needs in light of the KRS 403.200 factors. In so doing, it concluded that Andy should pay to Cheryl the sum of \$2,600 per month for 10 years, reduced to \$2,000 per month thereafter for 8 years. These findings and conclusion were incorporated by reference into a decree of dissolution entered on May 24, 2005. This appeal followed.

The sole issue for our consideration on direct appeal is Andy's claim that the award of maintenance was excessive and improper. He argues that Cheryl's monthly expenses were theoretical, that some expenses were for luxury items for Joseph, and that the expenses included support of the emancipated child, Andrew. Andy also maintains that the court erred in using income averaging rather than following the requirements of KRS 403.200. In sum, he claims that Cheryl is able to meet her reasonable financial needs and is therefore not entitled to an award of maintenance. He seeks an order vacating the circuit court's award of maintenance.

We have closely examined the written arguments, the record and the law, and find no basis for reversing the Fayette

Circuit Court's award of maintenance. As the parties are well aware, KRS 403.200 addresses maintenance. It states,

(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.

(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 the matter at bar, the circuit court expressly addressed the factors of KRS 403.200, and applied its findings of fact to those guidelines in concluding first, that maintenance was warranted, and second, in fixing the amount of maintenance. It found, for example, that Cheryl lacked sufficient property to provide for her reasonable needs, and that she was unable to support herself through appropriate employment. These findings are supported by the record. Evidence was adduced that Cheryl's monthly income from Kroger is approximately \$1,250, and that her reasonable needs exceed that amount even when child support is considered.

The circuit court went on to address each of the factors set forth in KRS 403.200(2). It noted that the parties had been married for 27 years,² during which Andy was the primary income earner. The court recognized Cheryl's age of 45, the relative limited nature of her income earning potential, and the fact that the parties' younger son, Joseph, had emotional and

² It appears from the record that the parties actually were married 22 years.

other problems requiring additional treatment costs. It also examined the ability of the spouse from whom maintenance was sought (Andy) to meet his reasonable needs while meeting the needs of the requesting spouse (Cheryl). Establishing the amount and duration of maintenance is within sound discretion of trial court,³ and Andy has not shown an abuse of that discretion.

As to Andy's specific claims of error, we are not persuaded that Cheryl's monthly expenses were theoretical, or that the circuit court included luxury items in its calculation of her expenses. Cheryl originally claimed \$8,000 in monthly expenses, which the circuit court summarily rejected as excessive. It subsequently examined her claimed expenses as part of its KRS 403.200 analysis to conclude that she was entitled to \$2,600 per month, diminishing to \$2,000 per month. These findings and conclusions are supported by the record and the law.

Andy also contends that the trial court erred by income averaging, i.e., seeking to equalize the parties' post-decree incomes. This argument is not persuasive. Nothing in the order on appeal, or the record as a whole, indicates that the circuit court sought to reach a result of equal incomes. Rather, the court expressly relied on the factors enumerated in

³ Weldon v. Weldon, 957 S.W.2d 283 (Ky. App. 1997).

KRS 403.200 in establishing the maintenance award, and we find no error on this issue.

Andy's third argument is that the circuit court erred in awarding \$2,600 per month in maintenance for 10 years, followed by \$2,000 per month for 8 years. He claims that this award is excessive and not supported by the law. This argument is merely a restatement of his first argument, i.e., that Cheryl is not entitled to maintenance. Having determined that the circuit court properly applied KRS 403.200 to the facts in reaching its award of maintenance, the instant argument is moot.

In her cross-appeal, Cheryl argues that if we find the maintenance award to be excessive, she is entitled to additional marital property. She bases this argument on her contention that Andy received more marital property than did she, and that the maintenance award had the effect of equalizing this disparity. Having determined that the circuit court did not abuse its discretion on the maintenance issue, and because the condition precedent to Cheryl's argument did not occur (i.e., no reduction in maintenance), this argument is moot.

Cheryl also contends that she is entitled to attorney fees. She notes that she owed over \$12,400 in attorney fees and accountant fees, and maintains that the trial court committed reversible error in failing to award these fees because of the disparity in the parties' incomes and marital property

distribution. The assessment of attorney fees falls within the sound discretion of the trial court.⁴ Cheryl received a substantial maintenance and marital property award, and nothing in the record or the law compels us to conclude that the circuit court abused its discretion in failing to award attorney and accountant fees to Cheryl.

For the foregoing reasons, we affirm the findings of fact, conclusions of law, and decree of dissolution of marriage of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Crystal L. Osborne
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Lola Philpot Lewis
Lexington, Kentucky

⁴ Gentry v. Gentry, 798 S.W.2d 928 (Ky. 1990).