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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001631-MR

JOY EDISON JOHNSON

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE KRISTI GOSSETT, JUDGE
CIVIL ACTION NO. 04-CI-00430

COLE TORRANCE JOHNSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.¹

HUDDLESTON, SENIOR JUDGE: Joy Edison Johnson and Cole Torrance Johnson were married on February 12, 1992. No children were born of the marriage. On November 9, 2004, Cole filed a petition for dissolution of marriage in the Family Court Division of Carter Circuit Court.

A final hearing was held on May 17, 2005. On June 7, 2005, a decree dissolving the marriage, distributing nonmarital

¹ Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and marital property, and denying Joy's request for maintenance was entered. On July 8, 2005, the decree was modified to provide that Joy was not entitled to any of Cole's post-dissolution disability benefits.

On appeal, Joy contends that the circuit court erred when it failed to award her maintenance. Kentucky Revised statutes (KRS) 403.200, which addresses maintenance awards, provides 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.

(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.

Under this statute, the family court has dual responsibilities: first, to make relevant findings of fact; and second, to exercise its discretion in making a determination on maintenance in light of those facts. Before we can reverse the family court's decision, we must find either that the findings of fact are clearly erroneous or that the family court abused its discretion.²

In its decree, the family court made the following findings of fact and reached the following conclusions of law relevant to its maintenance decision:

FINDINGS OF FACT

. . . .

[Joy's] non-marital property consists of the real property underlying the mobile home that was the parties' residence. By stipulation the court finds this land to be [Joy's] non-marital property. The court finds [Cole's] non-marital property to

² *Weldon v. Weldon*, 957 S.W.2d 283, 285 (Ky.App. 1997).

consist of a food processor, Ocean City Real Fishing [sic], a 1968 boat, and a 1979 Kawasaki.

The court finds the marital property of the parties to consist of typical household furniture and furnishings, two automobiles, one Harley Davidson motorcycle, a Fleetwood mobile home, and [Cole's] pension and annuity.

During the marriage the parties acquired a 2004 Chevrolet Cavalier that has been in [Joy's] possession during the pendency of this action. The court finds that it has a fair market value of \$13,000.00 with a \$6,000.00 debt and therefore resulting equity of \$7,000.00. [Cole] has had possession of a 2002 Chevrolet Silverado with a fair market value of \$17,000.00 and no debt. The parties also acquired a 1994 Harley Davidson with a fair market value of \$7,500.00 and no debt. [Cole] has an interest in a pension and an annuity. The court finds that the full value of both of these assets was acquired during the marriage and that both benefit plans are entirely marital in nature. The fair market value of the annuity is \$31,270.18. No evidence was presented as to the fair market value of the pension.

During the parties marriage a 16X80 Fleetwood mobile home was purchased at the price of \$29,000.00. No evidence was presented as to the current fair market value of this mobile home. The mobile home was purchased in 1998 or 1999. To purchase this mobile home \$7,000.00 was taken from a joint account of the parties and invested in the purchase of the mobile home. Additionally, [Joy] received a lump sum award of Social Security Disability backpay during the marriage in the amount of \$21,039.12 and this was invested entirely in the purchase of the mobile home. [Joy] additionally received \$1,431.00 representing

Social Security Disability backpay and this was used to purchase the air conditioning that went with the mobile home. Additionally [Cole] borrowed \$10,000.00 from his annuity to do a minimal amount of dozer work on the property to prepare it for the mobile home, and to purchase a \$2,500.00 outbuilding located on the property. It is unclear what the remaining balance of this \$10,000.00 went toward. \$5,000.00 of the \$10,000.00 is still owed and [Cole] is in fact repaying this amount to his annuity at the rate of 8% interest.

As stated above both parties have been declared disabled by the Social Security Administration. Both parties suffered a disability and were declared disabled during the marriage.

. . . .

The only debts of the parties include the \$6,000.00 debt owed with regard to the 2004 Chevrolet Cavalier and the \$5,000.00 debt owed to [Cole's] annuity plan.

[Joy's] sole source of income is in the form of Social Security Disability benefits and is in the amount of \$804.00 per month. The court finds [Joy's] reasonable expenses to be in the amount of \$1,354.00 per month. This amount includes the \$525.00 monthly car payment on the Chevrolet Cavalier. This amount does not include the amount [Joy] testified she tithed to her church or the amount she sends monthly to Saint Jude's Children's Hospital.

[Cole's] sole source of income is in the form of Social Security Disability benefits in the amount of \$1,400.00 per month. [Cole] has a gross monthly income of \$2,500.00. The court finds [Cole's] reasonable expenses to be in the amount of \$2,060.00 per month. This does not include the Chevrolet Cavalier car payment that he

has been making during the period of separation and does not include the full amount set forth on [Cole's] exhibit with regard to rent and medical expenses in as much as his testimony was contrary to that set forth in said exhibit. [Cole] currently suffers from hepatitis, diabetes, and arthritis. He was declared disabled in 1997. [Joy] suffered with cancer in 1992 and subsequently a stroke. She was declared disabled shortly thereafter.

CONCLUSIONS OF LAW

. . . .

The court concludes that the non-marital property of each party identified above should be restored to them.

The court concludes that [Joy] should receive the following marital property: 2004 Chevrolet Cavalier, the washer and dryer, one half of value of [Cole's] pension and [Cole's] annuity, the outbuilding and the 16X80 Fleetwood mobile home. [Joy] should also be awarded **one** half of the cookware and towels as well as all personal property currently in her possession other than as may be specified hereinbelow.

[Cole] should be awarded the 2002 Chevrolet Silverado, the 1994 Harley Davidson, one half of his pension, one half of his annuity, one half the cookware and towels, the 25-06 rifle, the rods and reels, the JVC television, the broiler oven, and the tools. [Cole] should also have all personal property currently in his possession other than as specified hereinabove.

Perhaps the biggest decision before this court is the nature of the Social Security Disability backpay received by [Joy]. The court concludes that the entirety of said sums are [sic] marital in nature. It is with reference to Bischoff v. Bischoff, 987

S.W.2d 798 [Ky.App. 1998], that the court reaches this conclusion. The court concludes that [Joy's] Social Security Disability backpay benefits became marital property when they were invested in the parties' residence.

The court concludes that [Joy] should be responsible for the indebtedness associated with the 2004 Chevrolet Cavalier and that [Cole] should be responsible for the loan owed to his annuity.

The value of the marital property awarded to [Joy] herein, excluding the value of the pension, as the court has no evidence as to this value, is in the amount of \$54,400.00. The value of the marital property awarded to [Cole], again excluding the value of the pension, is in the amount of \$40,000.00. The court finds this to be an equitable distribution of the marital estate in light of the relative economic circumstances of the parties. While [Joy] is awarded a greater percentage of the marital estate, [Cole] has triple [Joy's] monthly income. Pursuant to Gross v. Gross, 8 S.W.3d 56 [Ky. App. 1999], the court concludes that it is entitled to consider this fact in the overall division of the marital estate.

The court concludes that although [Joy's] expenses exceed her income, that she is not entitled to maintenance from [Cole]. The court reaches this conclusion after the division made herein of the marital estate and after full consideration of [Cole's] health. The court concludes that [Cole] has no ability to satisfy an award of maintenance.

. . . .

The findings of fact incorporated into the decree are supported by substantial evidence and, consequently, are not clearly erroneous.³

We cannot conclude that the family court abused its discretion in failing to award Joy maintenance. While the court found that Joy has an income of only \$804.00 per month and expenses of \$1,354.00, a \$550.00 per month shortfall, \$525.00 of the deficit is associated with the monthly car payment on the 2004 Chevrolet Cavalier she was awarded. The deficit is temporary and, when paid off, her income will be substantially in line with her reasonable needs. Moreover, the property distributed to Joy provides for a debt-free residence consisting of land and a 1,280 square foot mobile home. And, the marital property distribution provides her \$14,400 more than Cole.

While Cole does have income that is three times Joy's, he, unlike Joy, does not have a debt-free residence and must incur a monthly rental expense for housing. Although it is true, as the family court noted, that Joy "suffered with cancer in 1992 and subsequently a stroke" and has been declared disabled, it is also true that Cole suffers from hepatitis, diabetes and arthritis. KRS 403.200(f) requires family courts, in making maintenance decisions, to consider "[t]he ability of

³ *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005).

the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance." While Cole does currently have a \$460.00 per month surplus, we believe KRS 403.200(f) mandates consideration of his health and the necessity of accumulating some savings to off-set future health-related expenses.

In summary, the family court's findings of fact in support of its maintenance decision are not clearly erroneous and, in light of those findings, it did not abuse its discretion in declining to award Joy maintenance.

For the foregoing reasons, the decree is affirmed.

ALL CONCUR.

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