

RENDERED: APRIL 20, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002410-MR

CATHY PERRY DEAN

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
CIVIL ACTION NO. 04-CI-00321

DAVID ALLEN DEAN

APPELLEE

OPINION

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * * * * * **

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Cathy Perry Dean appeals from a Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage of the Whitley Circuit Court denying her maintenance, failing to award her interest, and making no mention of the

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2003 income tax refund in the dissolution of marriage action brought against her by her now ex-husband, David Allen Dean. We affirm in part, reverse in part, and remand.

Cathy and David were married on August 17, 1987. The couple has two children, Dakota, born on November 13, 1994, and Calista, born on November 30, 1999. The couple separated in January 2004, and David filed for divorce in April of that year.

In September 2005, the final hearing was held before the circuit court. The issues of child custody, visitation, child support, and division of property and debt had been resolved by agreement prior to the final hearing. The only remaining contested issues were maintenance and the 2004 income tax refunds.

Concerning maintenance, at the hearing Cathy requested \$450 per month for three years and David offered to pay \$200 per month for two years. Concerning the 2004 income tax refunds of \$4,400, David admitted that he had filed the return unbeknownst to Cathy, had signed her name to it, and had received refunds but had not shared them with her. He claimed, however, that he was not given the full \$4,400 in refunds because some of it was seized by the state. As to why he failed to share the refunds with Cathy, David said that “[b]y her disagreeing with me through this whole divorce procedure and being enemies, it cost me everything I have.”

On October 11, 2005, the court entered its Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage. The court, without stating its reasons, declined to award Cathy maintenance. As to the \$4,400 in income tax refunds, the court ordered David to pay Cathy \$2,200, which was one-half of the refunds. However, the court did not order David to pay Cathy immediately. Rather, it ordered him to pay her

\$92 per month for 24 months with no interest. When Cathy's motion to alter, amend, or vacate was denied by the court, her appeal herein followed.

Cathy first contends that the trial court erred by failing to award her maintenance. We agree.

Pursuant to Kentucky Revised Statute (KRS) 403.200(1)(a) and (b), the trial court could have granted Cathy a maintenance award only if it found that: (1) she lacked sufficient property, including marital property apportioned to her, to provide for her reasonable needs; and (2) she was unable to support herself through appropriate employment or was the custodian of a child whose condition or circumstances made it appropriate that she not be required to seek employment outside the home. *Id.*

If the court had determined that Cathy should have been awarded maintenance, then it was required to make the award "in such amounts and for such periods of time as the court deems just, after considering all relevant factors[.]" KRS 403.200(2). Those relevant factors include the factors enumerated in that statute.

In *Perrine v. Christine*, 833 S.W.2d 825 (Ky. 1992), the Kentucky Supreme Court stated as follows:

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. In order to reverse the trial court's decision, a reviewing court must find either that the findings are clearly erroneous or that the trial court has abused its discretion."

Id. at 826.

An award of maintenance may be made in the sound discretion of the trial court. *Clark v. Clark*, 782 S.W.2d 56, 59 (Ky.App. 1990). To reverse an award or denial of maintenance, the complaining party must show an “absolute abuse” of this discretion by the trial court. *Id.* at 60.

The evidence before the trial court was that David was a cable technician employed by Eubanks Broadcasting and that his annual gross income was \$34,981. He testified that his net income amounted to approximately \$1,900 per month, although this apparently had not been verified. Further, in discovery David had disclosed that his net income was \$1,002 every two weeks in 2004.

Cathy was disabled² and received social security disability benefits of \$528 per month, supplemental social security benefits of \$71 per month, and \$62 per month in food stamps.³ She also received \$45 per month in social security benefits for one of her children. The total income received by Cathy was \$706. In addition, David paid Cathy \$592 per month in child support pursuant to their agreement. Thus, Cathy’s total income each month was approximately \$1,300. Assuming David accurately testified that he had a net income of \$1,900 per month, he was left with approximately \$1,300 each month after paying child support.

² Cathy has a college degree in parks and recreation administration, but she is disabled as a result of head, neck, and back injuries she suffered in 1995 or 1996 after an accidental fall. She also suffered a miscarriage when she fell, and she testified that she has had anxiety, post traumatic stress syndrome, and depression resulting from the event. Neither the trial court nor David challenged her claim of disability. The trial court specifically accepted the disability determination made by Social Security Administration.

³ The children also have KCHIP cards to cover their health care needs.

At the final hearing, the evidence indicated that David's monthly expenses were approximately \$1,100.⁴ Cathy claimed monthly expenses of approximately \$2,850. The parties once had a house and vehicle, but those were lost after payments thereon ceased.

As we have noted, at the final hearing Cathy asked for maintenance of \$450 per month for three years and David offered to pay \$200 per month for two years. The court awarded nothing. In its final decree, the court did not make any findings concerning maintenance or state why maintenance was denied.⁵ Rather, after awarding Cathy one-half of the 2004 income tax refunds (1/2 of \$4,400 = \$2,200), the court ordered David to pay it to Cathy at the rate of \$92 per month for 24 months without interest and stated that "[t]his amount shall assist Cathy during the time she is trying to rehabilitate herself to the extent needed to find gainful employment." These payments by David to Cathy constitute a restoration of marital property to which she was entitled and must not be treated as a form of maintenance. To do so was error.

The clear facts are that David has a job that pays him nearly \$35,000 annually. Cathy is disabled, unemployed, and has apparently never been in the workforce. As there was very little property left after the marriage, she lacks sufficient property to provide for her reasonable needs. Further, despite her disability income, she

⁴ Cathy disagrees with this in her brief. However, David testified that he expected to pay \$450 in rent, \$200 in utilities, \$50 for telephone, \$100 for gasoline, and \$300 for food each month, for a total of \$1,100.

⁵ Such findings were required pursuant to *Perrine, supra*. See also Justice's Keller's opinion concurring in part and dissenting in part in *Powell v. Powell*, 107 S.W.3d 222, 226-27 (Ky. 2003).

is unable to support herself through appropriate employment at this time. We conclude that the court absolutely abused its discretion in denying maintenance to Cathy. Even David offered to pay her \$200 per month. In short, we reverse and remand with directions to the trial court to make specific findings after considering all relevant factors and award some amount of maintenance to Cathy for some period of time.⁶

Next, Cathy argues that the trial court erred when it failed to award her interest on the 2004 tax refund owed to her by David. We agree.

The trial court awarded Cathy a monetary judgment in the amount of \$2,200 as her portion of 2004 federal and state income tax refunds. To satisfy the debt owed to Cathy, the trial court ordered David to pay her \$92.00 per month for 24 months without interest. In her motion to alter, amend or vacate the trial court's final decree, Cathy requested interest on the judgment. The trial court denied Cathy's motion without stating a reason. We conclude that the court erred in not awarding Cathy interest at the legal rate from the date of judgment. *See Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky.App. 1988), and *Johnson v. Johnson*, 564 S.W.2d 221, 223 (Ky. 1978).

Finally, Cathy contends that the trial court erred when it did not award her one-half of the parties' 2003 income tax refunds. We disagree.

Cathy alleges that David filed 2003 federal and state income tax returns, again without her knowledge, and received refunds totaling of \$4,146.00. Cathy failed to raise this issue with the trial court at the final hearing and is thus precluded from raising it

⁶ Cathy suggests in her brief that this court should set the maintenance award at \$850 per month. In her reply brief, she states that this court should set a maintenance award in her favor in the amount of no less than \$500 per month. First, it is for the trial court to make the award, not this court. Second, we note that Cathy only requested \$450 per month at the final hearing.

for the first time on appeal. *See Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). Accordingly, we decline to review the question of whether Cathy was entitled to one-half of the 2003 income tax refunds.

The judgment of the Whitley Circuit Court is affirmed in part, reversed in part, and remanded in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sandra J. Reeves
Corbin, Kentucky

BRIEF FOR APPELLEE:

Jane R. Butcher
Williamsburg, Kentucky