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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000539-MR
AND
NO. 2006-CA-000610-MR

GORDON JAY SETTLOW

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 98-CI-00074

ALICE JEAN HAENDIGES SETTLOW

APPELLEE/CROSS-APPELLANT

AND

NO. 2007-CA-000171-MR

ALICE SETTLOW

APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 98-CI-00074

GORDON J. SETTLOW

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

WINE, JUDGE: Gordon Jay Settlow (“Gordon”) and Alice Jean Haendiges

Settlow (“Alice”) appeal and cross-appeal, respectively, from a February 16, 2006,

final order and judgment of the Trigg Circuit Court adopting the special domestic

relations commissioner’s (“DRC”) report and findings awarding maintenance to

Alice. Alice further appeals from a subsequent order of December 21, 2006,

denying her motions for modification of maintenance and an award of attorney

fees. This is the third time this matter has been before this Court. While the facts

and the law are not unduly complicated, the procedural history is complex. Twice

this Court has remanded this matter to the trial court primarily due to insufficient

findings of fact by the DRC or abuse of discretion by the trial court. For the

reasons stated below, we affirm the amount and duration of maintenance. We

vacate and remand Alice’s motion for modification of maintenance and award

of attorney fees. Further, we reverse and remand the automatic reduction in

Gordon’s maintenance obligation.

Gordon and Alice were married on July 25, 1970. At the time of their marriage, Alice was a nurse and Gordon was a medical intern. The parties were

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.

married for nearly thirty years although they lived separately beginning in 1990. During the marriage, they had four children and Gordon became a board-certified pathologist.

Gordon's career took the family throughout the United States, including California, New York, Tennessee, Alabama and Kentucky. Apparently, after Alice had moved with Gordon to Buffalo, New York, Gordon obtained employment in Nashville, Tennessee. At some point, the parties began living separately. Alice and the children moved to a rented house in San Diego, California. Gordon testified that since then he has remained in the Tennessee-Illinois-Kentucky region, and Alice has remained in the San Diego area, where Gordon and Alice purchased a home in 1992. Gordon traveled to California on a number of occasions to visit Alice and the children. Alice also visited Gordon, and the two vacationed together in Europe during the fall of 1996.

Gordon filed for dissolution of the marriage on May 14, 1998, in Trigg County, Kentucky. Alice had filed her own dissolution petition first in San Diego in April 1998, but consented to have the action tried in Trigg County. The trial court referred the matter to a DRC, who conducted a two-day evidentiary hearing on January 14-15, 1999. Following that hearing, the DRC issued findings that were fully adopted by the trial court on November 29, 1999. In pertinent part, the trial court ordered Gordon to pay maintenance to Alice in the amount of \$1,000.00 per month for three years.

On appeal, Alice argued that the trial court's award was inadequate in both amount and duration. In an opinion and order entered on May 11, 2001, this Court agreed, finding that the trial court abused its discretion given the significant disparity between the incomes of Gordon and Alice. Thus, this Court vacated the judgment of the trial court in part and remanded the case, instructing the trial court to reconsider the maintenance award. *Settlow v. Settlow*, 2000-CA-001022-MR (Ky. App. May 11, 2001).

Upon remand, the trial court again referred the matter to the DRC for a new hearing and findings. In his report of June 24, 2003, the DRC recommended that Alice's maintenance be increased to \$2,100.00 per month on a permanent basis. On July 2, 2003, Gordon filed exceptions to the DRC's report along with a motion to amend the report to comply with his exceptions. On July 3, 2003, Alice filed her own exceptions to the DRC's report. The matter was to be heard on August 13, 2003. However, on July 14, 2003, the trial court entered a final order and judgment without conducting a hearing on the parties' exceptions to the DRC's report. While the court noted that both sides had noticed the matter for a hearing on their exceptions, the court found no hearing necessary and subsequently adopted all of the DRC's recommendations as its final order and judgment. Gordon then filed a motion to alter, amend, or vacate the court's judgment, which was denied on October 14, 2003. Both parties appealed. In the second appeal, this Court considered that neither party was provided with notice of the trial court's intent to rule on the exceptions and the pending motions without a hearing, even

though a hearing had been noticed. Citing *Kelley v. Fedde*, 64 S.W.3d 812 (Ky. 2002), this Court noted that CR 53.06 requires the trial court to afford parties an opportunity of oral argument before ruling on objections to a DRC's report.

Again, this Court vacated and remanded the case to the trial court for a hearing on the parties' exceptions to the DRC's report. *Settlow v. Settlow*, 2003-CA-002408-MR and 2003-CA-002413-MR (Ky. App. June 10, 2005).

Pursuant to the mandate of this Court, the trial court held a hearing on the parties' exceptions to the DRC's report on January 23, 2006. The trial court entered a final order and judgment on February 16, 2006, denying the exceptions and adopting the June 24, 2003, report of the DRC as the final order and judgment. This appeal and cross-appeal followed.

In the interim, following the remand by this Court for the second time, and prior to the trial court's final order and judgment of February 16, 2006, Alice filed a motion to modify the maintenance award pursuant to KRS 403.250 in October 2005, and a motion for an award of attorney fees in December 2005. While the parties' third appeal and cross-appeal were pending before this Court, the trial court held an evidentiary hearing on Alice's motions to modify maintenance and for an award of attorney's fees on December 18, 2006. On December 21, 2006, the trial court denied Alice's motions. Alice appealed. The Court of Appeals consolidated the parties' pending appeals of the original maintenance award with the more recent appeal by Alice from the trial court's denial of her motions for modification of maintenance and attorney fees.

Both parties originally argued that the trial court abused its discretion in setting the amount and duration of maintenance. However, during oral arguments before this Court, Gordon concedes that the \$2,100.00 in maintenance awarded by the trial court would not be challenged. However, he contends that the duration of the award, until either party's death or Alice's remarriage, is inappropriate and unwarranted by the evidence. For her part, Alice argues that the amount of maintenance is deficient as there was no factual basis for the trial court's findings regarding her reasonable living expenses. Since the trial court made no findings, she asserts that the amount of maintenance awarded was arbitrary.

There is no dispute in this case that Alice is entitled to maintenance. KRS 403.200(2) provides that once it is established that maintenance is appropriate:

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.

The application of these statutory factors in determining the amount and duration of maintenance is a matter within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). “As an appellate court, . . . this Court is [not] authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court’s decision is supported by substantial evidence.” *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999), quoting *Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990). This Court may disturb the trial court’s order only if 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). Furthermore, “[f]indings 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 witnesses.” CR 52.01. See also *Whicker v. Whicker*, 711 S.W.2d 857, 858-59 (Ky. App. 1986).

The central question in both Gordon’s appeal and Alice’s cross-appeal concerns the sufficiency of the trial court’s findings regarding their respective incomes and reasonable living expenses. However, neither party requested the trial court make additional findings. CR 52.04. When “no request was made for such

findings, . . . we do not consider the issue on appeal.” *Wilhoit v. Wilhoit*, 711 S.W.2d 857 (Ky. App. 1986).

While not required to address this issue, we believe because of the lengthy and complex history of this case, it is appropriate to acknowledge the trial court made sufficient findings. In reviewing the parties’ incomes, the trial court found that during the six-year period from 1992-1997, Gordon earned an average annual salary of \$211,900.00 as a pathologist. From the time the parties separated and Alice moved to San Diego, Gordon was able to send her between \$6,000.00 and \$7,000.00 each month to provide for her and the children and to make mortgage payments. However, beginning in early 1998, Gordon reduced and eventually terminated those payments as the children grew and left the home, and as his finances began to look grim leading up to the termination of his employment in February 1998. After Gordon was terminated from his job with Associated Pathologists, he continued working on a temporary basis. In the last seven months of 1998, Gordon earned an average of \$6,800.00 per month. Gordon also presented substantial evidence regarding his health problems. Gordon is over 61 years old, has had colon cancer, and at the time of the 2003 hearing, experienced cardiac arrhythmia, hypertension, respiratory infections, tinnitus, back pain and testalgia. Even so, these ailments did not completely prevent him from performing the duties of a pathologist. Alice is over 59 years old, is a trained and licensed registered nurse but has not worked as a nurse since 1977. Her license has expired as she has failed to keep up with the continuing education requirements of the

profession. She has a bachelor's degree in art but is unable to sustain any substantial income as an artist. At the time of the trial, Alice made \$9.50 per hour working at a gift shop. Alice testified that she suffers physical and mental ailments including carpal tunnel syndrome, anxiety and depression. Due to her poor health, and the lengthy amount of time she has spent out of practice, the trial court found Alice was unable to return to nursing.

With regard to maintenance, the trial court appropriately considered the distribution of property between the parties. Alice received \$425,612.40 in retirement accounts and \$199,526.50 in marital assets, including the marital home in San Diego then valued at over \$450,000.00. The trial court assigned her marital debt, which included \$314,947.00 on the house in San Diego and credit cards and auto debt totaling \$43,362.00.

Gordon argues that the evidence only supported an award of temporary, rehabilitative maintenance to Alice. The duration of maintenance must have a direct relationship to two factors: (1) the period over which the need exists, and (2) the ability to pay. *Combs v. Combs*, 622 S.W.2d 679, 680 (Ky. App. 1981). KRS 403.200 seeks to enable the unemployable spouse to acquire the skills necessary to support himself or herself in the current workforce so that he or she does not rely upon the maintenance of the working spouse indefinitely. *Powell v. Powell*, 107 S.W.3d at 224, citing *Clark v. Clark*, 782 S.W.2d 56, 61 (Ky. App. 1990). But where there is no showing that a spouse has the ability to become self-

sufficient, there is a rebuttable presumption in favor of maintenance for life or until remarriage. *Combs*, 622 S.W.2d at 680.

Gordon points out that Alice was awarded a substantial amount of property. He also contends that Alice, upon renewing her nursing license, is capable of working and earning a substantial income. The trial court disagreed, noting Alice's age, her initial and subsequent health problems, the long absence from the nursing profession, the fact that the marriage lasted some 27 years, and her limited potential to earn income. And while the trial court awarded Alice a significant amount of marital property, it also assigned her a substantial amount of debt. We find no abuse of discretion in the trial court's decision to award her permanent maintenance, as the provisions of KRS 403.200 were considered.

In addition to the length of maintenance, Alice also challenges the trial court's findings as to the amount of maintenance. While Alice now contends that the trial court's findings as to her reasonable needs are not supported by any evidence, making the amount of the trial court's maintenance award grossly inadequate, again she failed to request the trial court make more specific findings. CR 52.04. Although the trial court never provided a detailed explanation for its findings on these matters, we conclude that the trial court's findings are supported by substantial evidence, and therefore find the court did not abuse its discretion in determining the duration of the award.

At the time of the 1999 trial, Gordon listed his living expenses, including taxes and debts, in the amount of \$8,500.00 per month. Alice claimed

expenses of \$7,300.00 per month. At that time, Gordon was earning \$6,800.00 per month, less than half of his income previous to 1998.

Undoubtedly, the parties would have experienced a substantial reduction in their standard of living even if they had remained married. However, the reality is that they are separated and each has his/her own expenses. The DRC reviewed each party's list of living expenses, and although found both to be "self serving," determined Alice would need \$3,700.00 per month and Gordon would require \$4,250.00 per month. In adopting these findings, the trial court acknowledged each party would out of necessity adopt more modest lifestyles.

KRS 403.200(2)(f) provides that the trial court may grant a maintenance order for either spouse for a period of time as the court deems just after considering all relevant factors, including, "The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance." *Dodson v. Dodson*, 864 S.W.2d 900, 903 (Ky. 1993). In *Garrett v. Garrett* 766 S.W.2d 634, 636 (Ky. App. 1989), the evidence showed that the husband could not work and had a fixed monthly disability income insufficient for his own needs. The Court of Appeals remanded the case to the trial court ordering the court to, "reexamine the issue of maintenance, considering the financial situation of each party and the evidence as it relates to all the factors in KRS 403.200(2)(a-f)." *Id.*

Further, Alice contends the trial court should have ordered that Gordon's maintenance obligation would not terminate upon his death. This issue

is not properly preserved for our review. Although not included in the original decree, in the subsequent order of July 10, 2003, the court adopted the June 24, 2003, recommendations of the DRC and ordered maintenance to cease upon Gordon's death. Alice never raised this challenge before the trial court or in the first appeal, nor in her exceptions to the DRC's report filed July 7, 2003.

Regardless, if a divorce decree "does not explicitly state that maintenance obligation continues beyond the obligor's death, it will terminate at his death."

Weldon v. Weldon, 957 S.W.2d 283, 286 (Ky. App. 1997).

Finally, Gordon takes issue with the portion of the trial court's order which provides "the award of \$2,100.00 [in maintenance] may be adjusted downward if at any time it should exceed 50% of Gordon's income for the previous year, considering both earned and unearned income." Gordon contends that this standard for modification of the award is arbitrary and does not comply with the standard for modification as set out in KRS 403.250(1). We agree with Gordon, and Alice concedes, that the statutory standard must control to the extent that it is inconsistent with the standard set forth in the judgment and therefore reverse the judgment of the trial court. Since this matter will be remanded to the trial court for further consideration of Alice's motion to modify, the above language detailing how maintenance should be reduced should be deleted.

With regard to Alice's appeal of the trial court's denial of her motion to modify the \$2,100.00 maintenance award, entered December 21, 2006, we find that the trial court abused its discretion when it based its findings on a clearly

erroneous finding of fact. KRS 403.250 provides that the provisions of the circuit court's decree respecting maintenance may be modified upon a showing of changed circumstances so substantial and continuing as to make the original terms unconscionable. KRS 403.250(1). The term "unconscionable" as referred to in the statute means manifestly unfair or inequitable. *Bickel v. Bickel*, 95 S.W.3d 925, 927 (Ky. App. 2002). The trial court determined that the primary change in circumstances was the fact that Alice had accrued more credit card debt. The court stated, "[Alice] has chosen the risk of financial failure rather than formulate a plan for selling her home in order to satisfy debt. This Court does not believe that poor fiscal management constitutes a change of circumstances intended by KRS 403.250(1)."

However, the trial court did not address the substantial changes in each party's income. In December 2006 the trial court reasoned Alice's monthly maintenance award of \$2,100.00 was sufficient even though Gordon was earning over \$219,000.00 (\$18,250.00+ per month). However, this finding is inconsistent with the trial court's final order and judgment, entered February 16, 2006, wherein the court adopted the DRC's recommendations for maintenance, filed June 24, 2003. Then, the DRC's recommendation for the \$2,100.00 in maintenance was based on Gordon's income of \$6,800.00 per month. We note that this Court found the maintenance award of \$1,000.00 per month for three years insufficient at a time when Gordon was making \$6,800.00 per month and the parties' expenses were \$8,500.00 for Gordon and \$7,300.00 for Alice. Upon remand, the trial court found

\$2,100.00 per month maintenance for life was appropriate under the same circumstances. Currently, just as Gordon's income has increased dramatically, Alice's income has decreased even more so. Gordon acknowledged during the 2006 hearing that after the 1999 trial, he obtained full-time employment at a community hospital in Wytheville, Virginia. In 2005, Gordon was making \$219,242.00, while Alice's wages have decreased from \$18,767.00 in 1999, while working in the gift shop, and have continued to decrease each year. In fact, Alice has been on social security disability due to a mood disorder and back problems at \$600.00 per month since 2005. The trial court should reconsider Alice's motion to modify the amount of maintenance in light of the increased income earned by Gordon, the decrease in Alice's income, the parties' respective lifestyles and expenses, as well as the financial choices made by Alice.

In addition to the motion to modify maintenance, Alice filed a motion seeking an award of attorney fees pursuant to KRS 403.220. An award of attorney fees is entirely within the discretion of the trial court. The court must give consideration to the financial resources of the parties. *Poe v. Poe*, 711 S.W.2d 849 (Ky. 1986). Other factors, such as which party prevailed, may also be considered. *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004), citing *Boden v. Boden*, 268 S.W.2d 632, 633 (Ky. 1954). Attorney fees may be awarded to a party pursuant to KRS 403.220. The statute states that the court may award a "reasonable amount" for the fees. *Id.* An award of fees is reviewed by this Court under an abuse of discretion standard. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 520 (Ky. 2001). Because we

believe Alice's motion to modify the amount of maintenance should be revisited by the trial court, the court should also reconsider Alice's motion for attorney fees.

Accordingly, the February 16, 2006, order and judgment of the Trigg Circuit Court is affirmed as to the permanency and amount of maintenance. On the issue of Alice's motion to modify, we vacate and remand the case to the trial court for reconsideration as the court failed to make a finding based on the parties' current monthly incomes and expenses. Likewise, the issue of attorney fees is vacated and remanded for a determination of whether or not attorney fees should be awarded after the court reconsiders Alice's motion to modify the amount of maintenance. Finally, the court order and judgment allowing for a downward adjustment of the amount of maintenance is reversed.

ALL CONCUR.

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