

RENDERED: DECEMBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000821-MR

LORETTA JONES

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 06-CI-00399

DREWEY LEE JONES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: Loretta Lynn Jones appeals from an order of the Breathitt Circuit Court awarding maintenance to her in the amount of \$200 per month for 8 months. She contends that the circuit court abused its discretion in establishing the amount and duration of the award by failing to make adequate findings and failing to properly apply the factors set out in KRS 403.200. For the reasons stated below, we affirm the order on appeal.

Loretta Lynn Jones (hereinafter referred to by her maiden name of Loretta Lynn Stamper) and Drewey Jones (hereinafter “Jones”) were married in Virginia in 1978. The marriage produced no children.

On October 11, 2006, Jones filed a Petition for Dissolution of Marriage in Breathitt Circuit Court. After a response was filed and proof was submitted, the Domestic Relations Commissioner rendered her Report and Recommendation on March 6, 2007. The report made findings of fact, and recommended to the court the disposition of personal property, debt and marital property. The Commissioner found that Jones received \$1,673.40 per month in the form of social security disability, and \$902.60 every 15 days for workers’ compensation. Stamper also received social security disability and food stamps totaling \$794.00 per month. Neither party was employed during the pendency of the litigation.

The Commissioner found that Stamper worked for 17 years during the marriage, generally earning between \$6.50 and \$7.32 per hour in jobs ranging from bank teller to teacher’s aide. Jones worked for 23 years as a mechanic, and became 100% disabled in 1998, due to an on-the-job injury resulting in head trauma and short-term memory loss.

Of relevance to the instant appeal, the Commissioner noted that Stamper sought maintenance from Jones in the amount of \$1,000.00 per month, but that she “would be ok” with \$500.00 per month. In examining the issue, the Commissioner determined that Stamper had not properly requested maintenance.

The Commissioner noted that Stamper never requested permanent maintenance at any time prior to the hearing, and that a prior motion for temporary maintenance was denied and the motion was not renewed. The Commissioner went on to find that Stamper received various lump sum payments which she had already expended, including a \$4,000.00 social security check, \$13,338.00 from the sale of a residence, \$8,100.00 from the sale of her mother's residence, and \$13,000 from an estate. The Commissioner found that Stamper blamed her son for her inability to wisely use these funds, and that these funds could have supported Stamper's reasonable needs if she had not expended them. It was also found that Stamper was employable given her experience, training (as a travel agent) and education (1.5 years of college). Given the implication that Stamper had squandered her lump sum payments, that she had not pled for permanent maintenance until the hearing (thus denying Jones the reasonable opportunity to rebut her claim), and because Stamper was found to be employable, the Commissioner recommended no award of maintenance.

The matter then went before the circuit court, which rendered its Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage on April 2, 2007. The court adopted the recommendations as to the division of marital property and debt. The decree rejected the recommendation as to maintenance, however, and awarded to Stamper the sum of \$200 per month for 8 months. This appeal followed.

Stamper now argues that the circuit court erred in its determination of the amount and duration of the maintenance award. Directing our attention to KRS 403.200 and *Perrine v. Christine*, 833 S.W.2d 825 (Ky. 1992), she notes that the court is required to make findings of fact and to exercise discretion in determining maintenance by applying those findings to the statutory factors. She claims that the circuit court's findings are insufficient, and that the court failed to properly apply the facts to the factors set out in the statute. She also argues that Jones has waived the argument that the maintenance issue was not properly pled, and that he may not raise that issue on appeal. In sum, Stamper seeks an order reversing the maintenance award and remanding the matter for further consideration by the circuit court.

We must first note that Stamper has not complied with the requirement set out in CR 76.12(4)(c)(v) that she demonstrate at the beginning of her argument whether the issue raised is preserved for appellate review and, if so, in what manner. We would be well within our authority to strike her appellate brief and summarily affirm the order on appeal. CR 76.12(8)(a). It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court. *Combs v. Knott County Fiscal Court*, 141 S.W.2d 859 (Ky. App. 1940).

Nevertheless, we have examined the issue on appeal as if it were properly preserved, and find no error. Stamper's claim of error centers on her argument that the circuit court failed to make sufficient findings of fact on the

maintenance issue and failed to apply those findings to KRS 403.200. The record refutes this argument. The Report and Recommendation of the Domestic Relations Commissioner expressly examined the factors set out in KRS 403.200, and made findings of fact which it then applied to the statutory factors. The Commissioner found, for example, that Stamper did not lack sufficient property to provide for her reasonable needs, that she is employable, and that much of Jones' income is non-marital. The circuit court then adopted the recommendations in full, but went on to enter an award of maintenance in favor of Stamper which the Commissioner had recommended against. The circuit court has the authority to adopt the Commissioner's recommendations in full or in part. See generally Kentucky Rules of Civil Procedure (CR) 53.03. We must conclude that the court's adoption of recommendations herein, albeit with the addition of an award in favor of Stamper, is sufficient to satisfy the statutory requirement that an award be grounded on an analysis of the KRS 403.200 factors.

Arguendo, even if the circuit court's adoption of the Commissioner's recommendations did not satisfy the requirement that it make findings and apply them to the statutory factors - which we do not find to be the case - the burden rested with Stamper to make a motion for additional findings before prosecuting an appeal on that issue. *Eiland v. Ferrell*, 937 S.W.2d 713 (Ky. 1997), citing *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982). No such motion was made herein. A party's failure to bring such an alleged omission to the attention of a trial court by means of a written request "will be fatal to an appeal." *Eiland* at 715.

Jones' argument as to the insufficiency of Stamper's plea for maintenance, and Stamper's response thereto, are moot. We find no error meriting reversal or remand.

For the foregoing reasons, we affirm the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage of the Breathitt Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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