

RENDERED: MARCH 6, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-000594-MR

KENNETH E. ASHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JOAN L. BYER, JUDGE  
ACTION NO. 05-CI-503305

BARBARA H. ASHER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON AND WINE, JUDGES.

CLAYTON, JUDGE: Kenneth E. Asher (Kenneth) appeals from a dissolution of marriage proceeding originating in Jefferson County, Kentucky. He claims that the trial court abused its discretion in awarding *pendente lite* maintenance, maintenance and attorney fees. After reviewing the record in light of Kenneth's

arguments, we find no basis for disturbing the decisions of the Family Court. We affirm the judgment and orders entered in this action.

Kenneth and Barbara H. Asher (Barbara) were married on July 29, 1991, in Oldham County, Kentucky and separated for the final time on January 5, 2006. They are the parents of two minor children. Kenneth is self-employed as a business consultant, and Barbara is employed as a pharmaceutical sales representative. The trial court entered a decree of dissolution on November 13, 2006.

Following a trial held on September 28 and 30, 2006, the trial court entered findings of fact, conclusions of law, and an order on January 17, 2007, which, among other items, awarded Barbara \$28,440.89 in *pendente lite* maintenance arrearages, \$2,000 per month in maintenance for forty-eight months, and \$25,000 in attorney fees. After cross-motions to alter, amend, or vacate, pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, the trial court, on February 19, 2007, entered a corrected order granting each party's motions in part and correcting some factual errors. On that same day, the court also entered an order of distribution. These orders, however, did not change Kenneth's *pendente lite* maintenance, maintenance, or attorney fee obligations. Thereafter, this appeal was filed.

Kenneth raised the following issues: (1) The trial court erred by awarding Barbara maintenance, including maintenance *pendente lite*; (2) the trial court erred and abused its discretion in the amount and duration of maintenance

awarded; and, (3) the trial court abused its discretion by awarding attorney fees to Barbara.

Maintenance is governed by Kentucky Revised Statutes (KRS)

403.200, which states:

(1) In a proceeding for dissolution of marriage . . . 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 short, the statute requires the trial court to make relevant findings of fact and exercise its discretion, using the above factors, to determine whether to award maintenance. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). Further, a trial court's decision regarding maintenance will not be reversed unless 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).

Kenneth argues that the trial court did not make adequate findings of fact with regard to Barbara's assets and Barbara's employment, thus invalidating its decision regarding maintenance. After careful scrutiny of the trial court's twenty-one page decision and the record, we reach a different conclusion. The trial court's decision painstakingly reviewed both parties' assets and employment. As part of that process, the trial court looked closely at both parties' reported expenses. It found that Barbara, notwithstanding her salary, had a monthly deficit and was unable to pay all her expenses.

Once the trial court decided that Barbara lacked sufficient property and was unable to support herself through reasonable employment, the trial court analyzed the factors in KRS 403.200(2) to set the amount and duration of the maintenance. Keeping in mind the discretion vested in the trial court, we see the

trial court concluded that, at the end of the fifteen-year marriage, maintenance was necessary for Barbara. Significantly, the trial court resolved the issue of whether to grant maintenance based not only on the party's assets and employment but also on a consideration of the other statutory factors. Moreover, the trial court examined these factors individually and as they related to each other. After this analysis, the trial court granted maintenance, but it did not grant Barbara's request for permanent maintenance of \$4,000 per month but ordered maintenance for four years in the monthly amount of \$2,000. Furthermore, the trial court made the maintenance award modifiable under KRS 403.250.

Our review of the record shows no use of erroneous facts by the trial court. Indeed, Kenneth points out no actual errors in the findings of fact but only disputes the interpretation of the facts. We believe the trial court's evaluation of these factors was appropriate and find no abuse of discretion with regards to maintenance. Nor do we find the amount unreasonable or the duration of the maintenance arbitrary.

During the pendency of this action, on June 23, 2006, Kenneth was ordered to pay \$4,000 per month *pendente lite* maintenance. At the time of the trial, Kenneth and Barbara both agreed that he was in arrears but disputed the amount of maintenance *pendente lite* owed. They also had different views regarding the amount of Barbara's monthly expenses. But no disagreement exists as to whether Kenneth was significantly in arrears. The \$32,000 arrearage claimed by Barbara was reduced, based on the trial court's review of payments between the

parties, to \$28,440.89. Given the contentious nature of the action, we think the trial court did an admirable job of dealing with the parties' dispute over the amount. Besides, an appellate court is prohibited from infringing on the fact-finding role of the trial court and should not substitute its opinion for that of the trier of fact in the absence of clear error. *Baze v. Rees*, 217 S.W.3d 207, 210 (Ky. 2006). Accordingly, we find no error or abuse of discretion here and uphold the trial court's order for Kenneth to pay \$28,440.89 maintenance *pendente lite*.

Kenneth's final argument is that the trial court abused its discretion by awarding attorney fees of \$25,000.00 to Barbara. We disagree. An award of attorney fees in a dissolution proceeding is permitted pursuant to KRS 403.220. Such an award is entirely within the trial court's discretion. *Glidewell v. Glidewell*, 859 S.W.2d 675, 679 (Ky. App. 1993). The only requirement is a disparity in the financial resources of the parties. *Id.* The findings of fact stated that in 2006 Barbara earned \$7,144.83 plus expenses per month while Kenneth earned, according to his 2005 tax return, \$147,614 or \$12,301 per month. Moreover, Kenneth's tax returns showed that he earned an average of \$123,686.00 over the past five years. He, too, is reimbursed for expenses. Kenneth made more money than Barbara. In this instance, financial inequality allowed the award.

Additionally, Kenneth argues that it would have been impossible for the trial court to ascertain the amount and character of the attorney's services. Again, we disagree. On the day of the trial, Barbara's attorney filed an affidavit

with the trial court showing attorney fees in excess of \$43,000. Kenneth has indicated that he spent roughly the same amount for legal fees.

The allocation of attorney's fees is entirely within the discretion of the court. *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky. App. 1982); *Wilhoit v. Wilhoit*, 521 S.W.2d 512 (Ky. 1975). The rationale for giving the trial court the discretion to do so is because trial court is with the case from beginning to end, and hence, is able to ascertain the volume and level of legal services. Here, we are not persuaded that the trial court abused its discretion as the record speaks for itself. Therefore, we affirm the trial court's award of attorney fees to Barbara.

For the reasons set forth above, we affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kimberly Withers Daleure  
Louisville, Kentucky

BRIEF FOR APPELLEE:

John Valentine  
Louisville, Kentucky