

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001896-MR

MICHAEL ELLINGTON

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, SPECIAL JUDGE
ACTION NO. 07-CI-00433

CAROL ELLINGTON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

LAMBERT, JUDGE: This is a domestic relations case where the issue before this Court is whether the trial court abused its discretion in awarding maintenance to Appellee, Carol Ellington. Appellant, Michael Ellington, appeals from an order entered September 11, 2008, overruling his exceptions to the recommendation of the domestic relations commissioner in this case. That same day the trial judge

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

entered findings of fact, conclusions of law, and a final judgment and decree of dissolution of marriage between the parties.

On appeal, Michael claims the trial court abused its discretion in the award of maintenance to Carol. Upon careful review, we disagree, and thus, affirm the September 11, 2008, order of the Harlan Circuit Court awarding maintenance to Carol.

The parties were married twenty-four years prior to the dissolution of their marriage. Two children were born of the marriage. The youngest child was finishing his senior year of high school at the time of the divorce. After a final hearing in the matter, the trial court adopted the domestic relations commissioner's findings. These findings determined that both parties were receiving Social Security disability benefits as their sole source of income, with Michael receiving \$1,990 per month and Carol receiving \$553 per month. The couple's monthly expenses were determined to be \$1,700 for Michael and \$1,424 for Carol. After dividing the parties' assets and debts in as equitable a manner as possible, the trial court adopted the following determination of maintenance:

Due to the length of the parties' marriage and the disparity in income of the parties, the Court, after considering all the factors contained in KRS 403.200, finds that the [Appellee] is entitled to receive permanent maintenance in the amount of \$300 (three hundred dollars) per month beginning April 1, 2007, with subsequent payments due [on] the 1st day of each month thereafter. Beginning June 1, 2007, in consideration of the fact that the [Appellee] will no longer receive child

support for [the minor child], the [Appellee's] permanent maintenance award will increase to \$500 (five hundred dollars) per month.

Appealing to this Court, Michael argues that Carol's maintenance award was an abuse of discretion for the following reasons: (1) Michael is disabled and cannot work; and (2) there is insufficient evidence that Carol satisfied the requirements for maintenance set forth in KRS 403.200(1). It is without dispute that the amount and duration of a maintenance award is within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky.App. 1990). A trial court abuses its discretion only when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Upon careful review of the record, we find no abuse of discretion by the trial court.

KRS 403.200(1) directs, in pertinent part, as follows: "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"

In its order, the trial court specifically set forth the property accumulated by the parties, which both parties agree was not substantial. The parties owned a one-half share in the marital home valued at \$16,000 and a secondary home valued at \$6,000. Because Carol was living in the marital home with the minor child and Michael was living in the secondary home, the trial court

awarded Carol the interest in the marital home while Michael was awarded the secondary home. The remainder of the estate consisted of four vehicles, three of which were awarded to Michael, personal property that was equally divided as nearly as possible, debt that was accorded to each party based upon their use of the debt funds, and a UMWA pension that was not in pay status.

Based upon the parties' unsubstantial accumulation of property, we find no abuse of discretion in the trial court's determination that Carol's slightly greater than 50% allocation of the marital property was not sufficient to provide for her needs. Michael points to the equal division of his UMWA pension as sufficient means for Carol's support. However, as noted by Michael, this pension has yet to enter pay status, and no evidence was submitted indicating when and in what amount the pension will pay out.² Thus, when the record is viewed in its entirety, we find sufficient evidence to support the trial court's determination that Carol lacked sufficient property to reasonably provide for her needs.

Michael argues there is also insufficient evidence in the record to demonstrate that Carol is unable to support herself through appropriate employment. We disagree. In its order, the trial court stated that both parties received social security disability as their sole source of income. Testimony before the domestic relations commissioner additionally indicated that both parties were totally disabled and not able to work due to injuries. Thus, we reject Michael's

² In the event this pension should pay out and be substantial enough to provide for Carol's needs, Appellant can move for a modification of the court's maintenance order pursuant to KRS 403.250.

argument that the record precludes the trial court from finding that Carol met the requirements set forth in KRS 403.200(1)(a) and (b).

Michael's final argument is the trial court's award of monthly maintenance to Carol is unfair for two reasons: (1) Michael is totally disabled; and (2) the amount awarded by the trial court does not leave Michael enough money to cover his monthly expenses. In light of the fact that Carol is also totally disabled, we find no abuse of discretion in the trial court's determination of Carol's maintenance award.

As of June 1, 2007, Michael was ordered to pay \$500 of his \$1,990 in monthly disability income to Carol, leaving Michael \$1,490 to pay his monthly expenses of \$1,700. Thus, Michael was left with a deficit of \$210 per month. Carol, on the other hand, had monthly disability income of only \$553, but monthly expenses of \$1,424. With the \$500 in monthly maintenance, Carol was left with a deficit of \$371 per month.

“The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance” is an important factor to be considered by the trial court in awarding maintenance; but it is not the only factor, nor is it foremost to the exclusion of the other factors. KRS 403.200(2). Other pertinent factors considered by the trial court included the substantial duration of this marriage, the age and physical condition of Carol, and the lack of financial resources available to Carol. KRS 403.200(2).

In this case, it is significant that Carol, as well as Michael, was totally disabled. Thus, Michael's citation to *Mosley v. Mosley*, 682 S.W.2d 462 (Ky. App. 1985) is not controlling in this case. *Id.* at 463 (no abuse of discretion in trial court's failure to award maintenance where party seeking maintenance was not disabled but the spouse from whom maintenance was sought was disabled). During the final hearing, Carol explained that she did not receive a more substantial disability benefit from the Social Security Administration because she spent most of her marriage as a homemaker. As such, Carol was not earning income for as many years as Michael.

Although Michael was left with a \$210 monthly deficit after payment of the monthly maintenance award, Carol was left with an even greater monthly deficit of \$371. The record further reflects that Michael was expected to receive additional income in the form of a tort award. After careful review of this record, we cannot say the trial court abused its discretion in its balancing of KRS 403.200(2) factors in this instance.

Accordingly, the September 11, 2008, order of the Harlan Circuit Court awarding Carol maintenance is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEES:

Sidney B. Douglass
Harlan, Kentucky