

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001694-MR

RICHARD GEYER

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS III, JUDGE
ACTION NO. 05-CI-01070

PHYLLIS GEYER

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

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

LAMBERT, SENIOR JUDGE: Richard Geyer appeals from the August 21, 2009, order of the Boyd Circuit Court which adopted the June 18, 2007, report and recommendations of the Domestic Relations Commissioner (DRC) and dissolved the marriage of the parties. Because we hold that the trial court abused its discretion in the process of dividing marital property and awarding maintenance, we reverse and remand.

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

The parties were married in April of 1967 and a petition for dissolution of marriage was filed by Phyllis on October 7, 2005. Following a multitude of delays,² the matter was eventually heard by the DRC in March of 2007, and the report and recommendations of the DRC was filed with the trial court on June 18, 2007. Both parties filed exceptions to the DRC's report and recommendations. A hearing on the parties' exceptions was rescheduled nine times before Richard filed a motion on July 28, 2009, requesting a ruling from the trial court. Meanwhile, Honorable George W. Davis took the bench and became the presiding judge in this case. After giving the parties an opportunity to supplement their pleadings, the court promptly ordered adoption of the DRC's report and recommendations and dissolved the marriage of the parties. That order was entered on August 21, 2009. This appeal followed.

Richard makes two arguments on appeal. They are: 1) that the trial court erred in its adoption of the DRC's recommendation claiming that it failed to divide marital property; and 2) that the trial court erred in its award of maintenance. We will address each argument in turn.

The disposition of property pursuant to a dissolution of marriage or legal separation is governed by KRS³ 403.190. In substance, the statute requires that the trial court divide the marital property in just proportions and without

² It is unclear why the underlying dissolution action took almost four years to complete. Because the Appellee has failed to file a brief, we have only the Appellant's brief and the record to draw our conclusions from. However, it appears that the case was continuously drawn out, without justification, by the combined actions of the trial court, the DRC, and the Appellee. We note, however, that Judge Davis was not assigned to this matter until July of 2009, at which time he promptly dissolved the marriage of the parties.

³ Kentucky Revised Statutes.

regard to marital misconduct. KRS 403.190(1). A trial court has broad discretion when accomplishing this task and we will not reverse the trial court's division of property absent an abuse of that discretion. *See, e.g., Smith v. Smith*, 235 S.W.3d 1, 6 (Ky.App. 2006).

Richard's challenge to the trial court's division of property pertains to the marital home. With regard to the marital home, the trial court adopted the DRC's recommendations as follows:

[Phyllis] shall have possession of the former marital residence until such time as she remarries or no longer resides full time in the residence, whichever occurs first. [Richard] shall continue to pay the mortgage, taxes and insurance. [Phyllis] shall be responsible for the payment of utilities.

At such time as [Phyllis] remarries or no longer resides in the former marital residence, the property, including the lot shall be sold. The equity shall be divided, with [Phyllis] receiving one-half of the equity that would have realized if the payoff was \$69,000 plus an additional \$2,750 (representing her interest in the 1978 Chevrolet drag car appraised by Marty Horton). [Richard] shall receive the remainder, getting the benefit of any reduction in principle due to his payments on the mortgage.

Although the trial court possesses broad discretion in its division of marital assets, we agree with Richard that this treatment of the marital home does not constitute a division of property. Our examination of the DRC's recommendations and the final judgment of the trial court fails to reveal any special circumstances justifying Phyllis' exclusive occupancy of the marital residence, possibly for as long as she lives, with Richard being required to support

the residence and indefinitely forego access to his equity. It is permissible for trial courts to allow one spouse to have exclusive occupancy of the marital home post-dissolution, with the other spouse being financially responsible for that residence. *See, e.g., Gibson v. Gibson*, 597 S.W.2d 622 (Ky.App. 1980) (husband ordered to pay expenses of marital residence until minor child turned 18). However, such a ruling is typical when the parties have a minor child(ren) who also resides in the home, and the arrangement is kept in effect only until the child(ren) acquires a certain age or level of education. *See id.* Such an arrangement has also been upheld when the trial court identifies the housing expenses as maintenance, and those expenses terminate at a predetermined time. *See, e.g., Drake v. Drake*, 809 S.W.2d 710 (Ky.App. 1991)(prior to final hearing, but post-decree, husband ordered to pay an additional maintenance amount, to be applied to husband's share of marital residence equity). But in this case, no special circumstances are identified, and while Richard was adjudged to be the owner of a one-half undivided interest in the real property, the only limitation imposed on Phyllis as to duration of her occupancy was until she remarries or chooses to live elsewhere and presumably when she dies. This is simply too uncertain and insufficiently supported by trial court findings to sustain the ruling.

It appears that the funds Richard has been ordered to pay towards the mortgage, taxes, and insurance on the marital home are in actuality maintenance payments. It has been held by the Supreme Court of Kentucky that an award of use of the marital residence for rest of a spouse's life unless she remarries

constitutes maintenance rather than a division of property. *Williams v. Williams*, 500 S.W.2d 79 (Ky. 1973). Although the facts in *Williams* are not identical to those presented here, they are similar enough to make the holding of *Williams* applicable to the case at hand. Accordingly, we hold that the trial court abused its discretion when it failed to divide the marital property of the parties in just proportions and that portion of the final order is reversed.

Richard's next argument is that the trial court erred in awarding maintenance to Phyllis. The trial court ordered, via adoption of the DRC's recommendations, that Richard pay \$500 a month in maintenance to Phyllis, indefinitely. The award of maintenance is governed by KRS 403.200, which provides that the trial court may grant maintenance if it finds that the spouse receiving the 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.

KRS 403.200(1).

The award of maintenance is within the sound discretion of the trial court provided findings supported by the evidence are made that satisfy the requirements of KRS 403.200. This Court will not set aside such an award absent an abuse of that discretion. *See, e.g., Combs v. Combs*, 622 S.W.2d 679 (Ky.App.

1981). The trial court failed to make either of the requisite findings of KRS 403.200(1). Furthermore, even if the trial court had made such findings, Phyllis' entitlement to maintenance could have been affected by the trial court's division of the marital home, possibly depriving her of maintenance. Accordingly, that portion of the trial court's order must also be reversed.

For the foregoing reasons, the August 21, 2009, order of the Boyd Circuit Court is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Jeffrey Scott
Grayson, Kentucky

BRIEF FOR APPELLEE:

No brief was filed on behalf of the Appellee.