

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002072-MR

WILLIAM EDWARD STEWART, JR.

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 11-CI-00127

LEANNE COFFEY STEWART

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES AND MOORE, JUDGES.

MOORE, JUDGE: William Stewart, Jr. appeals the Findings of Fact, Conclusions of Law, and Judgment Regarding Dissolution of Marriage of the Warren Circuit Court ordering William to pay maintenance to Leanne Stewart in the amount of \$1,000 per month for one hundred and twenty months. After careful review of the record, we affirm.

I. FACTUAL BACKGROUND

William Stewart, Jr. and Leanne Stewart were married on July 9, 1988, and were divorced on November 2, 2011. The parties entered into a Partial Property Settlement Agreement (the "Agreement") on July 5, 2012, which settled all disputes in the Dissolution of Marriage action except the issue of spousal maintenance.

The Stewarts were married for just over 23 years. They had three children, two of whom are still currently under 18 years of age. William and Leanne maintain joint custody of their minor children. Leanne is the primary residential parent of the two minor children, and pursuant to the Agreement, she received the marital residence. Leanne was also awarded a 50% interest in William's retirement funds, which amounts to approximately \$31,000; monthly child support in the amount of \$1,320; and vehicles and personal property that do not produce income. Additionally, she was restored two Wells Fargo accounts as non-marital property. The total value of the two accounts is approximately \$256,000, and the accounts earn an estimated annual income of \$5,500 or \$461 per month.

Leanne testified that she intends to sell the marital residence and downsize to a smaller house. The parties stipulated that Leanne will receive approximately \$210,000 in equity from the sale of the marital residence, which is worth approximately \$300,000. Leanne intends to purchase a home in the price range of \$160,000 to \$180,000. If she is able to do so, this would leave Leanne

with approximately \$30,000 to \$50,000 worth of net equity as a surplus property award.

Leanne is forty-six years old and currently works as a teacher's aide in the Warren County School System. She has worked in this position for the past four years. Her net income in this position is approximately \$964 per month. She has a college degree in elementary education and obtained her teaching certificate in February 2012. She plans to obtain her Master's degree in teaching within the next three years. She testified to efforts to obtain a teaching position, but has not been able to obtain such a position as of yet.

Leanne testified to expenses of approximately \$4,381 per month if she were to remain in the marital residence. However, if Leanne downsizes to a smaller house, she expects her mortgage payment to be eliminated and her bills regarding property tax, homeowner's insurance, house maintenance, and utilities to be reduced. Her reasonable needs were assessed by the trial court to be approximately \$3,300 per month.

William testified to earning approximately \$100,000 per year. His net income is approximately \$6,059 per month, and he listed his expenses as \$5,976 per month. However, a portion of these expenses are eligible for reimbursement by William's employer. He receives approximately \$500 per month from his employer in requested reimbursement for business expenses. William listed debts to Firestone, Home Depot, and Dillard's. These expenses account for a total of about \$300 per month and should be paid off within the next six months.

Additionally, he listed debts to BB&T Visa, CPA Steve Wheeler, and attorney fees to be paid off within the next three years. William has been paying these debts at an increased pace. His current reasonable needs, including his monthly child support payment, were determined by the trial court to be \$4,800 per month.

Based on these circumstances, the Warren Circuit Court determined that Leanne was entitled to maintenance from William in the amount of \$1,000 per month for one hundred and twenty months. William now appeals.

II. STANDARD OF REVIEW

“[T]he amount and duration of maintenance is within the sound discretion of the trial court.” *Weldon v. Weldon*, 957 S.W.2d 283, 285 (Ky. App. 1997). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). The order of the trial court awarding maintenance may only be disturbed by a reviewing court if it finds the trial court abused its discretion or based its decision on factual findings that are clearly erroneous. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

III. ANALYSIS

William argues on appeal that (1) Leanne is not entitled to maintenance; (2) Leanne is voluntarily underemployed, and therefore, should have additional income imputed to her in the maintenance determination; (3) the formula set forth in *Atwood v. Atwood*, 643 S.W.2d 263 (Ky. App. 1982), is the

appropriate method for determining the amount and duration of maintenance; and (4) the trial court abused its discretion when it awarded the excessive duration of one hundred and twenty months of maintenance.

William first argues that Leanne is not entitled to maintenance under Kentucky Revised Statutes (KRS) 403.200(1) which provides, a “court may grant a maintenance order for either spouse only if it finds the spouse seeking maintenance: (1) lacks sufficient property, including marital property apportioned to [her], to provide for [her] reasonable needs; and (2) is unable to support [her]self through appropriate employment.”

It should be noted that William includes in his argument on appeal two assets as Leanne’s which the trial court does not discuss in its judgment. First, he includes a life estate held in a QTIP account with a value of approximately \$840,000 to be divided equally with Leanne’s sister upon inheritance. The trial court did not hear evidence or make any findings regarding this expectancy, and accordingly, we will not include it in our discussion. The second asset William includes in his argument on appeal as Leanne’s is her trust fund in the amount of approximately \$88,931, which she is eligible to receive the balance of when she reaches the age of 50. Kentucky Rule of Civil Procedure (CR) 52.04 requires a written request or motion for findings of fact on an issue essential to judgment. “Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal.” *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997) (citing *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982)). The trial court

considered testimony by Leanne about the trust fund and its distribution, but the trial court did not make any specific findings regarding the amount and the effect of Leanne's trust fund in its judgment ordering William to pay maintenance to Leanne. Additionally, William failed to request more specific findings on this asset in a post-judgment motion. If William wanted further consideration of Leanne's trust fund to be made by the trial court in its maintenance determination, he should have timely made such a request. William's failure to request additional findings on this specific asset makes it inappropriate for our review since this Court may not reverse or set aside the final judgment of the trial court for its failure to make a finding of fact on an issue essential to judgment without a written request for such a finding. CR 52.04.

Notwithstanding William's failure to make a request for additional findings on Leanne's trust fund, the trial court did make sufficient findings to support an award of maintenance under KRS 403.200. The trial court determined that Leanne did receive significant property, including marital property apportioned to her pursuant to the Agreement; however, "the property does not yield income sufficient for [Leanne] to provide for her reasonable needs and maintain the standard of living, as established during the marriage, without being required to consume the corpus of her property."

Despite recently becoming qualified as a certified teacher, Leanne currently works as a teacher's aide and earns \$964 net income per month. Leanne testified to good faith efforts to obtain a full-time teaching position upon receiving

her teaching certificate, and the court specifically found her testimony regarding this to be credible. In addition to what she earns as a teacher's aide, she receives child support in the amount of \$1,320 per month as well as income from her non-marital property. However, both minor children (twins) will be emancipated in 2014, and child support will cease at that time. The court determined her income from her non-marital property to be around \$521 per month. This amount included the income from her two Wells Fargo accounts, as well as an additional \$60 per month if she sells the marital residence, obtains at least \$30,000 in net equity from the sale, and invests it similarly to her two Wells Fargo accounts. Leanne's reasonable needs were estimated by the court to be about \$3,300 per month. This was based on reduced monthly payments for the smaller house Leanne intends to purchase. The court found a deficit of approximately \$494 per month between Leanne's income and reasonable needs. The findings by the trial court of Leanne's monthly income and reasonable needs are supported by the record. After considering these circumstances, the court determined that Leanne was entitled to maintenance. Leanne was awarded maintenance in the amount of \$1,000 per month for one hundred and twenty months. In its determination of the appropriate amount and duration of maintenance, the court noted Leanne's considerable contributions to the marriage, financially and otherwise, in addition to the factors listed in KRS 403.200(2). Based on these facts, the trial court did not abuse its discretion in determining Leanne to be entitled to a maintenance award.

William maintains that Leanne is not entitled to maintenance because she is voluntarily underemployed, and therefore, additional income should have been imputed to her in determining whether an award of maintenance was appropriate. He relies on *McGregor v. McGregor*, 334 S.W.3d 113, 117 (Ky. App. 2011), which provides:

“[T]he maintenance statute, KRS 403.200, does not explicitly include a ... provision permitting a court to impute income to a voluntarily unemployed or underemployed spouse. ... While a case of first impression, it is implicit in this statutory language that a court may impute income to a voluntarily unemployed or underemployed spouse to determine both the spouse’s entitlement to maintenance and the amount and duration of maintenance.”

Specifically, William wanted the income of a first year teacher in the Warren County School System of \$35,000 per year, or \$2,916 gross income per month, imputed to Leanne because she had recently obtained her teaching certificate but was working only as a teacher’s aide. The court took into consideration Leanne’s work experience and education, including the fact that she had just recently received her teaching certificate in 2012, along with her testimony regarding her good faith efforts to obtain a teaching position in determining whether she was voluntarily underemployed. Based on this evidence, the court stated Leanne was not voluntarily underemployed and declined to impute the additional income to her. This evidence was within the discretion of the trial court, and William does not show that the trial court’s finding is clearly erroneous.

William continues to argue that Leanne is not entitled to maintenance under KRS 403.200 in the amount and for the duration set by the trial court because it failed to utilize the formula set forth in *Atwood*, 643 S.W.2d 263. In determining the appropriate amount and duration of maintenance, a court is required to consider the enumerated factors in KRS 403.200(2), including (1) the financial resources of the spouse seeking maintenance, including marital property apportioned to him; (2) the time necessary to acquire sufficient education or training to enable the spouse seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age, physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance. *Atwood*, 643 S.W.2d at 266 suggests the following method for determining the appropriate amount of maintenance: “Add the two net salaries, divide by two, and subtract from this result [spouse seeking maintenance] net income and child support [paying spouse] has been ordered to pay. Then order [paying spouse] to pay as maintenance this sum or any other sum within reason consistent with the facts, for a reasonable length of time.”

William cites the formula articulated in *Atwood* as the appropriate mechanism for determining the proper amount of maintenance. However, the formula set forth in *Atwood*, while subject to the discretion of the trial court, is merely suggestive and therefore subordinate to the command of KRS 403.200(2)

which the court is required to consider. *Sayre v. Sayre*, 675 S.W.2d 647, 648 (Ky. App. 1984).¹

The trial court considered Leanne's financial resources, the comfortable standard of living established during the 23 year marriage, Leanne's age, level of education and ability to support herself, as well as William's ability to meet his own needs as well as the needs of Leanne in determining the maintenance award. Additionally, based on the circumstances of this case, the court also considered Leanne's expenditure of her non-marital property for the benefit of the marriage. *Angel v. Angel*, 562 S.W.2d 661, 665 (Ky. App. 1978). Thus, since the trial court considered all relevant factors of KRS 403.200 in determining the amount and duration of maintenance, we find no abuse of discretion by the trial court in declining to use the suggested *Atwood* formula.

William's final argument is that the trial court abused its discretion by awarding Leanne maintenance for a period of one hundred and twenty months or ten years. He contends that Leanne will likely be able to secure a teaching position within that time period, her salary will then increase to at least \$35,000 per year, and she will no longer have a need for maintenance. William also asserts that Leanne will be more likely to obtain a teaching position once she gets her Master's

¹ The application of the *Atwood* formula using the monthly net incomes determined by the trial court of William (\$6,059.51) and Leanne (\$1,485.96) and the ordered amount of child support (\$1,320) gives a result of \$966.78 as the suggested amount of maintenance to be paid. This is very close to the \$1,000 per month the court assigned to William. It should be noted that in this application, Leanne's monthly net income includes her income from employment as a teacher's aide (\$964.91), estimated monthly income from her two Wells Fargo accounts (\$461.05), and an additional \$60 per month the court estimated as the least amount she would earn when she sells the marital residence and invests her surplus property award similarly to her two Wells Fargo accounts.

degree within three years, and therefore, the ten year duration of the maintenance award is excessive.

A maintenance award “shall be in such amounts and for such periods of time as the Court *deems just* ... after considering all relevant factors” KRS 403.200(2) (emphasis added). Given the equities of these circumstances and in consideration of the KRS 403.200(2) factors, the trial court determined that William should pay Leanne \$1,000 per month for ten years. The Warren Circuit Court made an additional consideration to the factors listed in KRS 403.200(2) of Leanne’s expenditure of her non-marital property for the benefit of the marriage in determining the appropriate amount and duration of the maintenance award. *Angel*, 562 S.W.2d at 665. Specifically, the trial court noted the considerable use of Leanne’s non-marital property to make improvements to the marital residence, purchase and maintain a boat, fund family vacations, and pay for monthly expenses. Furthermore, William’s income is substantially greater than what Leanne is likely to earn, even with a Master’s degree and a full-time teaching position, over the ten-year period. Accordingly, we find no abuse of discretion by the trial court in its determination of the amount and duration of Leanne’s maintenance award.

IV. CONCLUSION

The Warren Circuit Court did not abuse its discretion in ordering William to pay Leanne spousal maintenance in the amount of \$1,000 per month for one hundred and twenty months. Therefore, we affirm.

BRIEFS FOR APPELLANT:

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Christopher T. Davenport
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BRIEF FOR APPELLEE:

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