

RENDERED: NOVEMBER 9, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000484-MR
AND
NO. 2016-CA-000505-MR

JOHN RUSSELL BOON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM OLDHAM CIRCUIT COURT
v. HONORABLE JERRY CROSBY, II, JUDGE
ACTION NO. 14-CI-00480

TAMMY LORRAINE BOON

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

LAMBERT, J., JUDGE: John and Tammy Boon appeal and cross-appeal, respectively, from the Oldham Circuit Court's orders setting maintenance and other issues concerning their dissolution of marriage. We affirm in both.

The Boons were married in 1996 and had three children, all of whom are now adults. John began his career with the United States Navy, and since 1995 has been employed as a pilot with United Parcel Service (UPS). Tammy stayed home to raise the children and later returned to work as a registered nurse (after receiving the requisite amount of education). The parties separated for a final time in early 2014,¹ and John filed a petition for dissolution in July of that year.

During the dissolution process, the Boons engaged in mediation and resolved most, but not all, of their issues. On September 23, 2015, the Oldham Circuit Court held a lengthy hearing on the remaining issues, and entered its findings of facts and conclusions of law on February 1, 2016. Both parties took exception to the order, filing motions for additional findings of fact and, in the alternative, to alter, amend, or vacate the original order. Kentucky Rules of Civil Procedure (CR) 52 and 59. Those motions were denied on March 11, 2016, by a different sitting judge of the Oldham Circuit Court (Family Division). John timely filed his notice of appeal, as did Tammy her cross-appeal, both of which involve the issue of maintenance. Tammy also asks this Court to revisit the issue of the parties' PNC bank account.

We begin by repeating the circuit court's ruling regarding maintenance, namely, "effective February 1, 2016, the Court orders the Petitioner [John] to pay maintenance to the Respondent [Tammy] in the amount of \$2,000 per month for a period of seven years." In a footnote, the circuit court added that

¹ Although the parties disagree about the actual date of separation, we hold that it is not germane to any of the issues herein.

this amount “includes \$600 for the payment of taxes on the maintenance award.”

The maintenance arguments can best be described as this: John insists that any award was improper, and that the duration and amount are excessive (he suggests that, at most, Tammy should receive \$1,400 per month for five years), while Tammy contends that the duration and amount are insufficient to meet her needs (she would like to receive \$4,800 per month for nine years).

CR 52.01 provides the general framework for the family court as well as review in the Court of Appeals: “In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.] . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *See Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted) (An appellate court may set aside a lower court’s findings made pursuant to CR 52.01 “only if those findings are clearly erroneous.”). The *Asente* Court went on to address substantial evidence:

“[S]ubstantial evidence” is “[e]vidence that a reasonable mind would accept as adequate to support a conclusion” and evidence that, when “taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men.” Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses” because judging the credibility of witnesses and weighing evidence are tasks within the

exclusive province of the trial court. Thus, “[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal,” and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted).

Kentucky Revised Statute (KRS) 403.200 enunciates the conditions under which and factors to be considered in establishing a maintenance award:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, 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.

“While the award of maintenance comes within the sound discretion of the trial court, a reviewing court will not uphold the award if it finds 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) (citations omitted). *See also Brenzel v. Brenzel*, 244 S.W.3d 121, 126 (Ky. App. 2008) (“An award of maintenance and the amount are within the discretion of the trial court.”).

Once it decides that an award of maintenance is appropriate, the court must then consider all the relevant factors in KRS 403.200(2) to determine the appropriate amount and duration of maintenance. Like the decision to award maintenance, “the 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) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)); *Kentucky Nat. Park Com'n ex rel. Commonwealth v. Russell*, 301 Ky. 187, 191 S.W.2d 214, 217 (1945).

John argues that the circuit court's award of maintenance was lacking in virtually every aspect of the statute, i.e., that the circuit court erred in determining that Tammy lacked sufficient property or was unable to support herself (KRS 403.200(1)), and that the circuit court failed to consider or incorrectly found each of the factors listed in KRS 403.200(2).

We have reviewed the voluminous record as well as the exhibits proffered by each party (including the contents of the flash drive entered into the record by John). We decline to belabor this opinion with a rehash of the circuit court's findings but rather adopt its decision as if fully set out herein. We further borrow from the Oldham Circuit Court's order denying the parties' CR 52 and 59 motions:

[T]he trial court made five pages of findings regarding the parties' reasonable monthly expenses; sufficiency of financial resources; appropriate employment; and all other factors listed in KRS 403.200(2). The Court declines to make further findings, and does not find the trial court's conclusions of law to be unreasonable or unsupported by sufficient findings.

Brenzel, supra; Sexton, supra.

John further finds fault with the circuit court's decision not to allow two of the Boons' children to testify. As the circuit court stated in its denial of the post-dissolution motions, the children's testimony would have been cumulative at

best. John was not prejudiced by the circuit court’s disallowing their testimony. Kentucky Rule of Evidence (KRE) 403; *Brosnan v. Brosnan*, 359 S.W.3d 480, 483-4 (Ky. 2011) (where the Court of Appeals applied a harmless error standard in its review of witness testimony).

Tammy’s argument regarding maintenance is likewise affirmed for the same reasons: She has failed to convince this Court that the amount and duration of maintenance determined by the circuit court was an abuse of discretion. *Weldon, supra; Brosnan, supra* at 485-6.

We lastly address Tammy’s argument regarding the parties’ PNC bank account (also known as the Reserve account): She challenges the circuit court’s ruling regarding funds expended by John. However, we agree with John that the circuit court properly ruled that the “restored” value of the reserve account was not ripe for consideration and should be decided after the sale of the parties’ two houses. *Asente*, 110 S.W.3d at 354.

The orders of the Oldham Circuit Court are affirmed.

ALL CONCUR.

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