

RENDERED: MAY 10, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001319-ME

DAVID STIENMETZ

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 17-CI-00526

KATHRYN M. STIENMETZ

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON,
JUDGES.

CLAYTON, CHIEF JUDGE: David Stienmetz appeals from the findings of fact and conclusions of law entered by the Kenton Family Court in this dissolution of marriage action. The sole issue on appeal is whether the court awarded an excessively high amount of maintenance to David's former wife, Kathryn M. Stienmetz.

David and Kathryn were married on December 22, 1997. Three children were born of the marriage. Almost twenty years later, the couple separated, and Kathryn filed a petition for dissolution of marriage on August 30, 2017. The parties entered into a separation agreement which disposed of their assets. They also agreed to a joint custody arrangement regarding the remaining child who had not reached the age of majority. The only unresolved matter was maintenance, which was tried before the family court on May 21, 2018.

At the time of the final hearing, Kathryn was thirty-nine years of age and David was forty-four. Kathryn, who has completed the eleventh grade, suffers from multiple sclerosis and receives \$854 per month in Social Security disability benefits. David is employed as a printer. There was some dispute regarding David's earning capacity. He claimed that his 2017 income was unusually high, and he did not provide an income tax return for that year. He did submit a recent pay stub which showed earnings of \$19,674.15 from the beginning of 2018 through April 21, 2018. The family court annualized this amount and determined David's earning capacity to be \$5,328 per month. It calculated his monthly expenses to be \$2,330.64. The family court also recalculated David's support obligation for the remaining minor child, who was fifteen years of age at that time, to be \$551.28 per month. The family court found Kathryn's monthly expenses to be \$2,215 per month.

The family court concluded that maintenance was appropriate because Kathryn's medical condition will never improve, she lacks a high school education and there was no evidence she could be trained for gainful employment. The trial court awarded maintenance in the amount of \$900 per month, which is \$100 higher than the amount requested by Kathryn at the hearing. David filed a motion to alter, amend or vacate which was denied, and this appeal followed.

Kentucky Revised Statutes (KRS) 403.200(1) provides that the trial court may grant maintenance only if "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."

Once a determination is made that a spouse is entitled to maintenance, the award shall be made "in such amounts and for such periods of time as the court deems just[.]" KRS 403.200(2). In making this determination, the court must consider all relevant factors including the following:

- (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.

Id.

This Court “may not disturb the findings of the trial court in a case involving dissolution of marriage unless those findings are clearly erroneous.” *Johnson v. Johnson*, 564 S.W.2d 221, 222 (Ky. App. 1978) (citation omitted).

The ultimate decision of the family court regarding maintenance is a matter “delegated to the sound and broad discretion of the trial court, and an appellate court will not disturb the trial court absent an abuse of discretion.” *Barbarine v. Barbarine*, 925 S.W.2d 831, 832 (Ky. App. 1996) (citations omitted). “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)).

David does not dispute that Kathryn is entitled to receive maintenance but claims he cannot afford the amount ordered by the court. He contends that maintenance in the amount of \$900, when added to his monthly expenses of \$2,330.64, exceeds his post-deduction net income. He argues that the family court erred in calculating maintenance based on his gross, rather than his net, income.

We agree.

The Kentucky Supreme Court has stated:

We think that common sense dictates that a court consider the parties' net income when determining whether or not the spouse seeking maintenance will be able to meet his or her needs, as well as the payor spouse's ability to continue meeting his or her own needs. Indeed, our courts do consider tax implications to parties in the valuation and division of the marital property, and in determining the appropriate time to require a party to liquidate or transfer capital assets. Accordingly, we do not consider it a great leap to also hold that the trial court should consider the after-tax income of both parties in determining the proper amount and duration of maintenance to be awarded.

Powell v. Powell, 107 S.W.3d 222, 226 (Ky. 2003) (citations omitted).

In light of this holding, the family court in this case abused its discretion in awarding maintenance based on David's pre-tax income.

David further argues that the family court improperly relied on a website or program which it identified only as "Kentucky Support." At the close of the hearing, the family court stated that it would take the issue of maintenance under submission and advised the parties: "It's no secret, I tell all the lawyers that

one of the things I do when I look at this, because it's a beauty contest, I believe; there's a program called Kentucky Support and I always run a number in there to see what it says to me." Kathryn argues that this issue is unpreserved because David's counsel did not make a contemporaneous objection. However, we remind the trial court it has "no authority to consider evidence outside the record or to incorporate new proof into the record." *Sunrise Children's Services, Inc. v. Kentucky Unemployment Insurance Commission*, 515 S.W.3d 186, 190 (Ky. App. 2016) (quoting *Travelodge Intern., Inc. v. Kentucky Unemployment Insurance Commission*, 710 S.W.2d 232, 234 (Ky. App. 1986)). The family court is constrained by statute to set maintenance in accordance with the relevant specified factors. "[O]nce the trial court finds that maintenance is appropriate, the amount and duration of maintenance is left to the sound discretion of the trial court based on the factors set out in KRS 402.200(2)(a)-(f)." *Macleane v. Middleton*, 419 S.W.3d 755, 775 (Ky. App. 2014), *as modified* (Jan. 10, 2014). Reliance on "Kentucky Support" to determine the amount of maintenance is not in accordance within this statutory scheme.

The case is remanded for the family court to reconsider the amount of maintenance in light of David's post-tax income and the relevant factors in KRS 403.200(2).

ALL CONCUR.

BRIEF FOR APPELLANT:

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