

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002441-MR

CAROLYN RHODES HUNT

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE ROBERT I. GALLENGSTEIN, JUDGE
ACTION NO. 01-CI-00055

JACKIE NOLAN HUNT

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Fleming Circuit Court in a dissolution proceeding.

Appellant contends that the trial court abused its discretion by failing to award maintenance to her. For the reasons stated hereafter, we vacate the court's judgment and remand this matter for further proceedings.

The parties married in 1977 and divorced in 2001. By that time each was 48 years old and their only child was an

adult. Appellee earned approximately \$30 per hour from his full time employment. Appellant, who had completed one year of college, possessed no specialized job skills and had not been employed since 1987.

The parties entered into a settlement agreement regarding all issues but maintenance. It is undisputed that throughout the parties' separation, appellee voluntarily paid appellant's car payments and auto insurance premiums, and he gave her \$300 to \$400 per month. Although appellee objected to appellant's request for permanent maintenance, he specifically stated during the hearing below that he had continued his financial support of appellant because he still cared and worried about her, and that he would not object to continuing such support "for a couple of years." The trial court denied appellant's request for maintenance, finding that

there was no credible evidence other than the Petitioner's self-serving testimony. Petitioner testified that she is unable to support herself through appropriate employment, but the Court finds, based on both the testimony and the medical report of Dr. Harris, that the Petitioner is able to support herself if she is willing to work. Further, the Court finds that the parties have sufficient marital property apportioned to them to provide for their reasonable needs, and therefore, neither party is entitled to maintenance.

This appeal followed.

KRS 403.200(1) provides in pertinent part:

In a proceeding for dissolution of marriage or legal separation . . . 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[.]

Here, appellant asserted that she lacked sufficient property to provide for her reasonable needs, and that she was unable to support herself through appropriate employment. More specifically, she claimed that she was unable to work due to depression, anxiety and other medical problems. However, as the record contains a report from an examining and evaluating physician who saw "no reason" that appellant "would be disabled from most forms of employment," we cannot say that the trial court abused its discretion by finding that appellant is not physically disabled from working.

However, a finding that appellant is physically capable of working is not the same as a finding that she is capable of being self-supporting "through appropriate employment." KRS 403.200(1)(b). The record clearly showed that appellant possessed limited education and job skills. It was undisputed that she had been out of the work force for many

years and, even if it was assumed that she was physically capable of working, there was nothing in the record to suggest that appellant was qualified for employment which provided sufficient income to meet her needs. Moreover, although appellant failed to introduce evidence to show how long it might take her to acquire sufficient skills and training to become self-supporting, and although the record on appeal does not include the list of monthly living expenses which appellant evidently introduced into evidence below, appellee in essence conceded that appellant was currently unable to be self-supporting by expressing his willingness to continue paying a portion of her living expenses for "a couple of years." Given these circumstances, we are compelled to conclude that the trial court abused its discretion by finding that appellant is currently able to support herself "through appropriate employment."

Further, the evidence clearly did not show that appellant possessed "sufficient property, including marital property apportioned to" her, to provide for her reasonable needs. KRS 403.200(1)(a). According to the parties' separation agreement, appellant's nonmarital property included a mobile home lot which was valued at \$15,000 and which produced rental income of \$100 per month. The marital property awarded to appellant included a vehicle, her clothing, other personal

items, and approximately \$7,500 which represented one-half of the equity interest in the marital home less one-half of a credit card debt. Finally, qualified domestic relations orders were to be drafted to equally divide appellee's retirement and 401K accounts between the parties. According to the record, appellant's interest in the marital share of the two accounts was valued at approximately \$103,000, but that interest would be reduced in value to some \$60,000 to \$70,000 if the money was prematurely distributed to appellant around the time of the dissolution. Hence, the record showed that aside from her car, personal property and retirement accounts, appellant's cash reserves were limited to \$7,500 plus a mobile home lot valued at \$15,000. Although it appears from the record that the trial court may have expected appellant to support herself by cashing out her share of the marital retirement benefits and using the proceeds for daily living expenses, there is simply no statutory or judicial support for requiring a party to consume the entirety of the property award before seeking an award of maintenance. See Atwood v. Atwood, Ky.App., 643 S.W.2d 263 (1982); 16 Louise E. Graham and Hon. James E. Keller, Kentucky Practice §16.11 (2d ed. 1997). Given these circumstances, we must conclude that the trial court abused its discretion by finding that appellant had sufficient property to provide for her reasonable needs and that she was not entitled to an award

of maintenance. On remand, therefore, the trial court should award maintenance to appellant, in accordance with KRS 403.200(2), "in such amounts and for such periods of time as the court deems just" after consideration of the factors set out in that statute, including subsection (2)(b) pertaining to rehabilitative maintenance.

The court's judgment is vacated and this matter is remanded for further proceedings consistent with the views stated herein.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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