

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000002-MR

DONALD E. CROOM

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 95-CI-01129

OLLIE L. CROOM

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI, SCHRODER, JUDGES.

BAKER, JUDGE. Donald E. Croom appeals from an order of the Hardin Circuit Court entered on November 26, 2001, which overruled his objections to the master commissioner's report entered June 8, 2001, and incorporated said report into its order. We affirm.

Donald and Ollie Croom were married on October 2, 1976. On July 15, 1995, Ollie petitioned the Hardin Circuit Court for dissolution of marriage. On July 18, 1995, Ollie

filed a motion requesting use of the parties' marital residence, custody of their two minor children, temporary child support, temporary maintenance and an equitable division of the marital debts. After a hearing, a domestic relations commissioner entered a report recommending \$400.00 per month in temporary spousal maintenance, and \$345.27 per month in child support. Donald excepted to the award of maintenance and failure of the commissioner to assign obligations for all debts. In an order entered September 7, 1995, the court overruled the exceptions and awarded Ollie \$400.00 per month in temporary maintenance and \$310.08 per month in child support, after deducting \$196.00 per month for child support Donald was under court order to pay for a child from a previous marriage. The court also awarded custody of the children and use of the marital residence to Ollie.

The marriage was dissolved by Decree of Dissolution entered by the Hardin Circuit Court on October 13, 1995.

Donald and Ollie were both represented by counsel during the above action. However, on October 8, 1996, the court granted a motion by counsel for Donald, requesting to be removed as attorney of record.

On March 26, 2001, Ollie filed a motion requesting the court to set a final hearing date for resolution of all remaining issues. A hearing before a domestic relations

commissioner was held on May 8, 2001. At the hearing Ollie was represented by counsel and Donald appeared pro se.

By the time of the hearing, the children had reached the age of majority. Also by this time, the house had been foreclosed.

At the hearing Ollie requested that she be awarded permanent maintenance in the amount of \$400.00 per month, set off by her fair share of Donald's military retirement benefits. She also claimed that Donald was in arrears to her for the maintenance obligation from August 15, 1995, through May 30, 2001, for a total of \$27,000.00. Ollie admitted that had she been awarded her fair share of the military retirement benefits in the original order, that the maintenance obligation would have been reduced to \$85.42 for a total of \$5,851.27.

The commissioner found the following:

1) Both Donald and Ollie were retired from the military and that Ollie was 100% disabled with a nondivisible benefit of \$1,134.00 per month.

2) Donald retired from the military on June 30, 1993, with 240 months of total service. Taking into consideration the dates the couple were married and divorced, pursuant to the formula in Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986), the commissioner found that Ollie was entitled to 42% of Donald's military retirement benefits. The commissioner noted that

Donald was to provide proof of his benefits within 10 days and that "If as a result of this information, an injustice has been reached, then this matter may be reconsidered."

3) Relying on Donald's claim to have total military retirement benefits of \$1,070.00 per month, by which he claimed 30% (\$321.00) as Veterans Administration Disability, the commissioner found that Donald had \$749.00 in divisible benefits, entitling Ollie to \$314.58 per month.

4) Ollie had a total income of \$1,700.00 per month.

5) Donald had income of \$1,500.00 per month in salary from his business, "Cleaning Concepts", \$12.55 per hour for 40 hours per week through employment with Bakery Chef, Inc. and military retirement disability of \$755.42.

6) Donald was in arrears for temporary maintenance in the amount of \$27,400.00, less \$400 for the one payment he had made.

7) The difference between the military retirement benefit and the maintenance award equaled \$85.42 for a total of \$5,851.27.

The commissioner recommended that Ollie receive a judgment in the amount of \$35,736.37 for unpaid military retirement benefits and unpaid temporary spousal maintenance, with an interest rate of 12% per annum and that Donald be ordered to pay a minimum of \$500.00 per month.

The commissioner then determined that Ollie had a need for maintenance. She found that Ollie's income was \$1,700.00 per month, which included her disability retirement benefits and income from a part-time job. The commissioner then considered Donald's ability to pay pursuant to Kentucky Revised Statutes (KRS) 403.200. The commissioner found that Ollie was entitled to \$314.58 per month from Donald's military retirement benefit and then recommended that Ollie receive \$85.42 per month in permanent maintenance.

On June 22, 2001, the circuit court entered an order awarding Ollie \$27,000.00 "for past due and unpaid military benefits and unpaid spousal maintenance at the rate of 12% interest per annum." The order stated, "The Respondent shall attempt to satisfy the judgment by making minimum monthly payments in the amount of \$500.00 per month. However, this does not prohibit the Petitioner from pursuing other legal means of collecting this judgment."

The court also awarded Ollie 42% of Donald's divisible military retirement benefits and \$400.00 per month in permanent maintenance, reduced by her share of the military retirement benefits, which resulted in \$85.42 per month as spousal maintenance. The award of maintenance was awarded to Ollie "until such time as she dies, remarries or cohabits with a person of the opposite sex who is not a family member."

The court also awarded Donald and Ollie the personal property within their possession.

On August 9, 2001, Ollie filed a motion asking the court to hold Donald in contempt for failure to pay the minimum \$500.00 per month in satisfaction of the judgment. The court entered a show cause order on August 13, 2001, ordering Donald to appear in court on August 28, 2001. However, Donald could not be located and a new show cause order was entered on August 28, 2001. Service was effected on September 8, 2001 and a hearing was held on September 25, 2001. The court then entered an order requiring Donald to pay Ollie the sum of \$1500, representing the payments for July, August, and September and requiring Donald to pay \$250.00 in attorney's fees. The court also ordered that Donald be arrested and lodged in the Hardin County Jail until such time as he purged himself by paying the required amounts.

On October 2, 2001, by counsel, Donald filed a motion asking the court to set aside the commissioner's report and to reschedule a commissioner's hearing, specifically on the issue of spousal maintenance and division of military retirement benefits. In support of the motion, Donald stated that 1) because he did not have benefit of counsel at the commissioner's hearing, he was completely unprepared to defend against the motion for maintenance and division of military benefits; 2)

that the report had been mailed to an incorrect address, and therefore, he did not receive the report until after the time for filing exceptions; and 3) that he could not appear for the show cause hearing conducted on September 25, 2001 because he began serving jury duty for two weeks, beginning on that date.

After a hearing, the court entered an order setting aside the order for Donald's arrest. The court also entered an order setting aside its June 19, 2001 order, and gave Donald until October 23, 2001 to file objections to the commissioner's report.

After a hearing, the circuit court entered an order on November 26, 2001 overruling the objections. On the same date, the court entered an order awarding judgment in the same amounts as entered in the July 19, 2001 order. It is from these orders that Donald appeals.

Donald raises six issues on appeal that are categorized into two main issues - whether the award of maintenance was erroneous and whether the division of military retirement benefits was erroneous.

The maintenance issues are as follows: 1) whether the trial court erred in finding that temporary maintenance did not terminate when the decree of dissolution of marriage was entered; 2) whether the trial court erred in finding that Ollie was entitled to an award of maintenance; and 3) whether the

trial court erred in finding that Ollie was entitled to maintenance until she dies, remarries or cohabits with a person of the opposite sex who is not a family member.

The issues as to division of military retirement benefits are as follows: 1) whether the trial court erred in finding that Ollie was entitled to military retirement benefits Donald received prior to the hearing before the domestic relations commissioner; 2) whether the trial court erred in finding that all of Donald's military retirement was divisible as marital property; and 3) whether the trial court erred in applying the formula to determine that Ollie was entitled to 42% of Donald's military retirement benefits.

In Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992), the Kentucky Supreme Court held:

Under [KRS 403.200], the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion.

The circuit court awarded Ollie a judgment for arrearages of spousal maintenance due under the Order entered September 7, 1995. Donald argues that, pursuant to KRS 403.160(6)(c), the order for temporary maintenance terminated

upon the entry of the Order on October 13, 1995, dissolving the marriage. If the temporary order was terminated upon the entry of the divorce decree, then the arrearage for temporary maintenance would only be \$400.00.

KRS 403.160(6) states in relevant part:

(6) A temporary order or temporary injunction:

. . .

(c) Terminates when the final decree is entered or when the petition for dissolution or legal separation is voluntarily dismissed.

Read alone, this would seem to support Ollie's argument.

However, KRS 403.140(1) states in relevant part:

(1) The Circuit Court shall enter a decree of dissolution of marriage if:

. . .

(d) To the extent it has jurisdiction to do so, the court has considered, approved or made provision for child custody, the support of any child of the marriage entitled to support, the maintenance of either spouse, and the disposition of property.

Reading these statutes together, KRS 403.160(6)(c) contemplates that the final decree will settle all issues regarding support, maintenance and disposition of property pursuant to KRS 403.140(1)(d), therefore ending any temporary order. In the case sub judice, however, as specifically stated

in the decree of dissolution and the order of temporary maintenance, these property and maintenance issues were yet to be determined. In the order overruling objections to the commissioner's report entered September 7, 1995, the trial court specifically stated that, "[t]he Court notes and recognizes that the order is a temporary order pending a final hearing in which additional and more detailed evidence will undoubtedly be presented. Therefore, the Court is not making a final determination as to any issues included in this report and order." The order awarding temporary maintenance, entered September 7, 1995, states that the temporary maintenance was "continuing on the same day of each month thereafter during the pendency of this action." More importantly, the Judgment dissolving the marriage, entered October 13, 1995, tendered by counsel for Donald, specifically states, "[a]ll remaining issues shall remain before the Court for determination upon completion of the parties proof as to those issues." The order also stated, "[t]his is not a final and appealable order or judgment for appeal purposes."

Kentucky case law supports the actions of the trial court in entering the divorce decree prior to a final disposition of the matters enumerated in KRS 403.140(1)(d). Putnam v. Fanning, Ky., 495 S.W.2d 175 (1973). Given that the order was prepared and tendered by counsel for Donald, with no

motion made to suspend temporary maintenance payments or to make a final determination as to permanent maintenance, it is clear that the October 13, 1995 order did not terminate Donald's obligations to pay temporary maintenance.

Donald next argues that Ollie was not entitled to permanent maintenance, based upon the requirement of KRS 403.200. KRS.403.200(1) states:

(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.

Donald argues that there was insufficient evidence to establish that Ollie lacked sufficient property to provide for her reasonable needs. He bases this argument on testimony by Ollie as to her disability benefits, her income, and expenses. Donald claims that Ollie's monthly expenses are \$675.00 and her income is \$1734.00, leaving a difference of \$1059.00 per month. This is completely contrary to the evidence in the record. The

maintenance schedule submitted by Ollie, establishes monthly expenses of \$1365.00. In addition to the listed expenses, Ollie also testified that she was driving a car with over 300,000 miles on it that often needed repairs, and that the house had been foreclosed. At the commissioner's hearing, Ollie submitted documentation and testified as to her expenses and income. She also testified that the military disability income was for mental problems and that she worked as a cleaning person at Ft. Knox. It was undisputed that the couple had been married 19 years prior to the dissolution. The commissioner found that Ollie had \$1,700.00 in income from a combination of her Veteran's Disability benefit and her employment. After making a property division of the military retirement benefits of \$314.58, the Commissioner recommended and the trial court awarded, \$85.42 per month in permanent maintenance to Ollie. The commissioner concluded that Ollie was in need of the minimal assistance of \$85.42 per month after the property division and the court agreed. The commissioner also found, based on Donald's testimony that he had a total income of approximately \$4,430.75 per month.

The amount of a maintenance award is within the sound discretion of the trial court. Russell v. Russell, Ky. App., 878 S.W.2d 24, 26 (1994). KRS 403.200 states in pertinent part:

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.

Donald claims that the only factor considered by the court was the duration of the marriage. Clearly, based on the testimony at the hearing, the commissioner and court took into consideration more than the length of the marriage. Evidence was presented establishing Ollie's financial resources, her disability, her employment, and Donald's ability to pay. As such, we cannot say it was an abuse of discretion for the trial court to award Ollie \$85.42 per month in spousal maintenance.

Donald also argues that the court failed to divide the marital property before the award of maintenance. This argument is clearly without merit. The order from which the appeal is taken divides the property of the parties by setting off to each that personal property in their respective possession. The Court also divided the military retirement benefits. Donald does not state what marital property the court failed to consider, other than the marital residence, which had been foreclosed.

Donald also argues that the evidence was insufficient for a maintenance determination because he did not provide evidence as to his income and reasonable monthly expenses and that Ollie's attorney failed to question him about his reasonable expenses at the hearing. Our review of the record shows that the commissioner and the trial court requested this information and gave Donald every opportunity to comply. He failed to do so. In fact, even in his filing of objections to the commissioner's report, he made no argument and produced no evidence that he was unable to meet his reasonable monthly expenses or refuting Ollie's evidence that she was unable to meet her reasonable expenses.

Donald's final argument regarding maintenance is that the court erred in its finding that Ollie was entitled to maintenance until she dies, remarries or cohabits with a person

of the opposite sex who is not a family member. Donald bases this argument on a faulty understanding of what constitutes open-ended maintenance. The award to Ollie was not open-ended, but rather ends as stated at the time she dies, remarries or cohabits. Further, as stated previously, we believe the commissioner and court made the finding after considering the appropriate statutory factors.

Donald's next three arguments are regarding the division of his military retirement benefits. The first argument is that the Court erred when it found that Ollie was entitled to any of Donald's military retirement benefits before the commissioner's hearing on May 8, 2001. The basis of Donald's complaint is that because this issue was not addressed in the orders entered in September and October of 1995, laches applies. As stated previously, the order of October 1995 explicitly reserved all other issues for later determination of the court. While we agree on principle that if Donald was not ordered to pay Ollie the military retirement benefit in October, 1995, it would be fundamentally unfair for him to have to pay arrears on an amount he didn't know he owed, this argument misses the point. Donald was ordered to pay \$400.00 per month in temporary maintenance. This amount did not take into consideration, and at that time Ollie was not receiving, any of the military retirement benefits. Ollie is not claiming that

she is entitled to the arrears on the temporary maintenance plus the military retirement benefit from that time. She admits that the one is a set-off against the other, in that had the trial court awarded her the military retirement benefits, representing a property division, in 1995, it would have been as set-off against the maintenance. While we admit that the wording used by the commissioner and the trial court is confusing at times, what Donald was ordered to pay was the arrearage on the temporary maintenance payments of \$400 a month. The court stated:

The Petitioner is awarded permanent maintenance in the amount of \$400.00 per month, however, this obligation is to be reduced by her share of the Respondent's military retirement benefits. At the present time, the Petitioner is to receive \$314.58 per month from the Respondent's military retirement benefits. Therefore, the Respondent is required to pay \$85.42 per month to the Petitioner as spousal maintenance.

There is no doubt but that had Donald been paying the \$400.00 ordered in temporary maintenance, he would not be required to pay the military retirement benefit as an arrearage in addition to the maintenance payment.

Donald next argues that the trial court erred when it found that Ollie should have been receiving a portion of his military retirement from July 1, 1993 - the date of his retirement. The commissioner's report did state that Ollie

should have been receiving a portion of Donald's military retirement benefit from the date his retirement, which represented a period of time while they were still married. However, this issue was addressed and resolved at the hearing. Counsel for Ollie admitted that the statement of the date was in error but that the figures were correct, having been calculated from September 7, 1995, for a total of 68.5 months. Our review of the record establishes that this was the case, and the proper date was used to make the calculation.

Donald's final arguments are really one - that the Court erred in calculating the amount of the military retirement benefits to which Ollie was entitled. Donald claims that Ollie is not entitled to any of his military retirement for pay periods before June 25, 1981. He argues that prior to the enactment Title 10, Section 1408(c)(1) of the United States Code, and the holding in Jones v. Jones, 680 S.W.2d 921 (1984), which determined that military retirement pay was marital property, the case of McCarty v. McCarty, 453 U.S. 210 (1981) held that military retirement was the property of the recipient, not marital property. Therefore, Donald believes that Ollie is not entitled to any amounts paid into his retirement before the holding in McCarty.

In Poe, 711 S.W.2d at 851, this court outlined the formula to be used to determine what portion of pension benefits

represent marital property. The commissioner found that Donald retired with 240 months of total service. Based on the dates Donald and Ollie were married and divorced, the commissioner found that there were 201 months of marital contribution. Using the formula outlined in Poe, the commissioner found that Ollie was entitled to 42% of Donald's military retirement benefit. While Donald asserts, "it is not clear from the Court's Order that the Poe formula was correctly applied," he does not state a specific error in the calculation, and we find none. We have reviewed the record and believe that the commissioner carefully and accurately applied the Poe formula, using the proper dates in her calculation.

Donald also claims that no documentation was produced to accurately determine the allocation of retirement versus his disability benefits to determine the net income from his military retirement. As stated earlier in this opinion, the commissioner and court exercised extreme patience and leniency to allow Donald to produce retirement pay vouchers, tax returns and pay stubs. The commissioner finally based the calculations on Donald's testimony as to those amounts. Donald cannot now be heard to complain that the information was inadequate.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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