

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002008-MR

DANNY JOE STEWART

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE DANIEL SPARKS, JUDGE  
ACTION NO. 99-CI-00358

DELORIS STEWART

APPELLEE

OPINION

AFFIRMING

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BEFORE: GUIDUGLI, MINTON AND VANMETER, JUDGES.

GUIDUGLI, JUDGE. Danny Joe Stewart ("Danny Joe") appeals from findings of fact, conclusions of law, order and judgment of the Johnson Circuit Court in an action filed by Deloris Stewart ("Deloris") seeking dissolution of marriage. For the reasons addressed herein, we affirm.

Danny Joe and Deloris were married on February 2, 1952. The marriage produced three children who have reached the

age of majority. At the time of the filing of the petition, Danny Joe was employed by Addington, Inc. with an annual income including Social Security of approximately \$71,200. Deloris was a homemaker during the marriage, and the record indicates that she suffers from several debilitating physical conditions. Her annual Social Security income is approximately \$7,284.

Deloris filed a petition in Johnson Circuit Court seeking dissolution of the marriage. The matter proceeded before the Domestic Relations Commissioner ("DRC"), who heard proof and rendered a recommended order and judgment. Exceptions to the recommended order and judgment were filed, and on February 13, 2002, the Johnson Circuit Court rendered its findings of fact, conclusions of law, order and judgment which forms the basis for the instant appeal.

In the order and judgment on appeal, the trial court found in relevant part that Deloris testified that due to her limited education, lack of work experience and physical condition she was unable to support herself through appropriate employment and lacked sufficient property to provide for her reasonable needs. It adopted the PVA's assessment of \$8,500 as the value of the marital residence, which consisted of a mobile home and realty, and adjacent mobile home and realty. It went on to address a number of other issues which are not relevant to the instant appeal.

Based on the foregoing findings, the court awarded to Deloris permanent maintenance in the amount of \$1,500 per month; the marital residence valued at \$8,500; and, unspecified additional attorney fees.<sup>1</sup> The award also addressed the division of marital and non-marital assets. This appeal followed.

Danny Joe first argues that the trial court committed reversible error in awarding to Deloris \$1,500 in monthly maintenance. He notes that though he is currently employed at age 70 and is able to pay \$1,500 in monthly maintenance, he will retire someday without a pension, 401(k) or retirement income other than approximately \$1,608 in Social Security benefits. As such, he claims that at retirement virtually all of his income will be owed to Deloris in the form of maintenance, and that accordingly the award is clearly erroneous. He seeks an order reversing the award and remanding the matter for further consideration.

We have closely studied this argument and find no basis for tampering with the order on appeal. Danny Joe does not argue that the award of maintenance is erroneous under the facts as they now exist, but rather contends that the award will necessarily become erroneous if he retires. We are limited to address the facts as they existed at the time the order on

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<sup>1</sup> The court ordered that each party was responsible for his or her respective attorney fees, but awarded to Deloris "any remaining balances Petitioner [Deloris] owes as attorney fees."

appeal was rendered rather than looking prospectively into an unknown future. At the time the order on appeal was rendered, Danny Joe was (and presumably still is) gainfully employed with a yearly income in excess of \$71,200.

While it is possible if not likely that Danny Joe will retire at some point in the future, and while it might have been preferable to address this issue in the order on appeal, the legislature has provided a mechanism for amending maintenance orders. KRS 403.250 provides that an award of maintenance may be modified upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. Id. If Danny Joe's income declines at some point in the future as he anticipates, he may avail himself of KRS 403.250 for the appropriate relief. The court's failure to address this issue was not error.

Danny Joe next argues that the circuit court erred when it failed to require expert testimony on the issue of the value of the marital residence. He contends that KRS 403.190 and KRS 403.200 require the valuation to be conducted with greater accuracy, and he notes that he testified that the parcel's value was approximately \$40,000. He seeks an order reversing the circuit's court judgment on this issue and remanding the matter for the consideration of expert testimony as to the parcel's value.

The trial court's finding with respect to the value of a marital asset will not be disturbed unless it is clearly erroneous. CR 52.01; Purdom v. Purdom, Ky., 498 S.W.2d 131 (1973). This is the rule even in cases where evidence exists upon which the value could have been much higher or much lower. Id. In the matter at bar, the trial court was presented with evidence of the parcel's value including the PVA assessment, Deloris's opinion as to its value, and Danny Joe's estimate based on purchase price, improvements, and labor. The court chose to rely on the PVA assessment, and/or Deloris's opinion of that estimate, and this evidence taken alone is substantial evidence sufficient to support the trial court's finding. As is often the case, the court could have relied on other evidence and could have reached a different finding. The fact that it did not is not evidence of error, and this issue does not form a basis for tampering with the order and judgment on appeal.

Danny Joe's final argument is that the trial court failed to comply with KRS 403.220 and in so doing abused its discretion when it awarded attorney fees to Deloris. He points out that the order did not designate an amount of the award, and as such is vague and inconsistent with other provisions of the order.

As we noted above, the trial court ordered that each party was responsible for his or her respective attorney fees,

and additionally that Danny Joe was responsible for "any remaining balances Petitioner [Deloris] owes as attorney fees." We interpret this to mean that the parties would each pay their respective attorney fees for work already performed, and that Danny Joe was ordered to pay any future attorney fees which may be incurred.

As the parties are aware, the allocation of court costs and attorney fees is entirely within discretion of trial court. Tucker v. Hill, Ky. App., 763 S.W.2d 144 (1988). Furthermore, a court may award prospective attorney fees which are not yet fixed. Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513 (2001). In the latter instance, the court's discretion must be even more carefully exercised. Id.

In the matter at bar, the court ordered that Danny Joe was responsible for future attorney fees, if any, arising from the action. While this award is distinguishable from the type of prospective award contemplated in Neidlinger,<sup>2</sup> supra, Neidlinger clearly supports the notion that a party may be held responsible for attorney fees which are not yet fixed in amount. The award at issue in the matter at bar was proper and supported by KRS 403.220 (attorney fee statute), and we find no error.

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<sup>2</sup> Neidlinger addressed an award of attorney fees in anticipation of litigation was about to commence. In the matter at bar, the award was for future attorney fees, *if any*.

We must also note that we are not persuaded by Deloris's contention that she must prevail on this issue as a matter of law since her counsel was not named as a party to the instant appeal. Under KRS 403.220, unless an attorney fee is awarded directly to the attorney, the client is the real party in interest and the only indispensable party to the appeal. Neidlinger, supra. The prospective fee at issue in the matter at bar was not awarded directly to Deloris's counsel. This issue is moot, however, given our conclusion that the award was proper.

For the foregoing reasons, we affirm the Johnson Circuit Court's findings of fact, conclusions of law, order and judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Harlan Callis, III  
Paintsville, KY

BRIEF FOR APPELLEE:

Lance A. Daniels  
Paintsville, KY