

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000859-MR  
AND  
NO. 2006-CA-000925-MR

JAMES D. HELTON

APPELLANT/CROSS-  
APPELLEE

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 01-CI-00033

CONNIE SUE HELTON

APPELLEE/CROSS-  
APPELLANT

OPINION  
VACATING AND REMANDING IN PART AND AFFIRMING IN PART

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BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: James D. Helton appeals the Greenup Circuit Court's order directing him to pay \$1,000 per month in maintenance to his ex-wife, Connie Sue Helton, and directing him to pay \$2,000 of Connie's attorney's fees which she incurred during their divorce proceedings. Connie cross-appeals, arguing that the circuit court should have

<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

awarded her \$200 more in maintenance per month, plus \$495 per month for hospitalization insurance premiums until the time that her eligibility for Cobra insurance expires. After a careful review of the record, we vacate and remand the Greenup Circuit Court's order in part and affirm the order in part.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

James and Connie were married for approximately nineteen years before they separated, and they were separated for approximately six more years before their divorce decree was entered. The Domestic Relations Commissioner's (DRC) Report stated that the Heltons had one child, who was then an adult. The DRC found that James was fifty-one years old, worked for CSX, and had a gross income of \$55,000 to \$60,000 per year. The DRC also found that Connie was fifty-eight years old, in poor health and although she had been employed in the past, she was unemployed at that time, due to her health problems. The DRC noted that during the parties' long separation, James paid \$1,000 per month in temporary maintenance to Connie.

As for the parties' real property, the DRC found that they owned two pieces of real estate that were acquired during the marriage: (1) a house and a lot worth \$58,500, against which there was no mortgage; and (2) a lot and a camper "with no competent evidence of value." The DRC noted Connie requested that she be awarded the marital residence, and the DRC acquiesced, recommending that she be awarded such residence if, within six months of the date the final decree was entered, she paid James one-half of the value of the property, i.e., \$29,250. If she failed to do so, the DRC

recommended that the property be sold "and after the costs of sale, the proceeds divided equally between the parties." Additionally, the property that consisted of a lot and camper was recommended to be sold and the proceeds divided equally between the parties after the costs of sale were paid.

Regarding the Heltons' personal property, the DRC recommended that each party be permitted to keep the personal property in his or her possession because the parties had divided such property during their long separation. Additionally, the DRC found that each party should be entitled to keep the car he or she was driving at that time.

As for James's \$6,700 in U.S. Savings Bonds, the DRC recommended awarding all of them to James because he bought them during the separation and he was paying "significant maintenance payments" during their separation. On another note, the DRC recognized that Connie had filed for Chapter 13 Bankruptcy during the separation. Because the debts forming the basis of her bankruptcy were incurred by her during the separation and she had been receiving maintenance payments from James during that time, the DRC recommended that those debts were not marital debts.

The DRC found that, if appropriate, a QDRO should be entered awarding Connie one half of the value of any pensions James was entitled to receive. Finally, the DRC recommended that James should be directed to pay \$1,000 per month in maintenance to Connie, and that James should be ordered to pay \$1,000 of Connie's attorney's fees.

Both parties filed exceptions to the DRC's report. Connie requested that two particular items be returned to other people, and that a family history be returned to her. Additionally, she contended that the debts that were the subject of her bankruptcy were credit card debts, most of which she had incurred before the parties separated, so she sought to have those debts paid by James. She also alleged that she had asked that James be required to pay her \$500 per month hospitalization insurance premiums, in addition to maintenance payments. Furthermore, Connie asked that the court ensure their mobile home was sold, as well as their camper. Finally, she contended that James should have to pay more of her attorney's fees than the amount recommended by the DRC.

James also filed exceptions to the DRC's report. Specifically, James asserted that the funds in Connie's attorney's escrow account should be used to pay the attorney's fees. James also contended that \$1,000 was an excessive amount of maintenance for him to pay each month and that no more than \$750 per month should have been awarded because at the hearing, Connie allegedly produced no evidence concerning her expenses. Further, James filed an exception to the duration of the maintenance payments he was directed to pay, asserting that because he was employed by the railroad, Connie would "be entitled to a divorced spouse retirement or annuity from the railroad," so his maintenance payments "should not continue beyond the date that pension goes into effect." James also contended that the DRC's report erroneously assumed that Connie was unable to work because even though Connie's doctor had testified in his deposition that she was not a candidate for gastric bypass surgery due to

her anemia, at the time of the hearing before the DRC, Connie testified that she had undergone the surgery. As of the date of the hearing, Connie had lost fifty pounds and had both of her knees replaced. Thus, James argued in his exceptions to the DRC's report that Connie had not produced any evidence at the hearing of her inability to work, with the exception of her doctor's deposition in which he had testified that she was not a candidate for gastric bypass surgery.

In his exceptions, James further asked that, if Connie was unable to pay him for his half of the marital home within the time allotted, the court order the house to be sold by the Master Commissioner on the courthouse steps. Finally, James requested that he be permitted to retain possession of the trailer and property located in Farmers, Kentucky, until the marital home was either bought by Connie or sold.

The circuit court entered a divorce decree. The court then ordered James to pay \$2,000 of Connie's attorney's fees. However, because Connie's attorney already had prepaid fees in his possession, the court ordered that the attorney should keep those prepaid fees, but the amount of those fees should be credited against the \$2,000 owed by James. The circuit court ordered that the parties' mobile home trailer be sold, and the proceeds divided between the parties, as provided in the DRC's report. As for the two items of personal property that belonged to other people that Connie requested be returned to those people, the court ordered that the items be given to Connie. The court also "confirmed" the remainder of the DRC's report.

James now appeals, arguing that the circuit court's ruling was not based on substantial evidence because the evidence submitted concerning Connie's expenses do not reflect that she requires the amount of maintenance that the circuit court awarded to her, which was \$1,000 per month. Additionally, he contends that the circuit court abused its discretion by awarding maintenance for an indefinite period of time. Further, James asserts that the circuit court abused its discretion in ordering him to pay \$2,000 of Connie's attorney's fees. Finally, Connie cross-appeals, arguing that additional maintenance should have been awarded to her.

## **II. ANALYSIS**

### **A. CLAIMS AND CROSS-CLAIM CONCERNING THE AWARD OF MAINTENANCE**

James contends that the circuit court's award of \$1,000 per month in maintenance was not supported by substantial evidence, and he also alleges that the circuit court improperly awarded maintenance for an indefinite period of time. Connie cross-appeals, alleging that the circuit court should have awarded a greater amount of maintenance to her each month.

The decision to grant or deny a maintenance award lies within a trial court's sound discretion as it applies the governing factors of KRS 403.200 to the parties' circumstances upon dissolution of marriage. KRS 403.200(2). Maintenance may be awarded if spouses seeking it cannot otherwise provide for their reasonable needs. KRS 403.200(1)(a).

*Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999). However, "a reviewing court will not uphold [a maintenance] 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).

Kentucky Revised Statute 403.200 provides as follows:

(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.

James argues that, in the hearing before the DRC, Connie mentioned only the following monthly expenses: \$500 for food, \$151 for gas, \$88 for electricity, and \$60 for water. The sum total of these expenses is \$799. Thus, James contends that the \$1,000 in maintenance he has been ordered to pay is too much because substantial evidence does not support awarding that amount.

However, during their separation, Connie moved for temporary maintenance, and listed her approximate monthly expenses, which totaled \$1,272. The circuit court granted that motion, but awarded her only \$1,000 in temporary monthly maintenance. Therefore, the amount of monthly maintenance that James has now been ordered to pay is the same amount that he paid in temporary maintenance each month for the previous five years. Upon review of the evidence in the record, we note that Connie also testified to taking numerous medications. Therefore, in addition to the \$799 per month that Connie needs for her food, gas, electricity, and water expenses, she also has medication expenses. Consequently, James's assertion that there is a lack of substantial

evidence supporting the circuit court's award of \$1,000 in monthly maintenance is misplaced.

James next asserts that the circuit court abused its discretion by awarding maintenance for an indefinite duration. Kentucky Revised Statute 403.200(2), set forth above, provides guidance for analyzing this claim. First, Connie has no independent source of income, but she will receive the marital residence if she can pay James for his half of the property. Additionally, the parties will sell the mobile home trailer and lot in Farmers, Kentucky, that they own, and Connie will get half of the proceeds from that sale. Connie will also receive half of any pensions James receives once he begins to receive them, but we are uncertain of the value of these pensions.

Next, we consider the fact that the Heltons were married for approximately twenty-five years before their divorce decree was entered. Additionally, at the time of the hearing before the DRC, Connie was fifty-eight years old. At that hearing, Connie testified about the medical problems she had, which included: asthma, arthritis, a heart murmur, heart "leakage," and depression. Connie also attested that she had memory difficulties, requiring her to take medication "for Alzheimer's." She further testified that she had "a mental breakdown" when her husband left her, resulting in two hospital stays and six shock treatments. Connie stated at the hearing that she continued to suffer from suicidal tendencies. Connie also attested that she had undergone gastric bypass surgery, as well as knee replacement surgery. By the time of the hearing, Connie had lost approximately fifty pounds as a result of the gastric bypass surgery. Finally, Connie's

doctor testified during his deposition, taken a year earlier, that, based on her health problems, she was "not a candidate for employment."

James asserts that the circuit court abused its discretion because it "based its award of maintenance on the deposition of [Connie's doctor] and [Connie's] health condition at the time [of her doctor's deposition one year earlier]." The only evidence that we have concerning Connie's total disability is the deposition of her doctor, which was based upon her health problems of approximately a year earlier, many of which were remedied before the DRC hearing was held. Therefore, there was no evidence concerning Connie's ability or inability to work since her health has improved. Accordingly, we vacate the circuit court's order in part, as it pertains to the issue of the duration of the maintenance award, and we remand for a hearing and further findings of fact concerning Connie's ability or inability to work following her recent health improvements. *See* KRS 403.200.

Finally, in her cross-appeal, Connie asks for \$1,200 per month in maintenance, plus \$495 per month for her hospitalization insurance premiums for the period of time that she is eligible for Cobra benefits. However, the DRC's report provided that Connie would receive \$1,000 per month in maintenance, and in her exceptions to that report, she did not request the additional \$200 per month in maintenance that she now seeks on appeal. Rather, in her exceptions to the report, she merely requested that James be directed to pay her hospitalization insurance premiums for as long as she was eligible for Cobra benefits, in addition to the maintenance amount

the DRC's report provided, which was \$1,000 per month. Because Connie did not challenge in the circuit court the \$1,000 monthly maintenance award provided by the DRC by requesting an additional \$200 in maintenance, any challenge she now raises on appeal concerning the monthly maintenance payment will not be reviewed. *See Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997).

However, because Connie did raise in the circuit court her request that James be directed to pay her \$495 per month hospitalization insurance premiums, we will consider that part of her claim on appeal. Due to the fact that Connie was awarded \$1,000 in monthly maintenance plus half of the mobile home trailer and lot in Farmers, Kentucky, which was ordered to be sold and the proceeds divided equally between the parties, we cannot say that the circuit court abused its discretion in denying Connie's request. *See KRS 403.200(2); Powell*, 107 S.W.3d at 224.

## **B. CLAIM CONCERNING THE AWARD OF ATTORNEY'S FEES**

James next contends that the circuit court abused its discretion in ordering him to pay \$2,000 of Connie's attorney's fees. Decisions regarding whether and how to allocate court costs, as well as whether to award attorney's fees, are within the discretion of the trial court. *See Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001).

Therefore, we will not overturn the trial court's decision on such matters absent an abuse of discretion. *See id.*

Kentucky Revised Statute 403.220 provides that

[t]he court from time to time after considering the financial resources of both parties may order a party to pay a

reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

Although a trial court is not required to "make specific findings on the parties' financial resources," the court is obligated to "[c]onsider the financial resources of the parties in ordering a party to pay a reasonable amount in attorney's fees."

*Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 147 (Ky. App. 1990) (internal quotation marks and citation omitted). "An allowance of attorney's fees is authorized by KRS 403.220 only when it is supported by an imbalance in the financial resources of the respective parties." *Lampton v. Lampton*, 721 S.W.2d 736, 739 (Ky. App. 1986).

In the present case, because Connie is not employed, while James makes approximately \$55,000 to \$60,000 per year, there is an imbalance in the financial resources of the parties. *See id.* Consequently, the circuit court did not abuse its discretion in ordering James to pay \$2,000 of Connie's attorney's fees. *See Neidlinger*, 52 S.W.3d at 519.

Accordingly, the order of the Greenup Circuit Court is vacated and remanded concerning the issue of Connie's ability or inability to work following her recent health improvements and whether maintenance should be awarded for an indefinite duration. The remainder of the Greenup Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Stephen McGinnis  
Greenup, Kentucky

BRIEF FOR APPELLEE:

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