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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001397-MR

JADE BARKER

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE KRISTI HOGG GOSSETT, JUDGE
ACTION NO. 05-CI-00181

GWEN BARKER

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM¹, SENIOR JUDGE

ROSENBLUM, SENIOR JUDGE: This appeal follows from a decree of dissolution of

marriage between the parties. Appellant is in his mid-40's and employed as a union

boilermaker. Appellee is in her mid-50's and is an admitted drug addict with an

employment history of minimal wage jobs. Appellant seeks review of four issues relating

to the dissolution of the twelve year marriage: first, whether an award of maintenance

was improper; second, if maintenance was appropriate, whether there was error in the

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

trial court's calculations; third, whether it was error to award maintenance for an indeterminate period of time; and finally, whether there was error in the division of the personal property. We do not find any error and affirm the decision of the Carter Circuit Court.

AWARD OF MAINTENANCE

The trial judge reviewed the evidence and concluded the wife lacked sufficient property to provide for her reasonable needs and that she was unable to support herself through appropriate employment. With those conclusions, an award of maintenance is appropriate and well within the discretion of the trial judge. *See* KRS 403.200(1). The decision to grant maintenance lies within the sound discretion of the trial judge.

Leveridge v. Leveridge, 997 S.W.2d 1 (Ky. 1999). The trial judge properly considered the factors listed in KRS 403.200(2)(a-f) and applied the law to the facts. Based on the evidence heard, the trial court did not abuse its discretion in awarding maintenance. *See Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). We will not substitute our own judgment for that of the trial court where the decision is based on substantial evidence. *Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990). The evidence before the trial judge was substantial and sufficient for an award of maintenance. There was no error.

AMOUNT OF MAINTENANCE

The trial judge took into consideration the monthly expenses of the husband as reported by him, four years of annualized earnings averaging \$61,000 and anticipated unemployment benefits of \$298 per week along with earnings from part-time work. The

order notes that the couple led a modest yet comfortable lifestyle. The husband worked while the wife was primarily a homemaker. During the marriage, neither drew on government assistance to survive and both parties had operable vehicles. The trial court found that after the separation, the husband's standard of living had not changed yet the wife was living in very different circumstances from that which she enjoyed during the twelve year marriage. After finding the wife's reasonable expenses to be \$885.00 per month, the trial court concluded that the wife was entitled to an award of \$750 per month. There are further findings that the husband has the ability to pay this amount based on his income and self-reported reasonable living expenses.

The evidence cited by the trial court supports the maintenance award. *See Leveridge, supra.* We will not disturb the trial court's award on appeal unless it is clearly contrary to the weight of the evidence. *See Heller v. Heller*, 672 S.W.2d 945 (Ky. App. 1984). In this matter, the trial court's determination is clearly supported by sufficient evidence. There was no error.

DURATION OF MAINTENANCE

The award of maintenance was open-ended. There were several factors that led the trial judge to this conclusion. The wife was seemingly in the process of applying for disability benefits. The record does not provide us with any anticipated amount or even whether she would be successful. The trial judge also noted that in the future, the wife would be eligible for benefits from an annuity or a pension. Again, the exact amounts and when that would occur was speculative. With that evidence before it, the

trial court was unable to establish a date certain when maintenance would terminate. The order acknowledges that the husband was specifically granted leave to file a motion to modify maintenance at such time as the wife received additional income to justify modification. *See Weldon v. Weldon*, 957 S.W.2d 283 (Ky. App. 1997). Any reduction could then be applied retroactively from the date of the filing of the motion. *Mudd v. Mudd*, 903 S.W.2d 533 (Ky. App. 1995).

The time period of the maintenance is within the sound discretion of the trial court. *See Browning v. Browning*, 551 S.W.2d 823 (Ky. App. 1977). The evidence before the trial court required a decision that allowed for future modifications as economic factors outside the marriage developed. *See James v. James*, 618 S.W.2d 187 (Ky. App. 1981). Leaving the time period open-ended and dependent on those to be determined factors was not clearly erroneous. *See Cable v. Cable*, 730 S.W.2d 947 (Ky. App. 1987). We will not disturb the decision where it is supported by sufficient evidence. *See Combs, supra*. Nor did the trial court abuse its discretion by ordering maintenance to be paid during periods of the husband's unemployment. There was no error.

DIVISION OF PERSONAL PROPERTY

The only matter of division of property before the trial court was the wife's claim that she was entitled to a portion of the approximately \$4,000.00 vacation pay received by the husband in December 2005. The husband claimed his entitlement to a portion of a \$1,200.00 tax refund received in 2005 and retained by the wife along with an

\$11,700.00 insurance settlement paid to the wife because of a car accident. The net difference is that the wife retained \$8,900 that the husband argues should be divided as a marital asset. The response was that those assets had been spent repaying living expenses during the period of separation and to pay expenses incurred when the wife was forced to move from the family home. The trial court reviewed these claims and arguments and concluded the funds were no longer available for distribution.

It is clear from the analysis and careful attention the trial judge undertook to weigh all of the evidence that further apportionment of the retained money was not appropriate. Pursuant to KRS 403.190, the court shall divide marital property without regard to marital misconduct in just proportions. (emphasis added). The trial court is granted wide discretion in the division of marital property and we will not disturb those findings absent a clear abuse of that discretion. *Johnson v. Johnson*, 564 S.W.2d 221 (Ky. App. 1978). Here the trial court did not abuse its discretion and there was no error pertaining to the division of personal property. The judgment of the Carter Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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