

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000107-MR

ROBERT GLEN DAVIS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 06-CI-00246

NANCY HELEN DAVIS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

WINE, JUDGE: Robert Davis appeals from a decree of the Warren Circuit Court, Family Division, dissolving his marriage to Nancy Davis. He argues that the trial court's award of maintenance was inadequate. Finding no abuse of discretion, we affirm.

Robert and Nancy Davis were married in 1996 in Michigan and separated on January 26, 2006, while living in Warren County, Kentucky. No children were born of the marriage. Robert filed a petition for dissolution of the marriage on February 17, 2006. At the same time, he filed motions for temporary maintenance, advancement of

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

attorney fees, and a restraining order prohibiting Nancy from disposing of any assets. In his motion, Robert stated that he was disabled, homeless, and without any resources to support himself. He added that his only income was \$572.00 in social security disability benefits, and he was without health insurance benefits.

The trial court ordered Nancy to pay Robert temporary maintenance in the amount of \$1,000.00 per month. Following a period of discovery, the trial court conducted a hearing on the disputed issues of division of property, debts, and maintenance. Thereafter, the trial court issued its findings of fact, conclusions of law and a decree of dissolution on September 5, 2006. The trial court divided the marital property between the parties, including the portion of Nancy's pension plan which was acquired during the marriage. The court also found that Nancy had given Robert a 1999 Harley Davidson Softtail Classic motorcycle during the marriage, and therefore it was Robert's non-marital property. However, the trial court assigned the outstanding debt on the motorcycle to Nancy.

With regard to maintenance, the trial court found that Robert lacked sufficient property and income to provide for his reasonable needs, and that he is unable to meet his reasonable needs through appropriate employment. Consequently, the trial court concluded Robert was entitled to maintenance. KRS 403.200(1). In determining the amount and duration of maintenance, the trial court found that the parties enjoyed an extravagant standard of living during the marriage, but there is insufficient income for either of the parties to preserve that standard of living separately. The trial court found that Robert contributed little to the marriage due to his disability. On the other hand, the court also noted that there was no evidence that Robert was in a position to acquire

education or training which would enable him to find appropriate employment given his disability.

In looking at the parties' incomes, the trial court found that Robert has an average monthly income of \$570.00 in social security disability benefits and reasonable monthly expenses of \$1,400.00. The court also found that Nancy has an average net monthly income of \$4,081.96 and reasonable monthly expenses of \$3,200.00. Based on these findings, the trial court awarded Robert maintenance in the amount of \$850.00 a month for a period of 45 months. But, since the court assigned the outstanding debt for the motorcycle to Nancy, the court directed that she receive a credit for the final five months of the maintenance period.

Both parties filed motions to alter, amend or vacate the trial court's findings and judgment. CR 59.05. In pertinent part, Robert argued that the duration of maintenance was inadequate, and that the trial court erred by giving Nancy a credit for her payment of the motorcycle debt. In an order entered on December 14, 2006, the trial court declined to re-evaluate the maintenance award, but the court amended the portion of its award granting Nancy a credit for the outstanding debt on the motorcycle. Robert now appeals.

As an initial matter, we note that Nancy has failed to file a brief in this case, as required by CR 76.12(1). Under CR 76.12(8), we may accept Robert's statement of the facts and issues as correct, reverse the judgment if we believe his brief supports such a result, or treat the failure to file a brief as a confession of error and reverse the judgment without reaching the merits of the case. However, the rule does not mandate a particular penalty; it merely provides penalty options which an appellate court, in its discretion,

may impose for failure to file a brief. *Kupper v. Kentucky Board of Pharmacy*, 666 S.W.2d 729, 730 (Ky. 1983). Furthermore, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01. *See also Whicker v. Whicker*, 711 S.W.2d 857, 858-59 (Ky.App. 1986).

Moreover, Robert only appeals from the trial court’s conclusions regarding the amount and duration of maintenance, which is a matter within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). “As an appellate court . . . this Court is [not] authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court’s decision is supported by substantial evidence.” *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999), *quoting Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1999). This Court may disturb the trial court’s order only if 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).

There is no dispute in this case that Robert is entitled to maintenance. KRS 403.200(2) provides that once it is established that maintenance is appropriate:

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.

Robert does not identify a specific objection to either the amount or duration of maintenance. The trial court found that Robert has reasonable monthly expenses of \$1,400.00 and a monthly income of \$570.00, leaving an “unmet need” of \$830.00 each month. Robert does not contest the sufficiency of any of these findings or the trial court’s award of \$850.00 a month in maintenance.

Rather, he seems to suggest that the duration of maintenance ordered by the court was inadequate. Robert first argues that the trial court clearly erred in finding that he contributed little to the marriage. Although this factor is not among those enumerated in KRS 403.200(2), those factors are not exclusive. Furthermore, Kentucky courts have held that a spouse’s contributions to the marriage may be considered in awarding maintenance. *McGowan v. McGowan*, 663 S.W.2d 219, 224 (Ky.App. 1983); *Angel v. Angel*, 562 S.W.2d 661, 665 (Ky.App. 1978) (holding that courts should take into account the contribution of one spouse who supports the other spouse’s attainment of a professional degree).

But while Robert takes offense with the trial court’s finding that he contributed little to the marriage, he does not indicate how it is erroneous by any significant degree. The trial court noted that Robert provided transportation for Nancy

after she was involved in a car wreck in 2003, he cooked a few meals and he mowed the lawn several times a year. Although Robert contends that the trial court minimized these contributions, he concedes that his disability made it difficult for him to perform household chores and that Nancy earned most of the income during the marriage. We cannot find any clear error in this finding.

Moreover, in addressing this factor, the trial court was primarily concerned with Robert's contributions to the marriage over the ten-year duration of the marriage. In determining maintenance, the duration of the marriage is important, but it may be secondary to other factors. Courts have awarded maintenance in short-term marriages, *see Van Bussum v. Van Bussum*, 728 S.W.2d 538 (Ky.App. 1987) (maintenance award appropriate after six-year marriage); *Carter v. Carter*, 656 S.W.2d 257 (Ky.App. 1983) (maintenance award may be appropriate even after a two-year marriage), but have denied maintenance after long-term marriages where a spouse has substantial resources of her own. *See Lampton v. Lampton*, 721 S.W.2d 736 (Ky.App. 1986). "The duration of maintenance must have a direct relationship to two factors: (1) the period over which the need exists, and (2) the ability to pay." *Combs v. Combs*, 622 S.W.2d 679, 680 (Ky.App. 1981). Where there is no showing that a spouse has the ability to become self-sufficient, there is a rebuttable presumption in favor of maintenance for life or until remarriage. *Id.*

In this case, however, the trial court discussed each of the factors listed under KRS 403.200(2). The trial court pointed out that it awarded a significant amount of marital and non-marital property to Robert, including a non-marital motorcycle which was purchased for \$24,000.00 and could be liquidated at his discretion. In addition, the court explained its decision to limit Robert's maintenance to a period of 45 months,

noting that it awarded Robert a portion of Nancy's pension and timed the end of the maintenance award to coincide with his eligibility to receive his portion of the pension. Robert does not point to any evidence showing that his need for maintenance will continue after that time.

While the evidence may have supported an award of a longer duration, Robert points to no evidence which would have compelled such a result. Under the circumstances, we cannot find that the trial court abused its discretion in setting either the amount or duration of maintenance.

Accordingly, the judgment of the Warren Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Pamela C. Bratcher
Bowling Green, Kentucky

NO BRIEF FOR APPELLEE WAS
FILED.