

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000655-MR

JENIFER JEAN ELDER

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 11-CI-00538

KELLEY GENE ELDER

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: CAPERTON,¹ COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jenifer Elder appeals from the Graves Circuit Court's February 20, 2013, Order and April 15, 2013, Supplemental Findings of Fact awarding her spousal maintenance in the amount of \$3,000 per month for a period of 96 months (8 years). On appeal, Jenifer argues the award is too limited in

¹ Judge Caperton concurred in this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

duration to adequately sustain her standard of living into the future and the court should have awarded permanent maintenance. After review of the record and applicable law, we affirm.

Jenifer and Kelley married in 1990 and were divorced in 2012 after 22 years of marriage. They have no minor children. In December 2012, this matter came before the trial court for an evidentiary hearing to determine the appropriate amount of spousal maintenance to be awarded to Jenifer. By agreement, the parties had resolved issues of property division and debt, leaving spousal maintenance as the only remaining issue.

The agreement between the parties distributed property as follows: Kelley would receive the consulting business formed by the parties known as Elder Environmental and Safety Services (“the Business”), the Ford Mustang, the Yamaha, the Kawasaki, half of the record collection, his professional books and papers, personal pictures of his dad and grandfather in their military uniforms, and the life-size Elvis picture. Jenifer would receive the marital home, four vehicles (the Lexus, Chevrolet, Volvo, and Jaguar), the Farmall Tractor, the Mer oil painting, the rock polisher, and the purse accessories that match her cigarette case (if Kelley finds them in his possession). The parties agreed that Kelley would assume all marital IRS debt (approximately \$41,000) and Jenifer would be responsible for maintaining the life insurance policy and the payment of premiums.

At the time of the hearing, Kelley was 58 years old and Jenifer was 54 years old. The court found that Kelley grossed \$125,000-\$126,000 per year from the

Business, which was formed in 1993. His work-related expenditures were \$5,000 annually. Kelley hoped to continue working until he turns 70 and to maintain a stable income. Jenifer testified she was active in the Business but had not worked enough to draw Social Security Disability. In December 2007, Jenifer was injured in an automobile accident and received a \$200,000 settlement, from which \$80,000 was applied to medical expenses. The rest was consumed for marital expenses, excepting \$15,000 which remained for her use. Jenifer has not worked since the accident.

Since November 2011, Kelley paid Jenifer \$5,000 per month in maintenance and an additional \$315 per month since April 2012. Jenifer requested the trial court award permanent monthly maintenance in the amount of \$5,000. She testified to several of her monthly expenses, including \$2,000 per month in massage therapy, \$500 per month for gifts to family members, and over \$1,400 per month for maintenance and yard work on the home.

The trial court found Jenifer's expenses to be excessive. Specifically, the trial court found that no medical proof had been offered regarding the efficacy and necessity of the massage therapy treatments. Kelley testified that he thought Jenifer was able to do some work. Jenifer provided countervailing testimony. However, no medical testimony was provided establishing the nature and extent of Jenifer's claimed disability.

In view of the length of the marriage, the disparity in earning capacity, and the fact that in 96 months Kelley may be approaching the end of his working career

and Jenifer would be approaching retirement age, the court determined that maintenance in the amount of \$3,000 per month for 96 months was appropriate. The court specifically found that Jenifer lacked sufficient property, including marital property apportioned to her, to provide for her reasonable needs and is unable to support herself through appropriate employment.

On appeal, Jenifer challenges the maintenance award on the basis of its limited duration. She maintains that due to the automobile accident, she likely would not be able to gain employment in the future and is not eligible for Social Security benefits. As a result, she contends she will be unable to financially provide for herself at the end of the 96 months and the trial court therefore should have awarded permanent maintenance.

A reviewing court will not disturb a trial court's award of maintenance unless 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).

A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007). In the case at bar, we believe the trial court properly considered the factors enumerated in KRS² 403.200 and its award of maintenance was supported by the evidence.

KRS 403.200 governs spousal maintenance and provides in part:

- (1) In a proceeding for dissolution of marriage . . . 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;

² Kentucky Revised Statutes.

(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.

Jenifer directs us to four cases in support of her argument. While each case stands for the proposition that in appropriate circumstances a trial court *may* award permanent maintenance, the facts of each case are readily distinguishable from the present case and none compels reversal of the award herein. Specifically, in the most relevant case Jenifer cites, *Powell v. Powell*, 107 S.W.3d 222 (Ky. 2003), the Kentucky Supreme Court reversed the trial court's award of maintenance to the wife in the amount of \$3,000 per month for a duration of three years. Given the disparity between the husband's substantial income as a doctor (Dr. Powell personally grossed \$565,510.52 in salary), and the wife's potential income after completing additional coursework (earning annually less than the husband earned in one month), the Court found the amount and duration of maintenance to be unjust. In the case at bar, Kelley's income does not approach that of Dr. Powell's. Given the distinguishable circumstances in *Powell*, we do not believe the holding in that case compels reversal.³

³ Nor do we believe the three other cases Jenifer cites compel reversal. See *Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980) (affirming trial court's open-end award of maintenance to the wife in the amount of \$257.42 per month); *Russell v. Russell*, 878 S.W.2d 24 (Ky. App. 1994) (upholding trial court's award of permanent maintenance to disabled wife in the amount of \$500 per month to support wife's conservative standard of living); *Clark v. Clark*, 782 S.W.2d 56 (Ky. App. 1990) (affirming trial court's decision to order husband, who earned \$6,850 per month after taxes as a doctor, to pay wife maintenance in the amount of \$2,500 per month for a period of 20 years).

Here, the record shows the trial court considered the appropriate statutory factors in awarding maintenance. Kelley and Jenifer were married 22 years and are nearing retirement age. The court heard evidence concerning the parties' financial resources and claimed expenses, Jenifer's physical condition and her ability to work, the standard of living established by the parties during the marriage, and Kelley's ability to meet his own needs while supporting Jenifer. The court found unpersuasive Jenifer's claims concerning the reasonableness and efficacy of \$2000/month in massage therapist services. Considering the evidence and the factors set forth in KRS 403.200, the trial court ordered Kelley to pay maintenance in the amount of \$3,000 per month for a period of 96 months. In light of the broad discretion afforded to trial courts in awarding maintenance, we conclude that Jenifer has failed to show that the court's award was unjustified.

For the above reasons, the order and supplemental findings of the Graves Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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