

RENDERED: FEBRUARY 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2006-CA-002147-MR

HERBERT HOOVER YONTS

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 05-CI-01159

BRENDA KAY YONTS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

WINE, JUDGE: Herbert Yonts (“Herbert”) appeals an order of the Boyd Circuit Court ordering him to pay maintenance in the amount of \$1,800.00 per month to Brenda Yonts (“Brenda”). Specifically, Herbert argues it was an abuse of discretion when the trial court improperly divided his veteran’s disability benefits. Finding no error, we affirm.

The facts of this case are generally not in dispute. Currently, Herbert is 57 years old and Brenda is 55 years of age. Herbert and Brenda were married October 11, 1967. The parties had two children during the marriage, both of whom are now adults. Herbert served in the United States military from August 1968 until about August 1970,

when he was discharged. In 1996, the Department of Veteran Affairs determined that Herbert was 100 percent disabled due to post-traumatic stress disorder resulting from his service in the military. Pursuant to this determination, Herbert receives \$2,448.00 per month in veteran's disability income. In addition, Herbert receives monthly disability income in the amount of \$1,480.00 in social security benefits and approximately \$64.00 from an annuity account from Kentucky Electric Steel. Herbert's total income from all sources is approximately \$3,840.00 per month.

In contrast, Brenda has no income. Brenda did not complete high school and has never been employed outside of the home during the parties' nearly forty-year marriage. Brenda is also disabled but unable to receive benefits because she has never been employed. Brenda is a diabetic and is currently being treated for her condition.

On October 15, 2005, Herbert filed a petition for dissolution of the marriage. In response, Brenda denied Herbert's allegations that the parties had been separated or that the marriage was irretrievably broken. She further requested that the court grant only a legal separation rather than a decree of dissolution of the marriage as her health insurance benefits would terminate should she divorce. On November 15, 2005, Brenda filed a motion requesting temporary support and that Herbert be prohibited from selling or concealing any of the parties' assets during the pendency of the action.

In an order dated November 18, 2005, the trial court ordered Herbert to pay Brenda \$1,920.00 per month in temporary maintenance. Herbert immediately filed a motion to amend the order, arguing the amount of maintenance was excessive and unsupported by the facts. The trial court reduced Herbert's monthly obligation to \$1,500.00 on December 2, 2005. On December 20, 2005, Herbert asked the court to

enter an interlocutory decree of dissolution of marriage, reserving issues of restoration of non-marital property and division of marital property. Brenda objected to the interlocutory decree, again asserting that she would lose her health insurance coverage.

The trial court referred the case to the domestic relations commissioner (“DRC”) who conducted a hearing on the contested issues of the dissolution proceeding. The DRC issued findings of fact, conclusions of law and a recommended order on February 23, 2006. In the report, the DCR found the parties had filed for bankruptcy relief; the marital home was in default and lost to bankruptcy foreclosure; Herbert would keep the parties’ 1954 Chevrolet show car; and Brenda would retain the parties’ household goods and furnishings currently in her possession. The DRC further recommended Herbert pay Brenda \$1,500.00 per month; Brenda make a good faith application for social security benefits or any other benefits to which she may be entitled; the decree be entered as requested by Herbert, but if it was entered prior to the determination as to whether Brenda could obtain health insurance, then Herbert would be responsible to pay the total cost of her premiums and the court should set the matter for review to determine if additional support is needed once it is determined if Brenda is entitled to disability and/or insurance. Herbert filed exceptions to the DRC’s recommendations. But on March 3, 2006, the court overruled Herbert’s exceptions and adopted the DRC’s report.

The trial court again referred the case to the DRC for a hearing and recommendations after Brenda informed the court on March 17, 2006, that she was not entitled to disability benefits. On May 5, 2006, the DRC recommended the decree of dissolution not be entered until Herbert requested such entry to allow Brenda more time

to be covered by his insurance, at which time the DRC would make further recommendations. Herbert filed exceptions to the DRC's report arguing that his veteran's disability income was not divisible in a divorce proceeding. The court again overruled the exceptions and adopted the DRC's recommendations on May 23, 2006.

On June 19, 2006, Herbert again asked the trial court to enter the decree of dissolution. The trial court referred the matter to the DRC for a third set of recommendations. Finally, on August 31, 2006, the DRC made a final recommendation in light of Brenda's efforts to obtain health insurance upon dissolution. The DRC acknowledged that the parties' respective incomes were not enough to sustain either party at the level they were accustomed during the marriage. The DRC also recognized that both parties' cash flow was fixed and limited when they were together. Even so, the DRC recommended that Brenda's maintenance be increased from \$1,500.00 to \$1,800.00. The trial court adopted these recommendations in its final judgment and decree entered September 29, 2006. This appeal followed.

While disposable military retirement pay is subject to state laws regarding the division of marital assets upon divorce, 10 U.S.C. § 1408, Herbert correctly observes that the Act excludes from disposable retirement pay disability benefits the retired serviceman receives in lieu of retirement benefits. Consequently, Herbert contends that the maintenance award to Brenda was improper as it was tantamount to a division of property.

Herbert argues the trial court abused its discretion in awarding maintenance to Brenda because Veteran Affairs ("VA") disability benefits are pre-empted from division pursuant to *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d

675 (1989). The United States Supreme Court in *Mansell* considered whether state courts could divide military retirement pay waived by the retiree in order to receive veteran's disability benefits pursuant to the federal Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408). The Supreme Court held that a state court may not divide military retirement benefits waived in order to receive veteran's disability benefits. *Id.*

Similarly, in *Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989), the Kentucky Supreme Court addressed whether veteran's disability benefits received by a veteran *via* his election to waive retirement benefits in a like amount could be regarded as divisible marital property in a divorce proceeding. The Court held that pursuant to 10 U.S.C. § 1408 (a)(4) "[a]mounts waived in order to receive compensation under title 38, or, VA benefits received in lieu of military retirement pay, are specifically excluded from division as marital property." *Id.* at 232. *See also West v. West*, 736 S.W.2d (Ky.App. 1987).

However, the Court in *Davis* recognized the potential for inequity that *Mansell* puts on the former spouse upon dissolution of a marriage. In recognizing that, the Court concluded, "if an inequity arises in an individual case, the trial court can resolve the problem according to our statutes by making an appropriate award of spousal support and/or marital property." *Id.* *See also* KRS 403.190; KRS 403.200. In this case, the trial court did not order division of the VA benefits, or even that Herbert pay a portion of his VA benefits to Brenda. Rather, the trial court only awarded maintenance pursuant to state law. There is no authority which prohibits the trial court from considering VA disability benefits as income for maintenance purposes. Courts in other jurisdictions

have reached similar results. *Oakes v. Oakes*, 235 S.W.3d 152 (Tenn.Ct.App. 2007).

Therefore we find no error.

Herbert next argues the trial court's division of his VA benefits violates KRS 403.200(2)(f), asserting that he is unable to meet his monthly needs while paying the required maintenance to Brenda. The trial court must consider relevant factors such as the ability of the spouse paying maintenance to meet his needs in conjunction with paying his maintenance obligation. *Id.* We understand Herbert's dissatisfaction with the trial court's ruling as both parties are on a limited income to meet their daily needs. But, we find no error in this case.

Under KRS 403.200, the amount and duration of maintenance 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). 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).

We find no clear error or abuse of discretion. Herbert argues \$1,800.00 per month in maintenance amounts to an arbitrary and unreasonable award considering his economic situation. However, the parties have essentially no property. While Herbert's monthly income is \$3,840.00, Brenda is unemployable, uneducated, disabled without benefits, and has spent the entire marriage, nearly forty years, maintaining the parties'

home and caring for their children. In light of these facts, the trial court's award of \$1,800.00 per month in maintenance does not amount to an abuse of discretion.

Accordingly, the order of the Boyd Circuit Court awarding maintenance is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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