

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001214-MR

HERBERT FEIGE

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 06-CI-500262

GAIL FEIGE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Herbert Feige appeals from the Jefferson Circuit Court's findings of fact, conclusions of law and judgment whereby the court ordered lump sum maintenance to Gail Feige. After careful review, we affirm.

Gail and Herbert (hereinafter "Herb") Feige were married twenty-six

¹ Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

years before they separated in 2005. They have two adult married children. During the pendency of the divorce, Gail and Herb reached a property division settlement under which Gail received \$593,570.00 in marital assets and assumed the first mortgage on their home totaling \$149,908.00. Herb received \$223,767.00 in marital assets, assumed the second mortgage of \$25,114.00 on the marital residence, assumed a credit card debt of \$19,815.00, and paid Gail's attorney \$10,000.00 toward his fee. In addition to his share of the marital estate, Herb had non-marital assets from inheritances totaling approximately \$607,500.00.

The parties could not agree on maintenance and Gail's claim for additional attorney's fees and those issues were accordingly tried on February 6, 2007. At the time of the trial, Gail was forty-seven years old, in good health, and had a high school education with very little work history. During the time the parties were separated, Gail did not make any attempts to find employment or seek further education.

At the time of trial, Herb was forty-eight years old, in good health, and had a high school education. He started working at age fourteen and then later went into his family's business, Southern Service Station d/b/a Southern Tire Company, which is an independent tire dealership. Herb inherited part ownership in the business from his father. A few months before trial, Herb's brother died unexpectedly, and at the time of the trial, Herb was the sole owner of the business.

On March 16, 2007, the trial court rendered a decision awarding Gail \$3,750 per month in maintenance for seven years, and then \$3,000 per month for

an additional five years. No additional attorney fees were awarded. Both sides moved to amend the decision and the trial court overruled both motions, finding that the maintenance was proper given Gail's lack of work history and education. Furthermore, the court articulated its reasoning in establishing the maintenance amounts and duration so that Gail could obtain an education and/or seek full time employment. The court also stated that it had considered Herb's ownership interests in the family business and the possibility of an increase in ownership as a result of his brother's death. The court found no new evidence warranting an amendment of the attorney fee ruling it had made previously. This appeal followed the court's May 17, 2007, order.

Our standard of review regarding an award of maintenance is that of abuse of discretion. "The amount and duration of maintenance is within the sound discretion of the trial court." *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky.App. 1994). The requirements for an award of maintenance are set out in KRS 403.200, which states in part:

- (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.

Herb argues that the trial court mistakenly based its maintenance award on a belief that the law permits modification of lump sum or fixed term maintenance. Herb presumes that Gail will be able to sell the family home, buy a more modest home, and live off the remainder or use it to obtain an education or supplement work income. Thus, he argues the circumstances might be changed sufficiently enough to justify modifying the maintenance, which Herb claims cannot be done with lump sum maintenance awards. He also argues that his business could go down in today's market and that the death of his brother renders the business unsteady, and thus that his income could decrease sufficiently to render the maintenance award unjust. Essentially, he argues that the current lump sum award is not fair because it is unable to be modified under Kentucky law.

In its order overruling the motion to amend or vacate, the trial court stated:

Respondent claims the duration of maintenance is too long and any number of changes in circumstances could make the award unjust. However, Kentucky case law provides for modification of maintenance awards. See *Dame v. Dame*, 628 S.W.2d 625 (Ky. 1982) and *Low v. Low*, 777 S.W.2d 936 (Ky. 1989). There have been a substantial number of cases post *Dame* which have allowed modification of so-called lump sum awards, particularly when the award becomes inequitable. KRS 403.250(1) provides that 'maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.' The statute does not specifically include or exclude lump sum awards.

We find the trial court's analysis to be somewhat misguided, given a careful reading of *Dame* and *Low*. In *Low*, the Kentucky Supreme Court provided a narrow exception for modifying lump sum maintenance awards when an "essential element of the trial court's formation was eliminated" by occurrences subsequent to the judgment. *Id.* at 938. Specifically, the husband filed for bankruptcy and discharged the indebtedness to wife, thereby eliminating an essential element of the trial court's property division between the spouses. The court found that because maintenance is dependent upon a proper division of marital property, the trial court was proper in entertaining the motion to modify maintenance. The Court stated that, "[t]his decision should not be read as a significant departure from *Dame*. In ordinary circumstances parties may continue to rely upon the finality of a lump sum maintenance award." *Id.*

We do not find the facts at issue here amount to an elimination of the trial court's division of property and instead find Herb's claims to be unripe. No such change in circumstances has even occurred, and essentially Herb is arguing that the trial court should have instead awarded open-ended maintenance so that in the future, he could modify the maintenance award.

This court is not in the position to determine whether open ended or lump sum maintenance should have initially been awarded. Absent a clear abuse of discretion, we will not overturn the trial court's judgment regarding maintenance. Given the substantial and undisputed evidence that Gail had not

worked in any ongoing capacity since graduating from high school many years ago, we find it reasonable for the court to award maintenance for a period sufficient for her to obtain employment or obtain higher education. While we find that under *Dame* and *Low* the trial court's award in this case may not be modified, we do not find the actual award to be an abuse of discretion.

Herb also argues that the trial court ignored critical evidence in determining the amount of the maintenance award, specifically that the court ignored expert testimony regarding Gail's earning abilities. Herb contends that Gail's own expert testimony provided that she was capable of earning in the range of \$18,460.00 to \$23,110.00 and that the court's finding that she was capable of earning approximately \$10,712.00 (minimum wage) was in error. We disagree.

The trial court's order denying the motions to amend or vacate specifically stated that the court considered the testimony given by the various experts. Because the trial court did not necessarily agree with the experts, we are not at liberty to overturn the judgment absent an abuse of discretion. While Herb testified that he pays high school graduates at least \$12.00 an hour, we find the court's decision that Gail might not necessarily earn that wage to be reasonable. We do not find the court's decision regarding Gail's earning abilities to be an abuse of discretion.

Herb next argues that the trial court disregarded evidence as to Gail's true monthly living expenses and instead utilized her statement indicating that her expenses totaled \$5,489.00. Herb argues that her checking account and credit card

receipts indicate that her monthly expenses were \$3,155.00. We do not find the court's award of \$3,750.00 for seven years and thereafter \$3,000.00 for five years to be an abuse of discretion, given that Gail was retaining the marital residence with a mortgage payment of \$1,752.00 per month and had monthly expenses between \$3,155.00 and \$5,489.00.

Herb finally argues that the trial court disregarded Gail's ability to sell the marital residence and produce income and that the court miscalculated his income. We find no abuse of discretion in either regard. The court noted that while the marital residence was a significant asset, it was non-liquid and non-income producing. The court declined to order that Gail sell the home and we do not feel that under these circumstances, with the financial situations of both parties taken into consideration, this amounts to an abuse of discretion. The marital residence was essentially the only asset given to Gail, and the value of that asset was taken into consideration in awarding maintenance.

Herb argues that the trial court miscalculated his income at \$140,000.00 rather than \$112,278.00, and thus that the maintenance award was improper. We disagree. The record reflects that the court attributed Herb with income of \$112,278.00, but that his tax records indicated he made approximately \$140,000.00. If anything, the court's maintenance award would have gone up given the tax records, and the court's use of the lower income is reasonable and clearly not an abuse of discretion.

For the foregoing reasons, we do not find the Jefferson Circuit Court's judgment and denial of the parties' motion to vacate or amend to be an abuse of discretion, and the judgment is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bill V. Seiller
Louisville, Kentucky

BRIEF FOR APPELLEE:

James A. Grider
Louisville, Kentucky