

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001374-MR

ELIZABETH KAY PECK

APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON S. FLEMING, JUDGE
ACTION NO. 15-CI-00440

JOHN EDWARD PECK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, LAMBERT, AND SPALDING, JUDGES.

SPALDING, JUDGE: Elizabeth Kay Peck (“Beth”) appeals the Christian Circuit Court’s property division and maintenance order in this dissolution of marriage action between Beth and John Edward Peck (“John”). Beth alleges the trial court erred in the amount and duration of the maintenance awarded to her, in its failure to award attorney’s fees, and in its failure to award her moving expenses. After

reviewing the record in conjunction with the applicable legal authorities, we affirm the order of the Christian Circuit Court.

BACKGROUND

The parties were married on April 15, 1989 in Marshall County, Kentucky. The parties have two children who were both over the age of majority at the time of dissolution. Beth petitioned for dissolution on May 1, 2015. The final evidentiary hearing was held on April 3, 2017, and May 23, 2017.

At the time of their marriage, John was working for a bank and Beth was employed as a social worker. Beth stopped working during her pregnancy with the parties' first child. She became a full-time homemaker and never returned to employment outside the home. Throughout most of the marriage, John was the sole income earner, as he rose through the ranks of Hopkinsville Federal d/b/a Heritage Bank ("HopFed"). Since 2000, John has served as president and CEO of the bank.

Simultaneously, Beth's mental health was declining. In 2004, Beth intentionally overdosed on medication and was referred to a psychiatrist, Dr. Jana Williams, at The Parthenon in Nashville, Tennessee, for ongoing treatment. Dr. Williams diagnosed Beth with bipolar disorder and borderline personality disorder. Beth testified that her mental health issues rendered her incapable of getting off the couch between two and four days each week. Dr. Williams testified via deposition

that Beth was permanently occupationally disabled due to her mental health issues. John did not contest this fact.

During this dissolution of marriage action, the parties agreed to a temporary order requiring John to pay Beth \$3,200 per month in temporary maintenance, in addition to making the \$1,800 monthly mortgage payment for the marital residence and paying \$500 per month on Beth's credit card. According to Beth, this was insufficient and during the two years of divorce proceedings, she incurred debt of \$40,000 to \$50,000 to family members.

Beth requested that she be awarded \$10,000 in monthly maintenance with no end date, subject to review after she reaches 59 1/2 years old. She submitted to the court that her monthly expenses were \$9,664.76. John claimed his monthly expenses were \$10,178.00.

The court reduced both of these estimated amounts for the following reasons. First, the court found Beth's travel expenses were unreasonable in light of her testimony that she could not get off the couch multiple days of the week due to her mental health issues. It also found her grocery expenses unreasonable when she testified that she ate out for nearly every meal, which had already been accounted for in her entertainment expenses. Lastly, the court eliminated the personal trainer expenses after Beth conceded that she had not seen a personal

trainer in three years. The court found her reasonable monthly expenses to be \$6,914.76.

For John's reported expenses, the court found he would not have monthly payments for his credit card balance or his mortgage because he will have sufficient funds from the marital property division to purchase a reasonable home and pay off the remaining balance on his credit card. Additionally, the court did not allow him to include expenses for his two adult children. Thus, the court found his reasonable monthly expenses to be \$6,503.

The parties agreed to the division of the marital property.¹ Beth would receive \$1,171,127.94 in non-retirement assets, based on the value of two real properties, the value of some rental properties, the amount received after sale of automobiles, the value of bank stocks, and the amount received from an Edward Jones investment account. Beth would also receive \$631,411.19 derived from John's retirement accounts.

Much of the hearing was devoted to determining how Beth could invest and utilize her award of marital property in order to support herself post-divorce. It was agreed that Beth should use the non-retirement assets to pay off her vehicle (\$40,000) and to purchase a home (\$250,000). She should also maintain

¹ Four disputes of marital property were addressed in the court's July 28, 2017 order. These are not contested on appeal.

the rental properties (\$237,544.44) in order to generate monthly income. This would leave her with \$643,583.50 to invest. The court found John's recommended investment strategy too risky and instead agreed with Beth's more conservative plan that would purportedly yield \$2,091.65 gross income per month. The court then found, based on the evidence presented, Beth could receive \$2,265.60 in gross monthly income from the rental properties. In sum, the court found that Beth could generate \$4,357.25 gross income per month but will have to pay taxes on that amount (in addition to taxes on her maintenance award).

The court then determined that after Beth reaches 59 ½ years old she will be able to draw without penalty from her award of John's retirement assets (\$631,411.19), giving her \$8,000 in gross income per month until she is 82 years old.² The court also noted that when Beth turns 63 years old she will be able to draw from her share of John's Social Security account, which would amount to \$1,477.50 gross income per month.

After the final hearing, both parties submitted written closing arguments. The trial court entered its findings of fact, conclusions of law, and final order of property division and maintenance on July 28, 2017.

² Beth will reach the age of 59 ½ approximately seven years from the rendering of this opinion.

In its order, the trial court ordered John to pay Beth \$4,000 per month in maintenance until Beth turns 59 1/2 years old, at which time she will be able to draw on the retirement assets awarded to her in the divorce without penalty. The court denied Beth's request for attorney's fees and her request for moving expenses in the amount of \$7,039. This appeal followed.

On appeal, Beth contends the court abused its discretion in the amount and duration of maintenance awarded and in denying her requests for attorney's fees and moving expenses.

STANDARD OF REVIEW

An award of maintenance, and the amount thereof, is within the trial court's sound discretion and will only be disturbed on appeal if the appellate court "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); *Brenzel v. Brenzel*, 244 S.W.3d 121, 126 (Ky. App. 2008). The test for abuse of discretion is whether the decision of the family court was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). The appellate 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." *Macleane v. Middleton*, 419 S.W.3d 755, 775 (Ky. App. 2014). Simply put, the appellate court

should avoid “usurp[ing] the discretion which properly rests in the trial court.”

Perrine v. Christine, 833 S.W.2d 825, 827 (Ky. 1992). The claims for attorney’s fees and moving expenses are similarly reviewed for abuse of discretion.

Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001); *Bickel v. Bickel*, 95 S.W.3d 925, 928 (Ky. App. 2002).

ANALYSIS

In the Appellant’s brief the Kentucky statutory scheme for maintenance is lamented at length in favor of a statutory scheme that is more formulaic in nature. However, KRS 403.200 *et seq.* is the statutory framework for maintenance in the Commonwealth. Pursuant to KRS 403.200(1), a court may grant maintenance to a spouse if it finds that he or she lacks sufficient property to provide for his or her reasonable needs and is unable to support him or herself through appropriate employment. If the court finds maintenance is appropriate, it must determine the amount and duration of such maintenance in consideration of the relevant factors delineated in KRS 403.200(2). These factors include: (1) the spouse’s financial resources, including the marital property that has been awarded; (2) the standard of living established during marriage; (3) the duration of the marriage; (4) the age, and the physical and emotional condition of the spouse; and (5) the ability of the spouse from whom maintenance is sought to meet both

parties' needs. Upon review of the trial court's findings, we find no abuse of discretion in the court's decision.

Beth presented evidence at the hearing and the trial court found that she does not have sufficient property to support herself and that she is permanently disabled rendering her unable to work to provide for her reasonable needs. Those two findings, in accordance with KRS 503.200(1), deem maintenance appropriate in this case.

Next, the court must determine the amount and duration of maintenance, upon consideration of the totality of the evidence presented and after consideration of the statutory factors listed above. At the hearing, the court heard detailed testimony regarding John's employment and his financial status, each of the parties' monthly expenses, and their standard of living, along with investment and management strategies for the assets awarded to Beth in the agreed property division.

Beth directs a litany of grievances at the court's maintenance determination. These can be summarized as follows: (1) the court should not have considered Beth's share of the retirement assets from the property division in setting maintenance because she should not have to deplete those assets to support herself; (2) the court erroneously reduced her reported monthly expenses; (3) the court should have considered John's bonuses, benefits, and stock awards from his

employment in its determination; (4) the court erred in calculating her rental income; (5) the court did not address her future car needs and her health insurance; (6) the court did not address the \$40,000-50,000 she borrowed from her family during the course of the litigation in determining how much she would have to invest; and (7) the court used gross numbers rather than net in determining the financial status of the parties.

First, it was proper for the trial court to consider all of Beth's financial resources available when calculating her maintenance award. There is no reason to exclude some of her assets simply because they are classified as retirement investments. Rather, it is reasonable to expect that she will use the ample marital assets—without dissipating them in their entirety—to help provide for her own needs. *Powell*, 107 S.W.3d at 225 (citing *Atwood v. Atwood*, 643 S.W.2d 263, 265-66 (Ky. App. 1982)). Beth's share of the marital estate upon division amounted to more than 1.8 million dollars.

Second, the trial court acted reasonably in reducing Beth's monthly expenses. As described above, the court reduced amounts that appeared to be contrary to her testimony or appeared to be "double-dipping." Furthermore, the court similarly reduced John's expenses to a more reasonable amount.

The third assertion of error is similarly without merit. Regarding John's stocks, there was much testimony at the hearing that they should not be

considered as part of his salary because HopFed requires its officers to maintain ownership of a percentage of stock to sustain their position in the company. John's bonuses were inconsistent, and thus, not reliable in determining his annual salary.

We find Beth's remaining arguments are also meritless and do not rise to the level of abuse of discretion. The court did not consider certain financial information because it was too speculative or not recent enough, especially as related to the rental property income. Beth's concerns regarding replacing her new car in the future and her health insurance are also speculative expenses of which no evidence was presented during the hearing. The amount of money Beth owed to her family was not addressed in her written closing argument nor was it specifically addressed as an expense for Beth during the hearing. Finally, there is no issue with the court using gross amounts in its calculation because it explicitly stated it took taxes into consideration in setting maintenance. As shown, in determining the amount and duration of maintenance, the court considered the relevant factors in light of the information provided at the hearing.

Although the parties enjoyed a high standard of living during their marriage, we hold that the trial court's maintenance award of \$4,000 per month until Beth reaches 59 1/2 years of age was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. The court's decision aligns with the goal of maintenance "to facilitate one's transition from dependence upon her former

spouse to independence” and the goal of dissolution “to sever all ties as much as possible as soon as possible.” *Mays v. Mays*, 541 S.W.3d 516, 527 (Ky. App. 2018) (citations omitted). Beth is permanently disabled but has received sufficient assets from the marital property division to support herself and become independent from John.

Whether an award of attorney’s fees is warranted is a matter of pure discretion, and the trial court is under no duty to award them even when faced with a financial disparity. *Neidlinger*, 52 S.W.3d at 519. Attorney’s fees are governed by KRS 403.220, which authorizes the trial court to order one party to pay a reasonable amount for the attorney’s fees of the other party when there is a financial disparity between the parties’ resources. The only factor that must be considered is the financial resources of the parties. *Poe v. Poe*, 711 S.W.2d 849, 852 (Ky. App. 1986).

In its order, the trial court stated it had considered the parties’ financial disparities when making its ruling but determined Beth had sufficient resources from the marital property division to pay her attorney’s fees and stated it included attorney’s fees in its assessment of the maintenance award. Accordingly, we conclude the trial court did not abuse its discretion in denying Beth’s request for attorney’s fees in this case.

Lastly, we address Beth's contention that the trial court should have awarded her moving expenses. In its order, the court stated Beth had enough funds from the marital property division to pay for her own moving expenses. Beth does not provide this Court with any reason amounting to an abuse of discretion for us to reverse the trial court's decision, and thus, finding no error, we affirm.

CONCLUSION

Based upon the foregoing, the order of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John T. Reed
Paducah, Kentucky

BRIEF FOR APPELLEE:

Gary R. Haverstock
Murray, Kentucky