



## Mershon v. Mershon

2009 | Cited 0 times | Court of Appeals of Kentucky | July 17, 2009

NOT TO BE PUBLISHED

OPINION

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

BEFORE: CAPERTON, THOMPSON, AND WINE, JUDGES.

Keith Allen Mershon ("Keith") appeals the post-dissolution order of the Greenup Family Court whereby the trial court continued the award of maintenance to Sheila Kay Mershon ("Sheila") after Keith's request to terminate maintenance. Keith argues that the court erred in determining the witnesses' credibility prior to the actual testimony and applied the wrong standard in ordering continued maintenance. After a thorough review of the record, the arguments of the parties, and the applicable law, we affirm in part, reverse in part, and remand.

The parties were married for thirty-three years when the court granted their dissolution of marriage in an order entered September 9, 2005. In this order the court incorporated the parties' settlement agreement. Pursuant to this separation agreement Keith was required to pay Sheila \$1000 monthly maintenance for two years, from the date the decree was entered. Furthermore, after the two-year time limitation, the court was to review the amount of maintenance. As the two-year time limit was approaching, Sheila moved the court to continue maintenance, and Keith moved to terminate maintenance.

On October 19, 2007, the Greenup Family Court entered an order continuing Keith's obligation to pay Sheila monthly maintenance in the amount of \$1000. This order was entered after a hearing, which was scheduled on three separate dates due to problems procuring witnesses. At issue<sup>1</sup> was whether Keith was employed sub-rosa at Jad's Enterprises ("Jad's").

Keith testified that he received disability in the amount of \$1,037 per month and this was his only income. Sheila testified that Keith had worked for Jad's since the late 1980s and continued to do so today and that Keith was paid in cash because he was on disability. She further testified that she had picked up his wages in cash at Jad's during the parties' thirty-three year marriage and had continued to pick up a weekly allotment in cash from Jad's after the dissolution of marriage.

Sheila provided a 2004 time sheet which she claimed was for Keith's work at Jad's.<sup>2</sup> Keith denied that



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the time sheet was from Jad's and instead claimed it was from a swimming pool business that Sheila had once operated. To complicate matters, Keith lives<sup>3</sup> directly across from Jad's and often goes to the garage to socialize and help diagnose mechanical issues on their computer, but adamantly contends he does so without pay.<sup>4</sup>

The court also heard the testimony of several employees from Jad's. Prior to hearing testimony on the merits of the case, the court first addressed the problems associated with the subpoena of the witnesses and whether to hold the witnesses in contempt of court. While Sheila's counsel informed the court of evasion of service and willful disregard of the subpoenas, the witnesses and their attorney informed the court of the numerous problems with the subpoenas, including the listing of the wrong name, the wrong time, and failure to deliver the subpoenas. The court concluded that it would not hold the witnesses in contempt and then proceeded to hear testimony on the merits.

Sheila first called Jad Bailey of Jad's Enterprises.<sup>5</sup> Jad testified that Keith had worked for him but had not done so in years. Jad testified that Keith probably last worked for him sometime in the 1990s. However, Jad did say Keith could have worked as recently as 2004, and still visits most days. Jad testified that Keith currently does not work for Jad's but does have a key to the business as he watches the place for free since he lives across the street and is a good friend of Jad.<sup>6</sup>

Sheila next called the secretaries of Jad's. The first secretary, Christy Leadingham, testified that she had worked for Jad's for nine years. Leadingham testified that Keith has never worked for Jad's since she has been there, and in fact, she has never seen Keith at Jad's. The second secretary, Jody Kibby, testified that she has not seen Keith work at Jad's and has never seen him there.<sup>7</sup>

The last employee to be called from Jad's was Billy Carter, the part time mechanic. He testified that Keith worked with him years ago and now just stops by every now and then and helps diagnose mechanical issues.

The court concluded in its order that the employees of Jad's were not credible after observing their demeanor in court and the inconsistencies with their testimony. The court further expounded that the employees had attempted to sabotage the court's authority by intentionally not telling the truth and trying to circumvent the service of subpoenas.

Additionally, the court found that Keith was still working for Jad's, that Sheila was in need of maintenance, that Keith could readily afford to pay the maintenance, and that the circumstances have not changed since Keith agreed to pay Sheila \$1000 monthly maintenance. As a result, the court found no need to change the agreement made by the parties. The court then ordered Keith to pay Sheila \$1000 monthly maintenance until further orders of the court. It is from this order that Keith appeals.

Keith presents two arguments on appeal. First, that the court abused its discretion in adjudging the



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witnesses' credibility prior to having them testify. Second, Keith asserts that the court applied the wrong standard to be used in consideration of maintenance. Sheila counter-argues that the trial court as fact-finder had the discretion to determine the credibility of the witnesses, and that in accordance with KRS 403.200 the trial court properly ruled in favor of continuing Sheila's maintenance award.

We now turn to Keith's first argument, that the trial court abused its discretion in adjudging the witnesses' credibility prior to having them testify.<sup>8</sup>

After a review of the record, we disagree.

The 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 matter sub judice, the trial court properly determined which witnesses were credible and which were not after hearing their testimony. Contrary to Keith's argument, the record supports the trial court's decision regarding the credibility of the witnesses. Accordingly, the trial court's findings are not clearly erroneous.

Keith's second argument, that the court applied the wrong standard to be used in consideration of maintenance. The trial court's ability to award maintenance is set forth in KRS 403.200, which states:

(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.

(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



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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.

Id.

We note that the appropriate appellate standard of review was stated in *Powell v. Powell*, 107 S.W.3d 222, 224(Ky. 2003) (internal citations omitted), "[w]hile the award of maintenance comes within the sound discretion of the trial court, a reviewing court will not uphold the award if it finds the trial court abused its discretion or based its decision on findings of fact that are clearly erroneous."

The duration of the award of maintenance is also within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990).

However, the duration must be directly related to the period over which the need exists, and the ability to pay. *Combs v. Combs*, 622 S.W.2d 679, 680(Ky. App. 1981). Further, permanent maintenance<sup>9</sup> is only appropriate "where the court finds that the spouse seeking it (1) lacks sufficient property to provide for his or her reasonable needs, and (2) is unable to support himself or herself through appropriate employment." *Lampton v. Lampton*, 721 S.W.2d 736, 739(Ky. App. 1986)(internal citations omitted).<sup>10</sup>

Based on the statutory requirements of KRS 403.200 the trial court in the matter sub judice was required to consider the all relevant factors as set forth in KRS 403.200(2) prior to awarding an additional term of maintenance after the expiration of the term agreed within the parties' settlement agreement. The order issued by the trial court lacks adequate findings to enable meaningful appellate review as to whether the award of maintenance was proper in light of the statutory considerations. See *Qualls v. Qualls*, 384 S.W.2d 326, 327 (Ky. 1964).

Of particular concern is how the trial court determined that Keith could readily afford to pay a continued award of maintenance when the record is devoid of any testimony on the amount of income Keith allegedly earned from Jad's. We find the case *Schoenbachler v. Minyard*, 110 S.W.3d 776 (Ky. 2003), which addresses the determination of income for purposes of awarding child support, to be illustrative of income determination in maintenance award cases. In *Schoenbachler* the Kentucky Supreme Court held

That in making child support determinations, courts must consider all income proven by substantial evidence, regardless of whether that income is documented.... Neither a "windshield appraisal" that Appellee's "lifestyle and property reflected an income greater than her W-2's and tax returns indicated" nor Appellant's bare allegations of additional income are sufficient to support the trial court's finding of additional income.



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Id. at 778-785

In the case sub judice, the trial court was presented no actual evidence as to the amount that Keith earned from Jad's, only evidence from which the court could determine that he worked there. Without some evidence of how much Keith earned at Jad's we do not see how the trial court could have made the statutory assessment that was required under KRS 403.200 before awarding an additional term of maintenance. Without any evidence concerning the amount of Keith's additional income from Jad's, the trial court could not determine that the duration of maintenance was directly related to the period over which the need exists, and the ability to pay. See Combs, supra. Thus, the trial court's findings concerning maintenance are clearly erroneous. Accordingly, we must reverse the award of maintenance and remand to the trial court for any further proceedings.

Therefore, based on the aforementioned reasons, we affirm in part, reverse in part, and remand to the Greenup Family Court.

ALL CONCUR.

1. The court also heard testimony concerning Sheila's entitlement to maintenance. Sheila testified that during the marriage she never worked outside the home for extended periods of time, and in fact, did not have a driver's license while married. Sheila further testified to her serious health problems which limited her ability to work to two part time jobs which yielded approximately \$700 of income per month.
2. This was prior to the parties' dissolution of marriage.
3. Keith has since married Jad's niece.
4. Keith further testified that he keeps some mechanic's tools at Jad's to work on his families' cars.
5. Jad was called during the second day of the hearing. The trial court threatened to hold Jad in contempt of court for his demeanor and lack of respect for the judicial proceedings. Our review of the record shows a trial court faced with a contemptuous witness, who was combative, flagrantly disrespectful, and offered little in the way of actual proof. We agree with the trial court that there was a tremendous amount of judicial restraint used by the court in declining to hold Jad in contempt of court.
6. There was also testimony that Jad loaned Keith money from time to time but Keith always repaid the debt.
7. The person in charge of employee payroll, Nancy Bailey (Jad's wife), was not available to testify. Jad informed the court that his wife was out of town, while Sheila's attorney informed the court of numerous attempts to serve Nancy Bailey to no avail.
8. In support of his argument, Keith states that there was no evidence upon which the trial court could base its order.



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Contrary to Keith's argument, the record shows that the trial court had not adjudged the witnesses veracity prior to their testimony. Instead the record shows a trial judge attempting to keep order in his court, treating the witnesses with leniency and behaving in a reasonable manner given all the confusion surrounding the subpoenas. Further, the court chose to believe the testimony of Sheila over Keith and the employees of Jad's. Therefore, the court had some evidence to base its order upon. We would be presented a different situation if the trial court had disbelieved all the witnesses and then affirmatively found the opposite.

9. We have characterized the trial court's order of maintenance until further orders of the court as open-ended and thus an award of permanent maintenance.

10. See Powell at 224, "[s]tatute governing maintenance awards seeks to enable the unemployable spouse to acquire the skills necessary to support himself or herself in the current workforce so that he or she does not rely upon the maintenance of the working spouse indefinitely."

