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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001270-MR

RALPH LYNN OLDHAM

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 93-CI-000644

SHARON SUE OLDHAM

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Ralph Lynn Oldham (Ralph) appeals an order of the Hopkins Circuit Court entered May 1, 1998, denying his motion to terminate maintenance paid to his former spouse, Sharon Sue Oldham (Sharon). We affirm.

The Hopkins Circuit Court dissolved the parties' twenty-nine year marriage on September 1, 1995. The trial court ordered Ralph to pay Sharon maintenance in the sum of \$750 per month pursuant to recommendations made by the Domestic Relations Commissioner (DRC) in his reports of June 2, 1994, and July 20, 1994. The DRC found that maintenance was justified based upon Sharon's inability to find suitable employment, her limited job

skills, her age, her financial condition, and the length of the parties' marriage. However, the DRC specifically called the maintenance award an "open-ended" award, not to continue indefinitely and stressed that Sharon make good faith attempts to find suitable employment.

On November 12, 1996, Ralph moved the trial court to terminate maintenance based upon Sharon's continued unemployment. The matter was heard before the DRC and at that time Ralph alleged that the maintenance should also be terminated based upon Sharon's cohabitation with Davey Coker (Davey). On March 21, 1997, the DRC recommended that the trial court reduce maintenance to \$550 per month for a period of twenty (20) years but not terminate it. After Ralph filed exceptions to the DRC report, the trial court remanded the case to the DRC with instructions to take additional evidence regarding Sharon's living expenses. On October 2, 1997, the DRC filed his report and recommendation with regards to Sharon's living expenses. On May 1, 1998, the trial court overruled Ralph's motion to terminate maintenance and awarded Sharon maintenance of \$550.00 per month payable for twenty years. This appeal followed.

Ralph argues the trial court should have terminated maintenance obligation for two reasons: (1) Sharon's cohabitation with another man; and (2) Sharon's failure to pursue new employment. It is appropriate to note at this point that:

The determination of questions regarding maintenance is a matter...delegated to the sound and broad discretion of the trial court, and an appellate court will not disturb the trial court absent an abuse of discretion. [citations omitted]. An

appellate court is not authorized to substitute its own judgment for that of the trial court where the trial court's decision is supported by substantial evidence. [citations omitted].

Barbarine v. Barbarnie, Ky. App., 925 S.W.2d 831, 832 (1996).

"In such matters, unless absolute abuse of discretion is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge." Clark v. Clark, Ky. App., 782 S.W.2d 56, 60 (1990).

Modification of maintenance is governed by KRS 403.250, which provides in relevant part:

- (1) ...[T]he provisions of any decree respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable...
- (2) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

The Kentucky Supreme Court in Combs v. Combs, Ky., 787 S.W.2d 260 (1990), stated:

We believe that a maintenance recipient's cohabitation can render continued maintenance "unconscionable" if the nature of the cohabitation constitutes a new "financial source" as contemplated in KRS 403.200(2)(a). There is ample evidence in the case at bar to support the trial court's conclusion that the respondent's cohabitation did constitute a substantial new resource for her since the Court's previous decree of November 5, 1978. As an appellate court, neither the Court of Appeals nor this Court is 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. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). The trial court in the present case properly considered respondent's cohabitation as a factor in determining that Movant's maintenance obligation should be suspended.

We recognize that not every instance of cohabitation constitutes a change in circumstances making continued maintenance "unconscionable." We do not intend by this opinion to open the floodgates to motions to terminate or suspend maintenance payments in every situation in which the maintenance recipient has begun dating, or has formed casual relationships with persons of the opposite sex.

Combs, 787 S.W.2d 262. The Combs Court then set forth the following six factors to be considered by the trial court in determining whether or not to terminate maintenance: (1) Duration of the cohabitation, (2) Economic benefit of the cohabitation, (3) Intent of the parties cohabitating; (4) Nature of the cohabitation, (5) Nature of the financial arrangements and (6) Likelihood of a continued relationship. Id.

Ralph has failed to show that the trial court abused its discretion by denying his motion to terminate maintenance. A thorough review of the record shows that Sharon presented substantial evidence to the DRC and ultimately to the trial court in opposition to Ralph's motion. The testimony relied upon by the DRC indicated:

1. Sharon and Davey's relationship was not permanent;¹

¹On April 10, 1998, Sharon filed a notice with the trial court stating that Davey no longer lived in her home or spent time there. Further, she stated that she did not expect to receive any future financial assistance from him.

2. Sharon and Davey did not have joint banking accounts;
3. Sharon and Davey each paid their own expenses;
4. Davey effectuated repairs in Sharon's home in exchange for residence there;
5. Sharon and Davey did not intend to marry but to remain friends; and
6. Davey did not have sufficient assets to support Sharon.

Based upon this testimony and other evidence, the trial court denied Ralph's motion to terminate maintenance. We do not believe the trial court abused its discretion in this regard.

This case is similar to the Combs case where the Court held:

Our decision is based on KRS 403.250(1), not KRS 403.250(2). If the legislature wants to make a policy decision to automatically terminate maintenance upon a recipient's cohabitation, then it should amend KRS 403.250(2) to add cohabitation as a grounds for automatic termination.

Combs, 787 S.W.2d 263.

Second, Ralph argues that the trial court should have terminated maintenance because Sharon has not found appropriate employment to support herself. Although the DRC stated in his recommendations of June 2, 1994, that Sharon should make every effort to seek employment and become self-sufficient, he also noted that this would be a difficult proposition due to her age and job skills. In his March 21, 1997, recommendation, the DRC stated:

Surely [Ralph] does not expect his maintenance obligation to last for only four

years under the Commissioner's prior ruling. A reading of Kentucky case law should convince Ralph that there is ample legal precedent supporting permanent maintenance awards for twenty years or the life of the recipient when marriages have lasted for twenty or more years. This was a marriage of twenty-seven years prior to separation. The Commissioner's comments in paragraph 4 of his July, 1994 [and the comments in the June 2, 1994, recommendations] ruling were intended to encourage Sharon to be self-supporting and for her to recognize that a maintenance award is seldom an amount that is adequate to live on.

We believe an award of maintenance of \$550 per month for twenty (20) years was appropriate in this case pursuant to guidelines set out in KRS 403.200, which provides:

- (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 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.

Clearly, the record shows that the DRC and trial court considered the length of the marriage, Ralph's financial status, Sharon's inability to support herself, Sharon's age and the standard of living established during the marriage when deciding the issue of maintenance. Given these facts, we refuse to disturb the sound reasoning of the trial court.

For the foregoing reasons, the decision of the trial court is affirmed.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

J. Keith Cartwright
Madisonville, KY

BRIEF FOR APPELLEE:

Wendell Holloway
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