RENDERED: MAY 4, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000142-MR
AND
NO. 2006-CA-000209-MR

PATRICIA L. RAMSEY (FORMERLY RIGGS) — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL
FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 89-CI-001326

GEORGE E. RIGGS, JR. — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HENRY,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Patricia L. Ramsey (Pat) and George E. Riggs (George) appeal and cross-appeal, respectively, from an order of the Jefferson Circuit Court that terminated George's maintenance obligation to Pat and that awarded Pat a judgment

[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 KRS 21.580.

against George for maintenance arrearages. After our review, we affirm as to the appeal and as to the cross-appeal.

Pat and George were divorced by a decree entered on October 30, 1989. The decree incorporated by reference the parties' "Property Settlement Agreement," which was read into the record on October 16, 1989. Their Agreement provided that George was to pay Pat $700.00 per month as maintenance – with an automatic monthly increase or decrease based on the Consumer Price Index (CPI) – until Pat remarried or either party died.

From October 1989 until July 1990, George paid Pat $700.00 per month pursuant to the Agreement. In August 1990, George increased the payment consistent with an increase in the CPI. He continued to pay this amount monthly until December 2004, but he made no other CPI-related maintenance adjustments. On January 21, 2005, counsel for Pat sent a letter to George indicating that he was "in arrears on payment of maintenance in the sum of $29,394.31, which does not include judgment rate interest," and demanding payment of this amount. The arrearage arose from George's failure to increase his maintenance payments in accordance with the CPI as set forth in the Agreement.

Rather than responding to the demand letter, George filed a motion on February 15, 2005, in which he asked the circuit court to issue an order terminating his maintenance obligation to Pat. In support of his motion, he filed an affidavit stating that because of his "deteriorating health, income, and financial resources," he could "no

longer continue to support [himself] and continue making the $700 per month maintenance payments." The affidavit also set forth his belief that "it would be unconscionable for [him] to continue paying maintenance in futuro upon a two-year marriage that was dissolved in October 1989." Pat subsequently filed a motion the very next day asking for a judgment against George in the amount of $29,394.31 -- plus interest. She also asked the court to hold him in contempt.

Following a hearing on April 28, 2005, the circuit court entered an order on July 5, 2005, which terminated George's maintenance obligation. As grounds for its decision, the court found that George no longer had the ability to pay maintenance because of his deteriorating health (as a result of cancer) and because he did not have enough income to cover his own mounting debts and expenses. The court concluded: "This is not a finding that the Respondent does not need or deserve the money. It is a finding that the Petitioner does not have the ability to pay it." The court consequently terminated George's maintenance obligation effective February 15, 2005. However, the court also found that Pat was entitled to a judgment in the amount of $29,394.31, plus interest, for the accumulated maintenance arrearages. The final order reflected that the court carefully analyzed the parties' respective conditions. Nonetheless, each party filed motions, which were denied. This appeal and cross-appeal followed.

On appeal, Pat first contends that after the divorce decree became final, the court lost any authority to "terminate" maintenance but retained only the power to "modify" it. In support of her contention, Pat acknowledges that Kentucky Revised

Statutes (KRS) 403.250 remained applicable to any future efforts to modify maintenance; but she argues that maintenance could not be terminated before the death of one of the parties or her remarriage.

As a general rule, modification of a maintenance award is governed exclusively by KRS 403.250(1). *Roberts v. Roberts*, 744 S.W.2d 433, 437 (Ky.App. 1988). That statute provides as follows:

> Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.

However, as noted, this general rule is inapplicable in cases where KRS 403.180(6) is involved. It provides, in relevant part, as follows:

> Except for terms concerning the support, custody, or visitation of children, **the decree may expressly preclude or limit modification of terms if the separation agreement so provides**. (Emphasis added.)

Thus, a property settlement agreement that has been incorporated into a dissolution of marriage decree may be modified with respect to maintenance payments "upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable" -- **unless** the agreement expressly precludes or limits such modification. *Wheeler v. Wheeler*, 154 S.W.3d 291, 295 (Ky.App. 2004); *Roberts*, 744 S.W.2d at 437; *Scott v. Scott*, 529 S.W.2d 656, 657 (Ky. 1975). "Unconscionable" in this context means "manifestly unfair or inequitable." *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974).

Pat contends that their Agreement contained no provision allowing the circuit court to terminate maintenance. Rather, it explicitly provided that it "may not be modified except either in writing signed by both parties" in order to terminate George's maintenance obligation. Pat also argues that KRS 403.250 does not expressly provide that the duration of maintenance under a settlement agreement may be modified by a court or that maintenance can be terminated when the parties have agreed otherwise. Thus, she believes that KRS 403.180(6) rather than KRS 403.250(1) governs this dispute.

We first examine the Agreement's language reciting that it "may not be modified except either in writing signed by both parties . . . ." Under usual circumstances, that language would indicate that the parties intended to prevent the court from modifying the maintenance provisions of the Agreement in accordance with the exception in KRS 403.250(1) referencing to KRS 403.180(6). However, Pat concedes that the parties intended that KRS 403.250(1) remain applicable as to any future efforts to modify maintenance. In support of this interpretation, we note the following exchange that was read into the record as part of the Agreement:

> Mr. Optermiller [*sic*]: Just one standpoint of clarification, Judge. As to the conditions as to the modification of maintenance, it will be the automatic CPI adjustment, death or marriage, you know, the typical statutory modifications, and I presume, and Mike may have said this, and also until further order of court. Is that –
>
> Mr. Connelly: I think that goes without saying.
>
> Mr. Optermiller [*sic*]: And I think it does, too, Judge. It's just I don't recall that particular wording.

Judge Westerfield: You are indicating that maintenance is modifiable?

Mr. Optermiller [*sic*]: Yes.

Judge Westerfield: All right.

In addition to this clarification by counsel supporting the modifiability of maintenance in this case, our courts have consistently recognized that KRS 403.250(1) allows a trial court to terminate a maintenance obligation in cases that meet the criteria of that provision as to unconscionability. *See Brown v. Brown*, 796 S.W.2d 5, 8 (Ky. 1990): "This statute provides the method by which a party may seek court ordered modification or termination of provisions for maintenance, support and property disposition …." S*ee also Combs v. Combs*, 787 S.W.2d 260, 262-63 (Ky. 1990); *Williams v. Williams*, 554 S.W.2d 880, 882 (Ky.App. 1977). Although Pat admitted through counsel in the original proceedings that the parties intended for the trial court to retain the power under KRS 403.250(1) to modify maintenance, she now argues that she did not agree that maintenance could be terminated by the court. Inherent in the power to modify is the authority to terminate.

Pat cites the Agreement's provision stating that maintenance "shall be payable until such time as either the Petitioner or the Respondent die, or until remarriage of the Respondent" as support of her argument. However, that language merely recites the mandatory contingency language set forth within KRS 403.250(2) as follows: "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."

We find nothing in the Agreement indicating an intention by the parties to invoke the exception contained in KRS 403.180(6) to "expressly preclude or limit" the circuit court from terminating George's maintenance obligation. This Court has defined *expressly* to mean "in direct or unmistakable terms" or "directly and distinctly stated; expressed, not merely implied or left to inference." *Clark v. Clark*, 601 S.W.2d 614, 616 (Ky.App. 1980), quoting *In re Estate of Estelle*, 593 P.2d 663, 667 (Ariz. 1979). The language at issue here simply does not meet this standard of specificity. Therefore, we conclude that the circuit court had the authority to terminate George's maintenance obligation if the requirements of KRS 403.250(1) were indeed met.

Pat essentially argues that those statutory requirements warranting termination of maintenance could not be met because George failed to introduce any evidence or testimony of the status of his income and financial circumstances at the time the divorce decree was originally entered in 1989. Therefore, she contends that it was impossible for him to show "changed circumstances so substantial and continuing" as to render unconscionable the maintenance provisions of the parties' divorce decree under KRS 403.250(1).

Since KRS 403.250(1) is intended to provide for relative stability, a movant must demonstrate compelling evidence to persuade a court to grant relief under KRS 403.250(1). *Barbarine v. Barbarine*, 925 S.W.2d 831, 832 (Ky.App. 1996).

Accordingly, a party seeking modification bears a substantial burden. *McKenzie v. McKenzie*, 502 S.W.2d 657, 657 (Ky. 1973). "The determination of questions regarding maintenance is a matter which has traditionally been delegated to the sound and broad discretion of the trial court." *Barbarine*, 925 S.W.2d at 832. Our courts have long accorded great deference to trial courts in domestic matters. *Rayborn v. Rayborn*, 185 S.W.3d 641, 645 (Ky. 2006). Thus, our review on appeal is accordingly circumscribed: "an appellate court will not disturb the trial court absent an abuse of discretion." *Barbarine*, 925 S.W.2d at 832.

Pat argues that the court lacked adequate evidence of the economic circumstances surrounding the original entry of maintenance in order to assess whether circumstances have indeed changed so as to allow for modification. Our Supreme Court has recently observed that:

> [t]he parties' circumstances at the time of the Decree and maintenance obligation are the status quo against which the changed circumstances requirement of KRS 403.250(1) is to be measured.

Rayborn, 185 S.W.3d at 644. The financial status of the party obligated to pay maintenance as of the time that a divorce decree is entered is of paramount importance whenever a request to modify maintenance pursuant to KRS 403.250(1) is subsequently made. This concept is well established in Kentucky.

> The only basis for the modification of an award once entered is a change of the condition of the parties from the time of the original award to the time the modification is sought and comparative earnings are peculiarly pertinent where, as here,

> the amount of the original award was fixed by the Chancellor pursuant to agreement of the parties.

Moneypenny v. Moneypenny, 310 Ky. 9, 11, 219 S.W.2d 960, 962 (1949).

In this case, we must presume that the circuit court reviewed the terms of the original divorce record during the modification hearing. In addition, the court was presented with evidence that related to George's income for the years 1999-2004, his projected income for the year 2005, his current debts and expenses, and his medical history including nine surgeries within two years preceding the order under appeal. We have no basis for disturbing its finding. As there was no abuse of discretion, we affirm the court's order terminating modification.

On cross-appeal, George argues that the circuit court erred in awarding Pat a judgment for $29,394.31, plus interest, for maintenance arrearages, contending that her claim should have been barred by the doctrine of laches. The record is not clear as to whether the circuit court ever considered George's contention. Nevertheless, we shall examine his argument.

Our case law consistently holds that the equitable relief afforded by the doctrines of laches and estoppel is not available in cases involving vested obligations such as maintenance and child support. *See Heisley v. Heisley*, 676 S.W.2d 477, 477-78 (Ky.App. 1984). The underlying basis for this rule is that such matters "have the same effect as a money judgment." *Id.* In *Whitby v. Whitby*, 306 Ky. 355, 208 S.W.2d 68 (1948), overruled on other grounds by *Knight v. Knight*, 341 S.W.2d 59 (Ky. 1960), our

predecessor court explained its reasoning for treating maintenance and child support obligations as money judgments as follows:

> We perceive that no distinction can be made between a judgment based upon a claim for alimony or maintenance and a judgment based upon any other legal right. After the judgment is entered, although it may be subject to modification at a subsequent date, it is binding and final until modified; and any payments which may have become due previous to such modification constitute a fixed and liquidated debt in favor of the judgment creditor against the judgment debtor.

Id., 306 Ky. at 356-57, 208 S.W.2d at 69; *see also Stewart v. Raikes*, 627 S.W.2d 586, 587-88 (Ky. 1982). KRS 413.090(1) establishes a fifteen-year statute of limitations in which an action upon a judgment may be brought. "Given, therefore, that law has addressed the running of time in concerns such as these, equitable relief through laches and estoppel would not be available." *Heisley*, 676 S.W.2d at 477. Thus, we must reject George's argument that the doctrine of laches bars Pat's claim for vested maintenance arrearages.

In summary, we affirm the decision of the Jefferson Circuit Court terminating George's maintenance obligation to Pat. As to George's cross-appeal, we affirm the court's decision to award Pat maintenance arrearages.

ALL CONCUR.

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