RENDERED: JANUARY 29, 2010: 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001917-MR

GARY ROBERT COLBERG — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 99-FC-07891

SUSAN ELAINE COLBERG — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: Gary Robert Colberg appeals from a post-decree order of the Jefferson Family Court entered on August 16, 2007, denying his motion to terminate or reduce open-ended maintenance payments to his former wife, Susan Elaine Colberg. He argues the trial court erroneously applied KRS 403.250(1)

[1] Senior Judge William L. Knopf 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.

which allows modification of a maintenance provision, but only upon proof of "changed circumstances so substantial and continuing as to make the terms unconscionable," unless the property settlement agreement (PSA) has "expressly preclude[d] or limit[ed] modification of terms" under KRS 403.180(6). He contends KRS 403.250(1) does not apply in this case because he and Susan specified in the PSA when and how the maintenance provision was to be reviewed. He maintains the trial court should have reviewed the motion *de novo* under KRS 403.200(2) which lists six factors[2] to be considered before granting maintenance. Alternatively, he argues that if KRS 403.250(1) was applicable, he satisfied his burden of proof and the trial court misapplied the statute because Susan's return to the workforce and the emancipation of the couple's children constituted a substantial and continuing change in circumstances justifying termination or reduction of maintenance. Gary also argues the trial court should have considered Susan's earning potential before denying the motion. Finally, Gary appeals from an order of the same court denying his motion to alter, amend or vacate[3] the order entered on August 16, 2007. Upon review of the record and the law, we affirm.

NON-COMPLIANCE WITH CR 76.12(4)(c)(v)

[2] Factors to be considered would be: Susan's financial resources; the time necessary for her to acquire needed training; her standard of living during the marriage; length of the marriage; Susan's age, physical and emotional condition; and Gary's ability to meet both his needs and Susan's.

[3] The motion, made pursuant to Kentucky Rule of Civil Procedure (CR) 59.05, merely reiterated previously made arguments. The court was not asked to make additional findings.

At the outset, we note Gary's brief fails to meet the requirements of CR 76.12(4)(c)(v) in that it does not state with specificity how and where the three claimed errors were preserved. Stating generally, "[t]his issue was preserved for appeal by Gary's arguments before the trial court, including Gary's motion to alter, amend or vacate[,]" without including a pinpoint cite to the record does not satisfy the letter or the purpose of the rule or case law interpreting it. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. App. 1990). However, because Gary's brief is sufficient for the Court's review of the matters raised in this appeal, because Susan has not argued non-compliance, and because we hold Gary's arguments clearly fail on the merits, we will not impose sanctions in this particular case even though we are authorized to do so by the rule.

FACTUAL BACKGROUND

Gary and Susan were married in 1977 in Pennsylvania. Gary is a hospital administrator and has worked in a variety of cities across the southeast. In September of 1999, when Susan petitioned for dissolution, Gary was 45 years old and earning $190,000.00 annually. In 2007, when he moved the court to terminate or reduce his $4,700.00 monthly maintenance obligation to Susan, his annual salary had more than doubled to $385,000.00. Importantly, Gary did not seek modification of the maintenance terms due to an alleged inability to pay. He has acknowledged throughout this litigation that he has the ability to pay Susan and still meet his own needs. He seeks a change because he believes it is time for Susan to exercise independence and move on with her life.

Susan completed an associate degree in practical nursing in 1975. She worked full-time as a licensed practical nurse (LPN) until 1986. The couple started a family in 1981 with the birth of their first son. A second son was born to them in 1985. In 1986, the family moved to Louisville, Kentucky, and Susan ceased working outside the home to care for the children. A third child, a daughter, arrived in 1988. New job opportunities for Gary resulted in four additional family moves before September 8, 2000, when the twenty-three year marriage was dissolved.

The couple separated in September of 1999 when Gary moved to Alabama to accept a new job and told Susan, then 44, he did not want her to join him. Susan and the three children[4] (two of them still minors) returned to her native Pennsylvania to be near her family and support system. Susan did not rejoin the workforce until 2003, when she took a job as a cardiac technician to make money and primarily to have health insurance. But for her long-time acquaintaince with the physician who employed her, she was uncertain she would have been hired due to not having worked in the medical field for twenty years.

While seeking employment Susan discovered her LPN license had lapsed. To have it reinstated she would have had to take a test, which she was confident she could not pass, or complete a refresher course at a location ninety minutes away from her home, which she deemed impractical because of her job

[4] All three children are now emancipated. During the August 2007 hearing on Gary's motion to terminate or reduce maintenance, it was established the two youngest children were enrolled in college.

and the fact that two of her children were still in school and living at home. Susan chose not to reinstate her LPN license for several reasons. First, her pay[5] as a cardiac technician, about $19,968.00 annually, was roughly equivalent to the salary she would make as an LPN. Second, she deemed it cost prohibitive to enroll in a four-year curriculum to become a registered nurse when tuition would cost about $60,000.00, which she did not think she could afford. Third, she would be fifty-five years of age by the time she could use the degree.

STANDARD OF REVIEW

The principles guiding our review were succinctly stated in *Block v. Block*, 252 S.W.3d 156, 159 (Ky. App. 2007):

> We review the family court's determination regarding a motion to modify maintenance for an abuse of discretion. *See Bickel v. Bickel*, 95 S.W.3d 925, 927-28 (Ky. App. 2002). We cannot substitute our judgment for the family court's if there is substantial evidence supporting that court's decision. *Id.* at 928. Further, we may not set aside the family court's factual findings unless they are clearly erroneous. *See Wheeler v. Wheeler*, 154 S.W.3d 291, 296 & n. 16 (Ky. App. 2004). However, we review questions of law *de novo*. *See Western Ky. Coca-Cola Bottling Co. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

LEGAL ANALYSIS

The initial and seminal question is whether Gary's motion to terminate or reduce his monthly maintenance obligation to Susan should be reviewed under KRS 430.250(1) or KRS 403.200. Because this determination is a

[5] Susan works thirty-two hours per week and earns $12.00 per hour. Her monthly take home pay is about $1,664.00.

matter of law, our review is *de novo.* As this Court explained in *Massey v. Massey,* 220 S.W.3d 700, 703 (Ky. App. 2006), courts are authorized to change an open-ended maintenance agreement in only two circumstances. Both are found in KRS 403.250(1) which states:

> [e]xcept as otherwise provided in subsection (6) 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. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

Stated otherwise, a court may modify a maintenance provision only if the movant proves: (1) a "substantial and continuing" change in circumstances has made the current terms unconscionable; or (2) the parties have agreed upon their own limiting terms making KRS 403.250(1) inapplicable.

Gary claims his motion was erroneously reviewed under KRS 403.250(1) because he and Susan had agreed he could seek "judicial review"—which he defines as *de novo* review—within eighty-four months. Susan responds that the PSA she and Gary signed does not mention *de novo* review and fails to define any method of modification or review. It is her position that the maintenance provision merely "allows" Gary the opportunity to seek "judicial review" within the aforesaid eighty-four month period.

The trial court and both parties have described the maintenance provision signed by Gary and Susan following mediation as "unusual" and "strange." It reads in its entirety:

> The parties acknowledge that [Susan] is not now capable of supporting her reasonable needs in the manner to which she has become accustomed. Therefore, [Gary] shall pay to [Susan] the sum of four thousand seven hundred dollars ($4,700.00) per month. This monthly payment is support and as such shall be taxable to [Susan] and deductible to [Gary]. [T]his payment shall be made by wage assignment directly from [Gary's] salary. This monthly payment shall continue month to month until further Order of the Court. [Gary] shall have the right to seek judicial review of this paragraph within eighty-four (84) months. This obligation shall terminate upon the death or remarriage of [Susan].
>
> In order to insure the payment of this support obligation, [Gary] agrees to retain a life insurance policy with [Susan] as the sole beneficiary for a period of at least eighty-four (84) months. [Gary] agrees that the death benefit of this policy shall be four hundred thousand ($400,000.00). Thereafter, this obligation shall be reviewed consistent with the maintenance order, if any, of the Court at that time as set forth above. This obligation shall terminate upon the death or remarriage of [Susan].

However characterized, the foregoing is the agreement reached by the parties and, as such, it is an enforceable contract. *Block,* 252 S.W.3d at 160 (citing *Cole v. Waldrop,* 204 Ky. 703, 265 S.W. 274, 275 (1924)). In interpreting its meaning, we must discern the parties' intentions from the four corners of the document. Absent ambiguity, we will give the terms their ordinary meaning without resort to

extrinsic[6] evidence. *Baker v. Coombs*, 219 S.W.3d 204, 208 (Ky. App. 2007); *see also Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000).

Whether an ambiguity exists depends on whether the provision may be reasonably interpreted in a multitude of ways. *Transport Ins. Co. v. Ford*, 886 S.W.2d 901 (Ky. App. 1994); *Central Bank & Trust Co. v. Kincaid,* 617 S.W.2d 32 (Ky. 1981). In reading the maintenance provision, we discern only one reasonable interpretation of the clause—Gary bargained for and agreed to something called, but undefined within the PSA, "judicial review" of the first paragraph of the maintenance provision within eighty-four months[7] of some unspecified event. In our view, he got what he sought—the trial court judge reviewed his motion to terminate or reduce maintenance and ultimately denied the request. There being no other standard of review specified in the PSA, the trial court had no choice but to apply KRS 403.250(1). There is no support for Gary's contention that the PSA "contemplated a **change** in the maintenance after 84 months. . . ." (emphasis added). From the face of the agreement, all one can reasonably say is the parties agreed to **judicial review** of the maintenance clause **on Gary's request** within eighty-four months (emphasis added). However, such review is not tantamount to exacting a change in the maintenance terms.

---

[6] The attorneys for both parties have expressed doubt that parol evidence would be helpful in this case because it appears different information was conveyed to each party as they caucused in separate rooms during the mediation. Both parties are confident in their recollection of the terms brought to them, but those recollections vary greatly between the parties.

[7] Gary suggests eighty-four months was selected because it coincided with the youngest child's graduation from high school.

While Gary could have bargained for maintenance payments to cease after eighty-four months or that they be capped at $400,000.00, the fact is, he did neither. We reject his theory that "judicial review" is the equivalent of *de novo* review and that the words agreed to by the parties eliminated the applicability of KRS 403.250(1). The fatal flaw in Gary's theory is that the phrase *de novo* review does not appear in the PSA; only the term "judicial review" appears. A search of long-standing case law reveals the phrase "judicial review" usually refers to analysis of an administrative agency's action for arbitrariness, not a spouse's desire for modification of a maintenance obligation. *Holbrook v. Kentucky Unemployment Ins. Com'n*, 290 S.W.3d 81, 85 (Ky. App. 2009). Gary may be correct when he argues the parties **envisioned** *de novo* review, but that is not what they said and the words to which they affixed their signatures control our interpretation of the PSA. Neither we, nor the trial court, may supply definitions that are foreign to the record. *See Perry v. Perry,* 143 S.W.3d 632, 633 (Ky. App. 2004) (*quoting Goff v. Blackburn*, Ky.App., 221 Ky. 550, 299 S.W. 164, 165 (1927) ("The Court cannot read words into the contract which it does not contain."). Therefore, in exercising judicial review as requested by Gary, we must conclude the trial court correctly applied KRS 403.250(1) based on the language of the PSA.

The second question, asserted in the alternative, is whether Gary made a sufficient showing under KRS 403.250(1) to authorize modification. As stated previously, to satisfy the statute he had to demonstrate a change in circumstances

"so substantial and continuing as to make the current terms unconscionable." Gary claims he accomplished this by showing three changes: first, that Susan was now working and earning a paycheck; second, that the couple's three children were now emancipated; and third, Susan now had time to realize her full potential by receiving additional training and education to enable her to get a better job, become financially independent, and move on with her life.

As would be expected, Gary focuses almost exclusively upon Susan's choices and finances because he claims the maintenance provision should be reviewed under KRS 403.200. However, because we have determined the matter is governed by KRS 403.250(1), we must also consider Gary's station in life. Since entry of the decree of dissolution, his annual salary has more than doubled to $385,000.00 while Susan's annual paycheck remains less than $20,000.00. Thus, even if Gary could show a substantial and continuing change in circumstances since 2000, it would be difficult for him to prove *unconscionability,* which is defined in the context of KRS 403.250(1) as being "manifestly unfair or inequitable." *Combs v. Combs,* 787 S.W.2d 260, 261 (Ky. 1990) (citing *Wilhoit v. Wilhoit,* 506 S.W.2d 511, 513 (Ky. 1974)).

The trial court found Gary did not satisfy his burden of proof for three reasons. First, the age of the couple's three children—each had eclipsed eighteen years of age by the time Gary filed his motion—had no bearing on his maintenance obligation to Susan. We agree. Gary and Susan had to anticipate their children would become adults. Furthermore, in at least three places, KRS 403.200 refers to

maintenance in the context of the spouse being able to provide for or meet "his needs" without any reference to the needs of children.[8] KRS 403.200(1)(b), (2)(a) and (2)(f). As the trial court stated in its order denying the motion, "[m]aintenance is intended to provide for one's former spouse's reasonable needs, not for the children's needs."

Second, the trial court found Susan's decision not to reinstate her LPN license or seek other training did not constitute a change in circumstances making continued payments unconscionable. We agree. When Gary moved to Alabama, Susan became the primary caregiver for the couple's three children, two of whom were still minors. As Susan testified, full-time motherhood did not comport with going back to school, especially when the LPN refresher course was unavailable in the area in which she was living. The trial court found Susan's testimony to be convincing, as was its prerogative as the fact-finder. *Bristow v. Taul*, 310 Ky. 82, 85, 219 S.W.2d 641, 642 (1949). We will not disturb the trial court's findings as they are supported by substantial evidence. *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky.App.2000).

Third, the trial court found any improvement in Susan's financial situation did not render the continued maintenance payments unconscionable. We agree. We have already discussed Susan's return to employment and her decision not to enroll in college or reinstate her LPN license, and will not repeat our

[8] Gary paid Susan $2,000.00 in monthly child support over and above his monthly maintenance obligation of $4,700.00. Child support ceased in 2007 when the youngest child turned eighteen.

analysis here. As far as the investments she made to improve her financial situation, most of them resulted from property she received as a result of the divorce. Property derived from a divorce settlement cannot serve as the basis for a change in circumstances justifying modification of a maintenance obligation. *Rayborn v. Rayborn,* 185 S.W.3d 641, 643 (Ky. 2006).

Spousal maintenance is left largely to the "sound and broad discretion of the trial court." *Barberine v. Barberine,* 925 S.W.2d 831, 832 (Ky. App. 1996). While Gary has demonstrated the occurrence of *change* in the last seven years, we cannot say he has demonstrated a "change in circumstances so substantial and continuing as to make the terms unconscionable." There being no abuse of discretion by the trial court, we affirm its analysis under KRS 403.250(1) and its denial of Gary's motion to terminate or reduce his monthly maintenance payments to Susan.

Gary's third and final allegation of error is that the court should have considered Susan's earning potential.[9] This claim is based upon *Block* and KRS 402.200(2)(b) which directs a court to consider "[t]he time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment" when determining any award. Gary maintains the trial

[9] At page 11 of his brief, Gary says he will address the issue of whether Susan is "underemployed" in greater detail, but does not do so in such certain terms. From our review of the record, Gary never asked the family court to find Susan was underemployed. Because we are a court of review, we will not consider an issue that was not raised before and ruled upon by the trial court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court."). Therefore, we will say nothing more on this subject.

court ignored this item and argues Susan now has plenty of time to return to school and get a better job or take a second job so she will work at least forty hours a week instead of only thirty-two. In comparison, Gary's work week averages about sixty hours as President and CEO of Southeast Georgia Health System. However, the trial court found in its order denying modification, "Susan will reap little financial benefit from obtaining additional education in her field at her age." This finding was reasonably based upon Susan's testimony that bettering her nursing education would require travel to a school ninety minutes from her home and cessation of her current gainful employment. Further, in the end, her salary would not be substantially better and there would be a diminishing return on her investment because tuition would cost at least $60,000.00. Thus, we reject Gary's contention that the trial court ignored this argument or misconceived the evidence.

For the reasons stated above, we affirm the orders of the Jefferson Circuit Court denying Gary's motion to terminate or reduce his maintenance obligation and his motion to alter, amend or vacate the trial court's order denying the requested modification.

ACREE, JUDGE, CONCURS.

KNOPF, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOPF, SENIOR JUDGE, DISSENTING. Respectfully, I must dissent. Gary and Susan entered into a property settlement agreement which provided for judicial review of his maintenance obligation within the first 84

months. The trial court determined that, despite specific language allowing for judicial review, Gary must meet the more stringent requirements of KRS 403.250(1) in order to modify or terminate the maintenance. It is not a reasonable interpretation of the settlement agreement that Gary would bargain for something that he was already entitled to receive under KRS 403.250. The family court was clearly erroneous in failing to honor the terms of the parties' agreement, which provided for a judicial review.

BRIEFS FOR APPELLANT:

Melanie Straw-Boone
Louisville, Kentucky

BRIEF FOR APPELLEE:

James O. Risch
Louisville, Kentucky