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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000510-MR

STEPHEN T. COLSON — APPELLANT

v.

APPEAL FROM MARSHALL FAMILY COURT
HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 99-CI-00114

LISA K. BAKER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Stephen T. Colson appeals from the March 4, 2009, order of the Marshall Family Court denying his motion for modification of the amended separation agreement he and his wife, Lisa K. Baker, entered into

[1] Senior Judge Joseph E. Lambert 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.

pursuant to their divorce. Colson also appeals from the March 6, 2009, order that granted a money judgment against him in Baker's favor with interest at 12% per annum until paid. Because we hold that the trial court did not err in its judgment for Baker and its denial of modification of the agreement, we affirm.

The parties were married in 1996, and a petition for dissolution of marriage was filed by Colson in 1999. Thereafter, a separation agreement, signed by both of the parties, was filed of record. Among its various provisions, the agreement provided that Baker would retain the marital residence; that Colson would be responsible for the entire mortgage debt payment for five years; and that Colson would pay one-half of the mortgage payment thereafter until the mortgage debt was satisfied in full. On March 8, 2000, the domestic relations commissioner (DRC) rendered his recommended findings of fact and conclusions of law, in which he found that the agreement was not unconscionable and recommended that it be adopted as part of the final decree. On that date, a decree of dissolution of marriage was signed by the presiding judge, wherein the DRC's recommendations were adopted.

In 2003, prior to expiration of Colson's obligation to make the entire mortgage payment, the parties modified their earlier agreement and the trial court adopted the agreed amendment. The new agreement provided that, effective immediately, Colson would begin paying only one-half of the mortgage payment, and that the mortgage would be refinanced only in Baker's name.

On December 16, 2005, Baker filed a motion and affidavit seeking to hold Colson in contempt for failure to pay his one-half of the mortgage payment from September 2005. Several months later, a notice of automatic stay was filed, revealing that Colson had filed for Chapter 7 bankruptcy.[2] After the automatic stay, the case was inactive for over two years, until January 22, 2009, when Baker again sought a show cause order. At the show cause hearing, the trial court commented that Appellant had not shown the trial court that the debt on the marital home was discharged. Colson then sought to modify the prevailing agreement between the parties. Baker responded to Colson's motion to modify and the motion was denied in an order dated March 4, 2009. By this order, the trial court required Colson to pay Baker forty months of missed one-half mortgage payments, along with pre-judgment interest of 8% per annum. Accordingly, the amount adjudged in favor of Baker was $13,875.04, plus interest at 12% per annum from the date of judgment until paid. The order also required Colson to pay Baker's attorney's fees and reiterated that Colson remained under the continuing obligation of the amended agreement to pay future half-payments on the mortgage. This appeal followed.

On appeal, Colson claims three trial court errors: 1) granting Baker a money judgment with 12% interest until paid; 2) denying Colson relief under KRS 403.250; and 3) failing to address or acknowledge stipulated evidence of Colson's disability.

[2] Colson has not asserted in this proceeding that he is entitled to relief based on his Chapter 7 bankruptcy.

Post-judgment interest ordinarily is allowed as a matter of course by virtue of KRS 360.040, which states, in pertinent part, "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." The allowance of such interest has been applied to judgments rendered in response to delinquent payments arising from separation agreements incorporated in divorce decrees. *See e.g., Hoskins v. Hoskins*, 15 S.W.3d 733 (Ky. App. 2000).

Although KRS 360.040 allows post-judgment interest, it has been held by this Court and the Kentucky Supreme Court that the trial court may take into account whether allowing such interest is inequitable, and upon a finding of inequity, grant relief. *See Young v. Young*, 479 S.W.2d 20 (Ky. 1972); *Guthrie v. Guthrie*, 429 S.W.2d 32 (Ky. 1968); *Hoskins v. Hoskins*, 15 S.W.3d 733 (Ky. App. 2000); and *Courtenay v. Wilhoit*, 655 S.W.2d 41 (Ky. App. 1983). The trial court's order before us is silent as to any equitable relief analysis. Rather, the court merely applied the statute as it is written. The decisions cited hereinabove impose on a party seeking relief from the statute the burden of asserting and demonstrating entitlement to relief. As the trial court failed to grant relief or even address the question, we conclude that Colson failed to meet his burden with respect to departure from the general rule. A party may not claim error on appeal unless the claimed error has been brought to the trial court's attention and a ruling demanded. Kentucky Rules of Civil Procedure (CR) 52.04. The court's failure to address a possible avenue of relief from a statute is not grounds for relief unless the party

seeking relief has made every reasonable effort to obtain a ruling. Colson's efforts fell short of this requirement.

Colson next argues that the trial court erred when it denied him relief pursuant to KRS 403.250(1), which states:

> 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. 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.

KRS 403.180(6) states:

> 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. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

"Pursuant to KRS 403.180(6), the terms in a settlement agreement related to maintenance are subject to modification *unless the agreement expressly prohibits modification*." *Wheeler v. Wheeler*, 154 S.W.3d 291, 295 (Ky. App. 2004) (emphasis in original).

Against this backdrop of statutory and decisional authority, we address Colson's claim. The parties' agreement expressly stated:

> [E]xcept for the terms concerning support, custody, or visitation of the child of this marriage, modification of the terms of this agreement are precluded, unless such proposed modifications are consented to by each party.

This provision was incorporated into the decree per the trial court's adoption of the DRC's recommendation. The Kentucky Supreme Court has explained the purpose of KRS 403.180(6) as expanding the parties' ability to settle by allowing "the parties [to] settle their affairs with a finality beyond the reach of the court's continuing equitable jurisdiction elsewhere provided." *Brown v. Brown*, 796 S.W.2d 5, 8 (Ky. 1990). If this court should allow a modification of the agreement between Colson and Baker upon the motion of one party only, legislative intent would be defeated. Accordingly, we hold that the trial court did not err in its determination that the agreement between the parties was not of the type that could be modified under KRS 403.250(1). Therefore, the March 4, 2009, order denying Colson's motion for modification of the agreement is affirmed.

Colson's final argument is that the trial court erred when it failed to address or acknowledge stipulated evidence of his disability from employment. In support of this argument, Colson points to several cases which he claims stand for the proposition that a party's inability to pay is a valid defense to contempt. Although the trial court determined that Colson was in contempt, it chose not to impose any punishment or sanction upon him. The only remedy allowed against Colson was a money judgment.

It would appear that Colson's real argument, presented as a CR 60.02 claim three years after entry of the order approving the amended agreement, is just a rehash of his argument to the trial court: that his physical disability has rendered him unable to make the payments to Baker and therefore he should be relieved of

the judgment against him. This argument is not persuasive for multiple reasons. First, the evidence showed that Colson came into substantial sums of money on several occasions between the time that he stopped making payments to Baker and the date of the March 6, 2009, order. The evidence also showed that Colson and his current wife spent thousands of dollars on home improvements and vacations, while failing to make any payments to Baker. Second, Colson failed to file a motion to modify the agreement between the parties for more than three years after he stopped making payments and not until after his discretionary funds had been spent. Finally, payments which Colson failed to make when due became vested and absolute at the time they were due and, as such, were outside the modification powers of the trial court. *See, e.g., Combs v. Combs*, 787 S.W.2d 260 (Ky. 1990); *Boehmer v. Boehmer*, 259 Ky. 69, 82 S.W.2d 199 (1935); *Lape v. Miller*, 203 Ky. 742, 263 S.W. 22 (1924). Accordingly, the trial court committed no error by failing to grant relief to Colson from the payments he had missed.

For the foregoing reasons, the March 4, 2009, order and the March 6, 2009, order from which this appeal is taken are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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