

RENDERED: APRIL 9, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2009-CA-000564-MR

WAYNE PAGEL

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 00-CI-00061

BRENDA PAGEL

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Wayne Pagel appeals the Mason Circuit Court's order denying his motion to modify maintenance. After careful review, we affirm.

¹ Senior Judge Edwin White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Wayne and Brenda Pagel were married in 1976 and divorced in 2000.

At the time, Wayne was living in Maysville while Brenda remained in Texas working and raising the parties' son. During the divorce, Wayne was represented by counsel, who drafted a property settlement agreement that included an agreement for Wayne to pay maintenance in the amount of \$1200.00 per month. The agreement designated that Wayne would pay maintenance until Brenda died or remarried. The agreement was not to be modified, changed, or altered unless it was done so in writing and signed by both parties. In the agreement, Wayne also agreed to pay Brenda's reasonable moving expenses if she chose to leave the state of Texas. Brenda was not represented by counsel, but she signed the proposed settlement agreement and the parties were divorced by final decree entered on September 15, 2000.

At the time of the separation, Brenda was earning approximately \$35,000.00 per year, and Wayne was earning approximately \$75,000.00 per year. Not long after their divorce, Wayne and his business partner left their employment and started their own business, Four Seasons Marketing. Wayne was a minority shareholder, owning 49% of the company, and his title was Vice President of Administration. His gross earnings climbed to a peak of \$150,000.00 in 2003. On March 10, 2008, Four Seasons Marketing was sold. Wayne testified that his partner, the majority shareholder, negotiated the sale, which allowed the business

to shed a significant amount of debt and permitted him to retain a position with the company. Wayne, however, was not permitted to retain a position with the company, but rather he served as a consultant for three months and received a monthly allowance of \$17,000.00. Additionally, Wayne was to receive three distributions for his interest in the business: \$100,000.00 in 2008; \$50,000.00 in 2009; and \$75,000.00 in 2010. From these distributions, Wayne was responsible for paying a portion of legal fees, closing costs, and accounting fees incurred during the sale, [which](#) were to be deducted from his distributions. Wayne testified that his share of costs deducted from the first distribution was \$50,000.00. Also under the terms of the agreement, Wayne signed a covenant not to compete, and the covenant not to compete terminated with his final distribution in March 2010. Wayne is currently self-employed as an executive recruiter working on commission, and he testified that at the time of the hearing in this matter, this position had not generated any income for him.

In 2004, Brenda became disabled, left her job, and applied for Social Security disability benefits. Brenda testified that she receives \$937.40 per month from Social Security and an additional \$1,008.83 from a long term disability policy. Brenda testified that this income was not subject to tax and that these incomes combined amounted to seventy percent of her earnings at the time she was employed. Despite her limited income, Brenda testified that she had obligated

herself to make monthly payments on a \$15,000.00 loan to help her parents avoid foreclosure on their home. She also testified about her moral obligation to care for her elderly parents, which amounts to approximately two hours per day of her time.

Anticipating difficulty in meeting his maintenance obligation while maintaining his own standard of living, Wayne filed a motion to modify his maintenance obligation. Brenda initially filed a response requesting additional time to retain counsel and to make the trip from Tennessee, where she had relocated. Counsel for Brenda filed an entry of appearance on October 23, 2008, and a response to Wayne's motion was also filed at that time. In the response, Brenda asked the trial court to deny Wayne's motion and asked for attorney's fees and travel expenses incurred in defending the motion. The response did not make a specific request for any moving expenses from Brenda's relocation from Texas to Tennessee.

At the hearing on Wayne's motion, Wayne also testified that he had been remarried for two years. He stated that he was meeting his monthly obligations by drawing on the balance of his distribution received in 2008 and borrowing on credit cards against the anticipated distribution due in March 2009. He indicated that he had accrued approximately \$20,000.00 in credit card debt in anticipation of the March 2009 distribution. Further, Wayne testified on cross examination that his current wife was employed as a judicial assistant, but he was

not sure of her monthly income. He explained that they maintained separate accounts, but he contributed to a joint account from which some household expenses were paid. He acknowledged that while his child support obligations terminated when his son reached the age of eighteen, he had incurred \$55,000.00 in debt for his son's college education.

Regarding the moving expenses at issue in this case, Wayne testified that Brenda had inquired about him reimbursing her for these expenses, but that he told her he was not paying for them due to the length of time following the divorce and her relocation in 2005. Wayne recalled Brenda saying not to worry about the moving expenses. However, Brenda's recollection was that she never told Wayne not to worry about the expenses, but that when he said he was not going to pay them, she stated that there was "no harm in asking."

Following the conclusion of testimony, the trial court entered an order on February 26, 2009, denying Wayne's motion to modify maintenance. The trial court also ordered Wayne to pay Brenda \$1,289.53 as reimbursement for moving expenses. No request for reconsideration was filed by trial counsel and a timely notice of appeal was filed on March 26, 2009. This appeal now follows.

Wayne makes two central arguments on appeal. First, Wayne argues that the trial court erred in denying his motion to modify maintenance because he demonstrated a showing of changed circumstances so substantial and continuing as

to make the terms of the agreement unconscionable. Second, Wayne argues that the trial court abused its discretion when it awarded Brenda moving expenses, as there was no motion before the court requesting such moving expenses.

The determination of disputes regarding modification of maintenance has traditionally been delegated to the sound and broad discretion of the trial court, and this court will not disturb the trial court's holding absent an abuse of discretion. *Bickel v. Bickel*, 95 S.W.3d 925, 927-928 (Ky. App. 2002). 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. *Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990).

KRS 403.250(1) allows the provisions of any decree respecting maintenance to be modified “only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.”

“Unconscionable” means “manifestly unfair or inequitable.” *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997); *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974).

In support of his contention that the trial court erred in denying his motion to modify maintenance, Wayne argues that his monthly income ceased in June 2008, and while he was currently able to meet his own monthly obligations from the proceeds of his distributions, he realized that he was quickly dissolving

the proceeds, and his ability to meet his future needs would be jeopardized. Wayne contends that his reduction in income, resulting from the sale of his minority interest in his former business, was a change in circumstances so substantial and continuing as to make the terms of the parties' agreement unconscionable.

Further, Wayne argues that the trial court improperly considered his current wife's income in its ruling and that her income was not a relevant factor to be considered by the trial court as it related to changed circumstances. Wayne also argues that consideration of the fact that Brenda is now obligated to support her parents was also not a relevant factor for the trial court to consider.

A careful review of the trial court's order indicates that the court did not rely on any income earned by Wayne's spouse in its decision. While it is mentioned that Wayne is remarried and that his wife works, there was no testimony whatsoever before the court as to what portions of the bills Wayne pays versus what portion his current wife pays. Further, there was no testimony or evidence provided as to what income Wayne's spouse earns. Thus, any weight placed on the fact that Wayne was remarried was minimal and was therefore harmless.

Further, there is no mention whatsoever in the trial court's order of the wife's moral or other obligation to support her parents or the \$15,000.00 debt she

has incurred on their behalf. Thus, there is nothing to indicate that the trial court even considered this in its determination that a modification of maintenance was not justified and any consideration was harmless.

Instead, the record indicates that the trial court did not find that Wayne's circumstances were so substantially and continually changed as to render the terms of the separation agreement unconscionable. Given the fact that Wayne earned a significant salary for three months immediately after the sale of the business and received significant distributions during the period for which he signed a covenant not to compete, it appears that the record adequately supports the trial court's determination that Wayne's circumstances were essentially unchanged. While Wayne did testify that his current income was zero, the record indicates that his covenant not to compete expires in March 2010 and also that he has started two new businesses and has a reasonable expectation that those businesses will both generate income. Because substantial evidence exists in the record to support the trial court's determination, we find no abuse of discretion in the court's ruling that Wayne failed to meet his burden of showing that the terms of the separation agreement were unconscionable.

Wayne's second assignment of error on appeal is that the trial court erred in awarding Brenda \$1,289.53 in moving expenses, as designated in the terms of the separation agreement and incorporated into the divorce decree.

Wayne contends that because Brenda's response to his motion does not specifically ask the trial court to award these fees, the trial court abused its discretion in so ordering them. Brenda argues that Wayne's counsel failed to object to the questioning and testimony presented at the hearing regarding the moving expenses, and therefore the matter was not preserved for appeal to this Court.

Wayne apparently concedes that he did not preserve this issue for appeal, and urges this Court to address the matter under Civil Rule (CR) 61.02 for palpable error. Given that the moving expenses were agreed to by both parties in negotiating the terms of the separation agreement, we do not find that the trial court's order enforcing such agreement amounts to an abuse of discretion, much less a palpable error. Therefore, we decline to address the issue and hold that no manifest injustice has resulted from the trial court's ruling requiring Wayne to pay the moderate moving expenses.

Accordingly, we affirm the February 26, 2009, order of the Mason Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

William G. Knoebel
Burlington, Kentucky

BRIEF FOR APPELLEE:

Monica Hill
Morehead, Kentucky