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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001214-ME

ANDREW J. HARDY — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 14-CI-00325

THERESA R. HARDY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Andrew J. Hardy ("Appellant") appeals from an Order of the Oldham Circuit Court denying his Motion to Modify Child Support and Maintenance. Appellant argues that the circuit court erred in failing to properly apply Kentucky Revised Statute (KRS) 403.213 and KRS 403.250 to modify his support obligations. We find no error, and AFFIRM the Order on appeal.

Appellant and Theresa R. Hardy ("Appellee") were married in 2000. The marriage produced three children. In 2014, Appellee filed a Petition for Dissolution of Marriage in Oldham Circuit Court. The following year, the parties entered into a Marital Settlement Agreement ("the Agreement") addressing child support and maintenance. The Agreement was incorporated into the Decree of Dissolution rendered in 2015. In 2014, Appellant earned $297,753 as director of food promotions at Havi Global Solutions.

The Agreement provided that the parties' three children would reside with Appellee and that Appellant would pay Appellee child support in the amount of $1,750 per month. As to maintenance, the Agreement stated that Appellant would pay to Appellee the sum of $3,900 per month for 48 months beginning on May 1, 2015. The Agreement went on to provide in Paragraph 3 that "maintenance payments are not modifiable except if Andrew [Appellant] loses his job through no fault of his own."

Appellant lost his job with Havi Global Solutions on August 18, 2015. In December 2015, he filed a Motion with the Oldham Circuit Court to modify both obligations. After a responsive pleading was filed, the circuit court conducted a hearing on the Motion on March 14, 2016. At issue was whether Appellant was terminated for cause, as Appellee maintained, or whether he was fired due to corporate downsizing as Appellant argued. In support of her argument, Appellee presented evidence that Appellant behaved inappropriately on at least three instances which resulted in his termination from employment. Appellee produced

Appellant's personnel file from Havi Global Solutions, which contained materials labeled "documentation of incidents". The first documentation described Appellant's behavior on a business trip with clients, when Appellant stayed at a bar past 1:00 a.m. and was unable to provide transportation to the clients. The second alleged incident occurred in March or April 2015, when Appellant was doing "donuts" in a rental vehicle – i.e., spinning the vehicle in circles – while on a business trip. The final incident occurred in August 2015, when Appellant was on another business trip. According to the evidence, Appellant arrived an hour late to a morning meeting with clients, announced that he had "closed the bars" the night before, and was unable to fully participate in the meetings. According to the proof, Appellant was fired the following week and Havi agreed to continue his bi-weekly salary of $7,461.54 through December 24, 2015.

On May 18, 2016, the Oldham Circuit Court rendered an Order denying Appellant's Motion to modify his child support and maintenance obligation. In support of the Order, the court cited Appellant's personnel record, which it characterized as documenting incidents over several months. According to the court, it "is apparent the company had reached its limit of tolerance" before terminating Appellant's employment. The court rejected Appellant's contention that the firing was "purely pretextual" to conceal the reality that his firing was a cost savings measure. Appellant's subsequent Motion to Alter, Amend or Vacate was denied, and this appeal followed.

Appellant first argues that the Oldham Circuit Court abused its discretion by denying his Motion to Modify Child Support pursuant to KRS 403.213. In denying Appellant's Motion to Modify Child Support, the court determined that "pursuant to KRS 403.212(2)(d) . . . the Respondent [Appellant] was voluntarily underemployed at the time of the hearing and had a potential income equal to his prior earnings. As such, a modification of child support was not warranted under KRS 403.213." Appellant asserts that his termination from Havi did not constitute voluntarily underemployment. Rather, Appellant contends that a showing of a change in income equal to or greater than 15% creates a rebuttable presumption that a material change in circumstances has occurred sufficient to require a modification of child support. Appellant argues that because his income decreased by approximately two-thirds following his termination and subsequent re-employment, he met the standard of KRS 403.213(2) and was entitled to a reduction in child support.

KRS 403.212(2)(d) provides that "[i]f a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income . . . . Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community."

Whether a child support obligor is voluntarily unemployed or underemployed under KRS 403.212(2)(d) is a factual determination for the trial

court, which shall not be disturbed if it is supported by substantial evidence. *Gossett v. Gossett,* 32 S.W.3d 109, 111 (Ky. App. 2000). The trial court is vested with broad discretion in the establishment, enforcement, and modification of child support. *McKinney v. McKinney,* 257 S.W.3d 130, 133 (Ky. App. 2008). Accordingly, this Court reviews child support matters under an abuse of discretion standard, *i.e.,* whether the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

In the matter at bar, the burden rested with Appellant to demonstrate a change in circumstances under KRS 403.213 sufficient to justify a reduction in his child support obligation. However, a change based on the movant's voluntary underemployment does not justify a reduction in child support. *Gossett*, *supra*. In finding that Appellant was voluntarily underemployed, the circuit court relied on Appellant's personnel file, his testimony and Appellee's testimony. Appellant's conduct, to wit, failing to show up at a meeting because he was hungover and doing "donuts" in a vehicle rented by his employer, demonstrated that he "voluntarily engaged in conduct which he should have known would impair his ability to support his children." *Commonwealth ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 401 (Ky. App. 2000). Additionally, the court was fully apprised of Appellant's "recent work history, occupational qualifications, and prevailing job opportunities and earnings levels[.]" KRS 403.212(2)(d). As the court's finding of voluntary underemployment was supported by the record and the law, it did not constitute an abuse of discretion.

Appellant also argues that the circuit court abused its discretion by declining to modify his maintenance obligation under KRS 403.250. He contends that a trial court is vested with the authority to modify any decree respecting maintenance where it has become unconscionable because of changed circumstances. As applied herein, Appellant maintains that the circuit court's denial of his Motion to Modify Maintenance – which was based solely on its finding that Appellant was terminated for cause from his place of employment – was erroneous because the court failed to consider whether the Agreement had become unconscionable. In so doing, Appellant argues that the court improperly failed to consider the reality of his severely hampered ability to pay maintenance in the amount of $3,900 per month based on his drastically reduced earnings. He seeks an Opinion vacating the circuit court's Order denying maintenance modification and remanding the matter for an examination of whether the agreement has become unconscionable.

The corpus of Appellant's argument on this issue is that the Decree may be modified as to maintenance upon a finding of unconscionability, irrespective of whether the Agreement precluded modification of its terms. KRS 403.180(6), however, provides that "the decree may expressly preclude or limit modification of terms if the separation agreement so provides." Pursuant to this provision, "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). We conclude from the express

statutory language and the supportive case law that the terms of a separation agreement – as incorporated in the Decree – are modifiable based on unconscionability *unless* the parties agreed that its terms were not modifiable.

In the matter before us, Paragraph 3 of the Agreement – which was incorporated into the Decree – expressly provided that "Andrew [Appellant] shall pay Theresa [Appellee] maintenance in the amount of $3,900 per month . . . . Said maintenance payments are not modifiable except if Andrew loses his job through no fault of his own." In considering this matter, the Oldham Circuit expressly found that Appellant became voluntarily underemployed, *i.e.*, that the conduct resulting in his termination was volitional rather than through no fault of his own. As noted above, this finding is supported by the substantial evidence of record. *Gossett*, *supra*. The unpublished opinions cited by Appellant do not alter this outcome.

For the foregoing reasons, we AFFIRM the Order of the Oldham Circuit Court.

ALL CONCUR.

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