RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-0178-MR
AND
NO. 97-CA-0249-MR

BEVERLY A. STEVENS — APPELLANT/CROSS-APPELLEE

v. — APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY CHANDLER, JUDGE
CIVIL ACTION NO. 92-CI-000091

CHARLES THOMAS STEVENS — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART - REVERSING AND REMANDING IN PART

* * * * *

BEFORE: ABRAMSON, GARDNER and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. This is an appeal from the Union Circuit Court which (1) reduced the amount of maintenance owed from $2,500 to $1,700 per month; and (2) denied to the appellant arrearages in maintenance in the sum of $14,400 plus interest. We affirm in part, reverse and remand in part.

Appellant/cross-appellee, Beverly A. Stevens (Beverly) and appellee/cross-appellant, Charles Thomas Stevens (Charles), were divorced on May 3, 1994. The parties entered into a signed and notarized settlement agreement which was incorporated into and made a part of the decree of dissolution of marriage by reference. The separation agreement amicably resolved issues of

distribution of marital and non-marital assets and liabilities; child custody, visitation and support; and maintenance payments to the wife, as well as, other matters not relevant to this appeal. Specifically, as it relates to maintenance the agreement stated:

> Husband shall pay Wife monthly payments in the amount of $2,500.00 for maintenance, such maintenance payments to continue for a period of five (5) years after date of divorce unless the Wife dies or remarries, in which event the maintenance payments shall terminate.
>
> Husband understands that Wife may seek employment following the divorce. If Wife becomes so employed Husband agrees that for a period of one (1) year following the divorce he will not use Wife's employment as a ground for modification of maintenance under KRS 403.250. After one (1) year from divorce maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms in this section unconscionable.

As previously stated, the decree of dissolution of marriage which incorporated the settlement agreement was entered by the court on May 3, 1994. Beginning in February, 1995, Charles reduced the maintenance payments from $2,500 per month to $1,700 per month. Beverly cashed each monthly check. In May and June of 1996, Charles did not make any maintenance payments to Beverly. Eventually, after Beverly hired an attorney, Charles resumed making the $1,700 per month payments. In July, 1996, Charles filed a motion to modify his maintenance obligation and Beverly then filed a motion for contempt claiming Charles'

failure to make agreed upon maintenance payments of $2,500 per month resulted in a $13,600 arrearage at that time.

The matter was referred to a Domestic Relations Commissioner (DRC) and a hearing before the DRC was held on August 13, 1996. After a short hearing, the DRC recommended that (1) since Charles had shown a change in circumstances since the entry of the final decree so substantial and continuing as to make the terms of the settlement agreement unconscionable, he was entitled to a reduction from the original $2,500 per month to $1,700 per month effective August 1, 1996; and (2) that since there was no "definite concrete agreement to (orally) modify (the agreement)" that a judgment for maintenance arrearage be issued against Charles in the amount of $14,400 through July, 1996.

Charles filed exceptions to the DRC's report and recommendation. Each party submitted a memorandum to the trial court setting forth his/her position as to law and facts of the case. Thereafter, on January 2, 1997, the Union Circuit Court entered its opinion and order in this matter. The trial court affirmed the DRC's recommendation to reduce maintenance from $2,500 to $1,700 per month effective July, 1996. However, the trial court found the issue of arrearage to be a problem and accordingly sustained Charles' exceptions and found that no arrearage was due and owing since the parties had entered an oral modification effective February, 1995. The trial court found:

> As to the second contention, i.e. the arrearages, the Court has a problem. As always, oral modification causes problems because they usually cannot be clearly

> substantiated. The parties always disagree as to the whens and whys when the issue finally gets to the Court. Like the appearance of evil, this Court places the burden on both parties to avoid the appearance of oral modification if there has in fact been no such modification. In the absence of absolute proof, the Court can only look at the surrounding circumstances of the alleged modification. Here, we see Charles reducing his payments to $1,700.00 per month in February, 1995, and Beverly accepting that substantial reduction for over a year until May, 1996, without objection or court action. That certainly gives the appearance of oral modification. As so often happens in these cases, it was only after Charles failed to make any payment at all that the issue was raised along with a motion for contempt.

This appeal and cross-appeal followed.

On appeal, Beverly contends the trial court erred in finding an oral modification existed and in failing to apply the correct standard of review to determine whether such alleged modification should be judicially approved. Charles cross-appeals claiming that the trial court erred by reducing the maintenance to $1,700 per month when it should have been terminated based upon evidence which indicated he had no income at the time of the hearing.

KRS 403.250 deals specifically with modification or termination of provisions for maintenance. Pursuant to KRS 403.250(1), "...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." In the case <u>sub judice</u> both the DRC and the trial court found that Charles had shown a change in

circumstances so substantial and continuing as to make the terms of the settlement agreement unconscionable, thus meeting the standards set forth in KRS 403.250(1). At the time of the original decree Charles earned approximately $100,000. Since that time Charles has suffered several business losses and had no earned income for the year 1996. However, it was also shown that he had in excess of $68,000 in cash, had invested $9,000 in a new business venture, paid over $82,000 to cover expenses of his interest in the Mazzio restaurants, bought his son a new car and was actually working for nothing for Mazzio. Based upon these facts, it cannot be said that the trial court's decision to reduce but not terminate the maintenance owed was clearly erroneous or an abuse of its discretion, the standard to be applied on review by this Court. CR 52.01; Whicker v. Whicker, Ky. App., 711 S.W.2d 857 (1986); Mudd v. Mudd, Ky. App., 903 S.W.2d 533 (1995).

However, we, like the trial court, find the issue as to the maintenance arrearage much more troublesome. The trial court found that because Beverly accepted the reduced payments for over one (1) year without objection or court intervention and only sought a contempt finding after Charles had failed to pay anything for two months and had moved for a reduction in maintenance that her conduct "certainly gives the appearance of oral modification." We do not agree that Charles met his burden of proof nor did the court apply the proper standard in determining whether an oral modification was effected.

Initially, it should be pointed out that the parties agreed that the settlement agreement was fair and not unconscionable. Additionally, the parties stated in the preamble that they agreed and understood the terms and conditions set forth therein. Under item number seven - Maintenance Payments To Wife - Charles agreed to pay monthly maintenance payments of $2,500 per month for a period of five (5) years. Furthermore, he agreed not to use the Wife's employment as a ground for modification during the first year nor to seek modification until one (1) year from the date of dissolution and "then only upon a showing of changed circumstances so substantial and continuing as to make the terms in this section unconscionable."

Testimony of the parties as to the alleged February oral modification was contradictory. Before the DRC, Charles stated that when the parties discussed the issue of maintenance in February, 1995, he told her he was having financial troubles and asked her about a reduction in maintenance. The following is a portion of Charles' response to questions from his attorney during the hearing:

> 9. What did you ask in way of a reduction?
>
> A. I told Beverly, I said Beverly, I really need to get this thing dropped down here. I said I'd like to put it down to half to $1250. She didn't agree to that. I said okay, fine, what do you think would be fair since she was working at that time too. And she said, I don't know -- $1700 or $1800, and anyway we agreed to $1700 and she accepted that until this present date in time.
>
> 10. All right. Now you mentioned she was working. Was she working when you signed the property settlement agreement in April of '94?

A. No.

11. And in February of '95, where was she working?

A. I believe she was working at Kentucky Bank.

12. First Kentucky ...

A. First Kentucky Bank.

13. All right. Was that a consideration in your discussion with Beverly?

A. It was to me. She had another income other than what I was paying her plus I was paying child support too at the same time.

As can be seen from the testimony of Charles, the modification was made within one year (decree entered May, 1994 and oral modification February, 1995), and one of the considerations for said reduction was Beverly's recent employment. Both conditions were violations of the agreement which had been knowingly, and voluntarily entered.

When Beverly testified as to the oral modification, she emphatically denied that she agreed to accept a reduction to $1,700. She stated that she expected him to pay the full $2,500 per month once he sold his business and had money available. She added that, "I thought he would continue to pay $2,500 as soon as he sold the store." In response to how the $1,700 amount was reached, she said, "Well, we discussed different amounts in the garage and I said that really wouldn't meet the obligations that I already had and he said, well, this is all I can give so I tried to work with him." Later, on cross-examination, she again denied she agreed to the reduction and said, "I was trying to

work with him and I had this coming in so I took what he was able to give me."

The controlling case on oral modification of a settlement agreement is Whicker v. Whicker, Ky. App., 711 S.W.2d 857 (1986):

> With the foregoing discussion in mind, we hold that oral agreements to modify child support obligations are enforceable, so long as (1) such agreements may be proved with reasonable certainty, and (2) the court finds that the agreement is fair and equitable under the circumstances. In order to enforce such agreements, a court must find that modification might reasonably have been granted, had a proper motion to modify been brought before the court pursuant to KRS 403.250 at the time such oral modification was originally agreed to by the parties. Furthermore, in keeping with prior decisions, such private agreements are enforceable only prospectively, and will not apply to support payments which had already become vested at the time the agreement was made. See Dalton v. Dalton, Ky., 367 S.W.2d 840, 842 (1963).
>
> Parties who decline to use the procedures set out in KRS 403.250 run the risk of having their private agreements declared invalid by a court when the parties attempt to have the agreements judicially enforced. These agreements which attempt to accomplish privately what a court could not order legally will be declared invalid and will not be enforced.

Id. at 850.

Applying the standard set forth in Wicker to the facts of this case, we believe the trial court erred in finding that an oral modification was effectively entered into and that modification would have been granted had the appropriate motion been brought before the court. First, the mere acceptance of a

lesser amount by Beverly is not tantamount to acceptance of a reduction. Nor is the fact that appellant did not immediately proceed with legal action against Charles. If this was the case, then any individual without the financial ability or intestinal fortitude to race to the courthouse would be deemed to have accepted modification when in reality such modification was unilateral. Instead of encouraging parties to work together, every change in a financial situation or short-term crisis would necessitate court action and intervention. Surely, this is not the intent of KRS Chapter 403 nor the prevailing case law. Secondly, although the trial court found "that the modification was fair and equitable under the circumstances" there was no finding to substantiate its conclusion. Neither party presented adequate evidence as to the financial standing of Charles in February 1995. Apparently there was no discovery undertaken in this case and there were no exhibits introduced at the hearing (at least, there is nothing in the record to this effect). However, we do know from the testimony that Charles was the owner of a Druther's Restaurant which eventually sold for $250,000, that he had a one-third (1/3) interest in three Mazzio restaurants in which he invested an additional $82,500 since April, 1994, that he invested $9,000 in another business venture, that he received three payments of $17,000 from a settlement with Druther's restaurants, that he bought his son a new car, and that he continued to maintain his standard of living and had money in the bank. Furthermore, at the time the settlement agreement was

entered Charles was aware of some of the business hardships coming his way.

Finally, the trial court made no finding as required under Wicker that had a proper motion been filed to modify in February, 1995, that that request might reasonably have been granted. As previously pointed out, the maintenance section of the agreement provided that no modification could be undertaken for one year and that Beverly's employment could not be grounds for modification during that period. However, Charles specifically stated that the fact that Beverly had another income (employment) was a consideration that entered in his attempt to orally modify the agreement. Under the terms of the settlement agreement and based upon Charles' own testimony, the trial court erred in finding an oral modification took place when it could not have been granted had Charles filed the proper motion to modify and proceeded to a hearing before the court.

Based upon the foregoing reasons, the Union Circuit Court's opinion and order is affirmed as to the reduction in maintenance effective July, 1996, and reversed as to the oral modification and subsequent resulting maintenance arrearage. This case is remanded to that trial court for entry of judgment in favor of Beverly A. Stevens and against Charles Thomas Stevens for a maintenance arrearage in the amount of $14,400 as evidenced by Charles' failure to make full payment during the period February, 1995 through July, 1996.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-
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