

RENDERED: December 11, 1998; 2:00 p.m.
ORDERED NOT PUBLISHED BY THE KENTUCKY
SUPREME COURT: August 18, 1999

Commonwealth Of Kentucky

Court Of Appeals

No. 1998-CA-001835-MR

HERMAN KEARNS

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 86-CI-0860

JO ANN KEARNS

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, KNOPF, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. Herman Kearns (Herman) appeals from an order of the Warren Circuit Court denying his motion to terminate or modify his maintenance obligation. For the reasons set forth hereinafter, we affirm.

Herman and Jo Ann Kearns (Jo Ann) were married in 1955, separated in 1986, and divorced in 1988. The divorce decree awarded Jo Ann maintenance in the amount of \$400 per month "for the remainder of her life, or until she remarries, whichever event shall occur first." At the time of the divorce, Herman was employed by Bada Corporation as a plant manager and earned \$60,000 to \$80,000 per year.

In April 1990, Herman voluntarily left Bada Corporation to start a competing business. That business performed well for the first few years of its operation, and Herman earned approximately \$80,000 per year as its president and general manager. However, in September 1995, the business became insolvent.

In October 1995, Herman ceased making his maintenance payments to Jo Ann and filed a motion to terminate or modify his maintenance obligation. Herman stated that he was unemployed and unable to find work due to his age (59 at the time) and health problems and that he had a negative net worth of \$673,000, due in part to his having personally guaranteed many of the business's debts.

No evidentiary hearing was held, but the domestic relations commissioner (DRC) conducted a hearing at which he considered the oral arguments of the parties' respective counsel.¹ In a report which addressed each of the arguments raised by Herman in his motion, the DRC recommended denial of the motion to terminate or modify Herman's maintenance obligation and stated:

The Commissioner finds that, where one who has an existing maintenance obligation freely and consciously assumes a risk which may bring him either financial success or failure, one of the risks he faces upon failing is that he still must make his maintenance payments. Equity demands that Joann [sic] not share the burdens of Herman's failure.

¹ The DRC advised the parties that he would assume that all of the allegations in Herman's motion were true.

The DRC stated in his report that “[t]he issue here is not whether Herman had a bad motive, but whether Herman alone should bear the burdens of the expectable consequences of the risks he decided to assume or whether Joann [sic] should share the financial burdens of those decisions.” The DRC then recommended that Herman’s motion should be denied even though his change of employment was in good faith and his reduced income was merely due to an unfortunate business failure. When the trial judge overruled Herman’s exceptions to the DRC report, Herman appealed.²

Herman argues that the trial court erred in denying his motion since the undisputed evidence was that his lack of income and assets were the result of his good faith change of employment and that there was no bad faith effort to be unemployed. He argues that a finding of bad faith should be required to deny a motion to modify maintenance based upon reduction of income due to change of employment. In support of his argument, he cites several cases from the appellate courts of Minnesota and Illinois. See e.g. Savoren v. Savoren, 386 N.W.2d 288, 291-92 (Minn. 1986); In re Marriage of Kowski, 463 N.E.2d 840, 843 (Ill. App. 1984). However, these foreign cases are not binding upon

² Rule of Civil Procedure (CR) 53.06(2) provides that the court could adopt, modify, or reject in whole or in part the commissioner’s report. The order overruling Herman’s exceptions to the DRC report indicated only that the exceptions were overruled. We dismissed the original appeal as being one from a nonfinal order. The trial court subsequently entered an order adopting the DRC report, and Herman’s appeal from that order is now properly before us.

this court. As there is no Kentucky case directly on point, this is a matter of first impression in this state.

In Kentucky, modification of maintenance is governed by Kentucky Revised Statute (KRS) 403.250. KRS 403.250(1) provides in pertinent part that "the provisions of any decree respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." We do not read this to require maintenance modification where substantial and continuing changed circumstances exist in the form of lesser income due to a good faith change of employment. Rather, maintenance modification is required when the changed circumstances are so substantial and continuing as to make the terms of the decree unconscionable.

In determining whether the terms of a decree concerning maintenance have been rendered unconscionable by substantial and continuing changed circumstances brought about due to a good faith change in employment, we believe that the proper standard for the fact finder to consider is the totality of the circumstances. This would include the motive of the party changing employment, the ages and health of the parties, the financial situation of each party, the parties' earning abilities, the ability of the payee spouse to provide for himself or herself, the parties' expectations, and the payee spouse's opportunity to live on reduced maintenance. See Barbarine v. Barbarine, Ky. App., 925 S.W.2d 831, 833 (1996), wherein this court held that several similar factors were relevant to determine whether maintenance modification was appropriate after

the payor spouse elected early retirement. Although a change of employment for the purpose of seeking a reduction in maintenance would constitute bad faith and would defeat a motion for maintenance modification under the statute, a good faith change of employment resulting in reduced income would be only one factor for the court to consider in determining whether the motion should be granted.

The trial court in this case held that "equity demands that Joann [sic] not share the burdens of Herman's failure." In his report to the trial court, the DRC made findings noting that Herman was aware of his continuing maintenance obligation when he changed his employment, that the DRC did not accept Herman's contention that health problems caused his financial condition, and that the DRC believed that it would be more equitable for Herman to reduce his expenses than for Jo Ann to receive reduced maintenance as a consequence of Herman's risk-taking. Although the result might appear somewhat harsh to Herman, we find no abuse of discretion in the denial of his motion to terminate or modify maintenance as it appears that the trial court properly reviewed the totality of the circumstances.

The judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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