RENDERED: June 11, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001164-MR

JOHN NEIL PINSON — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 96-CI-00049

CHERRY LYNN PINSON — APPELLEE

OPINION AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: COMBS, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: Appellant, John Neil Pinson, appeals from an order of the Floyd Circuit Court issued pursuant to a show cause hearing addressing appellant's alleged failure to comply with the parties' property settlement agreement. The court ordered appellant to comply with the provisions therein, and to apprise the court upon doing so.

Appellant and appellee, Cherry Lynn Pinson, divorced in January 1996. At the time, appellant was earning $55,000.00 per year as an officer at a local bank, and appellee was earning $30,000.00 as a teacher. They incorporated into their divorce decree a property settlement agreement they had entered into,

wherein appellant agreed to be responsible for numerous debts, including: (1) all debt and other expenses associated with the parties' house; (2) all other marital debt; (3) appellee's expenses incurred in the course of obtaining her rank I status; (4) all college expenses incurred by the parties' grown daughters; and, (5) all debt and expenses associated with the vehicles driven by appellee and the parties' daughters. The evidence in the record indicates appellant's monthly obligations under the agreement totaled $2,778.00.

Appellant lost his job in April 1997 and was unemployed for four (4) months, eventually accepting a position that paid $40,000.00 annually, $15,000.00 less than he had previously been earning. Apparently, he fell behind in his obligations under the property settlement agreement. In February 1998, appellee moved the court for a show cause order, alleging appellant had failed to comply with certain terms of the property settlement agreement. The court granted appellee's motion, ordering appellant to appear in court on March 13th. Shortly thereafter, appellant moved the court under KRS 403.250 to modify the parties' agreement, alleging the terms were now unconscionable given appellant's reduced income. Appellant noticed his motion for March 13th, the same day he was to appear in court pursuant to the show cause order.

It appears there was, indeed, a hearing on March 13th, although it is not clear from the record what issues were addressed, nor does the record reflect any testimony taken or evidence introduced during the course of the hearing. On March

24, 1998, the circuit court ordered appellant to comply with those terms of the property settlement agreement alleged by appellee to have been violated. However, in its order of March 24th, the court did not summarize either the testimony or evidence introduced at the hearing, nor did it reference, or otherwise address, appellant's motion to modify the agreement based upon appellant's changed economic circumstances.

Appellant filed a CR 59 motion, asking the court to set aside its order and, again, asking for modification of the parties' property settlement agreement. The court denied appellant's CR 59 motion, again making no specific reference to appellant's motion for modification of the property settlement agreement. On appeal, appellant asks this Court to reverse the circuit court's order denying his motion to modify the agreement.

The record before us contains no videotape of the hearing on March 13, 1998, nor is there a transcript of the proceeding reflecting the issues addressed or the evidence introduced, if any. Further, appellant has prepared no narrative statement reducing the testimony of the parties to writing, pursuant to CR 75.13. Finally, neither appellant's nor appellee's brief references any testimony introduced at the hearing.

Under the circumstances, we are limited to determining whether the pleadings support the circuit court's order denying appellant's motion to modify the parties' property settlement agreement. See Porter v. Harper, Ky., 477 S.W.2d 778, 779 (1972) ("Without the evidence being presented to us, we are confined in

our review to a determination as to whether the pleadings support the judgment . . . .”). Porter further admonishes us that “on all issues of fact in dispute ‘ . . . we are required to assume that the evidence supports the finding of the lower court.’” Id. (Citations omitted). In this case, however, the court made no findings pursuant to its denial of appellant’s motion to amend the parties’ property settlement agreement. While we believe such findings would have proven helpful under the circumstances, they are not required, as a matter of law, when a motion under KRS 403.250 is denied. See Burnett v. Burnett, Ky., 516 S.W.2d 330, 332 (1974). As such, our review is limited to the pleadings in the record.

The record in this matter is minimal, containing a total of fifty-seven (57) pages. The only evidence in the record establishing appellant’s current financial situation is the information contained in appellant’s two (2) affidavits, one attached to appellant’s motion to modify and the other attached to his CR 59 motion. The facts contained therein were neither disputed nor contradicted by appellee.[1] The affidavit reflects that appellant had obligated himself under the property settlement agreement in the amount of $2,778.00, which appellant had evidently been paying on a regular basis prior to losing his job, but which now constitutes over eighty percent (80%) of his

[1]While appellee did not respond in writing to appellant’s motion to modify, she did respond to appellant’s CR 59 motion, in which response she neither contradicted nor attacked appellant’s allegations concerning his income.

current monthly gross income and, in fact, exceeds his monthly net income.

Appellant argues that under Shraberg v. Shraberg, Ky., 939 S.W.2d 330 (1997), he was entitled to modification of the parties' original property settlement agreement.[2] In Shraberg, psychiatrist-husband entered into a separation agreement, without advice of counsel, in which he obligated himself to pay in excess of eighty percent (80%) of his gross income for the support of his children and ex-wife. After operating under the agreement for only nine (9) months, husband moved to have it set aside on the ground it was unconscionable. The ex-wife argued husband had merely made a "bad bargain" and could not, on that basis, be relieved of the terms therein.

Our Supreme Court, however, disagreed with ex-wife. Noting the definition of unconscionable as "manifestly unfair or inequitable," the Court focused solely on the economic impact of husband's agreement to obligate himself for so large a percentage of his income. Likewise, in the case we now review, the evidence in the record indicates that appellant's monthly obligations under the parties' property settlement agreement exceed his current monthly net income. We believe such a situation is manifestly unfair, and constitutes cause for modification of the agreement.

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[2]While the Shraberg opinion addresses unconscionability under KRS 403.180, with respect to an original separation agreement, it is relevant to an analysis of unconscionability under the modification statute, KRS 403.250. In fact, the opinion defines unconscionability pursuant to case law interpreting KRS 403.250.

Appellee counters that it was appellant's own counsel who drafted the property settlement agreement, and that, further, appellant desired an expedited divorce, which he received, in return for his promises of support under the agreement. Appellee maintains appellant simply made a "bad bargain." However, given the evidence in the record, albeit minimal, we must disagree. Despite the circumstances under which the agreement was entered into, we do not believe the law in Kentucky supports the situation in which appellant has little, or no, income left over for himself after satisfying his obligations under the property settlement agreement.

Given the minimal evidence in the record and the failure by both parties to more adequately inform this Court, we would have preferred to order the matter remanded for further findings and a clearer disposition of the issue before us. However, we believe the law requires that we dispose of this appeal pursuant to the method we have used. As such, we determine that the pleadings in the record do not support the circuit court's denial of appellant's motion to modify the parties' property settlement agreement.

For the foregoing reasons, we affirm so much of the order of the Floyd Circuit Court obligating appellant to comply with the terms of the agreement for the period prior to appellant's filing his motion to amend. However, we reverse that portion of the court's order denying appellant's motion to amend the parties' property settlement agreement, and remand with instructions to modify the agreement accordingly.

ALL CONCUR.

BRIEF FOR APPELLANT:

John David Preston
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Pamela Robinette-May
Penelope Justice Turner
Pikeville, Kentucky