

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001500-MR

GRANT RUSSELL WILSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 94-CI-02951

PATRICIA CAROLINE WILSON

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: CHIEF JUDGE GUDGEL, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's motion to modify the maintenance obligation set out in the parties' separation agreement. We agree with the lower court that the maintenance obligation cannot be modified because appellant's income has decreased or because of the unfavorable outcome of litigation pending at the time of the agreement. Thus, we affirm.

Appellant, Grant Wilson, and appellee, Patricia Wilson, were married in Canada in 1969. During a large part of the marriage, Grant owned and operated a business in Canada which

produced and manufactured auto parts. In 1992, the business failed, and the parties subsequently relocated to Kentucky in 1994, where Grant obtained employment as an automotive marketing consultant. In 1994, the parties separated, and on September 30, 1994, Patricia filed for dissolution of the marriage. On April 15, 1996, the parties entered into a settlement agreement which was subsequently incorporated in its entirety into the decree of dissolution entered by the Fayette Circuit Court on April 17, 1996. The decree specifically stated, "The parties shall be ordered to perform the terms thereof and none of the provisions of this Agreement may be modified, unless otherwise agreed by both parties." The separation agreement provided:

Spousal maintenance shall thereafter be paid by Husband to Wife as set forth in this Paragraph 4 below when Husband pays Wife the sum of One Hundred Forty Thousand Dollars (\$140,000), Canadian, from the Net Recovery of the Innkeeper's Lien litigation, as more fully described in this Paragraph 4 below, or until December 30, 2005 or Petitioner's remarriage or her cohabitation with an unrelated male. . . .

The Innkeeper's Lien litigation was an action related to appellant's former business in Canada and was still pending at the time of the separation agreement. As relates to the maintenance obligation, the separation agreement went on to state:

The "Net Recovery" from the Innkeeper's Lien litigation referenced in 3f shall be defined as the amount remaining of any recovery in favor of the parties after the Respondent has been reimbursed for all costs and expenses he has paid or incurred associated with the Innkeeper's Lien lawsuit or any related proceedings, including his obligations paid or owed to . . . If the Net Recovery is Two

Hundred Seventy Thousand Dollars (\$270,000), Canadian, or less, Respondent and Petitioner shall evenly divide the Net Recovery, and Respondent's monthly maintenance obligation shall be reduced by the percentage difference between the Petitioner's half of the Net Recovery and One Hundred Forty Thousand Dollars (\$140,000), Canadian. If the Net Recovery exceeds Two Hundred Seventy Thousand Dollars (\$270,000), Canadian, Respondent shall be required to satisfy his future maintenance and property settlement obligations by paying Petitioner One Hundred Forty Thousand Dollars (\$140,000), Canadian, free of taxes, liens, or other encumbrances upon disposition of the Innkeeper's Lien litigation. Unless or until such sum is paid in full, however, Respondent's monthly maintenance as modified, reduced and agreed herein shall be due on the first of each month.

If Petitioner has not received payment of the One Hundred Forty Thousand Dollars (\$140,000), Canadian, lump sum from her half of the Net Recovery by September 30, 1996, then beginning October 1, 1996, Respondent shall pay maintenance in the sum of Seven Hundred Fifty Dollars (\$750), U.S., or the percentage thereof due pursuant to the preceding paragraph, per month for ten years through December 31, 2005 or until Respondent's death, or Petitioner's remarriage or cohabitation as defined by Combs or such other amount set by the Court after appropriate hearing and determination.

Finally, as to modification of the agreement, the agreement provided:

Both parties agree that this document, in the event a decree dissolving the marriage is granted by the Fayette Circuit Court, shall be incorporated by reference into said decree, that there shall be no modification or alteration of the terms of this Agreement, except by written documents signed by both parties.

The Innkeeper's Lien litigation referred to in the separation agreement was not resolved until well after September of 1996 and resulted in an award of only \$60,441.93 which was

applied to the costs and fees of the action, which totaled \$95,946.52. Thus, Patricia received no proceeds from that litigation.

After the decree was entered in this case, Grant fell into arrears as to his maintenance obligation. Consequently, Patricia sought a rule against him for nonpayment of maintenance. On April 8, 1998, the court entered an order holding Grant in contempt for failure to pay maintenance. On October 23, 1998, Grant made a motion to modify his maintenance obligation under the separation agreement, citing the unfavorable outcome of the Innkeeper's Lien litigation. He further claimed that he could not afford to pay the \$750 a month in maintenance because his employment had been terminated and he was having difficulty finding other employment. The court denied the motion, adjudging that there was no provision in the agreement excusing Grant from paying his maintenance obligation. This pro se appeal followed.

Grant first argues that the maintenance obligation set out in the agreement should be modified because, given the decrease in his income in his new employment, he cannot afford to pay appellee \$750 a month. KRS 403.250(1) provides in part:

Except as otherwise provided in subsection (6) of KRS 403.180, 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. (emphasis added).

KRS 403.180(6) states in pertinent part:

Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides.

As noted above, the agreement at hand expressly disallowed modification absent a written agreement of the parties. See Lydic v. Lydic, Ky. App., 664 S.W.2d 941, 943 (1983). Likewise, the decree itself stated that the agreement could not be modified unless otherwise agreed by the parties. Moreover, it has been held that maintenance awards for a fixed period such as the one in the present case are not modifiable under KRS 403.250(1). Dame v. Dame, Ky., 628 S.W.2d 625 (1982).

In support of his position, Grant cites to Low v. Low, Ky., 777 S.W.2d 936 (1989), wherein a fixed term maintenance award was modified by the court. However, Low is distinguishable from the present case on three fronts. First, in Low there was no agreement which contained a provision proscribing modification. Secondly, there are no extenuating circumstances such as in Low. Finally, reliance on Dame in the instant case is not serving as a "shield to prevent restoration of the underlying purpose of the decree." Low, 777 S.W.2d at 938. On the contrary, not modifying the maintenance award is giving effect to one of the purposes of the decree – to fairly compensate Patricia for her contributions to the 27-year marriage.

Grant next argues that there was a negative net recovery from the Innkeeper's Lien litigation and, therefore, under the language of the agreement, his maintenance obligation should be reduced accordingly. We reject this argument. Although Grant was to be first reimbursed for the costs and expenses associated with the litigation before the funds were to be divided, the definition of "Net Recovery" under the agreement

states that it is "the amount remaining of any recovery" (emphasis added). Hence, only the amount actually received by Patricia would be subtracted from the \$140,000 lump sum and then used to prorate the monthly maintenance obligation, in the event Patricia's share of the recovery was less than \$140,000. As correctly noted by the lower court, the monthly maintenance obligation was merely in lieu of the \$140,000 lump sum award if it "[could] not be paid due to a shortfall of the judgment from the litigation." Thus, it would be contrary to the intent of the agreement to reduce Patricia's maintenance award because the expenses of the litigation were greater than the amount awarded in the case.

For the reasons stated above, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Grant R. Wilson, Pro se
Lexington, Kentucky

BRIEF FOR APPELLEE:

W. Stokes Harris, Jr.
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