

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002838-MR

CONNIE KINGREY

APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM HARRIS, JUDGE
ACTION NO. 97-CI-00116

JAMES ROY WHITLOW

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Connie Kingrey appeals from an order of the Allen Circuit Court overruling her motion to enforce a judgment and for relief pending appeal. We affirm.

The marriage of Connie Kingrey ("Kingrey") and James Whitlow ("Whitlow") was dissolved on December 16, 1998 by way of findings of fact, conclusions of law, and decree of dissolution of marriage of the Allen Circuit Court. The terms of the decree were appealed and cross-appealed to this Court in 1999-CA-00138-MR and 1999-CA-00172-MR, and are not now before us. The instant appeal relates solely to the lower court's disposition of post-decree motions tendered by Kingrey.

A lengthy recitation of the facts is not required. During the pendency of the proceeding below, Kingrey was awarded maintenance in the amount of \$1000 per month. The December 16, 1998 decree reduced that amount to \$500 per month, restored the parties' non-marital property and divided the marital property in just proportions.

On January 4, 1999, Kingrey filed a motion seeking maintenance in the amount of \$1000 per month until such time as the judgment was enforced. Shortly thereafter, Whitlow's appeal and Kingrey's cross-appeal were filed on January 14, 1999, and January 22, 1999, respectively. Kingrey then filed supplemental motions seeking increased maintenance during the pendency of the appeal and again seeking enforcement of the judgment.

On August 2, 1999, the domestic relations commissioner released a report recommending that the court sustain Kingrey's motion to enforce the judgment and overrule her motion seeking increased maintenance. Upon considering the matter, the circuit court entered an order on October 21, 1999, which denied both the motion to enforce the judgment and the motion seeking increased maintenance. This appeal followed.

Kingrey's first argues that the circuit court erred in refusing to enforce its judgment pending resolution of the underlying appeal. Specifically, she notes that Whitlow did not execute a supersedeas bond, and she directs our attention to case law in support of the proposition that an appealed judgment must be enforced when no bond has been issued.¹

¹Whitlow argues that the October 21, 1999 order is
(continued...)

We have closely examined this argument, and must conclude that it is moot. The underlying appeal and cross-appeal are now final. As such, any argument relating to the enforcement of the judgment pending appeal is now moot.

Kingrey's second argument is that the circuit court erred in refusing to order maintenance in the amount of \$1000 pending appeal. She notes that she was receiving that amount during the pendency of the trial proceeding, and argues that the court abused its discretion in failing to award at least that amount during the pendency of the appeal. Kingrey maintains that she is unemployable due to Whitlow's mental and emotional abuse, and that the \$500 per month maintenance plus \$283 social security benefits are not sufficient to support her reasonable needs. As such, she seeks to have the matter remanded with directions that sufficient maintenance be awarded.

Unlike the first issue, we believe that this claim of error survives the resolution of the underlying appeal and cross-appeal. However, we have closely studied the record, the law, and the arguments of counsel, and cannot conclude that the circuit court abused its discretion in fixing maintenance at \$500.

Kingrey's motion seeking increased maintenance during the pendency of the appeal is simply a motion under KRS 403.250 to modify maintenance. KRS 403.250 provides in relevant part

¹(...continued)
interlocutory and non-appealable. The order addresses the parties' substantive claims, and was designated "final and appealable" by the circuit court. As such, it is properly subject to our review.

that " . . . 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."

The dispositive question, then, is whether Kingrey has shown a change in circumstances sufficient to make the award of \$500 per month unconscionable. Clearly she has not. Kingrey does not argue that she has experienced substantial and continuing changed circumstances; rather, she maintains that the trial court was bound to order the same level of post-decree maintenance as was awarded during the pendency of the circuit court proceeding. As Whitlow notes, the sole changed circumstances evidenced by the record accrue to Kingrey's favor, namely the receipt of social security benefits (which the court addressed in its October 21, 1999 order and chose not to deduct from maintenance) and her use and enjoyment of a parcel of rental property. In sum, the burden rested with Kingrey to prove changed circumstances, Ogle v. Ogle, Ky. App., 681 S.W.2d 921 (1984), and she did not meet this burden. The circuit court is presumptively correct in its award of maintenance, City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964), and Kingrey has not overcome that presumption. Accordingly, we find no error.

For the foregoing reasons, we affirm the October 21, 1999 order of the Allen Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James S. Secrest Sr.
Scottsville, KY

BRIEF FOR APPELLEE:

David Goin
Scottsville, KY