

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002458-MR

PERLE A. SORAH, JR.

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE FARMER HELTON, JUDGE
ACTION NO. 92-CI-00111

KARREN L. SORAH¹

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Perle Sorah appeals from an order of the Bell Circuit Court concerning his maintenance obligation to his ex-wife, Karren Sorah. Finding no error, we affirm.

Perle and Karren were married on October 19, 1973, and they separated on January 3, 1992. No children were born of the marriage. Perle filed a petition for dissolution of marriage on March 11, 1992. On November 24, 1993, the trial court entered a final decree which dissolved the marriage, divided the parties' property and debts, and directed Perle to pay Karren maintenance

¹ The appellee's name is incorrectly spelled in the notice of appeal as Karen L. Sorah.

in the sum of \$750 a month beginning in December 1993 and continuing until Karren's "death, remarriage or 62nd birthday, whichever occurs first." On June 23, 1995, this court rendered an opinion affirming the maintenance award.

On June 7, 1993, and while the divorce action was still pending, Perle filed a Chapter 7 bankruptcy petition seeking to have the maintenance award discharged. The bankruptcy court granted Perle's request to discharge the maintenance award, holding that it was in the nature of a property division. The U.S. District Court for the Eastern District of Kentucky affirmed the decision of the bankruptcy court, but the Sixth Circuit of the U.S. Court of Appeals reversed the decision in an opinion rendered on December 22, 1998. See Sorah v. Sorah, 163 F.3d 397 (6th Cir. 1998). The Sixth Circuit held that the award was not dischargeable.

Following the affirmance of the final decree in this case by this court in September 1995, no action was taken in the case until Perle filed a request for production of documents in March 1999. Following that discovery request, Perle filed a motion to terminate maintenance retroactively. In support of the motion, Perle stated that Karren was now cohabitating with another person and that the maintenance award was based on error in the amount of assets and income of the parties and future assets and income projections as well as "all other changed circumstances." Perle made other discovery requests to which Karren objected.

In September 1999, Karren moved the court for a wage assignment. In her motion, she alleged that Perle had a maintenance arrearage in excess of \$60,000 and that he was a full-time salaried employee of Downtown Radiology, Inc. She requested in her motion that the court enter a wage assignment assigning 65% of Perle's disposable income to her. Perle responded with a motion for a protective order and a motion requesting the court to compel Karren to comply with his discovery requests. He also filed a motion requesting the court to continue the case from the scheduled September 27, 1999, hearing date until after January 1, 2000, in order that discovery could be completed.

On September 27, 1999, the motions were heard by the court on its regular motion day. The following is the entire transcript of the proceedings at that hearing:

MR. GERALD L. GREEN: Judge, I have made a motion for a wage assignment. He has made motions to terminate maintenance and etc. And now, I think, there is a motion that has been made to put everything off, until the year 2000, or something.

MR. DAVID O. SMITH: Well, what I would like to do is tender an order for our discovery.

MR. GERALD L. GREENE: They have requested discovery of her, Your Honor. And this is a man, who has asked that alimony be passed for a number of years now. The Kentucky Court of Appeals, the Kentucky Supreme Court, and the Bankruptcy court, all the way up to the Sixth Circuit, all of that has been now affirmed.

THE COURT: I will give you time to find out whether any payments have been paid-in discovery.

MR. GERALD L. GREENE: I think, with the affidavit that she had also filed, and with this entire record, we are looking for some type of order. I would like the Court to review it. But he has objected to a wage assignment and, I think, technically the Court ruled correct. I think the Court, could order that Mr. Sorah pay 75% of his payroll to her. The man is definitely in contempt. I would like the Court to look at the whole file and enter an appropriate order on all of those pending motions.

THE COURT: Well, I have ruled on that already, until you get through with the appeal procedure. Is it through?

MR. GERALD L. GREENE: No

MR. DAVID O. SMITH: Well, after what I know about it.

THE COURT: Okay.

MR. DAVID O. SMITH: I will prepare an order. Thank you, Judge.

MR. GERALD L. GREENE: Okay, thank you, Your Honor.

As the transcript notes, Perle's attorney indicated that he would prepare an order. However, rather than prepare an order, Perle's attorney filed a motion to modify maintenance. The motion stated that it was based on (1) motive of the party changing employment; (2) age and health of the parties; (3) financial situation of each party; (4) parties' earning ability; (5) ability of payee spouse to provide for herself; (6) parties' expectations; and (7) payee spouse's opportunity to live on reduced maintenance amount.

On October 6, 1999, the trial court entered an order denying Perle's motion to continue the case and ruling on all pending motions. Concerning Perle's motion to terminate maintenance retroactively, the court cited Combs v. Combs, Ky.,

787 S.W.2d 260 (1990), and held that retroactive modifications of maintenance were improper. The court also held that Perle's request to terminate maintenance based upon error in calculating the prior assets and income of the parties was an improper attempt to re-litigate issues that had already been resolved in the final decree. The court noted in that connection that the decree had been affirmed by this court and by the U.S. Court of Appeals. Concerning Perle's motions as they related to Karren cohabitating with another person, the court noted that Perle's motions were not accompanied by affidavits and that Karren's objections were verified. The court thus held that Perle's motion as it concerned cohabitation was without merit, and the court likewise rejected Perle's motion to force Karren to comply with his discovery requests.

Additionally, the court held that it would not grant Perle relief from the maintenance award for the following reasons:

The petitioner has basically requested equitable relief from this Court. However, the petitioner has ignored this Court's Orders awarding maintenance and owes maintenance payments to the respondent since November, 1993. Although petitioner has been gainfully employed throughout and has substantial assets, he has made no effort to comply with the Court's previous orders and is certainly in contempt of this Court's Orders. Until such time as petitioner has satisfied his maintenance arrearage, he is not entitled to equitable relief by this Court.

Concerning Karren's motion for a wage assignment, the court denied the motion as not being permitted by applicable statutes. However, the court ordered Perle to pay 65% of his disposable

earnings each week to Karrren and stated that Perle's failure to comply with the order would be considered contempt of court and would be punished accordingly. Perle's appeal to this court followed.

Perle's first argument is that the trial court erred in summarily dismissing his motion to terminate or modify maintenance on the ground of changed circumstances, including cohabitation, without compelling Karren to comply with discovery requests and without holding a hearing. We first note that the trial court was entirely correct in denying Perle's motion to modify maintenance retroactively. As the court noted, retroactive maintenance modification is prohibited. The Kentucky Supreme Court held in the Combs case that "maintenance payments are vested from the entry of a decree and ordinarily can be modified only upon the entry of a subsequent order of the Court to operate prospectively, from the date of entry." 787 S.W. 2d at 263.

We now turn to whether the court erred in denying Perle's motion to modify maintenance, which was filed after the September 27, 1999, hearing but before the court entered its order. KRS² 403.250(1) provides in relevant part 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." We first note that the statute says that maintenance "may" be modified upon a showing of changed circumstances and does not state that

² Kentucky Revised Statutes.

maintenance "shall" be modified. Furthermore, the granting or denying of a motion to modify maintenance "rests in the sound discretion of the trial court." Gann v Gann, Ky., 347 S.W.2d 540, 542 (1961). "Evidence for the movant must be compelling for the trial court to grant the relief requested; the policy of the statute is for relative stability." Barbarine v. Barbarine, Ky. App., 925 S.W.2d 831, 832 (1996). Further, an appellate court will not disturb the determination of maintenance modification by a trial court absent an abuse of discretion. Id.

The trial court in this case based its decision to deny Perle's motion to modify maintenance on two primary grounds. First, the court believed the motion to be without merit on the issue of cohabitation, and second, the court declined to consider modifying maintenance because Perle was substantially in arrears with his maintenance payments despite being gainfully employed and having substantial assets. Because the maintenance modification statute used the word "may" rather than "shall", we conclude that it was within the discretion of the trial court to modify the maintenance award. The facts of this case lead us to this conclusion.

Perle made no effort to satisfy his maintenance obligation despite being employed and having substantial assets. Furthermore, his maintenance modification motion as it related to Karren cohabitating with another person, which Karren denied in her verified response, made only a broad allegation of cohabitation without containing any of the supporting elements stated in the Combs case that should be considered in

cohabitation cases. See Combs, 787 S.W.2d at 262. Under these circumstances, the trial court did not err in summarily denying Perle's motion rather than allowing him to proceed on a fishing expedition with discovery.

Perle's second argument is that the trial court erred in ordering him to pay 65% of his disposable income to Karren or else be held in contempt of court and punished accordingly. This portion of the court's order was obviously entered in response to Karren's motion for a wage assignment. While the trial court correctly denied the motion for a wage assignment for the maintenance payments, we fail to see how it erred in directing Perle to pay 65% of his earnings toward his current maintenance obligation and the maintenance arrearage.

It is apparently without question that Perle had a very large maintenance arrearage. In fact, the court's order stated that Perle owed maintenance to Karren from November 1993, the date of the final decree and maintenance award. Perle has cited no authority which would prohibit the court from ordering him to pay a portion of his disposable earnings toward the arrearage, and we are unaware of any such authority.

Perle also complains that the court erred in determining that he would be in contempt of court should he fail to pay a portion of his disposable earnings to Karren as ordered. Citing various authorities, he asserts he is entitled to a hearing regarding his ability to comply with the court's orders before being held in contempt. We agree with Perle that the court may not hold him in contempt without holding a hearing

should he fail to make the payments. Although the language employed by the court in its order states that Perle will be held in contempt should he fail to comply, Perle has not yet been held in contempt. We caution the court that should Perle fail to comply with the order regarding his disposable earnings, then he is entitled to a hearing on the issue of contempt.

Perle's third and last argument is that the trial court's order was prepared by Karren's counsel and was contrary to the court's ruling from the bench. Since Karren has not disputed in her brief that her counsel prepared the order signed by the trial court, we assume Perle's assertion that Karren's counsel prepared the order is correct. Nevertheless, having reviewed the transcript of the hearing as set forth above, we do not accept Perle's argument that the order conflicts with statements made by the court from the bench. We do not read the comments of the court in the transcript to indicate that it intended to compel Karren to respond to the discovery requests of Perle. Finally, there is no indication in the record that the findings and conclusions of the trial court set forth in its order were not the product of the deliberations of the trial judge, and we find no error in the fact that the order may have been prepared by Karren's counsel. See Bingham v. Bingham, Ky., 628 S.W.2d 628 (1982).

The order of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David O. Smith
Marcia A. Smith
Corbin, Kentucky

BRIEF FOR APPELLEE:

Gerald L. Greene
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