

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002622-MR

WILLIAM J. HUTTON

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE JANET P. COLEMAN, JUDGE  
ACTION NO. 89-CI-00526

ERIKA HUTTON

APPELLEE

TO BE HEARD WITH:

2001-CA-001814-MR

WILLIAM HUTTON

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE JANET P. COLEMAN, JUDGE  
ACTION NO. 89-CI-00526

ERIKA HUTTON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: William Hutton bring these appeals from a October 23, 2001 order of the Hardin Circuit Court. We affirm.

The marriage of appellant and appellee was dissolved by decree of dissolution entered in the Hardin Circuit Court on February 7, 1991. Appellee was awarded maintenance in the amount of \$695.00 per month, plus a share of appellant's military retirement. Appellee remarried on December 26, 1991; however, such marriage was annulled by the Hardin Circuit Court on August 26, 1993. When appellee remarried, her maintenance, of course, terminated. Kentucky Revised Statutes 403.250(2). In March of 1998, appellee filed a motion to reinstate maintenance. The matter was referred to a Domestic Relations Commissioner. The commissioner recommended denying the motion. On April 8, 1999, the circuit court entered an order denying the motion. Thereafter, appellee filed a second motion to reinstate maintenance on August 11, 1999. The matter again was referred to the commissioner. The commissioner recommended restoration of maintenance by report entered October 2, 2000. The circuit court overruled exceptions to the commissioner's report, adopted and incorporated it by reference into an order entered October 23, 2000. The order required appellant to pay appellee the amount of \$695.00 per month in maintenance. These appeals follow.

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Appellant contends that appellee is barred from relitigating the issue of restoration of maintenance by *res judicata* or claim preclusion. Appellant maintains that appellee litigated the issue of reinstating maintenance in her first motion for reinstatement. Appellant points out that this motion was referred to the commissioner, and that the commissioner recommended denying same. The circuit court eventually agreed with the commissioner, and denied appellee's motion for maintenance on April 8, 1999. Appellant argues that "[t]he key here is that, while the Commissioner's recommended order stated that the Appellee could bring her motion again at a later time, if certain prerequisites existed, the order of the Hardin Circuit Court did not contain that language or provide that authorization." As appellee failed to appeal the circuit court's April 8, 1999 order, appellant argues that appellee is now bound by the principle of *res judicata* or claim preclusion from relitigating the issue of reinstatement of maintenance. We must disagree.

The circuit court's April 8, 1999 order clearly incorporated by reference the commissioner's report. As such, the language that appellee could bring her motion at a later time was incorporated into the circuit court's order. We thus view appellant's contention to be without merit.

Appellant next asserts that the circuit court abused its discretion by ordering reinstatement of maintenance. A review of the record indicates that appellee's second marriage was annulled by decree entered in the Hardin Circuit Court on

August 26, 1993. Appellee cites to a form from the Commonwealth of Kentucky, Department for Health Services, State Registrar of Vital Statistics. It states that an "absolute divorce" was granted in appellee's second marriage rather than an annulment. We, however, believe that the actual judgment of the Hardin Circuit Court takes precedence and accurately reflects that appellee's second marriage was, in fact, annulled.

We are also of the opinion that the circuit court did not abuse its discretion in reviving appellee's maintenance under the precepts of McCord v. McCord, Ky. App., 558 S.W.2d 624 (1977). Therein, the court held that the issue of whether to revive maintenance following annulment is an equitable matter requiring balancing of equities. In the case at hand, the circuit court found that appellee is without sufficient resources to care for herself, and has several health issues. The circuit court also noted that appellee was to receive a share of appellant's retirement benefits. She began receiving that share in 1992 when he retired from the military. Thereafter, it appears that appellant sought to convert his retirement benefits to disability benefits, which are exempt from marital distribution. In the circuit court's order, appellant had been declared 100% disabled. In 1992, appellee's share of retirement benefits was \$866.00. By April 1, 2000, her share was \$80.50. Upon review of the whole, we are unable to conclude that the circuit court abused its discretion by reviving appellee's maintenance. The court made sufficient findings of fact, and conclusions of law. In the end, the balancing of the equities

required revival of appellee's maintenance. As such, we are of the opinion that the circuit court did not err in requiring appellant to pay \$695.00 per month in maintenance.

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In this appeal, appellant contends that the circuit court committed reversible error by ruling on a "post-judgment motion," which had not been served upon appellant pursuant to Rules of Practice of the Hardin Circuit Court 6.03(2). We view this contention to be without merit. We note that the motion was served upon appellant's counsel. Simply put, we are of the opinion that the circuit court acted well within its discretion.

For the foregoing reasons, the order of the Hardin Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FURNISHES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent. Despite the language in McCord v. McCord, Ky. App., 558 S.W.2d 624 (1977), which talks about courts of equity and public policy, I believe the better path to be that which follows the strict confines of the law. If maintenance is terminated by remarriage [see KRS 403.250(2)], I believe the obligation remains forever terminated. To allow the fiction of a later annulment to set aside a statutorily permitted termination of maintenance can only cause havoc on the finality of dissolution actions and cause financial and emotional harm to the ex-spouse who believes he/she

has been forever freed of the obligation. I believe it is time that this Court or the Supreme Court revisit this issue and overrule McCord and put an end to this dangerous precedent.

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