RENDERED: August 6, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000054-MR
AND
NO. 2003-CA-001173-MR

RANDALL POTTER DAVIDSON — APPELLANT

v.

APPEALS FROM SIMPSON CIRCUIT COURT
HONORABLE TYLER GILL, SPECIAL JUDGE
ACTION NO. 99-CI-00254

LARITA ANN MAYNARD DAVIDSON — APPELLEE

OPINION
AFFIRMING IN 2003-CA-000054
AND
VACATING AND REMANDING IN 2003-CA-001173

** ** ** ** **

BEFORE: COMBS, Chief Judge; BUCKINGHAM and TACKETT, Judges.

COMBS, CHIEF JUDGE. Randall Davidson appeals from orders of the Simpson Circuit Court denying motions to modify his maintenance obligation.[1] We affirm as to appeal 2003-CA-000054; we vacate and remand as to appeal 2003-CA-001173.

Randall Davidson and Larita Ann Maynard Davidson were married in June 1983. Two children were born of the marriage.

[1] The appeals have been consolidated for purposes of this opinion.

They separated in August 1999 when the children were three and nine years of age. A petition for dissolution of the marriage followed a few months later.

On December 6, 2000, the Simpson Circuit Court entered a decree of dissolution, which incorporated by reference the parties' property settlement agreement of November 17, 2000.[2] The agreement provided, in part, that Randall would pay to Larita $6,000.00 per month as maintenance for a period of eleven years and one month. The parties agreed that the maintenance obligation was non-modifiable except as provided by KRS[3] 403.250(2), which provides for the termination of maintenance upon the death of either party or the re-marriage of the spouse receiving maintenance.

In April 2001, Randall filed a motion requesting modification of his maintenance obligation. He contended that because "the maintenance in this action was based upon representations that certain debts did exist, there appears to be a genuine dispute about truthfulness of these debts." Motion at 2. Randall asked for a hearing to determine whether his maintenance obligation should be modified or terminated. In her response, Larita averred that all of her representations about the parties' debt had been accurate. She also contended that

[2] The agreement was prepared by Randall's counsel.

[3] Kentucky Revised Statutes.

Randall's maintenance obligation had been made non-modifiable by the express terms of the parties' agreement.

On May 16, 2001, a hearing was held before the court's Domestic Relations Commissioner (DRC). The DRC determined that the maintenance provision of the agreement was not unconscionable and that modification of the agreement was expressly prohibited. In a report entered July 20, 2001, the DRC recommended that Randall's motion for a modification be denied. No exceptions were filed with regard to these specific findings. In its orders of January 4, 2002, and July 10, 2002, the Simpson Circuit Court confirmed the DRC's report and denied Randall's motion for a modification of his maintenance obligation.

In April 2002, eighteen months after the decree of dissolution was entered, Randall filed a motion requesting the court to find the property settlement agreement unconscionable and accordingly to "enter any and all appropriate orders." Motion at p. 3. While acknowledging that his gross income since 1999 had been approximately $240,000.00 per year, he claimed that his child support and maintenance obligations consumed 66% of his after-tax income. Therefore, he claimed that the property settlement agreement had been unconscionable on its face at inception.

Citing the trial court's findings prior to the entry of the decree, Larita argued in response that the motion should be summarily denied. She highlighted the following finding:

> (9) That the parties have entered into a Child Custody and Property Settlement Agreement dated November 17, 2000 which the court finds to be not unconscionable and is hereby accepted by the Court and made a part of the Final Judgment in this action.

She then cited the trial court's conclusions of law as follows:

> (4) The Court has reviewed the terms of the Child Custody and Property Settlement Agreement dated November 17, 2000, a copy of which is attached hereto, which is executed voluntarily be [sic] each party, and the Court finds the division of said property and debts and all other matters addressed herein are fair and equitable and are not unconscionable.

Decree of dissolution at pp. 2-3.

Noting that Randall had not appealed the court's final judgment, she contended that he was precluded from challenging the court's findings and conclusions.

The DRC asked that the parties file legal memoranda concerning Randall's request for an evidentiary hearing on this issue. In a report filed September 30, 2002, the DRC found as follows:

> [T]here is a final Judgement of this Court on the very issue which [Randall] now seeks to review by means of an evidentiary

> hearing. The ruling of this Court is that the Agreement is not unconscionable. Judgment was final and appealable and no action was taken until the filing of the motion by [Randall]. . . . the Commissioner finds the Doctrine of res judicata applies in this case.

The DRC recommended that the court deny Randall's motion to find the terms of the parties' property settlement agreement unconscionable. He also recommended denial of Randall's request for an evidentiary hearing. The DRC's full report was confirmed by the Simpson Circuit Court by an order entered on December 17, 2002. Randall's first appeal followed. (No. 2003-CA-000054-MR.)

On January 9, 2003, Randall filed another motion to modify his maintenance obligation, contending that the parties' agreement had recently become unconscionable because of a change in circumstances. Randall, a physician, alleged that his wages would no longer be paid on a regular basis and that his hourly rate might be reduced due to changes at PhyAmerica, the company responsible for subcontracting his medical services to Greenview Regional Hospital. He also stated that he could not "continue to work his exhaustive and excessive work schedule to earn sufficient income to pay his obligations to [Larita]."[4] Larita

[4]A profit and loss statement was prepared by Randall's accountant and introduced into the record at a contempt hearing held in July 2002. That statement indicated that Randall had earned $306,021.09 in 2002 and that he had miscellaneous income totaling an additional $10,342.13. The statement indicated that in 2002, Randall and his

countered with a motion for sanctions. She argued that Randall had filed repeated motions in order to harass her and to cause her to incur unnecessary legal expenses.

On February 5, 2003, Randall filed an amended motion to modify his maintenance obligation, requesting the court to modify the terms of the divorce decree pursuant to the provisions of CR[5] 60.02(f) "since the circumstances have changed in an extraordinary nature justifying relief." In an affidavit filed in support of the motion, Randall again contended that the agreement had been unconscionable from its inception. Randall stated, in part, as follows:

> I believe that the maintenance agreement between Larita Davidson and myself was unconscionable from its very inception and that a review of the facts of this case will bear out that belief. The agreement was ill conceived and I was ill advised, albeit by purportedly "competent" counsel, to accept and sign on to the terms.
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> * * * * *
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> Further, I do not believe it is the intent of the court to oppress my own lifestyle or to mandate that I work heroic hours for what is tantamount to indentured servitude. The medical degree that affords me the opportunity to achieve above average income was earned by me, not by we.

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spouse spent more than $5,500.00 for clothing; nearly $7,000.00 for jewelry; more than $11,000.00 for a motorcycle; more than $6,000 for entertainment; and more than $3,000.00 in dining out.

[5] Kentucky Rules of Civil Procedure.

In a report filed on February 19, 2003, the DRC found that Randall's motion for a modification of his maintenance obligation failed to comply with the court's Local Rules of Domestic Relations Practice because it had not been accompanied by a sworn income and expense statement along with supporting documentation. Despite this deficiency, the DRC noted that the motion should be denied since Randall had expressly agreed to a clause prohibiting any modification of the maintenance agreement. Larita's motion for sanctions was passed to the court for consideration.

In an order entered May 2, 2003, the Simpson Circuit Court confirmed the DRC's report. The parties were ordered to attend a parent education clinic, but the court reserved ruling on the issue of sanctions. Randall's second notice of appeal followed. (No. 2003-CA-001173-MR.)

Randall argues that the trial court erred in failing to conduct an evidentiary hearing as to his allegation of the unconscionability of the parties' separation agreement. He relies on the provisions of KRS 403.180(2) and on the holdings in Adkins v. Jones, Ky., 264 S.W.2d 265 (1954), and Shraberg v. Shraberg, Ky., 939 S.W.2d 330 (1997).

The provisions of KRS 403.180(2) require a trial court to consider "the economic circumstances of the parties and any other relevant evidence produced by the parties" in determining

whether a separation agreement is unconscionable. In light of this provision, Randall contends that the court was required to conduct an evidentiary hearing following his post-decree motions.

The provisions of KRS 403.180 relate to a court's initial assessment of a separation agreement. The sections that follow address the incorporation of an approved agreement into the decree of dissolution and the remedies available for enforcement of the terms of the agreement. Furthermore, KRS 403.180(6) provides that "the decree may expressly preclude or limit modification of terms if the separation agreement so provides." Thus, Randall was not entitled to an evidentiary hearing concerning his post-decree motions based on the provisions of KRS 403.180.

Randall's argument is not supported by the precedent cited in Adkins v. Jones, supra, or Shraberg v. Shraberg, supra. Adkins was decided in 1954, pre-dating the enactment of Kentucky's no-fault divorce law in 1972; the appellant's motion in Adkins sought to set aside the judgment. Randall's initial motions did not seek the relief requested in Adkins. In Shraberg, the validity of a separation agreement was challenged (pursuant to the provisions of KRS 403.180) before the court had adjudicated the issue of fairness and prior to its entry of the final decree of dissolution that incorporated the agreement. By

contrast, Randall's motion requested the court to reconsider its assessment of the parties' agreement after the fact; that is, after the court had already examined the agreement, had determined that it was not unconscionable, and had incorporated it into the final decree. Thus, his reliance on Adkins and on Schraber is ill-founded. We hold that the court did not err in denying an evidentiary hearing to re-visit its previous determination that the agreement was not unconscionable.

Randall also argues that he was entitled to an evidentiary hearing based upon the allegation contained in his motion of February 5, 2003, filed pursuant to CR 60.02(f): "since the circumstances have changed in an extraordinary nature justifying relief." We agree that he is entitled to an opportunity to present evidence as to changed circumstances justifying a reopening of the dissolution decree. See Terwilliger v. Terwilliger, Ky., 64 S.W.3d 816 (2002). We do not hold that Randall is entitled to the extraordinary relief he seeks; our ruling merely allows him an opportunity to present evidence as to his contention. We are mindful of the strong and sound policy supporting the doctrine of finality of judgments. Substantive relief under CR 60.02(f) is available only where a clear showing of the most extraordinary and compelling equities is made. Bishir v. Bishir, Ky., 698 S.W.2d 823 (1985). In its order of December 17, 2002, the trial court cogently observed:

> [Randall's] motion was probably intended as a motion under Civil Rule 60.02(f) to set aside a Final Judgment for reasons of an extraordinary nature justifying relief.
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> * * * * *
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> [Randall's] only alleged basis is that the maintenance provisions of the Property Settlement Agreement are unconscionable because they are financially oppressive.
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> Dr. Davidson did not attempt to address why no appeal was taken or why he did not notice the unfairness of the final decree for more than a year after it was entered.
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> * * * * *
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> At this point, even if we were to assume he is right about the Decree being unconscionable, insufficient grounds exist to disturb it.

Motions attempting to invoke the provisions of CR 60.02(f) must be specific in mirroring the substance of the rule. Mindful of the admonition of the trial court concerning the precision required in a CR 60.02(f) motion, Randall's motion of February 5, 2003, properly articulated the necessary grounds for remedying the deficiency in his earlier motion. We note that on remand at his evidentiary hearing, he will bear a heavy burden in establishing proof of the extraordinary change in circumstances that he alleges. Bishir, supra, contains a clear *caveat* in this regard:

> The strong and sensible policy of the law in favor of the finality of judgments has historically been overcome only in the presence of the most compelling equities. Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made.

Id. at 826.

The order of the Simpson Circuit Court of December 17, 2002, is affirmed. The order of the Simpson Circuit Court of May 2, 2003, is vacated, and the matter is remanded for an evidentiary hearing as set forth in this opinion.

TACKETT, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

BUCKINGHAM, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in the portion of the majority opinion affirming Randall's appeal in Case No. 2003-CA-000054. However, I respectfully dissent from the portion of the majority opinion vacating and remanding Randall's appeal in Case No. 2003-CA-001173. Randal is not entitled an evidentiary hearing on his CR 60.02(f) motion in my opinion.

In Randall's motion to modify maintenance, he stated that it was filed pursuant to KRS 403.250(1). In support of his motion he stated that changed circumstances made the original agreement unconscionable. As for the facts alleged supporting his motion, Randall stated that he is not safely practicing

medicine because of his "excessive and unsafe work schedule" as an emergency room physician. He also claims that his wages will not be paid on a regular basis and that there may be a reduction in his hourly wage rate. In Randall's amended motion to modify maintenance, he adopted all the statements made in his original motion. He added only that he moved the court to consider his motion pursuant to CR 60.02(f).

KRS 403.250(1) states in part that "[e]xcept 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." KRS 403.180(6) states in part that "[e]xcept 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."

In Scott v. Scott, Ky., 529 S.W.2d 656 (1975), the appellate court held that KRS 403.180(6) appears to mean "that a marriage-dissolution decree incorporating a property-settlement agreement may be modified by the court, with respect to maintenance payments (when authorized by the conditions set forth in KRS 403.250), unless the settlement agreement and the decree expressly preclude modification." Id. at 657. KRS 403.180(6) and the Scott case indicate to me that the non-

modifiable language in the property settlement agreement and decree preclude Randall from getting any relief from the judgment, whether it be pursuant to CR 60.02(f) or otherwise. See also Lueckenotte v. Lueckenotte, 34 S.W.3d 387, 391-92 (Mo. 2001) (en banc).

However, it does seem logical that some extraordinary circumstances could arise that would give a party such as Randall relief from a maintenance obligation such as the one herein. For example, if Randall was severely injured in an automobile accident and was unable to work as a physician, perhaps he should be entitled to CR 60.02(f) relief. At any rate, the circumstances alleged by Randall in his motion were not unforeseeable when the agreement and decree were entered and, in my opinion, were not sufficient grounds of an extraordinary nature so as to warrant an evidentiary hearing on his CR 60.02(f) motion. In short, I do not believe that Randall alleged a sufficient basis for CR 60.02(f) relief in his motion.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Joseph R. Kirwan Bowling Green, Kentucky	Timothy D. Mefford Franklin, Kentucky