

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000940-MR
AND
NO. 2003-CA-002016-MR
AND
NO. 2003-CA-002079-MR

RANDY L. TURK

APPELLANT/CROSS-APPELLEE

APPEALS AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 99-CI-03980

BARBARA J. TURK

APPELLEE/CROSS-APPELLANT

OPINION

VACATING AND REMANDING APPEAL NO. 2002-CA-000940-MR,
REVERSING AND REMANDING APPEAL NO. 2003-CA-002016-MR,
AND DISMISSING CROSS-APPEAL NO. 2003-CA-002079-MR

** ** * * * * *

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: In this domestic relations action, Randy Turk has appealed, and Barbara Turk has cross-appealed, from decisions of the Fayette Circuit Court regarding first the award of and then the modification of spousal maintenance to Barbara. In the first appeal, Randy contends that the maintenance award was incomplete, as it did not address retirement, while in the

second appeal Randy contends that Barbara's maintenance should be terminated or at least suspended due to the inheritance she received and cohabitation with another man. In her cross-appeal from Randy's second appeal, Barbara contends that her maintenance award should not have been reduced due to her inheritance and that she was entitled to an award of attorney fees. We agree with Randy that the circuit court's original maintenance award was incomplete, and vacate that ruling, and that the circuit court erred in finding that Barbara's cohabitation did not constitute a significant enough new financial resource to support a modification, and therefore reverse that ruling. As for Barbara's cross-appeal, we hold that she did not preserve either issue she raised for review by this Court, and therefore dismiss her cross-appeal.

Randy and Barbara were married on October 18, 1969, in Madison County, Illinois, and separated almost twenty-nine years later on August 31, 1998. Three daughters were born of the marriage, all of whom were adults at the time the decree was entered. Barbara filed a Petition for Dissolution of Marriage in the Fayette Circuit Court on November 12, 1999, requesting dissolution, maintenance, attorney fees, a division of marital property, and the restoration of her non-marital property. Pursuant to agreed orders entered a month later, Barbara was to retain exclusive occupancy of the marital residence, and Randy

was to pay the house payment, the car lease and taxes, as well as \$285 per month in cash to Barbara. Barbara was also to receive \$5000 as an advance against her portion of the marital estate. The matter proceeded to a contested hearing the following October. Testimony at the hearing established that Randy worked for the majority of the marriage, while Barbara was responsible for raising their children and maintaining the home. At the time of the hearing, Barbara had recently obtained new employment at the University of Kentucky, earning \$24,934 per year. Randy, on the other hand, had earned an average salary of \$105,819 per year for the years 1998, 1999 and 2000 through his employment with Glen Springs Holdings, Inc.

The circuit court eventually bifurcated the action, and entered a decree of dissolution on April 6, 2001, reserving all other issues. The circuit court then entered its Findings of Fact, Conclusions of Law and Supplemental Decree on January 7, 2002. After finding that the parties had equally contributed to the marriage and the accumulation of assets, the circuit court, with some exceptions not relevant to these appeals, split the considerable marital estate equally between Randy and Barbara. Additionally, the circuit court found that Barbara was entitled to an award of maintenance in the amount of \$1,500 per month. Regarding the award of maintenance, the circuit court stated, in relevant part, as follows: "This amount will be

payable monthly until Wife remarries or dies. At that time Wife will be able to also use her retirement accounts, and Husband will also be at retirement age."

Randy filed a motion to alter, amend or vacate the supplemental decree, raising several issues, including the award of maintenance. In particular, Randy argued that maintenance should terminate when Barbara reached age 59 ½ because at that time she would be able to access retirement benefits without penalty. The circuit court denied this portion of Randy's motion in an order entered April 5, 2002. It is from the supplemental decree and the order denying his motion to alter, amend or vacate that Randy took the first appeal.

One month later, Randy moved the circuit court to abate, modify or terminate maintenance, and also requested that Barbara be required to pay for the damage to the marital estate. Regarding the maintenance portion of the motion, Randy asserted that Barbara had inherited at least \$150,000 and was probably the beneficiary of trusts from family members. Randy then indicated that Barbara had vacated the marital residence in early June, and had left it in bad condition. The parties conducted discovery concerning the contested issues, and filed prehearing memoranda prior to the April 10, 2003, hearing. In his memorandum, Randy indicated that Barbara's share of the marital estate was \$295,460; that she had distributions equaling

over \$150,000 from her father's estate; that she was a one-third heir in her sister's estate valued at over \$300,000; that she had voluntarily taken a different job at a lower salary; and that she had been living with Joe Newell at his residence and therefore had no housing expenses. In her memorandum, Barbara indicated that she had temporarily moved in with her boyfriend and had recently purchased a house that needed repairs. At the April hearing, both parties testified concerning Barbara's inheritance and her living arrangement with Newell. In particular, the testimony established that Barbara had been living with Newell at his residence at Overbrook Farm since she moved out of the marital residence. Newell lived in the house rent-free and utility-free as part of his employment with Overbrook Farm. Both Newell and Barbara contributed money to a joint bank account to pay for food, satellite television and the telephone service. Barbara contributed \$200 per month, which roughly equaled half of their monthly expenses. Newell paid for 80 to 90% of their entertainment expenses, and for airplane tickets to Hawaii and Florida when they traveled together. Barbara described their living arrangement as temporary because she intended to purchase a house and Newell was not planning on moving in with her. Although they did not have any plans to marry, Newell indicated that he wanted the relationship to continue.

On August 4, 2003, the circuit court issued the following Opinion and Order ruling on Randy's motion to abate, modify or terminate maintenance:

This matter came before the Court on [Randy's] Motion to Abate, Modify or Terminate Maintenance. [Randy] currently pays [Barbara] \$1,500 a month in maintenance per the Decree entered on January 7, 2002. [Randy] argues that [Barbara] has received inheritance money from her father, sister and aunt. [Randy] also states that termination of his obligation is appropriate because [Barbara] is cohabitating with Joe Newell.

[Barbara] asks the Court to deny [Randy's] motion stating that even with her inheritance the current maintenance obligation is equitable given the circumstances surrounding the lengthy marriage. [Barbara] argues her living situation does not legally justify a reduction or termination of maintenance. [Barbara] desires to leave her daughters of the marriage an inheritance and further argues a fundamental unfairness in [Randy] benefiting from [Barbara's] family deaths.

Under Combs v. Combs, 787 S.W.2d 260 (Ky. 1990), this Court is directed to look at several factors to determine if cohabitation constitutes a change in circumstances as to make an award of maintenance unconscionable. Specifically the factors are duration and economic benefit of the relationship, the intent of the parties, the nature of the living and financial arrangements, and the likelihood of a continued relationship. Id. at 262. These factors are to be considered when determining the significance of the change in circumstances for maintenance modification.

It is undisputed that the relationship between [Barbara] and Mr. Newell is one of the romantic variety and one that began in 2002. [Barbara] stated that she moved in with Mr. Newell in order to save money [with] which to purchase a home of her own. [Barbara] purchased a home and testified at the hearing that she would reside in her home while Mr. Newell intended to stay at his residence. [Barbara] further testified that Mr. Newell did not 'support' [her] and Mr. Newell stated he was not in a position to do so even if he wanted to. Further testimony revealed that the two shared most living expenses while [Barbara] paid for personal expenses such as pet needs. Given these factors the Court, at this time, does not feel the temporary cohabitation between [Barbara] and Mr. Newell created a significant enough change in circumstances in which to modify or terminate maintenance.

The Court does feel that [Barbara's] inheritance has created a significant enough change in circumstances in which to modify maintenance and thus SUSTAINS [Randy's] Motion to Modify. KRS 403.200 allows the Court to consider the receiving spouse's property when determining maintenance. KRS 403.250 requires a substantial change in circumstances which would make the current obligation unconscionable.

It was presented to the Court that [Barbara] has, or will have around \$201,000 in liquid assets from her combined inheritance. [Barbara] is currently receiving \$1,500 a month in maintenance and did receive half of the marital estate. Other sources of income as well as expenses were presented to the Court. [Barbara] indicated a desire to save a large portion of her inheritance for her daughters and further conveyed to the Court the unfairness of [Randy] essentially benefiting from the deaths in [Barbara's] family. [Barbara's] concerns with becoming older and the

possibility of assisted living were brought to the Court's attention.

The Court does note that [Barbara's] losses have been trying. However, the statute examined simply indicates a change in circumstances is enough to modify a maintenance award and the sadness of the facts causing the change cannot be considered. [Barbara] has come into a significant amount of money that in this Court's opinion is enough to modify the original maintenance award. The Court modifies [Randy's] maintenance obligation to \$800.00 a month.

The Court does not feel that termination is appropriate given the age of the parties, the length of the marriage and the lifestyle established during the marriage. [Barbara] does have expenses and the sum of money she will be receiving, although significant, is not enough to completely terminate support. Each party will be responsible for their own attorney fees. This Order is retroactive to April 10, 2003.

Randy filed timely CR 52 and CR 59 motions, requesting the circuit court to make a finding as to whether Barbara was capable of supporting herself through her own financial resources and employment, to amend its findings concerning the economic benefits she received from living with Newell, and to find that Barbara had not met the threshold for maintenance or at least should not receive any maintenance while she was living with Newell at Overbrook Farm. Barbara objected to Randy's motion in a response limited to those issues Randy raised in his motion. Following a hearing in August, the circuit court

entered an Order on September 18, 2003, ruling on Randy's motion, the pertinent part of which is set forth below:

1. [Randy's] motion to make a specific finding of fact concerning whether [Barbara] is capable of supporting herself through appropriate employment is sustained, and the Court finds as a matter of law that [Barbara] can support herself through appropriate employment although not at as high a level as she enjoyed during the marriage.

2. [Randy's] motion requesting the Court to amend its findings of fact to reveal that [Barbara] has received some economic benefits from Mr. Newell is overruled because the Court's previous Opinion and Order does in fact find that there was an economic benefit to [Barbara] although not so substantial and continuing to modify the maintenance award as made in the Court's Opinion and Order of August 4, 2003.

3. [Randy's] request for the Court to change its conclusions of law concerning [Barbara's] entitlement to maintenance for at least the time she lived with Mr. Newell is overruled.

4. [Randy's] motion to terminate maintenance permanently or at least for the months [Barbara] resided with Mr. Newell is overruled because the Court does not find that relationship to constitute change[d] circumstances "so substantial and continuing as to make the terms (of the maintenance award) unconscionable. . . .", see, KRS 403.250(1), parenthetical statement added.

Randy's second appeal and Barbara's cross-appeal followed. All three appeals have been consolidated for review.

Although he listed more issues in his prehearing statement, Randy raised three issues in his combined brief regarding the propriety of maintenance and the amount of maintenance awarded. On the other hand, Barbara asserts that she was entitled to maintenance, that the award of \$1,500 per month was appropriate, that the circuit court correctly held her living arrangement was not sufficient to terminate maintenance, and that she was entitled to attorney fees.

APPEAL NO. 2002-CA-000940-MR

We shall first address Randy's appeal from the circuit court's original maintenance award in the January 7, 2002, supplemental decree. Our standard of review regarding an award of maintenance is that of abuse of discretion. "The amount and duration of maintenance is within the sound discretion of the trial court."¹ In Weldon v. Weldon,² this Court held:

Furthermore, we are mindful that in matters of such discretion, "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge."
(citations omitted.)

The legislature set out the requirements for an award of maintenance in KRS 403.200:

- (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court

¹ Russell v. Russell, Ky.App., 878 S.W.2d 24, 26 (1994).

² Ky.App., 957 S.W.2d 283, 285-86 (1997).

which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
 - (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
- (2) The maintenance order shall be in such amount and for such periods of time as the court deems just, and after considering all relevant factors including:
- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
 - (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
 - (c) The standard of living established during the marriage;
 - (d) The duration of the marriage;

- (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Randy asserts that the circuit court's reasoning for awarding \$1,500 per month was unclear, that it failed to address Barbara's inheritance, that Paragraph 12 of the supplemental decree was ambiguous, and that it failed to limit the term of maintenance to when Barbara reached retirement age. Paragraph 12 of the supplemental decree reads as follows:

Wife is awarded \$1,500.00 a month maintenance. This amount will be payable monthly until Wife remarries or dies. At that time Wife will be able to also use her retirement accounts, and Husband will also be at retirement age. Maintenance will be paid twice a month in conjunction with the pay periods of Husband in the amount of \$750.00 each. (Emphasis added.)

Although we hold that the circuit court did not at that point in the case abuse its discretion in the amount awarded, it is clear that the portion of the supplemental decree underlined above is ambiguous when read together. It appears that the circuit court omitted a reference to retirement age when indicating the conditions, when met, that would cause maintenance to terminate. As Randy noted in his brief, Barbara conceded that maintenance should terminate once she either died or reached age 66, at

which time she would become eligible to collect social security benefits. For this reason, we hold that the circuit court abused its discretion in failing to provide for the termination of maintenance once Barbara reaches retirement age, in addition to the contingencies of her remarriage or death, and we must vacate that portion of the supplemental decree.

APPEAL NO. 2003-CA-002016-MR

In his second appeal, Randy argues that the circuit court abused its discretion by denying him any relief during Barbara's cohabitation with Newell and by failing to find that Barbara's income and other assets allowed her to meet her reasonable needs, thereby negating her right to collect maintenance. On the other hand, Barbara asserts that the changed circumstances were not so substantial as to make the award of maintenance unconscionable. She also correctly notes that KRS 403.250(1), addressing the modification of maintenance, is the applicable statute in this situation.

KRS 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." In Wilhoit v. Wilhoit,³ the former Court of Appeals defined "unconscionable" as

³ Ky., 506 S.W. 2d 511, 513 (1974).

"manifestly unfair or inequitable."⁴ In the present matter, we note that although the circuit court held that Barbara's inheritance constituted a significant enough change to reduce her maintenance award to \$800 per month, her living arrangement with Newell did not. We disagree.

The Supreme Court of Kentucky's opinion in Combs v. Combs⁵ is the seminal case on this issue. In Combs, the former husband moved to terminate or suspend maintenance due to his former wife's cohabitation with another man in a common law or de facto marriage relationship. As in the present matter, there was no indication that the parties agreed, or that the decree provided, that maintenance was to terminate if the dependent spouse entered into a cohabitation situation with another man. The Supreme Court relied upon KRS 403.250(1) and held that "a maintenance recipient's cohabitation can render continued maintenance 'unconscionable' if the nature of the cohabitation constitutes a new 'financial resource' as contemplated in KRS 403.200(2)(a)."⁶

Recognizing that "not every instance of cohabitation constitutes a change in circumstances making continued

⁴ See also Bickel v. Bickel, Ky.App., 95 S.W.3d 925 (2002); Shraberg v. Shraberg, Ky., 939 S.W.2d 330 (1997).

⁵ Ky., 787 S.W.2d 260 (1990).

⁶ Id. at 262.

maintenance 'unconscionable',⁷ the Combs court listed six elements to consider:

1. Duration – It should never be the intention of the Court to allow for maintenance reduction based upon casual “overnights” or dating. A showing of substantially changed circumstances under KRS 403.250(1) based upon cohabitation, necessarily involves proof of some permanency or long-term relationship.
2. Economic Benefit – The relationship must be such to place the cohabitating spouse in a position which avails that spouse of a substantial economic benefit. The scope and extent of the economic benefits should be closely scrutinized. If the “cohabitation” does not change the cohabitating spouse’s economic position, then reductions should not be permitted.
3. Intent of the Parties – Does it appear that the cohabitating spouse is avoiding re-marriage to keep maintenance? Does it appear from the circumstances that the cohabitating parties intend to establish a “lasting relationship?”
4. Nature of the Living Arrangements – Does it appear that the cohabitation is merely a space sharing situation or is there one common household?
5. Nature of the Financial Arrangements – Is there a “pooling of assets?” Is there actually a joint or team effort in the living arrangements? Who pays the bills and how are they paid?
6. Likelihood of a Continued Relationship – Does it appear that the relationship will continue in the future? Do the parties

⁷ Id.

intend the relationship to continue indefinitely?⁸]

We shall address each of these elements in turn.

The first element addresses duration. In the present case, Barbara moved in with her boyfriend, Newell, once she vacated the marital residence in June 2002. Although she had purchased her own house the next February, Barbara was still living with Newell at the time of the hearing in April. At the least, Barbara and Newell had been living together for ten months at the time of the hearing. Furthermore, it appears that their relationship started as far back as July of 2001, when they were introduced by a mutual friend. It was also established that Barbara and Newell shared the same bedroom. Their relationship was clearly of a long-standing nature.

Barbara also benefited economically from the arrangement. Newell testified that as a part of his employment at Overbrook Farm, he lived at a house on-site, and did not have to pay any rent or utilities. He only had to pay the telephone and satellite bills and for food. It follows that when Barbara moved in with him, she no longer was responsible for paying any rent or utilities, which comprised a large portion of her listed monthly expenses. Furthermore, she and Newell split the cost of the telephone and satellite services as well as their food. She

⁸ Id.

contributed \$200 per month to those expenses, which constituted half of those monthly expenses not covered by Newell's employment. Additionally, Newell testified that he paid for the majority of their entertainment expenses, and paid for Barbara's airline tickets for trips with him to Hawaii and Florida. Barbara clearly received an economic benefit by moving in with Newell in that she was no longer required to pay any rent, mortgage, or utilities, and split the other household expenses with Newell.

Regarding the intent of the parties, the testimony reveals that Barbara's intention to move in with Newell was based upon her desire to find and purchase a house and her inability to obtain rental housing because of her pets. Furthermore, Newell did not intend to move into Barbara's house once she purchased it, but rather was planning on staying in his house on Overbrook Farm. However, we must note that Newell lived at Overbrook Farm as a part of his employment.

As to the nature of their living arrangements, it appears that there was one common household rather than a space sharing situation. Barbara and Newell shared a bedroom, shared expenses, vacationed together, and went out to dinner with each other. She also received her mail at Newell's house.

Barbara and Newell's financial arrangements were more in the nature of a pooling of assets. They had a joint bank

account into which they would deposit funds to pay for their shared expenses. However, Barbara apparently paid for her own personal expenses, and expended the majority of the money to pay for the construction of a dog run in Newell's yard.

Finally, there is a likelihood of a continued relationship between Barbara and Newell, although neither indicated any plans to marry. Newell indicated that he wished the relationship to continue.

Based upon our review of the Combs factors, we cannot hold that there is substantial evidence to support the circuit court's finding that Barbara's living arrangement with Newell did not constitute a significant enough change in circumstances to make a continued award of maintenance unconscionable.⁹ Barbara received a sizeable economic benefit when she moved in with Newell in that she no longer had to pay any rent or utility bills, and was able to split other household expenses rather than pay for them entirely. Barbara's relationship with Newell was a long-term, romantic one that was likely to continue into the future. Her arrangement with Newell clearly constituted a new financial resource as contemplated in KRS 403.200(2)(a), making her continued award of maintenance unconscionable, at least during the period of time she continued to live with Newell and was not required to pay any rent, mortgage or

⁹ Id.

utilities. For this reason, we must reverse the circuit court's ruling regarding cohabitation.

Randy also argues that Barbara's maintenance should be terminated because she no longer met the threshold required for an award of maintenance due to her inheritance, her distributions from the marital and non-marital estates, her investment income, and her employment income. However, it is well settled in the law that "KRS 403.250(1) provides the exclusive method for modification of maintenance awards."¹⁰ Therefore, the circuit court is precluded from addressing KRS 403.200(1) and determining whether Barbara still meets the threshold for maintenance. But this does not mean that the circuit court cannot reduce her maintenance award to \$0 after considering KRS 403.200(2)(a), in particular the financial resources available to her. We leave it to the discretion of the circuit court to determine the proper amount of maintenance to award on remand.

CROSS-APPEAL NO. 2003-CA-002079-MR

In her cross-appeal, Barbara contends that the circuit court erred in reducing her maintenance payment from \$1,500 to \$800 per month and in ordering each party to be responsible for his or her own attorney fees. Randy argues that the trial

¹⁰ Roberts v. Roberts, Ky.App., 744 S.W.2d 433 (1988).

court's rulings were within its discretion, and that Barbara failed to preserve her argument regarding attorney fees.

It does not appear to the Court that Barbara properly preserved either issue raised in her cross-appeal. Barbara contends that she preserved the issue regarding maintenance in her response to Randy's CR 52 and CR 59 motions and in her notice of cross-appeal. However, her response to Randy's post-judgment motions merely opposes his motions. She raised no issue in support of her present argument that her maintenance award should not have been reduced at all. Furthermore, Barbara never raised the issue of attorney fees before the circuit court in the context of the August 4, 2003, ruling. She did not seek attorney fees either prior to or after that ruling in any type of post-judgment motion. Finally, she did not include a statement regarding issue preservation at the beginning of this argument pursuant to CR 76.12(4)(c)(v). In light of our previous rulings in the direct appeal and Barbara's failure to preserve the issues she raised, we dismiss her cross-appeal.

For the foregoing reasons, the circuit court's original award of maintenance is vacated, its ruling regarding the modification of maintenance is reversed, and this matter is remanded for further proceedings consistent with this opinion. Barbara's cross-appeal is dismissed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

W. Stokes Harris, Jr.
Lexington, KY

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Leslie Rosenbaum
Brandi Simon
Lexington, KY