

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002048-MR

BARBARA FLANERY (now CRUM)

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 04-CI-00838

JAMES ANTHONY FLANERY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON, GIUDUGLI, AND VANMETER, JUDGES.

ABRAMSON, JUDGE: Barbara Flanery appeals a decision of the Boyd Circuit Court terminating the maintenance obligation of her ex-husband, James Flanery, following her remarriage. Because we agree with the circuit court that Barbara's remarriage ended James' obligation to pay maintenance as a matter of law, we affirm.

On August 24, 2004, Barbara filed a petition seeking a divorce from James, her husband of fourteen years. To facilitate their divorce, the parties executed a Separation

Agreement on January 13, 2005. The agreement provided, in part, that "Husband [James] agrees to pay to Wife [Barbara] maintenance in the sum of \$250.00 per month for a period of thirty-six (36) months beginning February, 2005, with each monthly maintenance payment due by the 10th day of each month." The agreement further provided that it "shall not be altered, changed, or modified except that it be done in writing and signed by the parties hereto in accordance with the express terms hereof." The circuit court incorporated the agreement in its January 24, 2005, order dissolving the marriage.

During 2005, Barbara remarried¹ and James ceased paying maintenance. On August 19, 2005, Barbara filed a motion seeking to hold James in contempt for failure to make his July 2005, and August 2005, maintenance payments. James responded by claiming that his obligation terminated upon Barbara's remarriage. The circuit court agreed with James and entered an order on August 29, 2005, retroactively terminating James' maintenance obligation as of the date of Barbara's remarriage.

On September 6, 2005, Barbara moved to alter, amend or vacate the court's August 29, 2005, order. The circuit court overruled the motion by order entered September 9, 2005. Barbara has now appealed both the August 29 and September 9 orders.

¹ The record does not reflect Barbara's specific remarriage date.

Kentucky Revised Statute (KRS) 403.250(2) states that "[u]nless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." Barbara does not dispute the effect of this statute, but argues that the modification provision of the Separation Agreement, as incorporated into the divorce decree, supersedes application of the statute in this matter. According to Barbara, despite her remarriage, James' maintenance obligation cannot be modified or terminated barring the written agreement of both parties. We disagree.

Our Supreme Court recently held in *Messer v. Messer*, 134 S.W.3d 570, 573 (Ky. 2004), that "absent a *specific statement* in the written agreement or in the decree *that maintenance will not terminate upon the death of either party or the obligee's remarriage*, the occurrence of one of those statutory contingencies terminates the maintenance obligation by operation of law." (Emphasis added.) Reviewing the modification clause from the parties' Separation Agreement relied upon by Barbara, we find that it is not a "specific statement" such as is required by *Messer*. Neither the modification provision, nor any other provision in the agreement, references the effect of Barbara's remarriage on James' maintenance obligation. While the agreement does

prohibit one party from unilaterally altering the terms of the agreement without the assent of the other, this provision is not implicated herein because James has done nothing to modify the agreement. Indeed, it was Barbara's decision to remarry that triggered the application of KRS 403.250(2).

Moreover, despite Barbara's contentions to the contrary, there has been no modification of the Separation Agreement. When the parties executed a Separation Agreement that was totally silent as to the effect of Barbara's remarriage on James' maintenance obligation, it became certain that if Barbara did choose to remarry, James' maintenance obligation would cease as a matter of law. Thus, when James stopped paying maintenance to Barbara following her remarriage, he did not unilaterally modify either the Separation Agreement or the divorce decree. Rather, he simply asserted a right that arose by operation of law - a right that always existed as a possibility from the moment the parties' executed an agreement that was silent regarding the effect of remarriage.

Finally, Barbara's reliance on *Lydic v. Lydic*, 664 S.W.2d 941 (Ky. App. 1983) is misplaced. *Lydic* concerned the effect of an ex-wife's cohabitation with an unmarried man on the maintenance obligation of her former husband. Clearly, the matter now before this Court does not involve a cohabitation arrangement, but rather the remarriage of a former spouse. As a

result, *Lydic* is inapposite and KRS 403.250(2) and *Messer, supra*, are the applicable authorities herein.

In sum, we find that because the Separation Agreement executed by the parties did not contain a specific provision concerning the effect of Barbara's remarriage, James' maintenance obligation terminated pursuant to KRS 403.250(2) as a matter of law when she did remarry. Consequently, James did not breach or otherwise illegally modify the parties' contract when he ceased paying maintenance following Barbara's remarriage. Accordingly, the August 29, 2005, and September 9, 2005, orders of the Boyd Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Jeffrey Scott
Grayson, Kentucky

BRIEF FOR APPELLEE:

Richard A. Hughes
Ashland, Kentucky