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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001677-MR
AND
NO. 2011-CA-001678-MR

EMANUEL H. RADER

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM BELL CIRCUIT COURT
v. HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 10-CI-08479

SAMMIE RAE CORNETT RADER

APPELLEE/CROSS-APPELLANT

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Emanuel Rader and Sammie Rae Cornett Rader each appeal from a post-decree order of the Bell Circuit Court reducing Emanuel's maintenance obligation from \$700 per month to \$350 per month. Emanuel argues

that he was entitled to a termination of his maintenance obligation, while Sammie argues that Emanuel was not entitled to any modification. While we agree with the trial court that the original award was subject to modification, we conclude that Emanuel failed to present sufficient evidence to support his motion for modification. Under the circumstances presented in this case, the most appropriate remedy is to remand this matter to the trial court for introduction of additional evidence and entry of new findings and conclusions of law.

On February 14, 1975, the Bell Circuit Court entered a decree dissolving the twelve-year marriage between Emanuel and Sammie Rae Cornett Rader. In pertinent part, the decree required Emanuel to pay Sammie alimony of \$700 per month until her remarriage. This amount was based on a settlement agreement entered into by the parties and adopted by the trial court.

Sammie has never remarried, and although Emanuel was required on two occasions to pay maintenance arrearages, he is current on his maintenance obligations. In 2008, Emanuel retired at the age of 70 from the full-time practice of medicine. In December 2010, Sammie retired from her full-time employment. Thereafter, Emanuel filed this motion seeking to terminate his maintenance obligation based on a change in circumstances attributable to a material reduction in his post-retirement gross income.

After conducting a hearing, the trial court entered findings and an order on the motion on July 25, 2011. The trial court found that Emanuel's income has been reduced from an average gross income of \$250,000 per year to an annual

gross income of \$45,368 per year. This amount is comprised of \$25,368 in Social Security income and \$20,000 in part-time income. Based on these amounts, the trial court found that Emanuel has suffered an 82% reduction in his post-retirement income. The trial court further found that Emanuel's decision to retire was objectively reasonable under the circumstances. The trial court noted that Sammie did not present evidence of her pre-retirement income. However, Sammie stated that her current income is \$1,885 per month, comprised of \$319 in pension benefits, \$866 in Social Security benefits, and \$700 in maintenance payments.

After making these findings, the trial court concluded that Emanuel had a material and substantial change of circumstances which warrants a modification of his maintenance obligation. However, the court stated that these circumstances warranted only a reduction in that obligation, and not a termination of maintenance. The court noted that Emanuel had agreed to pay open-ended maintenance and that agreement has never been found to be unconscionable. Moreover, the trial court noted that Emanuel's post-retirement income is still greater than Sammie's to a significant degree. As a result, the court reduced Emanuel's maintenance to \$350 per month. This appeal and cross-appeal followed.

In his direct appeal, Emanuel argues that he was entitled to a termination of his maintenance obligation based on the post-retirement change in his circumstances. In her cross-appeal, Sammie argues that Emanuel failed to prove that continuation of the prior level of maintenance was unconscionable. Our

standard of review for a motion to modify maintenance is whether the trial court abused its discretion. *Block v. Block*, 252 S.W.3d 156, 159 (Ky. App. 2007). We will not set aside the family court's factual findings unless they are clearly erroneous. *See Wheeler v. Wheeler*, 154 S.W.3d 291, 296 & n. 16 (Ky. App. 2004). Questions of law are reviewed *de novo*. *See W. Ky. Coca-Cola Bottling Co. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

Since the separation agreement did not preclude a reduction of maintenance, *See* KRS 403.180(6), the trial court had the authority to modify maintenance as set out in KRS 403.250(1). *Woodson v. Woodson*, 338 S.W.3d 261, 263 (Ky. 2011). In pertinent part, that statute provides 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.” This standard applies whether the original award was designated as alimony or maintenance. *Wilhoit v. Wilhoit*, 506 S.W.2d 511 513 (Ky. 1974).

In *Bickel v. Bickel*, 95 S.W.3d 925 (Ky. App. 2002), another panel of this Court addressed the standards for modification of a maintenance award based on changed circumstances following the obligor’s retirement. The Court held that when an obligor's retirement is objectively reasonable, such retirement constitutes a substantial and material change in circumstances so as to permit modification of the support obligation. *Id.* at 929. In the current case, Sammie does not contend that Emanuel’s decision to retire from full-time employment at age 70 was unreasonable.

Rather, Sammie primarily argues that Emanuel failed to show that continued enforcement of maintenance was unconscionable. She first points to Rule 5(4) of the Family Court Rules of Practice and Procedure (FCRPP), which requires that:

All post-decree matters regarding the maintenance issues shall be submitted with a statement of monthly living expenses, supporting documentation of all year to date gross income from all sources, and the most recently filed federal and state income tax returns. The responding party is to similarly file this financial information. All parties shall exchange said information 10 days prior to the hearing. In addition, counsel shall certify, prior to any hearing being held, that reasonable efforts were made to resolve the issues in dispute.

Emanuel filed his motion to terminate maintenance on March 30, 2011, which was after the effective date of the FCRPP. In support of his motion, he attached copies of his 2010 Form 1099s, and copies of his 2007 Federal tax return and W-2. However, he did not introduce his most-recent tax forms, as required by the rule.

Emanuel points out that Sammie did not raise the application of FCRPP 5(4) before the trial court. Furthermore, she did not present any of her own tax forms, as also required by the rule. As a result, he maintains that Sammie has failed to preserve this issue for review.

But while Sammie did not specifically address the application of FCRPP 5(4) before the trial court, her counsel did request additional discovery into Emanuel's assets. Moreover, the party seeking a modification of maintenance

bears the burden of proof. Indeed, the Court in *Bickel* emphasized that the policy of the modification statute is to maintain relative stability. *Bickel*, 95 S.W.3d at 927. Thus, even when retirement is objectively reasonable, any modification of maintenance is dependent upon the respective incomes and resources of each party. *Id.* at 928-29. See also *Daunhauer v. Daunhauer*, 295 S.W.3d 154 (Ky. App. 2009). Consequently, Emanuel was required to prove that the change in his post-retirement circumstances is so substantial and continuing as to render the maintenance award unconscionable.

Emanuel clearly established that he incurred a significant reduction in his income following his retirement. However, there was very little evidence presented concerning his other assets. At the hearing on April 11, 2011, Emanuel mentioned that he has a retirement plan and that he had to use funds from that plan to pay a prior maintenance arrearage. He also stated that, as a result of these withdrawals, he will not be able to draw on the retirement plan until 2014. But there was no evidence about the current value of the plan. Likewise, there was no evidence of any other assets from which he might draw additional income.

Under the circumstances presented in this appeal, we must conclude that Emanuel presented insufficient evidence to support his motion to modify or terminate maintenance. Although Sammie may have waived strict compliance with the newly-adopted terms of FRCCP 5(4), she did request more information about the extent of Emanuel's resources. Without more detailed information, the trial court could not make a reasonable and informed decision either way.

Consequently, we are compelled to vacate the trial court's order modifying Emanuel's maintenance obligation and remand for additional proceedings. Under FRCCP 5(4), the parties' recent tax returns are the best evidence of their current income and resources. Sammie may also be entitled to discovery of Emanuel's retirement accounts and other assets. Likewise, the trial court may also require Sammie to produce evidence about her assets to the extent that such evidence is relevant to the matters presented in this motion. Upon taking this proof, the trial court can reach a conclusion on the merits of Emanuel's motion to modify or terminate maintenance.

Accordingly, the order of the Bell Circuit Court is reversed, and this matter is remanded for additional proceedings as set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Jennifer S. Begley
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Martha Farmer Copeland
Corbin, Kentucky