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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000115-MR

JANET LEE RUSHING — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 91-FD-000886

SCOTT DOUGLAS WILLIAMS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Janet Lee Rushing appeals from an order of the Jefferson Family Court denying her motion for a maintenance arrearage judgment against her former husband, Scott Douglas Williams. The issues presented are whether the family court erred by finding Janet and Scott orally modified the maintenance provision of their settlement agreement and by enforcing the oral agreement. We affirm.

Janet and Scott married on June 16, 1984, and separated on September 7, 1989. At the time of their separation, Janet and Scott signed a handwritten agreement providing Scott was to pay $1,600 per month in maintenance until Janet's car was fully paid, at which time it would be reduced to $1,400. The agreement provided it would be binding in the event of divorce and maintenance would continue until the death of either party. Between the date of separation and the entry of the decree in May 1991, Scott actually paid Janet $500 every two weeks, which the parties considered the after-tax equivalent of $1,600 monthly. Janet acknowledged the payments were made pursuant to an oral agreement.

Janet filed a petition of dissolution of marriage on May 15, 1991, and on May 22, 1991, a property settlement agreement was signed by Janet and Scott. Regarding maintenance, the agreement provided:

> Respondent shall pay to Petitioner as maintenance the sum of Seven Hundred Thirty Six and no/100 ($736.00) Dollars biweekly. Said payments of maintenance shall terminate upon the death of Petitioner or Respondent, whichever shall occur first.

The agreement further provided it "may not be modified by any court."

A decree of dissolution was entered after oral statutory proof was taken. Scott was not present or represented by counsel. After questioning Janet's counsel regarding the agreement, the court found the settlement agreement was not unconscionable and incorporated it into the decree.

Scott paid maintenance in the amount of $736 on a biweekly basis until January 1994, when he ceased making payments. Janet did not file a motion for a

maintenance arrearage judgment until over sixteen years later, on April 12, 2010. At that point, she alleged Scott owed her $763,734.31 in arrearage.

The family court conducted an evidentiary hearing. At the time of the hearing, Scott was 54 years old and employed as a government contractor earning $141,000 per year. He testified he was depressed when he signed the separation agreement and the payments were "crushing" him financially. He testified that in December 1993, he prayed regarding his financial situation and soon thereafter, received a telephone call from Janet. He discussed discontinuing the maintenance payments with Janet and they agreed he could cease making payments without a written agreement. Scott ceased the payments in January 1994.

Scott testified the parties have interacted over the past sixteen years. They both worked at the Naval Ordinance plant where they engaged in friendly conversation. Additionally, he recalled that in 1996, Janet signed a waiver and release on any claim she might have on his pension plan without mention of Scott owing any maintenance arrearage. In 1997, Scott borrowed a guitar, valued at $90, which Janet insisted he return. However, she did not mention his alleged maintenance arrearage. Scott testified that when he sold certain art prints owned by the parties with Janet's permission, she did not mention he owed any maintenance payments. During the sixteen years after Scott ceased paying Janet maintenance and despite their continued contact, Janet did not request money or suggest he continued to have an obligation to pay maintenance.

Randall Daniel testified that ten to twelve years prior to the hearing, Scott told him about praying and Janet calling him approximately one hour later. He recalled Scott told him he and Janet agreed to terminate Scott's maintenance obligation.

Janet testified Scott called her in late 1993 and told her he was going to cease making maintenance payments. She denied she agreed to the termination of maintenance. At that point, Janet had saved $20,000 received from Scott's maintenance payments to purchase a home.

Although Janet admitted sixteen years elapsed since Scott's last maintenance payment and her motion, she believed she could not afford an attorney until an individual she met while on jury duty informed her she could pursue her claim without paying any money in advance. She acknowledged that after Scott ceased payment, she described him to his future wife as a "good man."

Janet testified she has had little contact with Scott since 1998 and not talked to him in approximately ten years. She testified that after the maintenance payments ceased, she worked three jobs and lived with a roommate. However, she admitted she had a roommate while receiving maintenance and acknowledged she purchased a home in 1997. She further admitted she did not ask Scott to pay maintenance after December 1993, or suggest he owed an arrearage until just before filing the present motion. She currently earns $51,000 per year.

The family court made extensive findings of fact and concluded the parties verbally agreed to terminate Scott's maintenance payments in December

1993, and the agreement was fair and equitable under the circumstances. Because it found an enforceable oral agreement to terminate maintenance existed, the family court did not address the issues regarding the statute of limitations, laches, waiver, and estoppel.

Our review is governed by the rule that the trial court's factual findings may not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Abbott Laboratories v. Smith,* 205 S.W.3d 249, 253 (Ky.App. 2006)(citation omitted). We review a trial court's application of law *de novo*. *Monin v. Monin,* 156 S.W.3d 309, 315 (Ky.App. 2004).

Under Kentucky law, an oral agreement to modify a maintenance obligation is valid if the agreement is established with reasonable certainty and the court finds the agreement is fair and equitable under the circumstances. *Brown v. Brown*, 796 S.W.2d 5 (Ky. 1990). As noted by the Court in *Brown*, the rule is based on sound policy:

> As we have recently stated in other cases, in different context, the policy of the law is to encourage settlement in divorce litigation, whether prejudgment or post-judgment, and more particularly, to discourage as counterproductive to the welfare of the parties unnecessary post-judgment litigation. A necessary corollary of this principle is, where honest disagreement exists post-judgment as to whether the terms of a previous decree should be modified, courts approve of

> settlement as the method to adjust such disputes. We find nothing in the statutes to require judge resolution as opposed to voluntary settlement, openly and fairly negotiated.

Id. at 8-9 (citation omitted).

Janet argues Scott's maintenance obligation could not be modified by a verbal agreement because the settlement agreement expressly prohibited modification and by operation of KRS 403.180(6), which provides:

> Except 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. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

A similar argument was rejected in *Brown,* where the Supreme Court explained:

> This would be giving KRS 403.180(6) an opposite effect from the one intended. There is an exception to this equitable principle just stated provided for in KRS 403.180(6), but its purpose is to expand rather than to limit the parties' ability to settle.... Thus, KRS 403.180(6) states that '[e]xcept for terms concerning the support, custody, or visitation of children,' by expressly doing so the parties may settle their affairs with a finality beyond the reach of the court's continuing equitable jurisdiction elsewhere provided.

Id. at 8. Under the general principles of contract law, a modification may be verbal even if the original contract states otherwise. The "power to enter into a contract equally authorizes [the parties] to abrogate or modify" the contract. *National Union Fire Ins. Co. v. Duvall*, 268 Ky. 168, 104 S.W.2d 220, 222 (1937).

Having concluded the maintenance provision could be modified, we turn to the question of whether the family court properly found it was modified. Whether the parties agreed to modify a maintenance obligation is a finding of fact, which we review for clear error. *Whicker v. Whicker*, 711 S.W.2d 857, 860 (Ky.App. 1986). Pursuant CR 52.01, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

There is ample evidence to support the family court's finding that the parties orally agreed to terminate maintenance in December 1993. It is undisputed Janet did not seek to collect maintenance from Scott for over sixteen years. As the family court pointed out, the parties had significant contact when Scott allegedly was accumulating arrearage, yet there was no evidence Janet ever indicated to Scott he owed maintenance. There was evidence Janet spoke favorably of Scott, allowed Scott to borrow a guitar, was friendly with him, waived her interest in his pension plan, and allowed him to sell Walt Disney prints owned by the parties and retain the proceeds. Janet's actions are simply inconsistent with her contention Scott's maintenance obligation continued for a period of over sixteen years without payment. The parties' actions and the testimony presented constitute more than substantial evidence to support the family court's finding.

The second inquiry is whether the agreement to modify maintenance was fair and equitable under the circumstances. In making that determination, the court is required to consider the circumstances "at the time such oral modification was originally agreed to by the parties" and examine whether the court would have

allowed such a modification "had a proper motion to modify been brought before the court[.]" *Whicker*, 711 S.W.2d at 859.

The family court noted the parties were married for seven years but lived together for only five years. At the time of the oral modification, Scott had paid maintenance for approximately four and one-half years and Janet saved $20,000 from those payments and able to provide for her reasonable needs from her own income. The family court also found Scott's income was insufficient to allow him to make the payments to Janet and meet his own needs. Ultimately, the family court found that based on those facts, the court would have granted a motion to terminate maintenance. Under the circumstances, we cannot say the family court erred.

On appeal, Janet argues there was no consideration for the modification agreement and the statute of frauds precludes its enforcement. Janet does not cite to the record where either issue was presented to the family court. "It has long been this Court's view that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal." *Fischer v. Fischer,* 348 S.W.3d 582, 588 (Ky. 2011). Following that rule, we decline to address Janet's arguments.

Because we conclude the family court did not err when it found the parties orally agreed to terminate maintenance, we do not address Scott's arguments regarding the statute of limitations, laches, and estoppel.

Based on the foregoing, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

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