

RENDERED: NOVEMBER 8, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000219-MR

PHILLIP WAYNE LOCKHART, JR.

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 06-CI-502652

MARY DENIA LOCKHART

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, STUMBO, AND THOMPSON, JUDGES.

MAZE, JUDGE: Phillip Wayne Lockhart, Jr. (Phillip) appeals from a post-decree order of the Jefferson Family Court which denied his motion to terminate his maintenance obligation to Mary Denia Lockhart (Mary). Phillip argues that the trial court erred in finding that it lacked authority to modify maintenance based upon the terms of the parties' settlement agreement incorporated into the decree.

We agree with the trial court that the maintenance obligation was not subject to modification under Kentucky Revised Statutes (KRS) 403.180(6). Hence, we affirm.

On June 22, 2009, the parties entered into a Marital Settlement Agreement (the Agreement) which resolved the disputed issues relating to the dissolution of their marriage. In pertinent part, Phillip agreed to pay maintenance to Mary in the amount of \$3,000 per month for eleven years or until Mary's remarriage. The Agreement further provided, "There shall be no modification of this Agreement except by written agreement of the parties with respect to issues of property division, maintenance or payment of child expenses." The trial court found that the terms of the Agreement were not unconscionable and incorporated them into the decree entered on June 26, 2009.

On October 31, 2011, Phillip filed a motion to terminate his maintenance obligation due to a material and continuing change in his financial circumstances. He stated that both of his businesses have failed due to the economic downturn. As a result, Phillip states that his income had been reduced from approximately \$8,000 per month to around \$2,000. Phillip is more than \$90,000 behind on his maintenance obligation and is responsible for significant marital and business debt. Based upon this change in circumstances, he argued that his current maintenance obligation should be terminated as unconscionable.

Phillip acknowledged that the Agreement precludes modification of maintenance except by written agreement of the parties. However, he argued that

the recent decision by the Kentucky Supreme Court in *Woodson v. Woodson*, 338 S.W.3d 261 (Ky. 2011), permits the trial court to modify the terms of any degree upon a showing of unconscionability. In its order denying Phillip's motion, the trial court agreed that *Woodson* now allows modification of fixed-term maintenance awards under KRS 403.250(1). However, the court noted that KRS 403.180(6) excludes modification of maintenance if the agreement so provides. In light of the express terms of the Agreement, the trial court concluded that Phillip's maintenance obligation could not be modified. Phillip now appeals.

The sole issue presented is whether KRS 403.250 permits the trial court to modify the terms of the decree respecting maintenance where the Agreement requires written consent of both parties. Since this is an issue of law, our review is *de novo*. *Wahlke v. Pierce*, 392 S.W.3d 426, 429-30 (Ky. App. 2013). Phillip relies heavily on *Woodson*, which overruled the long-standing rule that a fixed-term maintenance award was not subject to modification. *Woodson*, 338 S.W.3d at 262-63, *overruling Dame v. Dame*, 628 S.W.2d 625 (Ky. 1982). The Court in *Woodson* found that this interpretation is contrary to the express language of KRS 403.250, which provides:

Except 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. [Emphasis added.]

Given the clear language of KRS 403.250, the Court in *Woodson* concluded that fixed-term maintenance awards were subject to modification under

the statute on the same grounds as any other maintenance award. *Woodson*, 338 S.W.3d at 263. Similarly, Phillip argues that the terms of his maintenance obligation are subject to modification upon a showing that they have become unconscionable.

However, the court in *Woodson* also pointed to KRS 403.180(6), which provides 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 this case, the Agreement expressly requires written agreement of the parties to modify its terms, including maintenance. In the absence of an agreement between the parties, the trial court correctly found that Phillip’s maintenance obligation was not subject to modification for unconscionability. *See also Wheeler v. Wheeler*, 154 S.W.3d 291, 295 (Ky. App. 2004)

We recognize that this conclusion may impose a great hardship on Phillip, and that “[t]he potential harm of a trial court not being able to modify a maintenance provision can lead to the financial ruination of a party.” *Woodson*, 338 S.W.3d at 263. Nevertheless, we are constrained to follow the clear language of KRS 403.180(6). Furthermore, we note that the trial court has only declined to modify Phillip’s maintenance obligation. The court has not attempted to hold Phillip in contempt for his arrearage and he may be entitled to assert impossibility as a defense to any contempt motion. *See Campbell County v. Commonwealth, Kentucky Corrections Cabinet*, 762 S.W.2d 6, 10 (Ky. 1988). While Phillip’s

current circumstances are unfortunate, we must conclude that the trial court properly denied his motion to terminate maintenance.

Accordingly, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

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