

RENDERED: NOVEMBER 15, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-000972-MR

BRENDA CHILDERS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE WILLIAM ENGLE III, JUDGE  
ACTION NO. 05-CI-00282

DELMON CHILDERS

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Brenda Childers appeals from the order of the circuit court denying her motion for enforcement of an order for temporary maintenance following the entry of a final decree of dissolution.

In 2005, following a twenty-seven year marriage, Brenda Childers and Delmon Childers separated and filed competing petitions for dissolution of marriage.

On September 22, 2005, Brenda filed a motion for temporary maintenance. She alleged she was currently unemployed, had only held brief part-time employment during the marriage, and was unable to support herself and maintain a home.

On November 29, 2005, after reviewing itemized expense statements filed by the parties and following a hearing by and the recommendation of the domestic relations commissioner, the court ordered Delmon to pay temporary maintenance to Brenda as follows:

[Delmon] shall continue to pay the parties' automobile and homeowner's insurance (in the total amount of \$236.04 each month: \$74.85 of which is for the homeowner's insurance and \$88.00 of which is for [Brenda's] automobile insurance); the payment for the marital residence (\$355.00); [Brenda's] health/medical insurance, which is deducted from [Delmon's] pay; and the reasonable utilities at the marital residence, including basic cable, electricity, and local telephone service. [Delmon] shall be responsible for these payments until further Orders of this honorable Court.

Delmon did not challenge this order.

On January 10, 2006, the court ordered Delmon to pay Brenda for her expenses and itemized the exact amounts to be paid. Delmon filed a motion to vacate, indicating that the court previously entered an order regarding temporary maintenance on November 29, 2005. Brenda filed a motion to show cause why

Delmon should not be held in contempt for failing to follow the January 10, 2006, order.

On December 7, 2006, the circuit court entered a partial decree of dissolution of marriage granting their divorce and reserving the remaining issues for further hearing.

On March 27, 2007, following a hearing before the circuit court, it ordered Delmon provide temporary maintenance to Brenda by paying certain bills on her behalf as follows:

Automobile insurance, (\$88.00), Homeowners insurance, (\$74.85) payment for the Marital Residence, (\$355.00) Respondent's Health/Medical Insurance, reasonable utilities (including basic cable, electricity and telephone service), marital property tax and tags and license for all vehicles.

The temporary maintenance payments were made retroactive to November 29, 2005. This order effectively nullified the January 10, 2006, order and renewed the November 29, 2005, order, but added that Delmon was responsible for marital property tax and the tags and licenses for the vehicles. Delmon did not challenge this order.

After Brenda obtained employment, Delmon filed a motion to terminate temporary maintenance and, on September 19, 2008, the court ordered Delmon's obligation to pay temporary maintenance terminated effective September 16, 2008. Brenda did not challenge this order.

On August 28, 2009, Delmon and Brenda entered into a separation agreement that stated, “it is the intention of the Parties by this agreement to amicably settle all questions remaining to the division of marital and non-marital property and debts.” The separation agreement then allocated marital and non-marital property and assigned marital debts.

The separation agreement did not address the previous award of temporary maintenance. Delmon does not allege the negotiations regarding this agreement included providing Brenda additional marital property in exchange for her waiver of his obligations under the temporary maintenance order, or any discussion of the temporary maintenance order.

That same day, the final judgment was entered incorporating the separation agreement. The final judgment failed to address the previous award of temporary maintenance.

On April 15, 2010, Brenda filed a motion for enforcement of the order for temporary maintenance alleging Delmon failed to pay maintenance directly to her and to pay most of the bills he was ordered to pay. On July 20, 2010, the court determined “[Brenda’s] motion is proper to enforce temporary maintenance since the agreed final decree of dissolution of marriage and the agreed separation agreement were silent as to the issue of maintenance” and referred the matter to the domestic relations commissioner for a hearing.

At the hearing, Brenda provided evidence of various bills she paid that Delmon failed to pay on her behalf as obligated under the terms of the temporary

maintenance order. Delmon failed to provide evidence he paid these obligations or provided direct support to Brenda. He also failed to raise any claim that Brenda negotiated away her right to these payments through the settlement agreement or otherwise. He failed to raise a claim of laches based on the time that elapsed since he incurred the obligations until she moved to enforce the order.

On December 27, 2011, the domestic relations commissioner recommended the court find Delmon did not comply with the court's order of temporary maintenance and reimburse Brenda for enumerated expenses she paid. On May 4, 2012, the court declined to adopt the recommendation of the domestic relations commissioner, determining as follows:

It is the opinion of this Court that the separation agreement and the final judgment resolve all issues between [Delmon] and [Brenda] as of the time of the final judgment. And the issues involved in the [Brenda's] motion cover a time period prior thereto. Although neither the separation agreement nor the final judgment specifically refer to the matters under consideration in [Brenda's] motion, it appears to this Court that their intent and effect were to resolve all then remaining issues between the parties. Accordingly, any recovery by [Brenda] as requested in her motion is barred.

It is from this order that Brenda appeals.

Brenda argues her right to temporary maintenance was vested when payments were due and, thus, she has the right to enforce the order after the entry of the dissolution decree. She argues that because the final decree was silent as to the issue of maintenance, this issue was not finally resolved by the decree.

Delmon argues the temporary maintenance order did not result in any vested right because the order could be modified at any time. Delmon argues the separation agreement settled all claims between the parties. He argues Brenda waived her claim by failing to assert her right to payment when she entered the separation agreement and never attempting to modify the decree through a CR 60.02 motion.

Under KRS 403.180(5), the terms of divorce decrees, including separation agreements as incorporated into divorce decrees, “are enforceable as contract terms.” *Bailey v. Bailey*, 231 S.W.3d 793, 797 (Ky.App. 2007).

We review contracts with the primary objective of effectuating the intentions of the parties based upon the four corners of the documents. *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005).

Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. Absent an ambiguity in the contract, the parties’ intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms.

*Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky.App. 2002)

(internal citations omitted). The interpretation of a contract, including the

determination as to whether it is ambiguous, is a question of law subject to *de novo* review. *3D Enterprises Contracting Corp.*, 174 S.W.3d at 448.

The circuit court reviewed the dissolution decree and the separation agreement as incorporated therein, and found no ambiguity regarding whether the decree resolved the outstanding obligation for Delmon to pay temporary maintenance, but concluded the decree barred Brenda from enforcing the temporary maintenance order. We agree the decree is not ambiguous, but disagree Brenda is precluded from enforcing the temporary maintenance order.

The separation agreement language the circuit court relied upon stated the parties intended to settle all questions remaining on the division of marital and non-marital property. This provision unambiguously covers only unsettled issues. The March 27, 2007, order awarding temporary maintenance and the September 19, 2008, order terminating temporary maintenance set the period of temporary maintenance and the amount of such maintenance between November 29, 2005, and September 16, 2008. Neither party challenged these orders. They resolved the issue of temporary maintenance. Therefore, Delmon was required to pay maintenance in accordance with the terms provided by these orders and Brenda's entitlement to temporary maintenance during this period was not a remaining issue.

Under these circumstances, there is no ambiguity in the separation agreement or dissolution decree resulting from the complete absence of any language referencing temporary maintenance or alteration of previous court orders by agreement. The failure to address the prior award of temporary maintenance in

the decree and separation agreement cannot be interpreted as an attempt to revisit this issue, as an implicit waiver by Brenda of her right to enforce the previous award of temporary maintenance or as an implicit revocation of these orders through the court entering the dissolution decree. *See Reid v. Reid*, 306 Ky. 305, 307-308, 207 S.W.2d 16, 17 (1947). Additionally, nothing in the agreement implies it conferred a benefit on Brenda in exchange for her surrendering the right to receive past due temporary maintenance.

Because the entry of the decree did not nullify the order of temporary maintenance, the question then becomes whether it is now enforceable. Temporary maintenance is awarded pursuant to KRS 403.160. “The purpose of temporary maintenance is to preserve the status quo between the spouses while the dissolution proceeding is pending.” *Horvath v. Horvath*, 250 S.W.3d 316, 318 (Ky. 2008). When initially ordered, temporary maintenance awards are interlocutory orders which are not immediately appealable. *Lebus v. Lebus*, 382 S.W.2d 873, 874-875 (Ky.App. 1964); *Atkisson v. Atkisson*, 298 S.W.3d 858, 864 (Ky.App. 2009). They are subject to being revoked or modified before the final decree if an appropriate factual showing is made. KRS 403.160(6).

“Past due payments for child support and maintenance become vested when due. Each payment is a fixed and liquidated debt which a court has no power to modify.” *Pursley v. Pursley*, 144 S.W.3d 820, 828 (Ky. 2004) (footnotes omitted). *See Dalton v. Dalton*, 367 S.W.2d 840, 842 (Ky. 1963); *Boehmer v. Boehmer*, 259 Ky. 69, 82 S.W.2d 199, 200 (1935).



However, temporary maintenance awards are not finally “due” if they have been challenged through an appropriate motion, because they may be altered by an order effective retroactive to the date of such motion. *See Higbee v. Higbee*, 89 S.W.3d 409, 410-411 (Ky. 2002); *Mudd v. Mudd*, 903 S.W.2d 533, 534 (Ky.App. 1995). Their potential retroactive reduction or elimination through modification may be broader than that which can apply to temporary child support orders. *See Thompson v. Thompson*, 172 S.W.3d 379, 382 (Ky. 2005).

Delmon has never challenged Brenda’s need for temporary maintenance as ordered between November 29, 2005, and September 16, 2008. Accordingly, there was never a showing of facts necessary for revocation or modification to the payments ordered during this period. *See* KRS 403.160(6)(b). Therefore, the circuit court would have no basis for revoking unpaid temporary maintenance in the final decree.

A prior temporary maintenance order becomes reviewable when it is incorporated into a lower court’s dissolution decree. *Calloway v. Calloway*, 832 S.W.2d 890, 894 (Ky.App. 1992). However, if temporary maintenance orders are not incorporated into a dissolution decree, the finality of orders awarding and terminating temporary maintenance are governed by CR 54.02(2) like all other interlocutory orders:

When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and

judgments determining claims which are not specifically disposed of in such final judgment.

*See Employers' Liab. Assur. Corp. v. Home Indem. Co.*, 452 S.W.2d 620, 623 (Ky. 1970). Accordingly, because the orders setting and terminating temporary maintenance resolved the issues of whether temporary maintenance was appropriate, what amount was appropriate and the duration of such support, and the decree did not otherwise resolve these issues, these orders became final when the decree became final. At that time, any authority the circuit court had to retroactively revoke the temporary maintenance order expired and it now lacks the discretion to nullify Delmon's obligations under this final order.

Furthermore, Delmon failed to raise any defense to the enforcement of the temporary maintenance order other than to assert the settlement agreement nullified it. He did not claim Brenda's motion was untimely. He did not claim he satisfied his obligations by directly paying the bills she claimed to have paid, through a payment in kind, via a negotiated agreement for value, or the temporary maintenance arrearage was a subject of the negotiation, which led to the settlement agreement of remaining issues.

We determine the Letcher Circuit Court erred in its interpretation of the dissolution decree and reverse and remand for it to enforce the March 27, 2007, order for temporary maintenance.

ALL CONCUR.

BRIEF FOR APPELLANT:

Angela Hatton Mullins  
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Danny Rose  
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