

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001132-MR

SHARON RUTH GALLO

APPELLANT

v. APPEAL FROM HOPKINS FAMILY COURT
HONORABLE SUSAN WESLEY MCCLURE, JUDGE
ACTION NO. 83-CI-00139

THOMAS ALAN GALLO

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MAZE, STUMBO AND VANMETER, JUDGES.

MAZE, JUDGE: Sharon Ruth Gallo (Sharon) appeals from a post-decree order of the Hopkins Family Court which reduced and eventually terminated the maintenance obligation owed by her ex-husband, Thomas Alan Gallo (Thomas).

We find that the trial court failed to apply the proper standard for modification of an existing maintenance award under Kentucky Revised Statutes (KRS) 403.250.

We further find that Thomas failed to present sufficient evidence showing that the

existing award was unconscionable as required by the statute. Hence, we reverse and remand for reinstatement of the original award.

Thomas and Sharon Gallo were married in 1965 and separated in 1982. Each party filed separate petitions for dissolution in different states. Sharon filed a petition in the Circuit Court for Wayne County, Michigan, where she moved following the parties' separation. The Michigan court granted the decree on January 6, 1984. Thomas filed his petition for dissolution in Hopkins County, Kentucky, where he continued to reside following the separation.

It appears that the parties litigated the disputed issues in the Kentucky proceeding. The matter was submitted to the Master Commissioner, who heard evidence and issued recommended findings of fact, conclusions of law and a judgment. In pertinent part, the Commissioner recommended that Thomas pay Sharon lump-sum maintenance in the amount of \$15,000, and thereafter monthly maintenance in the amount of \$1,500 for the remainder of her life or until such time as she should remarry. On January 3, 1986, the trial court entered a second decree of dissolution and an order adopting the Commissioner's recommendations.

Sharon has never remarried and Thomas has paid maintenance as directed since the Kentucky decree was entered. In October 2011, Thomas filed a motion to terminate or modify maintenance, citing a substantial reduction in his income due to his recent retirement from full-time employment. Sharon opposed the motion and filed her own motion seeking to increase maintenance. The parties

submitted evidence on their respective incomes, assets and expenses and submitted the motion to the trial court.

After considering the evidence, the trial court denied Sharon's motion to increase maintenance and Thomas's motion to immediately terminate maintenance. However, the trial court concluded that the amount and duration of maintenance had become unconscionable. The court found that Sharon lacked the financial resources to meet her reasonable needs and that Thomas had the ability to meet his reasonable needs and to pay continued maintenance to Sharon. Nevertheless, the court concluded that Sharon had failed to show a need for more than \$850 per month in order to meet her reasonable expenses. In addition, after considering the amount of time which Sharon had already received maintenance, the court ordered that this reduced amount of maintenance should terminate after May 31, 2013. Sharon now appeals from this order.

We review the family court's determination regarding a motion to modify maintenance for an abuse of discretion. *See Bickel v. Bickel*, 95 S.W.3d 925, 927-28 (Ky. App. 2002). We cannot substitute our judgment for the family court if there is substantial evidence supporting that court's decision. *Id.* at 928. Further, we may 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). However, we review questions of law *de novo*. *See Western Ky. Coca-Cola Bottling Co. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

On the question of law, we conclude that the trial court erred when it initially determined that “an examination of whether the continuation of maintenance is unconscionable requires a determination of whether Sharon meets the statutory criteria for maintenance.” The maintenance award in this case was part of a final judgment which has never been appealed. Although the award is subject to modification under KRS 403.250(1), the authority to modify does not undermine the compelling interests in finality of judgments and ensuring relative stability. *Woodson v. Woodson*, 338 S.W.3d 261, 263 (Ky. 2011). As further explained by the Kentucky Supreme Court in *Rayborn v. Rayborn*, 185 S.W.3d 641 (Ky. 2006):

KRS 403.250, the statute that allows for the modification of maintenance awards, states: “[T]he 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.” KRS 402.250(1) (emphasis added). The statute requires that the changed circumstances occur after the divorce decree and maintenance obligation become effective. Implicit in this requirement is the understanding that the circumstances of the parties brought about by the entry of the divorce decree and maintenance obligation cannot serve as the basis of the “changed circumstances” required by the statute. Rather, the parties’ circumstances at the time of the decree and maintenance obligations are the status quo against which the changed circumstances requirement of KRS 403.250(1) is to be measured. Were we to conclude otherwise, every maintenance obligation could immediately be modified under the statute. This is simply not the purpose of KRS 403.250 – it allows a modification only where there has been a change in circumstances *subsequent* to the immediate effects of the divorce decree.

Id. at 643-44.

Based on this standard, it is clear that a motion to modify does not authorize the trial court to revisit the propriety of the original award. In this case, the trial court did exactly that. The trial court also pointed out that Sharon received a lump-sum maintenance payment of \$15,000 when the decree was entered. But as discussed in *Rayborn*, a motion to modify or terminate maintenance looks to the *status quo* existing since the entry of the decree. Since the decree factored the lump-sum into the total maintenance award, that payment was not a relevant ground to modify or terminate maintenance at this time.

Furthermore, while we agree with the trial court that any assets which Thomas has accumulated since the divorce would have no bearing on an initial determination of the amount or duration of maintenance, those determinations were made in the 1986 decree. Likewise, while the trial court may reasonably question the original award of lifetime maintenance to Sharon, she is entitled to receive that award absent a showing of sufficiently changed circumstances as required by KRS 403.250(1).

As used in KRS 403.250(1), the word “unconscionable” means “manifestly unfair or unreasonable.” *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997), and *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974). Furthermore, the trial court incorrectly placed the burden of proof on Sharon to show that she still meets the statutory criteria for maintenance. To the contrary, since the policy of the statute is to promote relative stability, Thomas had the burden to present

compelling evidence warranting relief under the statute. *Woodson*, 338 S.W.3d at 263. See also *Bickel*, 95 S.W.3d at 927–28.

The trial court's factual findings do not support a termination of Thomas's maintenance obligation, either now or in the near future. Thomas has worked as a physician his entire career, earning a substantial income. Beginning in 2011, he cut back to part-time employment. In addition, Thomas turned 70 in 2011. In 2011, he had an average monthly income of \$4,681. He is also eligible to receive distributions from his retirement plan, but he was not required to take distributions until age 70 ½. Thomas lists total liquid assets of more than \$1,700,000. The trial court found that his reasonable monthly expenses total \$1,828.

In 2011, Sharon was 67 years of age and testified that that she suffers from asthma, emphysema, bilateral carpal tunnel syndrome, arthritis, hypertension, bilateral severe hearing loss and vision difficulties. Despite these ailments, she has made adaptations and continues to be self-employed as a medical transcriptionist. Including her wages and social security income but excluding maintenance payments, she had a gross monthly income of \$1,759. Sharon testified that she has assets of bank accounts, a home and an automobile with a total value of approximately \$142,800. She also has a home mortgage with a balance of approximately \$45,000. She testified that her home and automobile are in need of repair, but she had previously asserted these needs in earlier motions to modify maintenance.

Based on this evidence, the trial court specifically found that Sharon is currently unable to support herself through appropriate employment. There was no evidence that her circumstances are likely to improve at any time in the future. Sharon does not strenuously contend that Thomas's decision to partially retire was objectively unreasonable. Nevertheless, he remains capable of meeting his reasonable needs while paying his entire maintenance obligation even without relying on his pension income or savings. Apart from the trial court's disagreement over the duration of the original maintenance award, there was no evidence to support a conclusion that the obligation is now unconscionable.

We find that the trial court also applied an incorrect standard to Thomas's motion to reduce maintenance. As noted above, the trial court required Sharon to establish her right to continued maintenance, rather than place the burden on Thomas for modification as required by KRS 403.250(1). Generally, modification of an existing award of maintenance looks primarily to whether the obligor's circumstances have changed in a substantial and continuing way such that they are rendered unconscionable. *Tudor v. Tudor*, 399 S.W.3d 791, 793 (Ky. App. 2013).

In considering the obligor's ability to meet his reasonable needs while continuing to pay maintenance, the court should not consider income earned by a new spouse or expenses attributable to a new marriage. *Id.* On the other hand, the court may consider the extent to which Thomas's relevant expenses have been reduced as a result of his new marriage. *Id.* In addition, a substantial reduction in

income following a retirement may warrant a modification of maintenance under this standard. *Bickel*, 95 S.W.3d at 930.

The trial court acknowledged that Thomas has significant assets above his income, but was concerned that Sharon is not entitled to any portion of the assets which Thomas has acquired since dissolution of the marriage. While this is a valid consideration for division of property, it is not exactly relevant to the inquiry on a motion to modify or terminate maintenance. Thomas's independent, post-decree accumulations of assets or income become relevant only upon a showing that Sharon has failed to achieve self-sufficiency. *Daunhauer v. Daunhauer*, 295 S.W.3d 154, 160 (Ky. App. 2009). Since the trial court found that Sharon continues to have a need for maintenance, the trial court may consider all of Thomas's resources to determine his ability to pay. *Id. See also Roberts v. Roberts*, 744 S.W.2d 433, 436 (Ky. App. 1986).

As noted above, the trial court found that Thomas has sufficient income and other assets to meet his reasonable needs while paying the full amount of maintenance to Sharon. The only other question is whether Thomas has shown that the amount of maintenance should be reduced based upon Sharon's current needs. There is some conflicting authority whether any improvement in Sharon's circumstances may be considered on a motion to modify an existing maintenance obligation. In *Massey v. Massey*, 220 S.W.3d 700 (Ky. App. 2006), this Court suggested that a maintenance award may not be modified based only on an improvement in the financial situation of the receiving spouse. *Id.* at 703. But in

Daunhauer, this Court held that a court may consider circumstances of the receiving spouse and her continued need for maintenance. *Daunhauer*, 295 S.W.3d at 161.

As Sharon has not achieved self-sufficiency and there is no indication that she will, these contrary holdings do not implicate her continued entitlement to maintenance. The trial court found that Sharon does not require the entire \$1,500 a month in maintenance in order to meet her reasonable needs. In reaching this conclusion, however, the trial court did not point to any changes in Sharon's financial circumstances. Her income, assets and expenses have remained about the same. The trial court found no evidence that she is voluntarily underemployed.

The trial court's factual findings do not support a conclusion that Sharon's reasonable needs have changed. Rather, the trial court based its decision to reduce Thomas's maintenance obligation on a reevaluation of Sharon's reasonable needs. The trial court found that Sharon has reasonable and necessary monthly expenses of approximately \$2,503. Based upon her monthly income of \$1,722, the trial court determined that \$850 per month would be sufficient maintenance to meet her reasonable needs.

While this type of calculation may be appropriate in some cases involving modification, we must again point to the statutory preference toward maintaining the finality of judgments and ensuring relative stability between the parties. Moreover, KRS 403.250 requires a showing of "changed circumstances so substantial and continuing as to make the terms unconscionable." As discussed in

Rayborn, the focus of this inquiry must be on whether each party's circumstances have changed from the *status quo* established under the decree. *Rayborn*, 185 S.W.3d at 644.

The trial court took issue with the reasonableness of Sharon's mortgage payments and repair expenses for her current home. The trial court suggested that these costs were unreasonable. The court further encouraged Sharon "to evaluate the practicality of continuing to reside in her current home, given these costs and repair needs and considering the amount of equity she has accumulated in this home (approximately \$100,000)."

This observation was relevant to Sharon's motion seeking an increase in maintenance, but it was not relevant to Thomas's motion to reduce maintenance. The trial court noted that the repair expenses are not recently occurring. There is no indication that Sharon's desire to remain in her current home goes beyond the standard of living which was established during the marriage. And while it may be in Sharon's best interests to downsize her current living arrangements, we do not agree that she should be required to do so in order simply to justify such a significant decrease in Thomas's maintenance obligation.

Although the trial court may be justified in believing that the amount and duration of the 1986 maintenance award was excessive, that judgment is final and cannot be modified except as provided by KRS 403.250(1). That statute requires a showing of changed circumstances, not a *de novo* reconsideration of maintenance. Since the trial court applied an incorrect standard to Thomas's

motion to reduce maintenance, we would generally remand for additional factual findings under the correct standard.

But given the trial court's factual findings and other evidence of record, we must conclude that Thomas failed to meet his burden for modification under the statute. Therefore, the trial court abused its discretion when it reduced and terminated his maintenance obligation. Consequently, we must reverse the trial court's order outright and remand for reinstatement of the original award.

Accordingly, the May 30, 2012 order by the Hopkins Family Court is reversed and this matter is remanded for reinstatement of the original award of maintenance.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joe A. Evans, III
Taylor C. Evans
Madisonville, Kentucky

BRIEF FOR APPELLEE:

Pam Corbin
Madisonville, Kentucky