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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001969-ME

OLIVER CROMWELL JAMES, II

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 09-CI-03854

DELISA DARLENE HAAR JAMES
AND MILLER, GRIFFIN & MARKS, P.S.C.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Oliver Cromwell James, II appeals from the findings of fact, conclusions of law, and order of the Fayette Family Court modifying maintenance and child support awarded to Delisa Darlene Haar James and awarding attorney fees to Delisa. Miller, Griffin & Marks, P.S.C., as Delisa's attorneys, are named as appellees. Oliver maintains the family court applied an

incorrect standard of proof and, even if the standard was proper, the family court erroneously increased the awards of maintenance and child support. He further maintains the award of attorney fees was unreasonable. We conclude there was no error and affirm.

Oliver and Delisa married on November 14, 1998, and separated in July, 2009. They were divorced by a decree of dissolution on November 1, 2010. The parties share joint custody of the parties' two minor children by an agreement incorporated into the decree. At the time of divorce, among the contested issues were Delisa's entitlement to maintenance and the amount and child support.

At the final hearing held in 2010, the family court heard testimony regarding the parties' assets and their respective incomes. During the marriage, Oliver was employed as an anesthesiologist. Delisa, a nurse, stayed at home during the marriage to care for the parties' children. From 2003 through 2007, Oliver's yearly income averaged \$470,488 and in 2008, he earned \$656,000. Because Oliver did not provide his 2009 income tax returns, his earnings for that year were unavailable to the family court. However, as the dissolution of the parties' marriage approached, Oliver had a considerable drop in income which he attributed to the formation of his own business, Commonwealth Sleep and Rehab. In 2010, his taxable income was \$160,218.

In its 2010 findings of fact, conclusions of law, and decree of dissolution, the family court noted that in the past, Oliver had earned \$600,000 annually and imputed income to him in the amount of \$180,000 per year. Based

on testimony regarding Delisa's earning capacity as a nurse, the family court imputed income to her in the amount of \$40,000 per year. Based on those imputed amounts, the family court awarded maintenance to Delisa in the amount of \$2,000 per month for five years. Because the parties' gross monthly income exceeded the upper level of the child support guidelines contained in KRS 403.212, the family court deviated from the guidelines and calculated a base support amount of \$2,100. Oliver was given credit for paying \$308 per month for the children's health insurance making his support obligation \$1,666 per month. The family court ordered the parties to exchange income tax information from all sources by October 1st of each calendar year.

In December 2012, Oliver belatedly provided Delisa with a copy of his 2011 personal tax returns. Those returns showed that his total income for 2011, the year following the divorce, was \$617,393, well above the \$180,000 imputed to him in 2010 by the family court. Upon learning of Oliver's increased income, Delisa filed a motion to modify maintenance and child support.

Delisa's motion was heard on August 5, 2013.¹ Delisa's expert witness, Calvin D. Cranfill, CPA, testified that based on Oliver's 2012 K-1, Oliver took a distribution from his business of \$389,629 and a salary of \$125,000. His monthly after-tax cash received for 2011 and 2012 were, respectively, \$21,246 and \$38,000.

¹ Oliver also filed a motion for equal timesharing and evidence was also heard regarding that motion. The family court sustained Oliver's motion but Delisa did not file a cross-appeal and, therefore, we do not recite the evidence pertaining to that portion of the family court's order.

Delisa testified she began working in April 2012 and earns \$48,000 per year. She testified her lifestyle changed significantly since the divorce. She moved to a much smaller home and is unable to provide the children with the same lifestyle enjoyed before the divorce. Delisa testified regarding the reasonable monthly expenses for her and the children, which she stated were \$9,287.66 per month. Her net income at the time of the 2013 hearing was \$2,275 per month.

Oliver testified regarding his decrease in income just prior to the divorce and his increased income in the year that immediately followed. He explained that after the divorce, he realized his business was not generating the income expected and hired a consultant who discovered billing deficiencies. Oliver admitted his income in 2010 would have been higher had the billing issues been resolved earlier.

Based on the testimony, including Oliver's admission that his income just prior to the divorce would have been higher if proper billing procedures were in place, the family court found there was a substantial and continuing change in circumstances rendering the 2010 maintenance and child support awards unconscionable. Noting Oliver's income miraculously increased just after the "dust had settled on the divorce" the family court modified both awards.

The family court increased Delisa's maintenance to \$3,000 per month retroactive to January 2013 when Delisa filed her motion for modification and extended the period for an additional three years. Because the parties' monthly income exceeded \$15,000 per month as provided for in the upper level of the child

support guidelines, the family court found it appropriate to deviate from the child support guidelines and awarded \$2,200 per month in child support. The family court also awarded Delisa reasonable attorney fees which were determined to be \$15,000.

Oliver's initial contention concerns whether the family court applied the proper burden of proof. This issue is properly one of law and subject to *de novo* review. *Western Ky. Coca-Cola Bottling Co. Inc., v. Revenue Cabinet*, 80 S.W.3d 790 (Ky.App. 2001).

KRS 403.250(1) states, in relevant part:

(1) 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.

The burden of proof is upon the party seeking modification of the award.

Daunhauer v. Daunhauer, 295 S.W.3d 154, 157 (Ky.App. 2009). Therefore, Delisa had the burden to demonstrate that a substantial and continuing change in circumstances occurred since the original maintenance award rendering the maintenance award unconscionable.

Delisa testified regarding her expenses and, most persuasive, produced expert testimony that with the ink barely dry on the 2010 maintenance award, Oliver's income increased over three times the amount imputed to him in 2010. Oliver's only explanation for the dramatic decrease in income just prior to the divorce was a deficient billing system. Following the hearing, the family court

expressed skepticism regarding Oliver's explanation for his decrease in income just prior to the divorce and observed it appeared Oliver intentionally reduced his income to avoid higher amounts of maintenance and child support.

Oliver contends the family court's disbelief of Oliver's explanation indicates the family court shifted the burden to him to demonstrate there was no substantial and continuing change in circumstances requiring a modification of the maintenance award. We find no merit in his contention.

The family court's opinion regarding why Oliver's income suddenly and drastically increased in the post-divorce months did not shift the burden of proof. Delisa's burden was to demonstrate a change of substantial and continuing change of circumstances as to render the original maintenance award unconscionable, not to demonstrate why those circumstances changed. The family court specifically found Delisa met her burden.

Our standard of review applicable to a family court's modification of a maintenance award is well established:

We review the family court's determination regarding a motion to modify maintenance for an abuse of discretion. We cannot substitute our judgment for the family court's if there is substantial evidence supporting that court's decision. Further, we may not set aside the family court's factual findings unless they are clearly erroneous.

Block v. Block, 252 S.W.3d 156, 159 (Ky.App. 2007) (citations omitted).

Maintenance "is a matter which has been traditionally delegated to the sound and

broad discretion of the trial court[.]” *Bickel v. Bickel*, 95 S.W.3d 925, 927-28 (Ky.App. 2002).

Although the law favors finality, KRS 403.250(1) permits modification of a maintenance award.

Although we certainly do not wish to foster an atmosphere in which a long-parted spouse may move for a modification of a maintenance award simply to share the wealth with a former spouse who has fortuitously come into a large sum of money, or simply bettered his position in life through his own hard work and efforts, the spouse who is determined to be in need of maintenance has some expectation that he or she will be supported according to the standard of living established during the marriage to the extent that is possible.

Roberts v. Roberts, 744 S.W.2d 433, 436 (Ky.App. 1988).

Oliver argues the substantial and continuing change in circumstances of the payor is not sufficient to warrant a modification of maintenance. In support, he cites *Roberts* where the court held that because the payor had received an inheritance and the payee suffered health problems and could no longer work, an increase in a maintenance award was proper. He narrowly reads the Court’s statement that the “mere showing that Mr. Roberts received an inheritance would probably not alone be enough to warrant a change in the maintenance award[.]” *Id.* at 437.

Under the facts in *Roberts*, where the inheritance was both unexpected and unrelated to Mr. Roberts earning capacity during the marriage, we would agree that his sudden fortuitous wealth after the divorce alone would not justify a

maintenance modification. However, that factual situation has little relevance to the present. Maintenance awards and modifications of those awards are considered on a case-by-case basis and, as indicated by *Roberts*, on review, we consider the equity of the outcome. *Id.* at 436.

Here, modification of the maintenance award is an equitable outcome. Whether intentional or, as explained by Oliver, a result of inadequate billing system in the years just prior to the divorce, Oliver's representation of his actual annual income in 2010 was extraordinarily low and, consequently, maintenance was based on that amount. Based on this deflated income, the family court made its original award considering Oliver's ability to pay maintenance while providing for his own reasonable needs. Certainly, had Oliver earned over \$600,000 per year in 2010, the award would have been considerably higher. We conclude that the family court did not abuse its discretion when it found Oliver's increase in earning capacity immediately following the maintenance award was a substantial and continuing change in circumstances.

We also conclude the family court was well within its discretion when it determined the original maintenance award is now unconscionable.

“‘Unconscionable’ means manifestly unfair or inequitable.” *Bickel*, 95 S.W.3d at 927. During the marriage, the parties enjoyed a standard of living commensurate with Oliver's more than one-half million dollar annual income. Because of the deflated maintenance and child support awards, Delisa suffered a decrease in

lifestyle from that maintained during the marriage. There was substantial evidence that the 2010 maintenance award is now unconscionable.

The same standard of review application to the modification of the maintenance award applies to the family court's modification of the child support award. We may not reverse unless the family court abused its discretion.

Downing v. Downing, 45 S.W.3d 449, 454 (Ky.App. 2001).

Delisa requested a modification of child support based on her payment of the children's medical insurance and Oliver's net income of \$38,000 per month and her income of \$4,000 per month. Again, the court found that deviation from the guidelines was appropriate and awarded \$2,200 per month in child support based on the standard of living enjoyed by the children during the marriage and the parties' current incomes.

KRS 403.213(1) provides in part that "[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing." "When child support is set outside of the Guidelines, the Court is required to exercise discretion in arriving at a fair and equitable amount of support." *Downing*, 45 S.W.3d at 452.

In *Downing*, the Court expressly rejected a "share the wealth" approach to child support awards. Under that approach, the family court may "determine the reasonable needs of the children by mathematically calculating child support over

and above the maximum guidelines[.]” *Id.* at 455. The Court held a more favorable approach is one that depends on the child’s reasonable needs.

Beyond a certain point, additional child support serves no purpose but to provide extravagance and an unwarranted transfer of wealth. While to some degree children have a right to share in each parent's standard of living, child support must be set in an amount which is reasonably and rationally related to the realistic needs of the children. This is sometimes referred to as the “Three Pony Rule.” That is, no child, no matter how wealthy the parents, needs to be provided more than three ponies.

Id. at 456.

Again, Oliver’s actual income of over three times the amount imputed to him in 2010 is sufficient to support a modification of the child support award. After hearing testimony regarding the children’s reasonable needs including household expenses to ensure the children live a lifestyle similar to that enjoyed during the marriage, the family court properly found modification was warranted and based the amount “upon the reasonable needs of the children taking into consideration especially the standard of living enjoyed by the children during the marriage and the financial position of the parents.” The family court did not abuse its discretion when it increased the child support award to \$2,200 per month.

The final issue presented is whether the family court erred when it awarded attorney fees to Delisa. KRS 403.220 provides that the court may order a party to pay a reasonable amount for the cost and attorney fees if there is a disparity in the relative financial resources of the parties in favor of the payor. The amount to be awarded is within the discretion of the trial judge. *Wilhoit v. Wilhoit*, 521 S.W.2d

512, 514 (Ky. 1975).

Here, there is a wide disparity in the parties' respective incomes and, therefore, the family court properly ordered Oliver to pay Delisa's attorney fees and expert fees. Delisa's counsel submitted an affidavit detailing the hours worked and billed for services provided to Delisa and expert witness fees incurred in the 2013 proceeding. We conclude the family court did not abuse its discretion in awarding \$15,000 in attorney fees and expert fees.

For the reasons stated, we affirm the Fayette Family Court's findings of fact, conclusions of law and order.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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