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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002219-MR

DAVID LADUKE — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 08-CI-502009

JOAN LADUKE (now PRESTIGIACOMO) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

STUMBO, JUDGE: David LaDuke ("LaDuke") appeals from an Order of the Jefferson Circuit Court denying his Kentucky Civil Rule (CR) 60.02 motion to reconsider an Order reducing an award of maintenance payable to him by his former wife Joan LaDuke (hereinafter "Prestigiacomo"). LaDuke contends that the trial court improperly failed to consider new evidence demonstrating that

Prestigiacomo's income was improperly calculated. For the foregoing reasons, we find no error and AFFIRM the Order on appeal.

On October 28, 2009, the Jefferson Circuit Court, Family Division, rendered a Decree of Dissolution of Marriage terminating the marriage of LaDuke and Prestigiacomo, and incorporating by reference a Property Settlement Agreement entered into by the parties. The court also rendered an Agreed Order executed by the parties, which awarded maintenance to LaDuke in the amount of $1,450 per month through 2014, and $1,150 per month from 2014 to 2023.

On August 24, 2011, Prestigiacomo filed a Motion to terminate the maintenance award. In support of the Motion, Prestigiacomo maintained that she had retired from employment - due to circumstances beyond her control - and experienced a commensurate reduction in income. Specifically, Prestigiacomo alleged that she suffered from physical and mental health issues such that her employer advised her to retire in lieu of firing. A hearing on the Motion was conducted on September 8, 2011, which resulted in an Order rendered on September 28, 2011, reducing Prestigiacomo's maintenance obligation to $503 per month.

Thereafter, Prestigiacomo filed a CR 60.02 Motion to Reconsider with supporting memorandum. Appended to the memorandum was an exhibit characterized as newly discovered evidence, which consisted of a correspondence from her employer's insurance carrier. Prestigiacomo claimed that the

correspondence bolstered her argument that her maintenance obligation should be terminated.

LaDuke filed a responsive pleading to Prestigiacomo's Motion, as well as his own CR 60.02 Motion. Upon consideration by the court, each Motion was denied. As to LaDuke's Motion, the court determined that "it is really a motion pursuant to CR 59 and it is not timely filed." It went on to conclude that even if it were timely filed, that it was not a sound argument. The court also noted that its reduction in maintenance was based on LaDuke's needs and not Prestigiacomo's ability to pay. This appeal followed.

LaDuke now argues that the Jefferson Family Court erred in denying his CR 60.02 Motion to Reconsider the Order reducing Prestigiacomo's maintenance obligation. Specifically, LaDuke contends that the court's calculation of Prestigiacomo's income was improper and did not support a reduction in her maintenance obligation. He directs our attention to the "new evidence" appended to Prestigiacomo's CR 60.02 Motion to Reconsider, and notes that Prestigiacomo receives a substantial Long Term Disability benefit that was completely unaccounted for in the previous calculation of her monthly income. According to LaDuke's calculation, Prestigiacomo receives a monthly gross income of $8,571.00, which is more than double the trial court's calculation of $3,954.73. In sum, LaDuke contends that the evidence not only fails to support a reduction in Prestigiacomo's maintenance obligation, but that it supports an increase in the award under Kentucky Revised Statute (KRS) 403.250. In response,

Prestigiacomo maintains that her long term disability receipt of $3,574.00 per month is reduced dollar for dollar by what she receives in social security benefits. As such, she argues that LaDuke's calculation is in error and forms no basis for reversing the Order on appeal.

KRS 403.250(1) provides in relevant part that "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 corpus of LaDuke's argument on this issue is that the record does not demonstrate a change so substantial and continuing as to satisfy this provision.

In denying LaDuke's CR 60.02 Motion, the court expressly stated that its "reduction in maintenance is based on Mr. LaDuke's needs, not Ms. Prestigiacomo's ability to pay." As such, LaDuke's reliance on Prestigiacomo's income calculation is misplaced. *Arguendo*, even if Prestigiacomo's change in income upon retirement did form the basis for the court's modification of maintenance, we would find no error. We review a Family Court's disposition of CR 60.02 Motions under an abuse of discretion standard. *Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky. App. 2009). As the parties are well aware, an abuse of discretion is found where a trial judge's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)(citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). In the matter at bar, the totality of the record - including Prestigiacomo's diminution in income resulting from her disability and

retirement - demonstrates that the disposition of LaDuke's CR 60.02 Motion was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Additionally, the Jefferson Family Court determined that LaDuke's CR 60.02 Motion "is really a motion pursuant to CR 59 and it is not timely filed. Even if timely filed, however, it is not a sound argument." In sum, we find no abuse of discretion and no error on this issue.

LaDuke also briefly argues that the trial court abused its discretion when it refused to correct a mathematical error relating to the difference between LaDuke's monthly income and expenses. Specifically, LaDuke takes issue with the court's subtraction of $2,346 (representing the "Monthly Income of David and the Parties' Sole Child") from $3,050 (representing "Claimed Monthly Living Expenses of David and the Parties' Sole Child"). He maintains that the court erred in this calculation, resulting in a mathematical error in favor of Prestigiacomo in the amount of $201. He contends that this error supports a reversal of the Order on appeal.

In its September 28, 2011 Order, the Jefferson Family Court found as follows:

> Mr. LaDuke has not obtained any regular employment since the parties' divorce. He continues to perform as a musician, but does not earn any money doing so. Mr. LaDuke does not appear to have any intention of seeking employment. Though he has limited education and almost no work experience, Mr. LaDuke does not have any physical or mental impairment that prevents him from obtaining an entry-level job.

> Apart from his maintenance awards, Mr. LaDuke's only source of income is his share of Ms. Prestigiacomo's pension[.]

The issue now before us was raised before the Jefferson Family Court and rejected. We conclude from the totality of the record that the reduction in maintenance was based on all factors presented to the court including LaDuke's apparent desire not to seek employment, rather than merely based on a strict mathematical formula of LaDuke's expenses and income. While it may be true that LaDuke's expenses exceed his income by $704 per month rather than the calculated $503 per month, several other factors entered into the court's analysis including LaDuke's apparent desire not to generate an income. The question for our consideration is whether the court's denial of LaDuke's CR 60.02 Motion on this issue constitutes an abuse of discretion. *Snodgrass*, *supra*. Based on the foregoing, we conclude that it does not. As such, we find no error.

Accordingly, we AFFIRM the Order of the Jefferson Family Court denying LaDuke's Motion for CR 60.02 relief.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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