

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-002056-MR

CHAUNCEY J. TUDOR

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. MICHAEL DIXON, JUDGE
ACTION NO. 08-CI-00119

MELANIE K. TUDOR

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Appellant appeals from the Jessamine Family Court's November 12, 2013 Order overruling Appellant's motion for modification of his maintenance obligation. This is Appellant's second appeal to this Court on the matters regarding modification of his maintenance obligation. After careful consideration, we affirm the decision of the trial court.

BACKGROUND

On April 20, 2009, the trial court entered a Decree of Dissolution of Marriage for the parties. During the marriage, Appellee served as a stay-at-home mother, thus lacking proper employment history, skills, or training. Appellant, however, was found to have annual earnings of approximately \$104,000.00. Consequently, the trial court ordered the Appellant to pay maintenance to the Appellee in the amount of \$1,700.00 per month until the Appellee reaches the age of sixty-two (62). Additionally, Appellant was awarded primary care of the parties' two children, and was to receive \$515.00 per month in child support from the Appellee.

Approximately two years later, on January 5, 2011, Appellant filed a motion to modify his maintenance obligation. Appellant based this motion on the grounds that he had suffered a reduction in his gross annual income so substantial that continued payment of the original maintenance award would be unconscionable.

On November 29, 2011, following a contested hearing, the trial court entered an order denying Appellant's request to modify his maintenance award. At the time he initially filed his motion to modify maintenance, Appellant was earning approximately \$45,000.00 per year, whereas at the time of the trial court's original findings he was earning \$96,000.00 per year. The trial court found this change in income to be substantial, thus satisfying the standard for a modification of a maintenance order, governed under Kentucky Revised Statutes (KRS) 403.250.

The trial court additionally found, however, that Appellant was voluntarily underemployed and thus denied the motion for modification of maintenance.

Appellant appealed the trial court's decision and a panel of our Court entered an opinion reversing and remanding the trial court's denial of Appellant's motion for modification of the maintenance obligation. The trial court revisited this issue as a result of our opinion and on November 12, 2013, entered its subsequent order denying Appellant's motion to modify maintenance. From that Order, this appeal followed.

STANDARD OF REVIEW

If there is substantial evidence supporting the lower court's maintenance decision, an appellate court cannot substitute its judgment for that of the family court. *Block v. Block*, 252 S.W.3d 156 (Ky. App. 2007). "The determination of questions regarding maintenance is a matter which has traditionally been delegated to the sound and broad discretion of the trial court, and an appellate court will not disturb the trial court absent an abuse of discretion. An appellate court is not authorized to substitute its own judgment for that of a trial court where the trial court's decision is supported by substantial evidence." *Bickel v. Bickel*, 95 S.W.3d 925, 927-28 (Ky. App. 2002). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005). With these standards in mind, we turn to the matter before us.

ANALYSIS

In 2011, the trial court listed in its findings of fact that consideration of the new wife's income was proper for the consideration of Appellant's complete circumstances in the court's determination of whether or not a modification of the maintenance order is appropriate.

In June 2013, this Court reviewed Appellant's appeal of the first Jessamine County Circuit Court order, which denied his request to modify the amount of monthly maintenance owed to Appellee. This Court reversed and remanded on grounds that the lower court improperly considered the income of Appellant's new wife. The Court provided that relying primarily on the income of Chauncey's new wife, and citing expenses relating to their marriage, was improper in the determination of modification of Appellant's maintenance obligation. Additionally, this Court provided that the lower court should focus on whether the change in Appellant's income is substantial and continuing such that the award is unconscionable. The issue of voluntary underemployment was also mentioned.

KRS 403.250(1) provides that maintenance payments may be modified "upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." Additionally, the statutory language of KRS 403.200 provides when a court may grant an order for maintenance. In the interest of justice, there is a list of factors that a court must consider in order for the maintenance order to be properly granted.

To determine whether circumstances have changed, a trial court may compare the parties' current circumstances to those at the time the original separation decree was entered. *Block v. Block*, 252 S.W.3d at 160. A substantial change in circumstances may guide a court in its determination to increase, decrease, suspend, or terminate a maintenance order. [Change in financial condition or needs of husband or wife are also grounds for modification of maintenance, 18 American Law Reports \(A.L.R.\) 2d 10](#) (1951). Additionally, “‘unconscionable’ means ‘manifestly unfair or inequitable.’” [Bickel, 95 S.W.3d at 927](#). It is important to note that the party seeking modification of child support or maintenance has the burden of proving a changed circumstance so substantial and ongoing that the terms of the decree have become unconscionable. *Wilcher v. Wilcher*, 566 S.W.2d 173 (Ky. App. 1978).

Appellant's circumstances have changed since the time of issuance of the maintenance order to the time of his request for modification of that order. At the conclusion of the divorce proceedings, Appellant earned approximately \$96,000 per year. However, in 2011, at the time of Appellant's request for modification of maintenance, he was earning \$48,000 per year.

After this Court reversed and remanded the lower court's decision denying Appellant's request for modification of the maintenance order, on November 12, 2013, the lower court again denied Appellant relief. The trial court based its denial of modification on the reasoning that, while the Appellant's

income has decreased by 50%, the decrease was due to his voluntary underemployment. We agree.

The trial court did not use Appellant's new spouse's income to justify the reason for refusing to find the maintenance award unconscionable, but as a reason to explain why Appellant is able to maintain his lifestyle while remaining underemployed. This is not an abuse of discretion. The Appellant is currently employed as a constable and has another job making \$45,000 per year. The constable job is an elected position which pays very little. Clearly, the Appellant has made decisions regarding his employment that were not based on the amount of income positions paid.

The Appellant contends that the reason he is making less money is due to the drop in the automobile market. He does not, however, provide evidence of the impact on his salary nor does he explain the rebound of the automobile industry and its effect on his salary. He has not met his burden in proving he was not voluntarily underemployed. Thus, we affirm the trial court's decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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