RENDERED: JUNE 7, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NOS. 2017-CA-000915-MR & 2017-CA-000975-MR

ANNE KATHERINE WILSON APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEALFROM MERCER CIRCUIT COURT
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 11-CI-00330

ALAN LEE WILSON APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Anne Katherine Wilson ("Kathy") appeals, and Alan Lee Wilson ("Lee") cross-appeals, from the Mercer Circuit Court's order modifying Lee's spousal maintenance obligation. Kathy argues that the termination of a lease allocated to Lee in the parties' divorce decree did not constitute a substantial and continuing changed circumstance sufficient to reduce

Lee's maintenance obligation, while Lee argues that, pursuant to *Daunhauer v. Daunhauer*, 295 S.W.3d 154 (Ky. App. 2009), the circuit court should have terminated his entire maintenance obligation. Finding no error regarding both appeals, we affirm.

BACKGROUND

Lee and Kathy were married in August of 1983, and the Mercer Circuit Court entered a decree dissolving their marriage in June of 2012. The parties entered into a written Settlement Agreement in July of 2012 (the "Settlement Agreement"), which was ultimately made a part of the divorce decree. Per the Settlement Agreement, Lee would pay Kathy maintenance in the sum of $150,000.00 from January 1, 2013, through December 31, 2020. Lee would pay $1,000.00 per month for the entirety of the period, with one additional $6,750.00 balloon payment each of the eight years. No specific limiting conditions, such as death, remarriage, or cohabitation, were made a part of the parties' maintenance agreement, and no other provisions of the Settlement Agreement addressed maintenance.

Lee paid the maintenance on the foregoing schedule through August of 2016. In September of 2016, Lee filed a motion to modify his maintenance obligations and asked the court to relieve him of any obligation to pay Kathy maintenance. In his motion, Lee argued that he had sustained significant farming

losses since the divorce. Further, he argued that, because Verizon had recently terminated a land lease that the parties had entered into during the marriage and that was assigned to Lee in the Separation Agreement (the "Lease"), Lee's income had been significantly reduced. Therefore, he argued that his farming losses and the Lease termination constituted substantial enough changes in circumstances to warrant modifying his maintenance obligations pursuant to Kentucky Revised Statutes (KRS) 403.250.

To substantiate his arguments regarding his farming losses, Lee tendered with his motion to modify maintenance a Federal Tax Return Schedule F from the tax years 2012, 2013, 2014, and 2015; all of which showed losses in his farming operation. The trial court held a hearing on Lee's modification motion. Upon cross-examination of Lee's accountant, Walter Goggin affirmed that Lee had been reporting farming losses since 2006, only reporting a small gain in 2005. Further, Goggin testified that the losses reported in 2012, 2013, 2014 and 2015 were comparable, if not less than, the losses that were reported in a number of the years before the parties divorced. In 2010, two years before the parties divorced, the farm loss was $287,092.00, the largest loss during the 2005 to 2015 period.

As to Lee's plans for the future, Lee testified at the hearing that he had taken a job with Pro Ag in August of 2016 as a full-time truck driver and maintenance worker and that he had listed his farm for sale for $2.3 million,

ultimately hoping to extricate himself from cattle farming and to work full-time as a trucker. Lee further testified that, as of February 2017, his debts totaled $655,136.68 to Farm Credit and $1,806,176.00 in unsecured debt to his parents.

As previously discussed, the Lease was marital property of the estate at the time of the divorce filing, and Lee received the Lease and its proceeds as his property in the Settlement Agreement in the marital property division. The Lease provided that Verizon would pay the fixed sum of $12,000.00 per year as rent and contained a term which allowed Verizon to terminate the Lease in any year as long as Verizon provided proper notice to the parties. Verizon did in fact terminate the Lease in April of 2016, such termination taking effect in September of 2016.

After the hearing, the family court subsequently issued findings of fact, conclusions of law, and an order on May 2, 2017, and found that Verizon's termination of the Lease constituted a changed circumstance substantial and continuing enough to warrant a modification, but not a total cessation, of Lee's maintenance payments to Kathy. The family court ordered Lee's maintenance obligation to be changed from $1,000.00 to $500.00 per month for the remaining term, and the annual balloon payment was modified from $6,750.00 to $3,375.00. This appeal and cross-appeal followed.

Additional facts will be discussed as they become relevant.

ANALYSIS

As a preliminary matter, Lee argues that Kathy's brief should be stricken or, in the alternative, that we should review the case for manifest injustice only due to her failure to cite to the record on appeal. We agree that, in contravention of Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv), Kathy's "Statement of the Case" in her brief failed to include "ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings . . . supporting each of the statements narrated in the summary." Further, as required by CR 76.12(4)(c)(v), nowhere can this Court discern in the "Argument" section of Kathy's brief any specific citations to the record on appeal supporting each of her arguments or references to the record showing whether the issue was properly preserved for review. While Kathy did append items to her brief, "an appellate court cannot consider items that were not first presented to the trial court. By citing us to the specific location of the item in the record, we can confirm the document was presented to the trial court and is properly before us." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012).

In *Hallis v. Hallis*, a panel of this Court explained:

> It is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe

> passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated.

328 S.W.3d 694, 696 (Ky. App. 2010) (internal quotation marks and citations omitted). The Court in *Hallis v. Hallis* further stated that, in situations such as these, an appellate court has the following options: "(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only . . . [.]" *Id.* (citing *Elwell v. Stone,* 799 S.W.2d 46, 47 (Ky. App. 1990)). In this case, the shortcomings in Kathy's brief do not warrant striking her brief or reviewing the appeal solely for manifest injustice. Although we have elected not to impose the more severe sanctions permitted under *Hallis* and CR 76.12, we advise counsel our decision may not be so lenient upon the occurrence of subsequent violations of this Court's procedural rules.

Turning to the standard of review applicable in this case, the circuit court's decision to modify a maintenance award may only be disturbed if the circuit court "abused its discretion or based its decision on findings of fact that are clearly erroneous." *Powell v. Powell,* 107 S.W.3d 222, 224 (Ky. 2003); *see also Tudor v. Tudor*, 399 S.W.3d 791, 793 (Ky. App. 2013) (internal citation omitted). The circuit court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Artrip v. Noe,* 311 S.W.3d 229,

232 (Ky. 2010) (internal citation omitted). Additionally, a trial court's factual findings are not clearly erroneous if they are "supported by substantial evidence." *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). Overall, "[f]or the purposes of the standard of review, in reviewing family court cases, we acknowledge that a family court judge has extremely broad discretion in ascertaining the reliability of the evidence presented." *Jones v. Hammond*, 329 S.W.3d 331, 334-35 (Ky. App. 2010) (internal citation omitted).

a. **Kathy's Appeal**

Kathy argues that the trial court abused its discretion when it found that the Lease termination constituted a substantial and continuing changed circumstance under Kentucky's statute governing the modification of maintenance agreements. Such statute, KRS 403.250(1), states 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." Maintenance becomes unconscionable if it is "manifestly unfair or inequitable." *Combs v. Combs*, 787 S.W.2d 260, 261 (Ky. 1990) (quoting *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974)). As stated in *Block v. Block*, "[t]o determine whether the circumstances have changed, we compare the parties' current circumstances to those at the time the court's separation decree was entered." 252 S.W.3d 156, 160 (Ky. App. 2008) (internal citation omitted).

In this case, the crux of Kathy's argument is that the termination of the Lease did not constitute a substantial and continuing change under KRS 403.250(1) because Lee knew about the termination clause in the Lease at the time of the divorce yet retained the Lease and its proceeds in the Settlement Agreement, thereby "assuming the risk" that Verizon may one day terminate the Lease. We disagree, however, as the statutory standard is not which party assumed the risk that the Lease may one day be terminated, but rather whether the record in this case contains substantial evidence that the termination of the Lease was a substantial and continuing changed circumstance. We find that the record contains such evidence. For example, Goggin testified to the following in his deposition:

> So when the cell tower went out, overall – well, the cell tower revenue for a given year compared to the total revenue, had that revenue – had the cell tower not been there, [Lee's] revenue would have been down 15 percent, 17 percent, and 17 percent. *So it's a – that cell tower was a substantial asset to him. And when that went away, that revenue stream stopped*.

(Emphasis added). Further, Lee testified that he had been paying the spousal maintenance by automatically paying Kathy from his checking account once the monthly payment from Verizon was paid to him, and that he had to rely on a line of credit in order to make the annual balloon payment to Kathy. Without the monthly Lease payments, Lee would have had significant trouble paying the monthly maintenance amounts to Kathy, at least without incurring more debt.

Finally, it appears that since the time the Separation Agreement was entered into by the parties, Lee's parents had continued to lend him money in larger and larger amounts and had largely kept him from bankruptcy. As noted by the trial court, "monetary gifts from [Lee's] parents . . . are less certain. While they have existed in the past, the Court has little reason to expect they will continue." The monthly payments received by Lee from the Lease acted "as a bulwark against [Lee's] total financial failure." Undoubtedly, the parties' current circumstances compared to those at the time the court's separation decree was entered had changed with the termination of the Lease.

Moreover, the termination of the Lease was clearly a continuing change, as there was no indication that Verizon had any intentions of renewing or reinstating the Lease in the future. We cannot find that the trial court erred when it found that it would be "manifestly unfair or inequitable" to continue the full maintenance amounts. As a result of the foregoing substantial evidence, we do not find that the trial court's findings of fact were clearly erroneous or that its decision rose to the level of an abuse of discretion, and therefore affirm the trial court's decision to modify, but not order a total cessation, of Lee's maintenance obligation.

b. **Lee's Cross-Appeal**

Lee argues in his cross-appeal that, pursuant to *Daunhauer*, he was entitled to a complete cessation of his maintenance payments, as Kathy had been sufficiently rehabilitated since the original award of spousal maintenance and therefore did not require continued maintenance payments. Because Kathy was earning approximately $31.00 per hour as a physical therapist assistant, Lee cites *Daunhauer* for the proposition that, once the person receiving maintenance becomes self-sufficient through employment, the maintenance obligation should be terminated.

However, Lee's argument fails to take into account that, in *Daunhauer*, the parties' separation agreement included a specific provision that either party could request review of the maintenance obligation, which terminated *only* upon the wife's death or remarriage, after the occurrence of an initial two-year period. *Daunhauer*, 295 S.W.3d at 155. As a result, a panel of this Court viewed the maintenance award as rehabilitative, reasoning that, "the parties' handwritten settlement agreement did not prohibit modification *but instead presumed it*." *Id*. at 156 (emphasis added). In fact, "[t]he original maintenance award was premised upon the finding that [the wife] was not capable of self-sufficiency immediately after the divorce." *Id*. at 161. In contrast, the Separation Agreement in this case expressly provided for the payment of maintenance by Lee for a set number of

years only and contained no provision for the review or modification of the Separation Agreement. Therefore, it was not "premised upon the finding" that Kathy was not self-sufficient after the divorce. *Id*. Further, although the Court in *Daunhauer* explained the policy behind maintenance as being rehabilitative, it still performed an analysis under KRS 403.250. Therefore, we do not find that *Daunhauer* mandates that Lee's maintenance obligations be completely terminated solely based on the fact that Kathy had obtained employment, but rather that we again must analyze whether the circumstances were changed in such a substantial and continuing fashion under KRS 403.250 that a total cessation of Lee's maintenance obligation was warranted.

In the case *sub judice*, the circuit court's determination that Lee's farming losses and the Lease termination did not constitute such substantial and continuing changes to warrant a complete cessation of his maintenance obligation was not clearly erroneous or an abuse of discretion. As determined by the circuit court, substantial evidence of record demonstrates that Lee's inability to make farming profitable "existed prior to and after dissolution," and such risk had been both "borne by both parties during the marriage" and "borne by [Lee] when agreeing to undertake a maintenance obligation." In fact, evidence existed that Lee had sustained more significant farming losses in 2010 – two years before the parties' divorce.

We further agree with the circuit court that Lee's farming losses cannot be seen as "continuing" under the statute, as Lee had already listed his farm for sale and would presumably be able to satisfy a large amount of his debt upon such sale. Further, at the time of the hearing, Lee had over one hundred cattle awaiting sale, the profits from which he would not have to re-invest into the purchase of more cattle and could go towards alleviation of his financial woes. Therefore, we agree with the circuit court that, standing alone, Lee's farming troubles were not a substantial and changed circumstance meriting cessation of his maintenance payments. Here, the trial court was well-informed concerning the state of Lee's finances, considered the evidence before it, and made a decision supported by substantial evidence. As a result, we cannot find that the circuit court's findings were clearly erroneous or that it abused its discretion.

CONCLUSION

For the foregoing reasons, we affirm the Mercer Circuit Court's order modifying Lee's maintenance obligation.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
William R. Noelker Danville, Kentucky	J. Hadden Dean Danville, Kentucky