

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001779-MR

HARRY WEISER

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 93-CI-00201

ELIZABETH HAMMOND (FORMERLY WEISER)

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Harry Weiser has appealed from an order of the Scott Circuit Court entered on May 21, 2002, which denied Dr. Weiser's motion requesting that his maintenance obligation be terminated. Having concluded that the trial court did not abuse its discretion by denying Dr. Weiser's motion, we affirm.

Dr. Weiser and Elizabeth Hammond were married on May 18, 1989. Two children were born of this marriage, Alexandra Jett Weiser, born on January 29, 1990, and Elizabeth Jade Weiser, born on September 2, 1993. Approximately four months

prior to the birth of their second child, the couple separated. At the time of the separation, Dr. Weiser and Hammond were living in Connecticut, where Dr. Weiser was in the process of meeting his educational requirements.¹ Shortly thereafter, Hammond moved back to Georgetown, Kentucky, along with the couple's then three-year-old child.²

On December 13, 1993, Dr. Weiser and Hammond signed a separation agreement that had been prepared by Hammond's attorney.³ As part of this separation agreement, Dr. Weiser agreed to pay \$1,500.00 per month in child support for the two children, and \$900.00 per month in spousal maintenance. The separation agreement further provided that the \$900.00 per month maintenance payments were to continue until "the death of either party or the remarriage of [Hammond] or until January 1, 2000," when the maintenance payment obligation would then be "reevaluated" according to the financial circumstances of both parties. Because Hammond had a "history of cancer and heart problems,"⁴ the separation agreement specifically stated that her

¹ Dr. Weiser is a neurosurgeon, who was employed by the United States Army at the time the trial court's final order was entered.

² Hammond is from Georgetown, Kentucky. The couple met at the University of Kentucky Medical Center where Hammond was employed as a registered nurse and Dr. Weiser was completing a portion of his residency requirements.

³ Dr. Weiser testified that at the time he signed the separation agreement, he had dismissed his attorneys and was not represented by counsel.

⁴ Hammond testified that she was diagnosed with Hodgkin's disease in 1973. According to Hammond, her treatments were successful and her doctors informed

"health and health care needs" were to be taken into account as a part of this "reevaluation."⁵

On October 24, 1994, the separation agreement was filed with the Scott Circuit Court.⁶ Hammond has testified that at the time the separation agreement was filed, she had no health problems other than the heart murmur which had been detected shortly after the birth of the couple's first child. On October 25, 1994, a decree of dissolution was entered by the

her afterwards that her risk of developing cancer in the future was no greater than anyone else. Shortly after the birth of the couple's first child in 1990, her doctors discovered that Hammond had a heart murmur.

⁵ The pertinent provisions of the separation agreement regarding spousal maintenance were as follows:

5. Spousal Maintenance. It is further agreed by and between the parties hereto that the Respondent shall pay to the Petitioner as spousal maintenance the sum of \$900.00 per month. Said payments shall be due and payable \$450.00 on the first day of each month and \$450.00 on the 15th day of each month and shall also be voluntarily assigned from his wages. This sum shall continue to be due and payable until the death of either party or the remarriage of the Petitioner or until January 1, 2000, at which time, maintenance shall be reevaluated given the financial circumstances of both parties, including but not limited to, the health and health care needs of the Petitioner. In any event, maintenance shall be only terminable upon the death or remarriage of the Petitioner and except for those contingencies Petitioner's [sic] liability therefor based on the financial circumstances, shall always stay openended as provided in the case of James v. James, Ky.App., 618 S.W.2d 187 (1981) because of her history of cancer and heart problems.

⁶ Hammond testified that she wanted to wait before filing the separation agreement due to the fact that the couple's second child was still an infant and Hammond had hoped at the time that she and Dr. Weiser might be able to reconcile.

trial court. The decree incorporated by reference the parties' separation agreement.

In approximately May 1995, Hammond began experiencing serious health problems. On May 5, 1995, after an episode in which she suffered cardiac arrest, Hammond underwent open heart surgery. In June 1995 Hammond had her gallbladder surgically removed. In November 1995 Hammond underwent a thoracotomy to correct complications associated with the lining of her lungs. Over the next two years, Hammond underwent several medical procedures designed to correct problems associated with blockages in her blood vessels.⁷ As a result of her various health problems, Hammond was forced to quit working. She eventually sought and received disability benefits from the Social Security Administration. According to Hammond's testimony, she began receiving disability benefits in late 1999, or early 2000. Hammond received benefits of \$1,046.00 per month for herself and \$522.00 per month for the two children.

On February 22, 2001, Hammond filed a motion seeking an increase in Dr. Weiser's maintenance obligation pursuant to the "reevaluation" provision of the couple's separation agreement. On June 11, 2001, Dr. Weiser moved the trial court

⁷ According to Hammond's testimony, she was eventually diagnosed as having constrictive pericarditis. This disease is marked by the thickening of the sac surrounding the heart which restricts the ability of the heart to beat. Problems associated with this disease include congestive heart failure, shortness of breath, and fatigue.

to terminate his maintenance obligation. Dr. Weiser argued that since Hammond was receiving Social Security disability benefits, she had "experienced a substantial and continuing change in circumstances that render[ed] continued maintenance unconscionable."

An evidentiary hearing was held before the Domestic Relations Commissioner and he filed recommended findings of fact and conclusions of law. On May 21, 2002, the trial court entered an order adopting the Commissioner's recommendations in full.⁸ The trial court found that Hammond had failed to meet her burden to justify an increase in Dr. Weiser's maintenance obligation, and that "considering the present financial resources of the parties . . . it would be manifestly unfair to terminate [Dr. Weiser's] maintenance obligation." This appeal followed.⁹

Dr. Weiser argues that under the terms of the separation agreement, the trial court erred by not terminating his obligation to pay Hammond spousal maintenance in the amount of \$900.00 per month. Dr. Weiser claims that Hammond had

⁸ In adopting the Commissioner's recommendations, the trial court corrected one clerical error that is not relevant to this appeal.

⁹ On May 31, 2002, Dr. Weiser filed a motion to alter, amend or vacate the trial court's order entered on May 21, 2002, pursuant to Kentucky Rules of Civil Procedure (CR) 59.02. Dr. Weiser argued that the trial court's original calculation of child support arrearages was the proper amount and that the trial court erred in granting Hammond's motion to correct. The trial court denied Dr. Weiser's motion on August 1, 2002. This issue is not relevant for purposes of this appeal.

experienced a substantial change in circumstances as to make the terms of the separation agreement unconscionable¹⁰ and that Hammond could not demonstrate her entitlement to maintenance pursuant to KRS¹¹ 403.200. Dr. Weiser challenges Hammond's entitlement to maintenance on grounds: (1) that she has sufficient property, in the form of disability benefits, to provide for her reasonable needs; and (2) that she has failed to prove that she is unable to support herself through appropriate employment.¹²

We begin our analysis by stating the appropriate standard of review and the relevant statutory standards. In Clark v. Clark,¹³ this Court stated:

¹⁰ See Wilhoit v. Wilhoit, Ky., 506 S.W.2d 511, 513 (1974)(holding that "[t]he provision of KRS 403.250 which imposes the test of modification on a showing of changed circumstance so substantial and continuing as to make the terms unconscionable does not introduce a novel standard unknown to the law. . . . It is evident that the term 'unconscionable' as used in KRS 403.250 means 'manifestly unfair or inequitable'"). We conclude that Dr. Weiser has unnecessarily argued that the continuation of maintenance is unconscionable. KRS 403.250 has no applicability to this case because that provision deals with modification of decrees respecting maintenance where the parties have not provided for modification in their separation agreement. The parties agreed that on January 1, 2000, "maintenance shall be reevaluated given the financial circumstances of both parties[.]" We understand this provision to require a de novo determination of maintenance pursuant to KRS 403.200.

¹¹ Kentucky Revised Statutes.

¹² The separation agreement clearly states that maintenance "shall always stay openended as provided in the case of James v. James, Ky.App., 618 S.W.2d 187 (1981)." In James, this Court upheld a trial court's decision to reserve the issue of a maintenance determination due to the fact that although the wife was not at the time in need of support, she "had a history of cancer" and might require support in the future. Id. at 188-89. Dr. Weiser also challenges the fairness of the perpetual maintenance obligation under James, but since Hammond was disabled on January 1, 2000, James is not implicated.

¹³ Ky.App., 782 S.W.2d 56, 60 (1990).

[M]aintenance determinations are within the sound discretion of the trial court. In such matters, unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge [citations omitted].

Further, KRS 403.180 provides as follows:

- (1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children [emphasis added].
- (2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable [emphases added].
- (3) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, support, and maintenance.
- (4) If the court finds that the separation agreement is not unconscionable as to support, maintenance, and property:

- (a) Unless the separation agreement provides to the contrary, its terms shall be set forth verbatim or incorporated by reference in the decree of dissolution or legal separation and the parties shall be ordered to perform them; or
- (b) If the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and state that the court has found the terms not unconscionable [emphases added].
- (5) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms [emphases added].
- (6) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides. Otherwise, terms of a separation agreement are automatically modified by modification of the decree [emphasis added].

In pertinent part, the parties' separation agreement reads as follows:

This sum shall continue to be due and payable until the death of either party or the remarriage of the Petitioner or until January 1, 2000, at which time, maintenance shall be reevaluated given the financial circumstances of both parties, including but not limited to, the health and health care needs of the Petitioner.

We review this language with general contract principles in mind,¹⁴ giving unambiguous terms their plain and ordinary meaning.¹⁵

The separation agreement clearly provides that spousal maintenance in the sum of \$900.00 per month "shall continue to be due and payable until the death of either party or the remarriage of the Petitioner or until January 1, 2000, at which time, maintenance shall be reevaluated given the financial circumstances of both parties, including but not limited to, the health and health care needs of the Petitioner." Thus, we are required to consider the maintenance award under the provisions of KRS 403.200.

Dr. Weiser claims that since Hammond is now receiving \$1,568.00 per month in Social Security benefits, she now has sufficient property to support herself. Specifically, Dr. Weiser argues that when Hammond's Social Security benefits (1,568.00 per month) are added to Dr. Weiser's child support obligation (\$1,500.00 per month), Hammond has a total income of \$3,068.00 per month, which exceeds her claimed monthly expenses

¹⁴ See Richey v. Richey, Ky., 389 S.W.2d 914, 917 (1965)(holding that "[q]uestions relating to the construction, operation and effect of separation agreements between a husband and wife are governed, in general, by the rules and provisions applicable to the case of other contracts generally")(quoting 17A Am.Jur., § 904, p. 92).

¹⁵ Frear v. P.T.A. Industries, Inc., Ky., 103 S.W.3d 99, 106 (2003)(stating that in the absence of ambiguous provisions, "a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence" [footnote omitted]).

at the time of the couple's divorce (\$2,148.00). Accordingly, he argues that Hammond has failed to meet the requirements of KRS 403.200(1)(a) and (b).

However, Dr. Weiser has conceded that due to Hammond's health problems which arose after the separation agreement was signed, she now incurs, at a minimum, an additional \$634.00 per month in health-related expenses. While Hammond is receiving \$1,568.00 per month in Social Security benefits that she was not receiving when the separation agreement was signed, it is important to note that she only receives these payments because she was forced to quit working due to her health problems. Thus, when we consider the fact that Hammond was faced with the dual difficulties of an increase in her medical expenses and a decrease in her ability to earn income, we cannot conclude that the trial court abused its discretion by refusing to terminate Dr. Weiser's maintenance obligation.

Dr. Weiser also claims that the trial court erred by finding that Hammond is disabled under the Social Security Administration's standards. In particular, he argues that "although [Hammond] testified that she is completely disabled . . . she has provided no competent evidentiary proof to sustain her claim." The record reveals that Hammond testified that she continued to work after the separation agreement was signed and that she tried, unsuccessfully, to resume working after she

developed health problems. Hammond had enjoyed steady employment as a registered nurse from 1979 until the onset of these serious health problems, when she was no longer able to work. Dr. Weiser nonetheless asserts that Hammond was required to prove both her disability and her receipt of Social Security benefits with documents from the Social Security Administration, expert medical testimony, and/or the appropriate medical records. However, Dr. Weiser has failed to identify any evidence in the record rebutting Hammond's claim that she is receiving Social Security benefits due to her disability. Therefore, since Hammond testified that she is unable to work and that she is receiving Social Security disability benefits, and since there is no evidence in the record to the contrary, we cannot conclude that the trial court clearly erred by finding that Hammond is receiving benefits pursuant to the requirements of the Social Security Administration due to her disability.¹⁶

In summary, we cannot conclude that the trial court abused its discretion by denying Dr. Weiser's motion to terminate maintenance in light of the economic circumstances of both parties. Accordingly, the order of the Scott Circuit Court is affirmed.

¹⁶ See CR 52.01 (stating in part that "[f]indings of fact shall not be set aside [on appeal] unless clearly erroneous. . ."); and Thomas v. Platt, Ky., 282 S.W.2d 354, 355 (1955)(holding that where there was no conflicting testimony and the decision of the trial court was supported by substantial evidence, the findings of fact would not be disturbed on appeal).

EMBERTON, CHIEF JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I agree with much of the reasoning and the result of the majority opinion. I write separately to point out that the trial court did not apply the proper standard in this case. As the majority correctly notes, the parties agreed that after January 1, 2000, "maintenance shall be reevaluated given the financial circumstances of both parties[.]" I entirely agree with the majority that this provision contemplates a *de novo* determination of maintenance pursuant to KRS 403.200, and not a modification of maintenance pursuant to KRS 403.250. However, the commissioner and the trial court clearly applied the latter standard.

Nevertheless, I agree with the majority that the trial court reached the correct result, albeit for the wrong reason. KRS 403.200(1) requires a trial court to find that the spouse seeking maintenance (1) lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs; and (2) is unable to support herself through appropriate employment. Factors a trial court may consider in making this determination include the spouse's financial resources, the standard of living established during the marriage, the duration of the marriage, and the spouse's physical condition. KRS 403.200(2)(a-f).

As the majority correctly notes, there was evidence supporting the trial court's finding that Hammond is unable to work. Furthermore, Hammond has Social Security disability income of \$1,568.00 per month. The \$1,500.00 in child support which Dr. Weiser pays cannot be included as income, as those amounts are for the children's expenses. Although the factual findings concerning Hammond's expenses could be more detailed, and the commissioner rejected some of her claimed monthly expenses as inflated, her total reasonable monthly expenses clearly exceed \$2,468.00 per month. Because Hammond has not appealed from the trial court's order denying her motion for an increase in support, the court's order keeping maintenance at the same amount should be affirmed.

In closing, however, I would also note that this case represents an unusual situation. Although the parties' agreement contemplated a *de novo* determination of maintenance after January 1, 2000, it also clearly contemplated that maintenance would continue after that date, subject to adjustment based upon the financial circumstances of the parties. In essence, Dr. Weiser agreed to pay open-ended maintenance for as long as Hammond is unable to meet her reasonable needs. The duration of the maintenance is more generous to Hammond than a trial court probably would have imposed at the time of the 1994 divorce for a five-year

marriage. However, Dr. Weiser is bound by the terms of his negotiated agreement.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Anita M. Britton
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BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Ronald D. Bowling
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