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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000546-MR

CHERYL SPRIGGS

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 96-CI-00594

W. GUY SPRIGGS

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: Cheryl Spriggs appeals from a post-decree
order of the Greenup Circuit Court in an action for dissolution
of marriage. In affirming the report of the Domestic Relations
Commissioner (DRC), the court overruled the exceptions that she
had filed. The DRC held a hearing on a motion by the appellee,

¹ Senior Judge John D. Miller, sitting as Special Judge by Assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

W. Guy Spriggs, in which he sought to terminate his obligation to pay maintenance to Cheryl. The DRC recommended that Guy's motion be granted and determined that the maintenance should end after a period of four more years. Cheryl argues that Guy failed to meet his burden of proving the elements necessary to terminate or to modify maintenance as required by KRS² 403.250. She contends that the court erred: (1) in failing to find that he did not meet his burden, (2) in limiting her ability to discover Guy's financial resources, and (3) in refusing to make an award sufficient to pay all of her attorney's fees incurred in defending Guy's motion. We agree that Guy failed to meet the statutory requirement of proving the existence of changed circumstances so as to justify modification of the original award of maintenance for unconscionableness. Therefore, we vacate that portion of the trial court's order. Otherwise, we affirm.

Cheryl's marriage to Guy was dissolved on May 30, 1997. All other matters (the custody and support of their two minor children, the classification and division of property, maintenance, and attorney's fees) were reserved for a later ruling. In its final order entered on July 21, 1998, the trial court considered and applied the criteria of KRS 403.200 and accordingly awarded Cheryl maintenance in the sum of \$984 per

² Kentucky Revised Statutes.

week. The court recited several of the relevant factors bearing on its decision with respect to maintenance: the length of the marriage; Cheryl's forfeiture of a career during the early years of the marriage in order to be a full-time homemaker; Cheryl's diminished ability to find suitable employment due to her age; the amount of marital assets awarded to Cheryl; the parties' standard of living during the marriage; and Guy's earnings and financial ability to pay maintenance.

On September 2, 2002, Guy filed a motion in which he sought to terminate his obligation to pay maintenance. Guy cited the court to its characterization of the maintenance award in its final decree as "temporary." He contended that Cheryl was employable; that she had had sufficient time since the dissolution to obtain a four-year college degree; and that she had received sufficient marital property to meet her needs. He alleged that under these circumstances, it was unconscionable to require him to continue to pay any amount of maintenance to her.

The matter was referred to the DRC. When Cheryl sought to obtain discovery from Guy concerning his financial situation, he filed a motion to quash her discovery request. He then acknowledged that the maintenance that he was currently required to pay was "not financially burdensome" to him. (Record, p. 355.) Presumably in light of that admission, the court sustained Guy's motion to quash. However, it did require

him to disclose copies of his 2001 personal income tax return and his latest financial statement. The tax return revealed that since the entry of the dissolution decree, Guy's annual income had increased from approximately \$500,000 to \$1,161,362 in 2001. His financial statement indicated that as of January 1, 2002, Guy had a net worth of nearly \$11 million.

At the hearing to terminate maintenance, Guy did not offer any evidence that Cheryl's financial circumstances had changed for the better since the dissolution. However, he expressed a generalized belief that he should not have to pay any additional amount of maintenance. He made three contentions: (1) that the original award was temporary, (2) that Cheryl was not making appropriate efforts to become self-supporting, and (3) that she was spending her money unwisely. He testified as follows:

I guess my question is that it was made mention in [the final decree] that this is temporary maintenance. I assume the Court's choices at that point were temporary or permanent, and the Court said temporary, which I assumed was to give my ex-wife a chance to get herself . . . She was unemployed at that time or had an in-house clothing business going on which has now moved on to a different vender. But that wasn't an income producer. But I guess my question to the Court is: What is temporary and how long does that continue?

. . . .

- Q. Based upon your observations of your former wife and what you have described concerning her efforts at reemployment and efforts at reeducation and so forth, do you believe that this is going to come to an end at any point if the Court doesn't put some stop to it, or is she just going to float along as long as you are writing checks?
- A. That becomes a personal call and a judgment call. I guess what my feeling is that there is no emphasis on her gaining full employment . . . I haven't seen any sort of permanency in her moves. (Transcript of hearing, pp. 5-8.)

Cheryl testified that after the divorce, she attempted to find employment in advertising -- the field in which she had worked prior to her marriage. In 1999, she was hired by the *Huntington Herald-Dispatch* at a salary of \$50,000 per year. After working there for six months, she resigned in lieu of being fired by a newly hired manager. She then found a similar job in Maryland. She had moved temporarily to Maryland in order to be near one of their children, who was attending boarding school there. Once again, Cheryl testified that she quit after being informed by her employer that she was not "working out." She referred to a number of other jobs for which she had applied unsuccessfully.

Cheryl also recounted that she was currently enrolled in a nursing program, which she expects to complete in 2006. However, she testified that she was not certain that she could

find a job in light of her age (59), her lack of experience in the nursing field, and her various health-related problems.

Cheryl related that she was unable to support herself with the amount of maintenance that she was currently receiving. She acknowledged that from the money she received in the division of marital property, she had spent a portion in making improvements to the marital residence, in purchasing some new furniture, and in taking trips with her children. She also admitted to losing \$150,000 in the stock market. Nonetheless, she testified that even if she had invested all of the liquid funds that she received in the dissolution, she would not have had enough income to maintain the standard of living enjoyed by the parties during the marriage.

In his report, the DRC analyzed the issue before him as follows:

[I]s it unconscionable or "grossly unfair" to require [Guy] to continue to pay maintenance to [Cheryl] after she has been awarded 1.3 million dollars in marital assets; has demonstrated ability to become self employed even at her present age and has rejected those opportunities; and further engaged in [a] financial course of conduct which shows a lack of regard for her own future financial well-being and stability. The Commissioner finds that said finding is justified. (Report of Domestic Relations Commissioner, pp. 4-5.)

The DRC made no findings with respect to how the parties' circumstances had substantially changed since the entry

of the final decree. Nonetheless, he recommended that Cheryl's maintenance be terminated in four years.

This will give [Cheryl] additional time to make whatever financial arrangements she deems appropriate and also ultimately result in an actual award of maintenance to [Cheryl] for their 16 year marriage of over 10 years (approximately 2 years prior to Decree and 8 ½ years post decree)[.] (Id. at p. 5.)

Both parties filed exceptions to the DRC's report. The exceptions were overruled, and the court confirmed the report and recommendations in their entirety. This appeal followed.

The primary issue on appeal is whether this maintenance award is governed by KRS 403.200 or by KRS 403.250(1). In making an award of maintenance at the outset, a court is governed by the criteria set forth at KRS 403.200:

- (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
 - (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
 - (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

- (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
 - (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
 - (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
 - (c) The standard of living established during the marriage;
 - (d) The duration of the marriage;
 - (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
 - (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

An award made pursuant to this statute is generally deemed to be non-modifiable if it is made for a sum certain, for a lump sum, or for a fixed time period; modification can be granted only in the rarest of circumstances. Dame v. Dame, 628 S.W.2d 625 (Ky. 1982) and Low v. Low, 777 S.W.2d 936 (Ky. 1989). Other than case law providing for the most specific modifications of KRS 403.200 directly, all other modifications

to the initial maintenance award are automatically governed by KRS 403.250.

In the 1998 final decree in this case, the trial court recited that its maintenance award of \$964 per week was being made pursuant to KRS 403.200. It was not a lump sum, and no fixed time limit was stated. Therefore, it can be subject to modification only according to the terms of KRS 403.250(1), which provides as follows:

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.

"Unconscionable" in this context means "manifestly unfair or inequitable." Wilhoit v. Wilhoit, 506 S.W.2d 511, 513 (Ky. 1974). As with an initial award of maintenance, a subsequent modification is a matter entrusted to the sound discretion of the trial court. Barbarine v. Barbarine, 925 S.W.2d 831, 832 (Ky.App. 1992).

An appellate court is not authorized to substitute its own judgment for that of the trial court where the trial court's decision is supported by substantial evidence.

Id. citing Perrine v. Christine, 833 S.W.2d 825 (Ky. 1992).

Guy is correct in arguing that the original award was made pursuant to KRS 403.200. This award remained subject to further orders of the court. Thus, it was by its very terms

modifiable, subject automatically to the criteria of KRS 403.250. Therefore, it necessarily imposes upon Guy the very burden he seeks to avert: the burden of demonstrating "changed circumstances so substantial and continuing as to make the terms unconscionable." There is no provision of inherent modifiability implied or expressed by KRS 403.200. Regardless of any recitations in the court order referring to its award as one of temporary maintenance, the only modification that can occur in this case must comply with the criteria of KRS 403.250(1).

After reviewing the record, we agree with Cheryl that there was no evidence of a change in circumstances as contemplated by KRS 403.250 to warrant a modification of her maintenance. In his brief, Guy argues:

[Cheryl] has invented a new lifestyle for herself since the divorce full of foreign travel, home improvements, expensive furnishings and lots of clothes, which far exceeds the lifestyle she had when she and [Guy] were married.

That observation, however, has no evidentiary support in the record. Guy presented no evidence that the current lifestyle which Cheryl maintains for herself and her children differs at all from that which she enjoyed during the marriage. There is no evidence that Cheryl's reasonable needs have changed since the dissolution. There is no evidence that Cheryl has

deliberately kept herself impoverished to avoid a reduction of maintenance. The only evidence of any significant, relevant change in the parties' financial circumstances demonstrates that Guy's standard of living has dramatically improved since the dissolution -- a change at variance with the modification that he seeks.

KRS 403.250(1) does not permit a trial court to modify maintenance absent a proven change in the current circumstances which makes the award unconscionable. The statute allows a court to modify maintenance in its discretion only upon proof of a "substantial and continuing" change in circumstances -- an actual and present change rather than an anticipated, projected change at a future date. Although Cheryl is working toward a nursing degree, it is not certain that she will be able to finish it. Even if she does complete it successfully, she may not find employment that will provide her with an income to meet her needs as measured by her standard of living during the marriage. See, Clark v. Clark, 782 S.W.2d 56 (Ky.App. 1990); Robinette v. Robinette, 736 S.W.2d 351 (Ky.App. 1987). She has cited the credible fact of her age as a realistic impediment to possible employment. Guy retains the right to invoke KRS 403.250 to seek a modification of his obligation if the anticipated changes do indeed materialize into reality. The trial court erred in changing its award of maintenance in light

of Guy's inability to meet his requisite burden of proof as to an actual change in circumstances.

Cheryl has also raised as error the failure of the trial court to allow her adequate discovery as to Guy's financial situation. While that allegation of error is arguably rendered moot by our decision to vacate the order modifying maintenance, we will nonetheless address the issue because of the likelihood that it will recur if or when maintenance is examined in the future. Since Guy stipulated that his ability to pay maintenance was not a consideration, we find no abuse in the trial court's ruling limiting Cheryl in discovering his income and net worth.

Finally, Cheryl argues that the trial court erred in awarding her only \$1,200 toward the legal fee of \$2,700 that she incurred in challenging Guy's motion to terminate her maintenance. In light of the considerable disparity in the parties' financial resources, an award of the entire amount would have been justified. However, we note that an award of attorney's fees is wholly within the sound discretion of the trial court. Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001). We may not invade the province of that judicial discretion.

That portion of the judgment of the Greenup Circuit Court modifying the decree with respect to maintenance is

vacated and remanded for entry of an order consistent with this opinion. Otherwise, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gordon Dill
Ashland, Kentucky

BRIEF FOR APPELLEE:

Philip Bruce Leslie
Greenup, Kentucky