RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001070-MR

LARRY RICHARD KIMBLER — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE DAVID E. MELCHER, JUDGE
ACTION NO. 02-CI-00245

DEBRA LYNN KIMBLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

TACKETT, JUDGE: Larry Richard Kimbler appeals from an order of the Mason Circuit Court denying modification of maintenance paid to his former spouse Debra Lynn Kimbler. Larry argues that the court abused its discretion in denying his motion without an evidentiary hearing. We do not agree that a hearing was

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

necessary, as it did not meet the threshold of a material change in the circumstances of the parties, and affirm.

The parties agreed in 2002 to divorce, and Larry agreed to give Debra a substantial amount of property, including a 2/3 share of his 401(k) plan, the bulk of the parties' personal property and one-third of all income received by Larry until the parties began receiving income under the retirement plan as maintenance to Debra. One year later, in October, 2003, Larry moved the court to declare the agreement unconscionable, arguing that the aggregate of all the payments to Debra amounted to 2/3 of his total income, leaving him on the verge of bankruptcy. The court denied the motion, and Larry did not appeal that order. A few months later, Larry moved the court again for a modification, and the court denied the motion without a hearing, holding that the motion presented no new grounds for modification and demonstrated no change in the circumstances of the parties. This appeal followed.

The issue before this court is not whether the agreement between the parties is in fact unconscionable. Our review is confined to whether the court abused its discretion in denying the motion without a hearing. As Debra notes in her brief, it appears that Larry offered nothing new in his second motion for modification. The court was not obligated to consider the same grounds it considered in its first order,

absent evidence of a change in the circumstances of the parties. We hold that it did not abuse its discretion in denying the motion.

To obtain a modification of maintenance, a party must show that the overall circumstances have altered so that it would be manifestly unfair to require continued payment of maintenance. Wilhoit v. Wilhoit, 506 S.W.2d 511 (Ky. 1974). Contrary to Debra's assertion, this case does not fall under the strict rule of Dame v. Dame, 628 S.W.2d 625 (Ky. 1982), but rather under Baker v. Baker, 785 S.W.2d 261 (Ky. App. 1989), which held that a maintenance award that was tied to the receipt of a share of retirement benefits was a hybrid of maintenance and property distribution. Nevertheless, we hold that Larry has not made a sufficient showing of a change in circumstances. The motion made before the circuit court is essentially a relitigation of the same argument as he made in seeking relief from maintenance the first time. Larry does not show that there has been a change in circumstances since that time, but continues to assert that Debra is receiving such a large share of his overall income that he is not able to meet his obligations. Such matters are within the sound discretion of the trial court, and must be reviewed under an abuse of discretion standard. It is especially significant that Larry failed to appeal the denial of modification the first time he

sought relief. If the court did not abuse its discretion then (tacitly admitted since Larry accepted the result) then it did not abuse its discretion now, as the facts and allegations are substantially the same.

For the foregoing reasons, the order of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
James Walden Morgan, Jr. Newport, Kentucky	Jeffrey L. Schumacher Maysville, Kentucky