

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000592-MR

ROBERT A. METRY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT, FAMILY DIVISION SIX
v. HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 98-FC-003971

JANET S. METRY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: LAMBERT AND MOORE, JUDGES, BUCKINGHAM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Robert Metry appeals from an order denying his motion requesting termination of maintenance due to a significant change in circumstances; or in the alternative, to reduce his obligation. After careful review, we affirm.

Robert and Janet Metry were married on June 14, 1959, and were divorced by a decree of dissolution of marriage on December 7, 1990. The parties had four children, all of which were over the age of eighteen at the time of the divorce.

¹ Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On August 21, 1991, the trial court entered its findings of fact and conclusions of law and order. The trial court found that Robert Metry, an attorney, had a 1990 pre-tax income of \$108,612.83. The court found that Janet Metry needed six credit hours to become recertified as a teacher and that she acknowledged she was going to get those hours. Both parties were fifty-two years of age at the time of the divorce. The Metrys also had considerable debt. In light of these factors, the trial court ordered that: (1) the parties would share the marital estate equally; (2) Robert would assume all of the marital debt and tax liability (in excess of \$400,000.00); and 3) Robert would pay open-ended maintenance to Janet in the amount of \$2,500.00 per month. At a subsequent hearing, the trial court reaffirmed the appropriateness of the open-ended maintenance but reduced the payment to \$2,175.00 per month.

In 1999, Robert moved to terminate his maintenance obligation or, in the alternative, to decrease his obligation. This motion was denied, as the trial court found that Robert was earning \$132,000.00 per year and no longer had the majority of marital debt (as it had been discharged in bankruptcy). The trial court noted that since the divorce Janet had not completed the six hours necessary to become a full-time certified teacher. The trial court ordered Robert to continue to pay Janet monthly maintenance of \$2,175.00 per month.

On July 13, 2006, Robert again moved to terminate or modify his maintenance obligation on the grounds that there were changed circumstances between the parties so substantial and continuing as to make the continuance of maintenance unconscionable. Robert presented evidence that he lost his job as an attorney in 2005 when he was sixty-seven years old and that it took him a year to find

other employment. His new job required significant travel and paid significantly less than his previous salary. Robert also argued that at sixty-eight years old he had virtually no savings and had paid Janet approximately \$400,000.00 in maintenance over the previous seventeen years.

Robert also presented evidence that since the divorce in 1991, Janet had refused to obtain the six hours of education credits necessary to acquire her certification to teach full-time. He argued that had she done so, she would have accrued salary and pension benefits that she could have relied upon after retiring. Instead, Janet chose to work part-time and care for her grandchildren. At the time of the hearing in July 2006, Janet was collecting Social Security benefits of \$9,315.00 annually and was earning a part-time teaching income of \$20,368.00.

A hearing was held in October 2006 wherein the above evidence was presented. The court denied Robert's motion in an order dated January 31, 2007, finding that Robert was employed by Sullivan University earning \$125,000.00. In addition, he was receiving Social Security income of \$22,000.00 per year. The court found that Janet was earning \$14,900.60 from teaching and \$10,368.00 per year in Social Security benefits. The court found that the maintenance was not rehabilitative in nature and was instead open-ended and therefore permanent. The court found that the maintenance could only be terminated upon the death of either Robert or Janet, or the remarriage of Janet, pursuant to KRS 403.250(2). Further, the court found that the maintenance could be modified under KRS 403.250(1) only if the court found a change in circumstances so substantial and continuing as to make the terms unconscionable.

The court declined to find the maintenance obligation unconscionable, given Robert's financial resources and Janet's modest income and reasonable needs.

On February 12, 2007, Robert moved to alter, amend or vacate the court's order denying his motion to terminate maintenance. The court denied his motion on February 28, 2007, and this appeal followed.

KRS 403.250(1) allows the provisions of any decree respecting maintenance to be modified "only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." "Unconscionable" means "manifestly unfair or inequitable." Evidence for the movant must be compelling for the trial court to grant the relief requested; the policy of the statute is for relative stability. 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 the trial court where the trial court's decision is supported by substantial evidence.

Bickel v. Bickel, 95 S.W.3d 925, 927-928 (Ky.App. 2002)(internal citations omitted).

The question, therefore, is whether the trial court's decision is supported by substantial evidence, meaning: "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence . . . has sufficient probative value to induce conviction in the minds of reasonable men." See *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (quoting *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62 (Ky. 1970)(emphasis in original omitted)). After reaching this conclusion, we then review the trial court's application of the law to those facts *de novo*. The trial court applied the standard set forth in KRS 403.250(1) and (2) and the standard set forth by the Kentucky Supreme

Court in *Combs v. Combs*, 787 S.W.2d 260 (Ky. 1990). In *Combs*, the issue was whether there had been a change in circumstances sufficient to modify maintenance pursuant to KRS 403.250(1). Here the issue is the same, whether there had been any changed circumstances sufficient to warrant the court modifying the maintenance agreement, given that the provisions of KRS 403.250(2) were not triggered by either party's death or Janet's remarriage. The trial court found no such circumstances warranting a modification.

On appeal, Robert argues that he is being forced to continue to work past the normal age of retirement to pay Janet maintenance. However, in its order denying Robert's motion to alter, amend, or vacate, the trial court found that Robert failed to realize that Janet is also sixty-eight years of age and has substantially fewer assets and has lacked the ability to earn in excess of \$100,000.00 per year since the parties dissolved their marriage. In light of the totality of the evidence, the court reaffirmed that their previous ruling requiring Robert to pay maintenance of \$2,175.00 per month, which calculated is less than seventeen percent of Robert's total income, was not unconscionable. We find that the trial court correctly found that there had not been any changed circumstances sufficient to warrant the court modifying the maintenance agreement.

Accordingly, we affirm the trial court's order denying Robert's motion to modify or terminate maintenance and affirm the order denying Robert's motion to alter, amend or vacate the previous order.

ALL CONCUR.

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