

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000079-MR

ADRIAN NIGEL PARKER

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 98-CI-00977

TERESE SHENEVELYN PARKER,
(NOW ORR)

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

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

ACREE, CHIEF JUDGE: Adrian Parker appeals an order of the Hardin Family Court awarding his ex-wife, Terese¹ Parker (now Orr), \$36,585.84 and ordering continued monthly payments to supplement her share of Adrian's monthly military retired pay. The family court's ruling was a response to Adrian's having converted

¹ The record and the parties' briefs evince two spellings of the appellee's first name: Terese and Teresa. We have chosen to use that spelling identified in the body of Adrian's notice of appeal.

a portion of his military retired pay to disability retired pay, which is not marital property subject to division. We vacate the order and remand for additional proceedings.

I. Background

Adrian entered military service in 1980 and married Terese in 1982. They separated in 1996; the decree of dissolution, which reserved matters concerning the division of property, was entered July 8, 1998.

The outstanding property matters were resolved in an order of December 1, 1998, which determined, in pertinent part, that Adrian was required to pay Terese \$400 in monthly maintenance until she remarried or he retired; upon Adrian's retirement, Terese would be entitled to a portion of Adrian's military retired pay in accordance with *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986).

Following ongoing conflict concerning Adrian's monthly maintenance obligation, an order of wage assignment was entered in October 2001. Pursuant to that order, \$400 would be withheld monthly from Adrian's "active duty or retired military pay[.]"²

Adrian retired in May of 2002. At the time of retirement, he elected to waive a portion of his retired pay, namely seventy percent, and to receive disability retirement benefits instead. Adrian took no action to cease the monthly \$400 payment to Terese, and so the appellee did not become aware of Adrian's retirement for some time.

² It is not evident from the record or the parties' briefs why Adrian's military retirement pay would have been so garnished if Terese's right to maintenance ended upon Adrian's retirement.

In 2011, Terese filed a motion for clarification of the family court's 1998 order resolving outstanding property issues. To that end, she requested that she be awarded arrearages for the difference between the \$400 Adrian had paid and the amount of his retirement benefits to which Terese believed she was entitled. Terese contended, more specifically, that she should be awarded thirty-six percent of Adrian's total retirement benefit, with no deduction for the portion which had been converted to disability retirement benefits.

Adrian responded that Terese was entitled only to thirty-six percent of the military retired pay, excluding his disability retirement benefits, an amount significantly smaller than the \$400 monthly payment she had received since his 2002 retirement. In support of this argument, he noted that military disability benefits are not marital property and are therefore not subject to division upon dissolution of marriage.

Although the family court agreed that military disability benefits could not be awarded to the military retiree's ex-spouse, the family court awarded Terese the amount requested nonetheless. In so doing, the family court concluded that it was permitted to "order the payment to [Terese] of support in an amount equivalent to that which" she would have been entitled had Adrian not undertaken a "unilateral modification of the terms of the [December 1998 o]rder [of property division]." (Record on appeal, p. 16). The family court further stated that its order did not constitute a modification of the previous order concerning property division and, in

fact, that it could not undertake such a modification.³ It was also determined that the doctrine of laches did not bar Terese’s motion because Adrian had come to court with “unclean hands.”

This appeal followed. Adrian’s arguments on appeal are essentially two: 1) the family court lacked authority to modify the order; and 2) Adrian did not have “unclean hands,” and therefore the circuit court improperly declined to apply the doctrine of laches to Terese’s motion.

II. Discussion

Before turning to Adrian’s substantive argument, we must address his contention that the circuit court erroneously failed to conclude the doctrine of laches barred Terese’s motion due to Adrian’s own “unclean hands.” Adrian concedes that “[a] trial court[’]s decision to invoke the equitable defense of the unclean hands doctrine rests within its sound discretion.” *Mullins v. Picklesimer*, 317 S.W.3d 569, 577 (Ky. 2010) (citation omitted).

“The unclean hands doctrine is a rule of equity that forecloses relief to a party who has engaged in fraudulent, illegal, or unconscionable conduct ... [.]” *Suter v. Mazyck*, 266 S.W.3d 837, 843 (Ky. App. 2007). The family court concluded, essentially, that Adrian’s failure to modify the \$400 monthly wage garnishment upon his retirement, as mandated by the December 1998 order, was unconscionable. We cannot say this constituted an abuse of discretion.

³ The reasoning behind the family court’s belief that it could not undertake such a modification is unclear because this statement was not accompanied by supportive findings of fact or legal conclusions.

By declining to halt the monthly payments to Terese, Adrian effectively concealed the fact that he had retired and that she was now entitled to receive a portion of his retirement pay. Because she was not so notified, Terese was unable to bring the parties' dispute concerning the amount to which she was entitled, in light of Adrian's disability, before the family court for resolution. Adrian's action was the cause for the delay, and so the family court correctly concluded he should not be entitled to invoke the doctrine of laches due to his own unclean hands.

We turn now to the parties' arguments concerning the family court's award of \$36,585.84 to Terese and its order that Adrian continue payments equivalent to that which Terese would have received from his retirement account had he not opted to take disability pay.

Our first task is to correctly characterize the nature of the family court's order. Adrian contends the order amounts to an impermissible award to Terese of his disability benefits.⁴ *See Copas v. Copas*, 359 S.W.3d 471 (Ky. App. 2012). Terese argues the family court was merely enforcing its previous, pre-retirement order by ensuring that she received the portion of Adrian's retirement benefits contemplated by the parties at the time of the property division. The family court stated explicitly that its action did not constitute modification of a previous award of maintenance or property provision.

⁴ Although Adrian raises a number of arguments on appeal in support of this contention, only one of those arguments was presented to the family court, namely that distribution of a retired military member's disability benefits to an ex-spouse was impermissible, as provided by *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), and *Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989). The rest of these arguments were unpreserved.

None of these explanations is correct. It is apparent, despite the family court's protestations to the contrary, that its order of December 19, 2011, is a modification of its previous order of December 1, 1998. After a change in the parties' circumstances which had not been anticipated at the time of the initial property division, namely Adrian's transformation of seventy percent of his military retirement pay to disability retirement benefits, the family court found it necessary to adjust the parties' financial relationship.

KRS 403.250(1) provides in relevant part as follows:

[T]he 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. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

It is not apparent if the family court intended to modify the award of maintenance or the property disposition, but it is apparent that a modification pursuant to KRS 403.250 was made without the prerequisite findings. If the family court intended to modify the maintenance award, it should first have determined whether Terese had shown "changed circumstances so substantial and continuing as to make the terms unconscionable." *Id.*; see also *Block v. Block*, 252 S.W.3d 156, 160 (Ky. App. 2007). If, instead, the family court intended to reallocate the parties' marital property in light of Adrian's conversion of a large portion of marital property to non-marital property, it failed to identify "the existence of conditions that justify

the reopening of a judgment under the laws of this state.” KRS 403.250(1); *see also* KRS 403.190.

Under these circumstances, the vacating of the order and remand of the matter is appropriate. *See Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011) (noting that “CR 52.01 [creates] a general duty for the trial court to find facts”).

III. Conclusion

The family court did not abuse its discretion in determining Adrian’s own actions justified its decision not to apply the doctrine of laches to bar Terese’s motion. However, the order in question is missing the statutory requisites for modification of either an order of maintenance or a property disposition, and so must be vacated. The matter is remanded to the family court for additional proceedings consistent with this opinion.

ALL CONCUR.

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