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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001313-MR

JANICE GERALDS APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 10-CI-502979

LESLIE ARVIL GERALDS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

JONES, JUDGE: This appeal arises out of an order from the Jefferson Family Court denying Janice Gerald's motion to modify the parties' prior property settlement agreement. For the reasons set forth below, we AFFIRM.

I. Background

The parties were married on September 28, 1984. Approximately twenty-six years later, on August 13, 2010, the parties filed a joint petition for dissolution of marriage in the Jefferson Family Court. During the course of the dissolution proceedings, the parties, with the assistance of separate counsel, negotiated a property settlement agreement.

In relevant part, the parties agreed as follows: 1) the martial residence would be sold and the proceeds divided equally between the parties after an initial $20,000 was placed in a joint escrow account for their daughter's future educational expenses; 2) all jewelry, furniture and personal effects were divided equally and fairly with each party to be in possession of his or her own respective property with the exception that Husband retained the washer, dryer, and treadmill bike; 3) Husband retained sole ownership of the 2005 Ford Explorer, 2006 Majestic Houseboat, Jet Skis, 4Winds, 2002 560 Volvo and Lund and assumed the debt related thereto;[1] 4) Husband assumed responsibility for debts to Bank of America and Marriot Chase Visa; 5) Husband was to maintain health insurance for Wife thru January 1, 2011; 6) Husband was to pay Wife maintenance in the amount of $2,500.00 per month beginning November 1, 2010 for two years;

[1]The disclosures filed by the parties indicated that the 2006 Majestic was at a NADA value of $235,000 with the parties owing $205,616 in debt thereon.

thereafter, Husband was to pay Wife $1,500.00 per month for an additional two years; 7) effective November 1, 2010, Wife received 40.62% of Husband's interest in his pension retirement plan, any SERP portion accrued and vested as of November 1, 2010, of his pension/retirement plan and his annuity retirement plan; 8) Wife retained her pension and her Simple IRA with Met Life Securities; 9) Husband's 401K with Prudential Retirement Group was divided equally by the parties after Husband received $11,045.00; and 10) Wife retained all interest in J&L Fitness (otherwise known as "Curves") including all assets and liabilities.[2]

Husband and Wife, as well as their respective counsel, signed the agreement wherein each acknowledged:

> E. Parties fully understand the provisions of the Agreement and their legal effect, and each party acknowledges each has consulted with legal counsel with respect to all of its provisions; this Agreement is being entered voluntarily, and is not the result of any duress or undue influence.
>
> F. This Agreement contains the entire understanding of the parties and there are no representations, warranties, covenants or undertakings other than those expressly set forth herein.

(R. at 12).

The signed property settlement agreement was filed with the family court. On February 9, 2011, the family court entered a decree of dissolution,

[2] Curves was listed as having a value of $15,000.00.

which expressly incorporated by reference the agreed property settlement. Before incorporating the agreement, the family court determined that its terms were not unconscionable.

On April 7, 2014, Wife filed an affidavit with the family court seeking to modify the property settlement agreement to provide her with continuing maintenance. In relevant part, Wife averred as follows:

> 2. The parties agreed in a collaborative divorce to maintenance of $2,500 per month for two years, and $1,500 per month in maintenance for two years, which is scheduled to cease in October, 2014. In addition, Petitioner [Husband] pays $390/month for Respondent's [Wife's] health insurance, expiring in March of this year.
>
> 3. Due to the recent 2012 closure of one of the two Curves fitness centers (Middletown) awarded to Affiant [Wife] in the divorce agreement, and the second Curves fitness Center (Dupont) is to be closed in the near future of this year, Respondent [Wife] is in need of continued maintenance. Further, her health insurance costs will be similar to the previous costs but through Kynect each month, which Affiant [Wife] cannot afford to pay. In stark contrast, Petitioner's [Husband's] base income has gone up substantially to approximately $250,000 per year. Affiant [Wife] has only a high school diploma, and supported Petitioner [Husband] in his now nearly forty year career with Rogers Group, Inc. The fitness centers have only served as a drain on marital assets awarded to Affiant in the divorce action. She did not take a salary in 2012, and took $1,600 total annual salary in 2013. She has tried to keep them going and use this time towards being self-sufficient but needs further assistance. She is being sued for a $15,482.70 judgment relating to the unpaid lease at the Middletown Curves, and will owe Curves International $10,710.00 for the early closure of

> Middletown. There will still be a lease owing on the DuPont location $71,984. She has commenced the Pension Plan benefit of $802.78/month, and winding down/closing the DuPont location is currently a full-time job, although Affiant [Wife] is exploring efforts at other employment.
>
> 4. Affiant's [Wife's] personal monthly expenses are nearly $4,000.00 per month, plus debts of $212,237.75, including her condo, balloon payment of over $105,000 being due August 1, 2014.
>
> 5. Affiant [Wife] has been researching the Supplemental Employees Retirement Plan (SERP), a portion of which was awarded to her in the divorce agreement. She was told by Petitioner [Husband] that this Plan, in total, would be worth approximately $200,000 a year in retirement income, of which she was awarded 40.62%. However, she is now being told by the SERP Plan Administrator that there will be no benefit paid to her. This huge disparity, along with the above detailed change in circumstances, makes the prior maintenance award unconscionable and necessitates modification by this Honorable Court.

(R. 70-71).

Husband objected to Wife's attempts to modify the maintenance award, and filed his own competing affidavit. Husband asserted that Wife's debts acquired after the dissolution are due to her own actions; Wife was advised by counsel during the dissolution proceeding and was well aware, or should have been well aware, of the terms of the agreement; and that the agreement specifically provided that the agreed upon maintenance was "non-modifiable."

Upon review, the family court agreed with Husband. It found that because the agreement expressly prohibited modification of the maintenance award to Wife, it lacked the authority to grant Wife relief pursuant to KRS[3] 403.250(1). The family court also concluded that Wife's motion for relief under CR[4] 60.02(f) failed because she had not alleged facts of an "extraordinary" nature.

Following the family court's order, Wife filed a CR 59.05 motion asking the family court to alter, amend or vacate its order to the extent it denied her relief based on CR 60.02(f). In support of her motion, Wife submitted additional evidence to the family court to support her assertion that Husband mislead her concerning the value of the SERPA account, that the Curves franchise has been determined to be one of the worst franchise investments in the United States, and that she has developed numerous health problems since entry of the original property settlement agreement.

Husband moved the family court to strike the additional exhibits filed by Wife as improper. The family court agreed with Husband that the additional evidentiary support included by Wife was improper for consideration as part of a motion under CR 59.05, and ordered that the "attachments and related content" in

[3] Kentucky Revised Statutes.

[4] Kentucky Rules of Civil Procedure.

the motion be stricken. The family court then denied Wife's motion for relief under CR 59.05.

This appeal by Wife followed.

II. Standard of Review

An appellate court reviews the family court's determinations regarding settlement agreements for an abuse of discretion. Also, in reviewing decisions of the family court, an appellate court cannot substitute its judgment for that of the family court if there is substantial evidence supporting that court's decision. *Bickel v. Bickel*, 95 S.W.3d 925, 928 (Ky. App. 2002). Lastly, an appellate court may not set aside the family court's factual findings unless they are clearly erroneous.

III. Analysis

In *Woodson v. Woodson*, 338 S.W.3d 261, 263 (Ky. 2011), our Supreme Court held that "[a] maintenance award in a fixed amount to be paid out over a definite period of time is subject to modification under KRS 403.250(1)." *Woodson v. Woodson*, 338 S.W.3d 261, 263 (Ky. 2011). However, the *Woodson* Court also pointed to KRS 403.180(6), which provides that "[e]xcept 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." KRS 403.180(6) permits the parties to a property settlement to "settle their affairs

with a finality beyond the reach of the court's continuing equitable jurisdiction elsewhere provided." *Brown v. Brown*, 796 S.W.2d 5, 8 (Ky. 1990).

Although Wife asserts that she was not aware that the agreement was non-modifiable, the agreement expressly states that the agreed upon maintenance payments "are non-modifiable." Likewise, even though Wife claims she was told by Husband's attorney that they could reexamine the agreement in two years, no such provision appears in the agreement which specifies that it "contains the entire understanding of the parties and there are no representations, warranties, covenants, or undertakings other than those expressly set forth herein."[5] Based on the clear, plain and unambiguous terms of the parties' agreement, the parties precluded by agreement any future modification of maintenance based on changed circumstances. *See* KRS 403.180(6). Accordingly, the family court correctly declined Wife's request for modification.

While CR 60.02(f) remained an avenue of attack notwithstanding the non-modification provision, we are in agreement with family court that Wife failed

[5] We would also point out that the correspondence Wife relies on to support this assertion is wholly inadequate. It consists of an email from Husband's counsel to Wife's former counsel discussing a *potential* division of the Curves business. Therein, Husband's counsel wrote: "We need to resolve the issue of J&L Fitness. One possibility we haven't discussed would be to take the business out of the equation by agreement that Janice maintain control and receive a set salary each month and pay a certain percentage of receipts toward the note. This arrangement could continue for a period of two years at which time the business would be valued and either apportioned or dissolved." This "proposal" was not adopted by the parties. Curves was "left in the equation" with Wife receiving all Husband's interest in the business without a set salary and without the option of any future apportionment to Husband.

to present the kind of "extraordinary circumstances" necessary to justify relief under that rule. Even if we considered the evidence stricken by the family court, our opinion would be the same. Wife was represented by counsel throughout the initial dissolution proceeding and had every opportunity to review Husband's financial information and to discuss the same with her attorney. Additionally, no promises were ever made to Wife that the Curves business would be successful. Certainly, Wife must have believed that the venture would be profitable; however, her incorrect financial assessment is not the kind of extraordinary circumstance Rule 60.02(f) was designed to remedy.

IV. Conclusion

For the reasons set forth above, we AFFIRM the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lauren Adams Ogden
Louisville, Kentucky

BRIEF FOR APPELLEE:

Steven J. Kriegshaber
Sam Pollom
Louisville, Kentucky