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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001876-MR

DAVID ANDREWS, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 15-CI-01394

GINA ANDREWS; NANCY M. HOUSE, ESQ.;
AND WHITE, MCCANN & STEWART, PLLC

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: David Andrews, Jr., appeals from the Fayette Circuit Court's order denying David's motion to reduce maintenance payments to Gina Andrews and awarding attorney's fees to Gina. We affirm.

David and Gina were married in 1997 and separated in 2014. Their marriage was dissolved in 2015. The decree of dissolution incorporated by

reference the parties' property settlement agreement. According to the agreement's terms, David would pay Gina maintenance of \$4,000.00 per month, as well as the tax due thereon. He also agreed to maintain a life insurance policy with Gina as beneficiary unless she remarried. Both parties agreed to waive benefits of each other's retirement accounts. They further agreed that, should either of them seek bankruptcy at any time thereafter, the agreement's financial obligations "shall not be dischargeable." The agreement was prepared by David's attorney. Gina was not represented by counsel in the dissolution proceeding.

In 2016, David moved to modify the maintenance agreement, alleging that he had "lost four large accounts" and "had a 36.53% decrease in pay," and urged that his maintenance obligation be reduced accordingly. Gina responded and filed a motion to compel. The record contains no ruling on that motion.

David remarried in 2017. In February 2018, David unilaterally reduced his monthly maintenance payments to \$1,000.00. On March 14, 2018, Gina filed a motion to compel, and she asked that he be held in contempt. On March 22, 2018, the Fayette Circuit Court, Family Court Division, ordered that a case management conference be held the following April 19. The day prior to the hearing, David filed a motion to modify maintenance, alleging that he had been terminated, through no fault of his own, from his employment effective January of that year. He had recently found a new position but at a lower starting salary

(although he would also receive commission). He requested that his maintenance payments be reduced to \$1,000.00 per month.

The circuit court held a lengthy hearing, in which both parties testified, on August 29, 2018. The order denying David's motion for modification of maintenance and granting Gina's request for attorney's fees (in the amount of \$8,147.50) was entered on October 22, 2018. David's motion to alter, amend, or vacate (pursuant to Kentucky Rule of Civil Procedure (CR) 59.05) and for more specific findings of fact and conclusions of law (pursuant to CR 52.02) was denied on November 28, 2018. David filed his notice of appeal on December 14, 2018.

David first argues that, by ignoring the significant reduction in income suffered by David because of his job loss in January 2018, the circuit court abused its discretion in denying his motion to modify maintenance. Gina argues otherwise, stating that the circuit court's decision was supported by substantial evidence and should be affirmed.

We begin by enunciating our standard of review, namely:

We review the family court's determination regarding a motion to modify maintenance for an abuse of discretion. *See Bickel v. Bickel*, 95 S.W.3d 925, 927-28 (Ky. App. 2002). We cannot substitute our judgment for the family court's if there is substantial evidence supporting that court's decision. *Id.* at 928. Further, we may not set aside the family court's factual findings unless they are clearly erroneous. *See Wheeler v. Wheeler*, 154 S.W.3d 291, 296 & n. 16 (Ky. App. 2004). However, we review questions of law *de novo*. *See*

Western Ky. Coca-Cola Bottling Co. v. Revenue Cabinet, 80 S.W.3d 787, 790 (Ky. App. 2001).

....

We note that marriage separation agreements, such as that between the present parties, are enforceable contracts. *See Cole v. Waldrop*, 204 Ky. 703, 265 S.W. 274, 275 (1924).

Block v. Block, 252 S.W.3d 156, 159-60 (Ky. App. 2007).

Kentucky Revised Statute (KRS) 403.180 (“Separation agreement; court may find unconscionable”) provides statutory guidance:

(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

....

(5) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(6) Except 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. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

And KRS 403.250 (“Modification or termination of provisions for maintenance and property disposition”) provides:

(1) Except as otherwise provided in subsection (6) of KRS 403.180, 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**. 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.

(2) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

(Our emphasis.) “The term ‘unconscionable’ is defined as ‘manifestly unfair or inequitable.’ *Combs v. Combs*, 787 S.W.2d [260,] 261 [(Ky. 1990)]. To determine whether the circumstances have changed, we compare the parties’ current circumstances to those at the time the court’s separation decree was entered. *See Rayborn v. Rayborn*, 185 S.W.3d 641, 644 (Ky. 2006).” *Block*, 252 S.W.3d at 160.

With these standards in mind, we have examined the circuit court’s ruling and find no error. The circuit court’s findings were supported by substantial evidence. The maintenance amount established in the separation agreement was a bargained-for exchange because Gina waived her claim to any of David’s retirement accounts. David had a superior earning capacity, while Gina had none.

She had been deemed disabled, was a cancer survivor, and suffered from chronic and debilitating health issues. Although David had received a setback of a couple of months' unemployment as well as a non-compete clause of two years, he failed to demonstrate that his turn of circumstances was anything other than temporary, not "substantial and continuing[.]" KRS 403.250(1). David and Gina had no debt at the time their marriage was dissolved. The circuit court had little sympathy with David over the \$100,000.00 debt he had incurred since then because "he has little to show for same": the money was spent at casinos, on dinners out, jewelry for his new wife, hot yoga classes, and "other items not necessary to daily functioning." The circuit court further found that "David has voluntarily created the circumstances regarding his exorbitant monthly expenses and the Court cannot allow such circumstances to create a justification for modifying maintenance."

We agree with David that his change in employment was not voluntary. But we cannot agree that his accumulation of debt was directly related to the change in jobs or that his new position would not soon reap similar benefits since he would be earning commission on top of his salary.

The family court is in the best position to weigh the evidence and determine if a separation agreement is unconscionable or if it resulted from duress, undue influence, or overreaching. *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997). Regarding such determinations, we defer to the family court's broad discretion, and are prohibited from disturbing its decision

absent an abuse of its discretion. *See id.*; *Peterson* [*v. Peterson*], 583 S.W.2d [707,] 712 [(Ky. App. 1979)].

Mays v. Mays, 541 S.W.3d 516, 524 (Ky. App. 2018). *See also Ford v. Ford*, 578 S.W.3d 356 (Ky. App. 2019). We affirm the circuit court’s decision to deny the motion to modify maintenance.

We next turn to the issue of attorney’s fees. Again, we are guided by the standard of reviewing whether the circuit court abused its discretion:

Because the trial court followed the dictates of the statute [KRS 403.220], it did not err in its award of attorney’s fees. We agree with the portion of *Gentry* [*v. Gentry*, 798 S.W.2d 928 (Ky. 1990),] which holds, “[t]he amount of an award of attorney’s fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court’s and attorneys’ time and must be given wide latitude to sanction or discourage such conduct.” 798 S.W.2d at 938. The trial court was certainly in the best decision to observe the lack of candor and cooperation which led to the accrual of many of the fees in this case—which it noted in its order.

Smith v. McGill, 556 S.W.3d 552, 556 (Ky. 2018). We have examined the record in its entirety, including the videotape of the August 2018 hearing, and “find no abuse of discretion in the [circuit] court’s decision to award [Gina] the amount of fees [s]he requested[.]” *Herbener v. Herbener*, 587 S.W.3d 343, 355 (Ky. App. 2019).

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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