

**Commonwealth Of Kentucky**

**Court Of Appeals**

No. 97-CA-0072-MR (DIRECT)

BETTY J. REARDEN (now Cooper)  
and RICHARD T. FORD

APPELLANTS

V. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 85-CI-1252

HERMAN D. REARDEN

APPELLEE

AND

NO. 97-CA-0136-MR (CROSS)

HERMAN D. REARDEN

CROSS-APPELLANT

V. CROSS-APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 85-CI-1252

BETTY J. REARDEN (now Cooper)

CROSS-APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, GARDNER and GUIDUGLI, JUDGES.

GARDNER, JUDGE. Appellants, Betty Rearden Cooper (Betty) and Richard T. Ford have appealed from an order of the Daviess Circuit Court in this dissolution of marriage action. Herman Rearden (Herman) has cross-appealed. After reviewing the issues raised by both parties and reviewing the record below, this Court affirms the circuit court's order.

Herman and Betty were married for thirty-one years and divorced in December 1985. Herman and Betty entered into a separation agreement whereby Herman would pay Betty \$600 per month maintenance which could be increased to \$800 per month if Betty showed additional need. The agreement also provided that Betty would receive one-half of Herman's retirement when he received it. The circuit court's original findings of fact, conclusions of law and decree were entered December 19, 1985. In September 1987, the circuit court increased Betty's monthly maintenance to \$800 after finding that she had shown additional need.

Herman worked at Commonwealth Aluminum Company (Commonwealth) in Lewisport, Kentucky. In 1990, Commonwealth offered early retirement to its salaried employees. Evidence presented in the court below showed that if the employees did not take the offer, some would be laid off as a reduction in work force. Herman chose to take the offer. Herman at retirement had a 401K plan valued at \$25,000 and received a severance payment worth \$24,000 after taxes. Herman receives a monthly retirement pension benefit of approximately \$1,688. Because of his early retirement, Herman in March 1990 filed a motion to terminate or modify maintenance based on the grounds of changed circumstances

which rendered the parties' prior agreement unconscionable. The domestic relations commissioner believed that the maintenance should be modified, but the circuit court ruled that the circumstances presented did not make the maintenance agreement unconscionable. The court held that the prior order pertaining to maintenance would remain in full force and effect. Herman attempted to appeal the order, but this Court in September 1992, dismissed Herman's appeal because the order was not final and appealable.

On January 4, 1993, Herman filed another motion in circuit court to modify the court's September 1987 order so as to reduce the monthly maintenance payments because of circumstances making the order unconscionable. In an order of February 15, 1994, the court ruled Herman made an insufficient showing of a need to set aside the amount of maintenance. Herman filed yet another motion on February 23, 1994, seeking to reduce maintenance. On February 25, 1994, Herman filed a motion in circuit court seeking the court to clarify its February 1994 ruling to determine whether Betty was entitled to one-half of Herman's pension accruing during the marriage or one-half of the pension he started receiving five years after the dissolution decree and whether Betty was entitled to receive part of Herman's 401K plan. The circuit court ruled in a March 1994 supplementary opinion and order that Betty was entitled to one-half of Herman's pension which accrued during the marriage and that the 401K plan accrued after the marriage so Betty was entitled to no part of it.

Herman appealed that order to this Court. In July 1996, this Court issued an opinion reversing and remanding the circuit court's order. This Court ruled that the parties' property settlement agreement regarding the pension plan was not ambiguous and that Betty was to receive one-half of the monthly pension payments that Herman received. This Court held that Herman's request for modifying maintenance must be remanded in light of the holding that Betty was entitled to one-half of the pension payments.<sup>1</sup> This Court directed the circuit court upon remand to consider whether the consequences of Herman's early retirement constituted changed circumstance so substantial and continuing as to make the separation agreement's terms unconscionable in view of the pension benefits Betty was receiving.

Upon remand, Betty argued that the circuit court should not entertain new evidence but should base its decision on the existing record. The circuit court disagreed, and the domestic relations commissioner considered new evidence. In November 1996, the commissioner ruled that the maintenance agreement providing for \$800 monthly maintenance to Betty was unconscionable. He stated since Herman received \$1,688.92 per month and had to pay out \$1,641.44 in maintenance and pension benefits, he was entitled to relief. He found that the total pension benefits due her through September 1, 1996 was \$37,943 plus 12% interest. The commissioner ruled that the maintenance obligation should be temporarily reduced to \$200 per month and reviewed again in two years when Herman

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<sup>1</sup>This Court noted in our opinion that Betty stated in her brief that the issue concerning the 401K plan was moot, because Herman paid her a portion of his 401K proceeds.

becomes eligible for Social Security benefits. He held Betty was entitled to receive the \$37,943 plus 12% interest subject to Herman having the maintenance reduction effective from March 30, 1990, the date of his motion to terminate or reduce maintenance. The commissioner concluded that the amount of overpayment resulting from the reduction in maintenance should be offset against the past due pension payments, and there was no additional sum due Herman nor any sum due Betty. The commissioner also recommended that Herman pay \$1,000 towards Betty's attorney fees and costs. Exceptions were filed to the commissioner's report, but the circuit court in a December 9, 1996 order overruled the parties' exceptions and upheld the commissioner's report. Both parties have appealed from the circuit court's order.

Betty in her appeal first argues that the circuit court erred by permitting Herman to reopen the record and present additional testimony after the case was reversed and remanded by this Court. Betty's argument lacks merit.

Generally, when a judgment is reversed on direct appeal, it is as though it never existed. Clay v. Clay, Ky. App., 707 S.W.2d 352, 353 (1986). The former Court of Appeals in Preece v. Woolford, 200 Ky. 604, 255 S.W. 285 (1923), considered the question of what is the correct practice when the appellate opinion merely reverses the judgment without any directions as to whether or not additional proof should be taken upon remand. The court held that the trial court had discretion to allow the taking of additional proof. Id., at 286. Generally, on remand of a case, a trial court may make any order of direction that is not inconsistent with the

decision and directions of the appellate court. Id. (citation omitted). Cf. City of St. Matthews v. Oliva, Ky, 392 S.W.2d 39 (1965).

In the instant case, this Court did not state whether additional evidence should or should not be heard upon remand. This Court did direct the circuit court to consider upon remand whether the consequences of Herman's early retirement constituted changed circumstances so substantial and continuing as to make the separation agreement's maintenance terms unconscionable. Thus, the trial court did not abuse its discretion by permitting additional evidence to be presented upon remand since it was necessary to determine the economic and living conditions of the parties at that time. We decline to reverse on this issue.

Betty contends that the circuit court's order granting Herman a reduction in maintenance from \$800 to \$200 monthly was clearly erroneous and constituted an abuse of discretion. She maintains that the trial court failed to follow the test surrounding voluntary retirement set out in Barbarine v. Barbarine, Ky. App., 925 S.W.2d 831 (1996). She asserts that at most, Herman would be entitled only to reduce maintenance prospectively from \$800 to \$600. We have uncovered no error regarding this issue.

Generally, as with basic valuation matters, maintenance determinations are within the sound discretion of the trial court. Clark v. Clark, Ky. App., 782 S.W.2d 56, 60 (1990). Unless absolute abuse of discretion is shown, the appellate court must maintain confidence in the trial court and not disturb its findings. Id. See also Barbarine v. Barbarine, 925 S.W.2d at 832;

Drake v. Drake, Ky. App., 721 S.W.2d 728 (1986). See Kentucky Revised Statute (KRS) 403.200. "[T]he provisions of any decree respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." KRS 403.250(1). In Barbarine v. Barbarine, supra, this Court considered a situation regarding maintenance modification where one spouse had voluntarily retired. This Court held that if after considering and weighing the circumstances of a case, the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse, then a decrease in the amount of maintenance may be appropriate. Barbarine v. Barbarine, 925 S.W.2d at 833. Several factors are relevant to this determination including the ability of both spouses to earn in the labor market, the age and health of the retiring spouse, the motives of the party for retiring, the timing of the retirement, the ability of the party to pay maintenance after retirement, the ability of the other spouse to provide for himself or herself, the reasonableness of the early retirement, the expectations of the parties and the opportunity of the defendant spouse to prepare to live on the reduced support. Id.

In the case at bar, this Court has found no abuse of discretion by the circuit court. Evidence was presented that Herman received only \$1,688.92 per month after retirement and had to pay Betty \$1,641.44 per month, thus leaving him with a meager amount for his living expenses. Further, evidence was presented that Herman's retirement was not entirely voluntary, because his employer was offering retirement packages in order to cut the

payroll and might lay off employees that did not take the offer. In fact, apparently some employees were laid off. Thus, reducing maintenance to \$200 was not an abuse of discretion. The circuit court followed the directive in our earlier opinion reversing and remanding the case. Barbarine v. Barbarine, supra, was not final at the time of our earlier opinion in this case and thus was not mentioned in the opinion. Betty raised Barbarine in her exceptions to the commissioner's report. The trial court in its order stated that while the commissioner did not specifically refer to Barbarine, the criteria discussed in Barbarine were considered. We concur with the circuit court on this matter. Further, the facts in Barbarine were distinguishable as the former husband in that case had clearly retired voluntarily. Thus, we decline to disturb the trial court's decision. The modified amount of maintenance set by the circuit court was not inappropriate, and the court seemed to apply the correct factors in establishing that Herman had met his burden of showing changed circumstances. See Roberts v. Roberts, Ky. App., 744 S.W.2d 433 (1988); McGowan v. McGowan, Ky. App., 663 S.W.2d 219 (1983); Wilcher v. Wilcher, Ky. App., 566 S.W.2d 173 (1978).<sup>2</sup>

Betty next argues that the circuit court erred by making the reduction of maintenance retroactive to March 30, 1990, the date Herman filed his original motion to modify and to offset the retroactive relief against the judgment due Betty for her share of

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<sup>2</sup>Herman in his cross-appeal has argued that maintenance should have been terminated altogether. Again, we have reviewed the record and cannot find that the circuit court erred by reducing maintenance to \$200 per month.



the pension benefits. After reviewing the applicable law, we have uncovered no error.

The law regarding the retroactivity of modifying maintenance has been addressed several times. In Combs v. Combs, Ky., 787 S.W.2d 260 (1990), it was noted that maintenance payments are vested from the entry of a decree and ordinarily can be modified only upon the entry of a subsequent order of the court to operate prospectively, from the date of entry. See also Louise Graham and James Keller, Kentucky Practice, Domestic Relations Law, § 16.1, p.2 (1997). However, retroactive relief has been ordered when circumstances delay a case from being submitted for decision. Mudd v. Mudd, Ky. App., 903 S.W.2d 533, 534 (1995). Our law does not prohibit reduction of maintenance for the period of time from the filing of the motion to the entry of judgment. Id. See also Graham and Keller, Kentucky Practice, Domestic Relations Law, at § 16.19. Although payments which have accrued generally become vested, and Kentucky law primarily supports prospective relief, a trial court has discretion to allow appropriate relief in certain circumstances. Mudd v. Mudd, 903 S.W.2d at 534.

The circuit court in the instant case did not err or abuse its discretion by making the reduction of maintenance retroactive to March 30, 1990, the date Herman filed his first motion to modify maintenance. His appeal from that order was dismissed by this Court because the order was not final and appealable as there were other pending issues in the case. Betty and Herman did appeal from the court's February and March 1994 orders regarding maintenance and pensions, and this Court reversed

and remanded for a determination of whether the maintenance provision was unconscionable because of changed circumstances. Thus, Herman's appeal of the maintenance issue was delayed primarily because of judicial proceedings. We do not believe the circuit court abused its discretion by making the modification retroactive. Further, the court's actions did not circumvent the parties' property settlement agreement since Betty was awarded the pension benefits pursuant to the agreement. Under Kentucky law, open ended maintenance provisions are subject to modification pursuant to KRS 403.250. Lydic v. Lydic, Ky. App., 664 S.W.2d 941 (1983); Graham and Keller, Kentucky Practice, Domestic Relations Law at § 16.21. The court below thus did not err by offsetting the pension amounts and the maintenance payments.

Betty and Herman both contest the circuit court's award of \$1,000 to Betty for attorney fees and expenses. Betty maintains that this amount is inadequate while Herman argues that Betty should not have been awarded any attorney fees. We have found no error by the circuit court.

This Court must first note that Herman has waived this issue by not naming Betty's counsel as a party in his cross-appeal. Although the rule regarding naming attorneys as parties to an appeal has been loosened in some types of cases, the rule remains in effect in dissolution cases. Appellants must name the attorney as a party to the appeal when contesting the award of attorney fees. Knott v. Crown Colony Farm, Inc., Ky., 865 S.W.2d 326, 330 (1993); Tyler v. Bryant, Ky., 394 S.W.2d 454 (1965); Beaver v. Beaver, Ky. App., 551 S.W.2d 23 (1977). We have reviewed the trial

court's award of attorney fees in the instant case nevertheless, and have uncovered no abuse of discretion.

KRS 403.220 provides that a trial court, after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney fees. The court must consider the financial resources of the parties, and the awarding of attorney fees is appropriate where one party's resources exceed those of the other. Drake v. Drake, Ky. App., 809 S.W.2d 710, 714-15 (1991); Hollingsworth v. Hollingsworth, Ky. App., 798 S.W.2d 145, 147-48 (1990); Drake v. Drake, 721 S.W.2d at 731. A trial court has great discretionary power in its determination to award or deny attorney fees. Drake v. Drake, 809 S.W.2d at 714-15; Hollingsworth v. Hollingsworth, 798 S.W.2d at 148.

In the case at bar, we have uncovered no abuse of discretion. Betty's resources were more limited than Herman's because of her disabilities and the fact that she lived alone. Herman on the other hand was on a limited income, thus limiting the amount he could pay. We decline to disturb the trial court's award of \$1,000 in attorney fees to Betty.

For the foregoing reasons, this Court affirms the judgment of the Daviess Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

Richard T. Ford

BRIEF FOR APPELLEE/CROSS-  
APPELLANT:

Ralph W. Wible

Owensboro, Kentucky

Owensboro, Kentucky