RENDERED: March 5, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001272-MR

DEBRA SCHOO CECIL and
IRVIN D. FOLEY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 92-CI-02178

BENNET DOWNS CECIL, III — APPELLEE

and

NO. 1997-CA-001454-MR

BENNET DOWNS CECIL, III — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 92-CI-02178

DEBRA S. CECIL — APPELLEE

OPINION
AFFIRMING IN PART AND VACATING AND REMANDING IN PART
** ** ** ** **

BEFORE: COMBS, DYCHE, and SCHRODER, Judges.

COMBS, JUDGE: This case is a consolidated appeal from two judgments of the Jefferson Circuit Court in an action to modify child support and maintenance. Debra Schoo Cecil (now Debra

Schoo Hibberd — "Debra") and Bennet Downs Cecil, III ("Ben") both filed direct appeals from the orders of the circuit court entered on April 3, 1997, and April 21, 1997, respectively.

Debra and Ben were married on May 7, 1973; three children were born of the marriage. In March, 1992, Debra filed a petition for dissolution of the parties' marriage. The court dissolved the marriage by decree entered November, 1992, but it reserved all other issues relating to the dissolution. After three years of litigation, the court disposed of the remaining issues in a judgment entered on November 17, 1995, and a supplemental judgment entered on February 7, 1996. Pertinent to this appeal, the court awarded Debra custody of the parties' three minor children, granted Ben visitation, and required him to pay $2,850.00 a month in child support to Debra.

The court also held that Debra was entitled to maintenance and ordered Ben to pay her $3,000.00 a month for ten years from the entry date of the judgment (November 17, 1995). In awarding Debra maintenance, the court found significant the fact that Debra had supported the household while Ben was attending medical school. Additionally, the court divided the marital property equally — with each party receiving approximately $239,059.00 in marital property.

The record indicates that very soon after entry of the court's judgment of November, 1995, Ben was in arrears in child support and maintenance payments. Consequently, Debra filed a series of motions to require him to make his child support and maintenance payments and to hold him in contempt of court for

failure to do so. She also filed a garnishment against the accounts receivable of his medical practice.

Ben then filed a motion to reduce his child support and the maintenance obligation to Debra. A hearing on this matter was scheduled for March 20, 1996, but it was postponed due to discovery disputes between the parties. Near the end of May, 1996, Ben closed his private medical practice; he had earned between $200,000 and $300,000 a year from his practice. In August, 1996, Ben took a staff position with the Department of Veteran Affairs with an annual salary of $102,730.00. This position required him to staff a primary care clinic at Fort Knox, Kentucky, as well as to provide supervision at Ireland Army Hospital.

Upon closing his practice, Ben filed a motion in June, 1996, to reduce his child support obligation and to suspend his maintenance payments. The Domestic Relations Commissioner (DRC) conducted a hearing on November 21, 1996, on the issue of child support and of maintenance modification. Ben argued that he was entitled to a reduction in his child support and maintenance obligation on the ground that there had been a material change in his circumstances. Conversely, Debra maintained that Ben was voluntarily underemployed, citing the fact that he had elected to close his successful, profitable private practice in order to take a salaried position for less than half of what he had earned in private practice.

On December 20, 1996, the DRC submitted its report to the court, agreeing and finding that there had been a substantial

change in Ben's circumstances and that his child support and maintenance obligations should be reduced. The DRC also held that Ben was not voluntarily underemployed, stating that Ben had closed his private practice due to mental health problems. The DRC re-calculated Ben's child support obligation as $1,373.50 per month and recommended that his maintenance payments be reduced from $3,000.00 to $2,250.00 per month; the modifications were to relate back to June 1, 1996, the date Ben filed his motion. Additionally, the DRC determined that Ben owed Debra a total of $30,374.00 in arrearage for child support and maintenance.

After conducting a hearing on the parties' exceptions, the court entered an order on April 3, 1997, adopting the DRC's report and recommendations. The Court also stated that Debra and Ben were to pay their own legal fees. Subsequently, on April 21, 1997, the court denied Debra's motion to amend the court's order of April 3, 1997, to allow her to reserve the issue of attorney's fees. Debra and Ben both filed direct appeals from the court's orders of April 3, 1997, and April 21, 1997; their appeals were consolidated into this appeal.

Debra and Ben both raise issues concerning the court's modification of the original maintenance award to Debra. Ben argues that the court erred by not eliminating entirely his maintenance obligation to Debra. Debra, however, contends that the court erroneously modified her maintenance award. We find that the court improperly reduced Debra's maintenance award.

It is well established in Kentucky that a maintenance award for a fixed sum — payable either in lump sum or in

installments to be paid over a definite period — is not subject to modification. Dame v. Dame, Ky., 628 S.W.2d 625 (1982). The Supreme Court carved out a narrow exception to this rule in Low v. Low, Ky., 777 S.W.2d 936 (1989). In Low, as part of the division of the marital property, the husband was required to execute a promissory note in favor of the wife; the promissory note was a significant factor in the court's decision to award a fixed sum of maintenance to the wife, which the husband was to pay to her in installments. Subsequently, the husband voluntarily filed bankruptcy and the promissory note was discharged. The wife then sought a modification to increase her original award of maintenance. Recognizing the "strong nexus" between property awarded and maintenance, the Court held that modification of the wife's fixed maintenance award was proper, stating:

> Upon occasion, however, extraordinary events may intervene which render full compliance with the decree impossible and defeat the scheme formulated by the court. As a result, one party may reap a windfall while the other is left to suffer. In equity and good conscience, this Court cannot approve prospective application of one provision of a decree when another and essential provision of the same decree has failed entirely.

Low, supra at 938. The Court explained however that this decision was not to be read as a significant departure from Dame. The Court emphasized that parties could continue to rely upon the finality of a lump sum maintenance award. The exception established in Low is applicable only under extraordinary circumstances which affect the underlying purpose of the decree.

In this case, Debra was awarded maintenance by means of a fixed sum to be paid to her installments over a definite period of time — $3,000.00 per month to be paid over a ten-year period. Thus, the award cannot be modified unless there has been a failure of the division of marital property upon which the court's calculation of maintenance was based. We find that the scheme formulated by the court in the original decree has not changed nor has it been rendered unconscionable by the occurrence of any extraordinary events. After the parties' divorce, Ben continued in his private medical practice, earning a substantial salary. The fact that Ben closed his practice and is now earning a lower salary does not constitute a failure of the court's original division of marital property. The reasons behind the closure of his medical practice are irrelevant as Bennett continues to have a high earning potential. We find that the court erred in reducing Ben's maintenance obligation.

The next issue raised by Debra on appeal is whether the court erred in determining that Ben was not underemployed. The court adopted the DRC's finding on this issue, attributing the closure of Ben's medical practice to mental and emotional difficulties. Debra, however, argues that he voluntarily closed his private practice and took a lower paying job solely to defeat her maintenance award. She maintains that the court should not have reduced his child support obligation based upon his lower salary.

Pursuant to KRS 403.212(2)(d), the court in its discretion may find a parent underemployed and calculate child

support based upon a determination of his or her potential income. However, this statute should be interpreted to include a bad faith requirement so as to avoid unfairly punishing an individual whose employment situation has changed because of circumstances beyond his control or where his change in employment is reasonable in light of the circumstances. In this case, the DRC found that it was reasonable for Ben to close his medical practice because of his mental health problems and to seek less stressful employment that resulted in a lower salary.

The trial court's findings of fact should not be disturbed on appeal unless they are clearly erroneous. CR 52.01. The DRC's findings of fact, which were adopted by the court, were extensive and detailed. The record contains substantial evidence to support the court's findings. Ben introduced evidence that he had been diagnosed as suffering from chronic depression and that his doctor had recommended that he limit his work hours for health reasons. We do not consider the court's finding on this issue to be clearly erroneous and will not disturb it on appeal. Having found that Ben was not underemployed, the court was correct in re-calculating his child support obligation based upon his current salary of $102,730.00.

The final issue raised by both Debra and Ben on appeal relates to attorney's fees. In its order entered April 3, 1997, the court found that the parties had "the ability and should therefore be required to pay their own attorney's fees and costs." Debra filed a motion to amend the court's order of April 3, 1997, to reserve her right to move for attorney's fees.

The court denied her motion in its order entered on April 27, 1997. Debra contends that the court has erred procedurally in denying her (in advance of the motion) the opportunity to move for attorney's fees. Ben maintains that the court erred in failing to order Debra to pay his attorney's fees and court costs.

KRS 403.220 authorizes the trial court "from time to time after considering the financial resources of both parties" to order a party to pay a reasonable amount for the cost to the other party of maintaining or defending a proceeding under KRS Chapter 403. The plain language of the statute does not prohibit the court from addressing this issue sua sponte. Moreover, the allocation of attorney's fees and court costs is entirely within the discretionary authority granted to the trial court. Wilhoit v. Wilhoit, Ky. App., 521 S.W.2d 512 (1975). We find no error in the court ordering sua sponte the parties to pay their own legal expenses.

Based upon the foregoing reasons, we affirm in part and vacate and remand in part the order of the Jefferson Circuit Court entered April 3, 1997. We also affirm the order of the circuit court entered on April 21, 1997.

ALL CONCUR.

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