

RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003227-MR

MICHAEL FORREST STEPHENS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 92-CI-00998

REBECCA BARRIER STEPHENS

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, EMBERTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Michael Forrest Stephens (Michael) appeals from the order of the Hardin Circuit Court entered on September 16, 1996, which overruled Michael's motion to modify a maintenance award due to changed circumstances. Michael argues that the trial court erred in determining that the maintenance award was not subject to modification since the trial court had previously stated in an order that the award was not a lump sum award. We affirm.

On July 15, 1992, Rebecca Barrier Stephens (Rebecca) filed a petition seeking dissolution of her seventeen-year marriage to Michael. By judgment entered on January 6, 1995, Michael was ordered to pay Rebecca maintenance "in the sum of \$1,500 per month for a period of ten (10) years." Rebecca filed a motion to alter and amend a portion of the trial court's judgment stating as follows:

Specifically, the Petitioner is unclear as to whether or not the Court has awarded her a sum certain of maintenance due and payable over a period of time, or whether this Court has set monthly payments which may be modified. If the Court has set monthly payments which may be modified, then Counsel asks the Court to make the payments for lifetime. If the Court has intended these payments to be nonmodifiable [sic], then the Court should specifically make that ruling.

On April 12, 1995, the trial court ruled on Rebecca's motion to clarify its ruling in regard to the maintenance payments. The trial court quoted Kentucky Revised Statutes (KRS) 403.250(2), then stated as follows:

The judgment is amended to provide that the award of maintenance is not a lump sum award and in accordance with KRS 403.250(2) maintenance shall terminate upon the death of either party or in the remarriage of the Petitioner.

The trial court then amended its original judgment and order in pertinent part as follows:

6. That the Respondent shall pay maintenance to the Petitioner in the sum of \$1,500.00 per month for a period of ten years or until the death of either party or the remarriage of the Petitioner whichever first occurs.

This was a final and appealable order and neither party appealed.

On July 3, 1996, Michael filed a motion to modify the maintenance award "on the grounds that there have been substantial and continuing changed circumstances which make the original award unconscionable." The trial court set a hearing for September 13, 1996. Before any proof had been taken at the hearing, Rebecca, relying on Dame v. Dame, Ky., 628 S.W.2d 625 (1982), moved the trial court to overrule Michael's motion as a matter of law. Rebecca argued that the award of \$1,500 per month for ten years was the equivalent of a lump sum award payable in installments and thus, was not subject to modification. Michael responded that the trial court in the order amending the original judgment specifically stated that the maintenance award was not a lump sum award. Michael also argued that Rebecca had not filed a written motion as required by the local rules of the Hardin Circuit Court and that she should have been prohibited from bringing the oral motion at the hearing.

The trial court did not allow any proof to be taken and entered an order on September 16, 1996, which summarized its previous orders and then stated:

Therefore, the Court found that maintenance would be terminated by the death of either party or remarriage of the Petitioner. The Court cited and addressed only KRS 403.250(2) and amended its prior order by only adding "or until death of either party or remarriage of the Petitioner, whichever occurs first."

The Trial Court relies on Dame v. Dame, Ky., 628 S.W.2d 625 (1982) [,] in which the

language is almost identical to the order in this case. In Dame, supra, the Appellate Court held that a maintenance award in a fixed amount to be paid over a definite period of time was not subject to modification.

Thus, the trial court overruled Michael's motion to modify.

Michael then filed a motion to alter, amend, or vacate the September 16 order. The trial court overruled this motion and stated:

The Order must be viewed in its entirety. Although the Order may have been inartfully worded, by quoting the statute, KRS 403.250(2), it is obvious that the Court was simply parroting that statute to provide that maintenance would terminate upon the remarriage of the Petitioner.

This appeal followed.

Since our review of the issues in this case is as a matter of law, we need not defer to the ruling of the trial court. Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996). KRS 403.250 states in pertinent part as follows:

(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. . . .

(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.

In Dame, supra, the Supreme Court specifically considered KRS 403.250 and addressed the issue of whether the

circuit court has "jurisdiction to change an award of maintenance in a fixed and determinate amount to be paid either in a lump sum or for a specific amount to be paid over a definite period of time[.]" Id. at 625. The Court stated that if KRS 403.250 purported to apply only to open-end awards, "the legislature in enacting KRS 403.250 merely carried into the statute the law as it existed prior to the adoption of the statute." Id. at 626. On the other hand, the Court queried, "did the legislature in enacting KRS 403.250 intend to extend the jurisdiction of the circuit court so as to permit it to amend or modify a lump sum award of maintenance as well as an open-end award?" Id. The Court discussed the purpose of Chapter 403 and it noted comparable foreign statutory law and case law. The Court concluded as follows:

The law favors finality to litigation. To extend the jurisdiction of the circuit court so as to permit it to amend or modify an award of maintenance other than an open-end award would do nothing toward finalizing distasteful litigation. Certainly and most assuredly, the purposes sought by KRS 403.110, supra, would be frustrated.

Id. at 627 (emphasis added).

Thus, the question we must consider is whether the maintenance award in the case at bar was an open-end award. We conclude that the plain language in Dame stands for the rule that if the award is open-ended, it is modifiable; if it is not an open-end award, it is not modifiable. There is no dispute that the trial court ordered Michael to pay Rebecca \$1,500 per month

for ten years, until she remarried, or until either of them died, whichever occurred first. Basically, the trial court ordered the payment of \$1,500 per month for ten years and later in the amended order added the requirements of KRS 403.250(2). It is clear to this Court that the trial court ordered a specific amount of maintenance to be paid for a definite period of time. This is not an open-end award and thus, as a matter of law, it is not subject to modification. See Graham & Keller, Kentucky Domestic Relations Law § 19.05 (1988).

Since as a matter of law Michael is not entitled to relief, the trial court properly denied the evidentiary hearing. Further, any error that the trial court may have committed by not following the local rule concerning written motions was harmless since Michael has had an opportunity to fully brief his argument and the trial court's ruling was correct as a matter of law.

The order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Stephen C. Todd
Hon. Clint G. Willis
Bowling Green, KY

BRIEF FOR APPELLEE:

Hon. Barry Birdwhistell
Elizabethtown, KY