

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000216-MR

ALICE MARIE GAMBLE

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 95-CI-00083

HOWARD EUGENE GAMBLE

APPELLEE

OPINION AFFIRMING IN PART,  
VACATING IN PART, AND REMANDING

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BEFORE: DYCHE, GUIDUGLI, AND JOHNSON, JUDGES.

DYCHE, JUDGE: Alice Marie Gamble appeals from an order of the Daviess Circuit Court modifying the terms of the parties' final divorce decree. The order relieved appellee, Howard Eugene Gamble, (Howard) from a \$750.00 dollar per month maintenance award and reduced Alice's share of Howard's marital 401K retirement account.

The parties were married on September 25, 1981. On January 20, 1995, Howard filed a petition to dissolve the marriage. The action was then referred to a Domestic Relations Commissioner (DRC).

On May 2, 1995, the DRC's recommended order was entered requiring Howard to pay Alice temporary maintenance of \$1000 per month. Additionally, both parties were ordered to file with the court and opposing counsel within thirty days a sworn statement of all assets either party had knowledge of. The parties were also ordered not to transfer or dispose of any marital property.

On February 13, 1996, the DRC issued his final report. The DRC recommended that Alice be awarded \$750 per month in maintenance for eight years, and a one-half, or \$33,000.00, interest in Howard's 401K retirement account. Howard and Alice each filed exceptions to the report. On May 14, 1996, the trial court entered an order affirming and adopting the Commissioner's report in all respects, though the order did, in addition, make certain clarifications. In response to the order, Howard filed a "motion for reconsideration."

On June 7, 1996, the trial court entered the dissolution decree. Included in the decree was a judgment that Howard pay Alice \$750.00 per month in maintenance for a period of eight years and that Howard's \$66,000.00 401K be divided equally between the parties. Howard did not file a motion to vacate or amend the order, nor did he file an appeal with this court.

Following the entry of the decree, various contempt litigation continued. On November 25, 1996, Howard filed a motion to terminate the maintenance ordered under the decree and requested that matters be referred back to the DRC for additional consideration. On November 26, 1996, a hearing on the motion was held before the trial court. At the hearing, Howard accused Alice of having perjured herself by lying about or failing to

disclose certain assets in her possession at the time of the parties' separation.

Howard requested that Alice execute waivers to permit him to obtain certain bank records. On January 22, 1997, the trial court entered an order requiring Alice to execute waivers to permit Howard to gain access to the bank account records. The trial court held the motion to terminate maintenance in abeyance pending the results of the information obtained as a result of the waivers.

While the maintenance issue languished in abeyance, on October 23, 1997, Howard filed, in conjunction with a motion for contempt, another motion to terminate maintenance. The motion further complained that Alice had failed to execute the bank account waivers.

Following a November 20, 1997 hearing on the motion, on December 24, 1997, the circuit court entered an order terminating Howard's maintenance obligation to Alice, retroactive to January 1, 1997. The order also reduced Alice's interest in Howard's 401K account. Alice filed a "motion to reconsider," which was denied by order entered January 21, 1998. This appeal followed.

Modification or termination of provisions for maintenance and modification of a prior property disposition are both addressed by KRS 403.250(1). KRS 403.250(1) provides, in pertinent part, that

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.

The provisions of a property disposition cannot 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." Burke v. Sexton, Ky. App., 814 S.W.2d 290, 291 (1991); KRS 403.250(1). Alice has correctly identified the method for reopening a final judgment, Rule of Civil Procedure (CR) 60.02. Alice argues that the trial court abused its discretion by reopening the case under CR 60.02. We disagree.

Howard's November 25, 1996, motion alleged that Alice had committed perjury or falsified evidence relating to assets she controlled at the time of the parties' separation. The trial court may reopen the proceedings to relieve a party from a final judgment upon the grounds of perjury or falsified evidence. CR 60.02(c); Duncil v. Greene, Ky., 424 S.W.2d 940 (1968). A motion for relief under CR 60.02(c) must be brought within one year. Copley v. Whitaker, Ky. App., 609 S.W.2d 587, 942 (1980).

Howard did bring his motion alleging perjury and falsified evidence within one year. The decree was entered on June 7, 1996, and Howard's initial motion was filed on November 25, 1996. There is substantial evidence in the record that Alice committed perjury or falsified evidence in the course of these proceedings. For example, her supposed inability to explain what became of a significant amount of Howard's personal possessions following his departure from the marital residence was particularly incredible. Moreover, Alice's asset disclosure

exhibit failed to accurately list or account for withdrawals and amounts held in her bank accounts at the time of separation.

"[T]he determination to grant relief from a judgment or order pursuant to CR 60.02 is one that is generally left to the sound discretion of the trial court[.]" Schott v. Citizens Fidelity Bank and Trust Co., Ky. App., 692 S.W.2d 810, 814 (1985). The time limitation and the perjury or evidence falsification criteria for reopening a proceeding under CR 60.02(c) were met. The trial court did not abuse its discretion in reopening the proceedings to reconsider property distribution.

We reject Alice's argument that Hartford Accident & Indemnity Company v. Lewis, Ky., 296 S.W.2d 228 (1956), required Howard to specifically request relief under CR 60.02, either in the caption of his motion or in the body of his motion, for the trial court to reopen the proceedings under CR 60.02. Hartford held that the grounds for CR 60.02(f) relief for reasons of an "extraordinary nature" must be clearly stated in a written motion or petition attempting to invoke it. Howard's November 21, 1996, motion specified grounds for relief consistent with the requirements stated in CR 60.02(c). The trial court properly reopened the final judgment for consideration of whether property distribution should be modified.

In its order of December 24, 1997, the trial court made a finding that

[t]he records establish that Mrs. Gamble withdrew \$21,223.67 from a personal account (No. 0001378643) in her name only, on December 14, 1994, the day after the parties separated. Mrs. Gamble never provided such information and, indeed, denied any knowledge of such.

We may not set aside a finding of fact of the trial court unless the finding is clearly erroneous. CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). If supported by substantial evidence, the trial court's finding of fact is not clearly erroneous. Black Motor Co. v. Greene, Ky., 385 S.W.2d 954 (1964). The bank records, when compared with Alice's testimony and asset disclosure sheets, support the trial court's finding.

To provide Howard relief from Alice's prior dissemblances, the trial court reduced Alice's share of Howard's 401K by \$21,223.00. This represents the amount Alice had withdrawn from Owensboro National Bank account No. 0001378643 immediately following the separation and had failed to disclose in her subsequent testimony and asset disclosure schedules. Our standard of review in considering property distribution awards is limited to determining whether the trial court abused its discretion in light of the factors set forth in KRS 403.190. Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994). Here, the trial court merely off-set Alice's previous award by the amount she had failed to disclose in the prior proceedings. This was not an abuse of the trial court's discretion.

We now consider the trial court's termination of Alice's maintenance award of \$750.00 per month for eight years, a total award of \$72,000.00. Alice argues that the trial court erred as a matter of law in terminating her maintenance award under Dame v. Dame, Ky., 628 S.W.2d 625 (1982). A sum certain payable for a definite period, as here, is considered a lump sum

Dame award. John v. John, Ky. App., 893 S.W.2d 373 (1995). Dame awards are, generally, non-modifiable.

However, as discussed supra, the trial court properly reopened this case pursuant to CR 60.02(c). A Dame maintenance award may be reopened if, as here, the standards of CR 60.02(c) are met. Moreover, the form of relief under CR 60.02 "may include modification or setting aside of the judgment or order, or granting a new trial, or taking other appropriate action." 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 60.02, cmt. 1 (5th ed. 1995). Therefore, it was unnecessary for the trial court to consider the general statutory elements, i.e., change of conditions and unconscionability, for a modification of maintenance under KRS 403.250.

The trial court's rationale, which we set forth in full, for reducing Alice's share of Howard's 401K account and terminating her maintenance was as follows:

waivers were prepared and presented to Mrs. Gamble [allowing Howard access to alleged accounts Alice has or had at Republic and Charter Banks], however, she refuses to execute the waivers. This continued refusal to comply with demands of Mr. Gamble and orders of this Court for a full disclosure of assets gives credibility to Mr. Gamble's claims that Mrs. Gamble is hiding thousands of dollars in assets. Mr. Gamble has subpoenaed records from out of state banks. The subpoena was not honored. Particularly telling, however, is the fact that Mr. Gamble was able to obtain records from the Owensboro National Bank. The records establish that Mrs. Gamble withdrew \$21,223.67 from a personal account (No. 0001378643) in her name only, on December 14, 1994, the day after the parties separated. Mrs. Gamble never provided such information and, indeed, denied any knowledge of such. (See e.g., Transcript of Mrs. Gamble's testimony, July 31, 1995, p. 97, line 19). This account should not be

confused with other accounts at Owensboro National.

Mrs. Gamble also received a \$14,000 severance package from Peabody Coal Company which has not been accounted for.

When Mr. Gamble left the marital residence all his personal belongings, except some work clothes, were left in the residence. These items included such things as safety awards from his employer, a bedroom suite, gifts to him from relatives, guns, clothing, and so forth. Mrs. Gamble acknowledged having possession of such items, however, in spite of being ordered to deliver such items to Mr. Gamble, she has refused to do so and now claims she doesn't know what happened to them. She has no explanation for their disappearance. She was ordered to return a fishing boat to Mr. Gamble that she took to their farm in Illinois. She failed to do so until Mr. Gamble made several appearances in an Illinois court to finally get its return. He has valued his missing property at \$10,000.

Rarely, if ever, has this Court experienced such blatant contempt as that shown by Mrs. Gamble. This may explain her reluctance to return to Kentucky for the hearing on this matter.

To enforce the previous orders of this Court against Mr. Gamble under the circumstances of this case, particularly in view of the inexcusable leniency this Court has shown Mrs. Gamble to this point, would make a mockery of the judicial system.

Combining the reduction in her share of Howard's 401K account with the amount of the terminated maintenance, \$72,000.00, the total reduction to Alice's original property and maintenance award as a result of the reopened proceedings was \$93,223.00. While the \$21,223.00 reduction to Alice's 401K account is accounted for by Alice's withdrawal from the Owensboro National Bank the day after the parties' separation, the trial court has only identified an additional \$24,000.00 in undisclosed



assets - \$14,000.00 relating to Alice's severance package and \$10,000.00 relating to the personal property of Howard which Alice failed to return.

That leaves \$48,000.00 (less any maintenance actually paid following the decree) of the reduction to the maintenance award unaccounted for in the trial court's order.

While we sympathize with the trial court in its frustration with Alice's conduct, we believe the imposition of, in effect, a \$48,000.00 civil sanction was excessive and therefore an abuse of its discretion. In this regard, we note that Howard has not been a model of virtue in complying with the trial court's orders. In particular, he failed to timely make certain maintenance payments. While certainly Alice should be assessed attorney fees for the additional litigation she has caused for Howard in these proceedings, we do not believe Howard should be the recipient of a forty thousand dollar plus windfall if, in fact, Alice is entitled to maintenance under KRS 403.200. We therefore vacate that portion of the trial court's order terminating maintenance and remand for a de novo determination of maintenance under KRS 403.200.

We affirm the trial court's reduction of Alice's share of Howard's 401K account, vacate the trial court's termination of Alice's maintenance award, and remand for a determination of appropriate maintenance, if any, under KRS 403.200.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathy L. Hornaday  
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BRIEF FOR APPELLEE:

Patrick T. Flaherty  
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