RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2001-CA-002043-MR

PETER DAVID JARVIO — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 98-CI-03234

ANN M. MCCARTE (FORMERLY JARVIO) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND KNOPF, JUDGES; AND MILLER, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Peter David Jarvio, pro se, has appealed from an order entered by the Fayette Circuit Court on July 25, 2001, which denied his motion for a reduction of his maintenance obligation to Ann M. McCarte (formerly Jarvio).[2] Peter has also appealed from an order entered on August 23, 2001, which denied

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Although Peter is proceeding pro se on appeal, he was represented by counsel throughout the initial stages of this litigation.

his motion to alter, amend or vacate the order entered on July 25, 2001.[3] Having concluded that the trial court did not err in its ruling on either motion, we affirm.

Peter and Ann were married in 1977, and the marriage produced four children. The couple separated during the summer of 1995 and Ann filed a petition for the dissolution of their marriage on September 4, 1998. The Fayette Circuit Court entered a decree of dissolution on September 16, 1999.

At the time of the dissolution, Peter was employed as an engineer earning approximately $84,000.00 per year. Ann was the primary caretaker of the couple's four children, and by agreement of the parties, she was not employed throughout the majority of the marriage. Thus, when Ann filed her petition for dissolution, she had no separate income and she requested temporary support from Peter.

The parties subsequently agreed that Peter would pay Ann $3,046.00 per month from September 11, 1998, through March 11, 1999.[4] On March 24, 1999, the trial court entered an order extending the support payments until the matter was resolved. On May 10, 1999, Ann filed a motion to increase the maintenance

[3] Kentucky Rules of Civil Procedure (CR) 59.05.

[4] The entire amount was originally designated as temporary maintenance per a mediation agreement signed by both parties. Thus, we are unable to discern exactly how much of the $3,046.00 represented maintenance and how much represented child support, however, upon a close review of the record it appears that $1,730.00 represented temporary maintenance and $1,316.00 represented temporary child support.

and child support payments. On June 10, 1999, the trial court granted Ann's motion and increased the child support and maintenance payments by an additional $300.00 per month, effective as of May 10, 1999. On June 17, 1999, Peter requested that the matter be assigned for trial.

A trial was conducted on August 31, 1999, and after hearing the testimony of both parties, the trial court entered a decree of dissolution ordering Peter to pay Ann maintenance in the amount of $2,500.00 per month for 48 months, beginning with the month of September 1999; $1,750.00 per month for 24 months, beginning with the month of September 2003; and $1,000.00 per month for 24 months, beginning with the month of September 2005.[5] Peter was also ordered to pay child support in the amount of $781.00 per month, beginning with the month of September 1999.[6] Joint custody was granted as to the three minor children and Ann

[5] The maintenance award was based primarily on Ann's testimony as to her current financial situation, her ability to meet her needs independently, her ability to acquire the education necessary to pursue employment as a teacher, and the standard of living she enjoyed during the marriage. Specifically, Ann testified at trial that she graduated college in 1976 with a B.A. in Spanish Linguistics and a teaching certificate. Ann further testified that her teaching certificate had long since expired and that it would take her approximately two to three years of full-time schooling to become recertified. Ann stated that she would like to obtain an elementary certification so that she could teach elementary school, however, she also testified that it would be difficult for her to work or attend school full-time because of the children. The limitations on Ann's opportunities for work and her desire to attend school full-time provided the primary basis for the maintenance award.

[6] Peter's child support obligation was subsequently lowered due to a clerical error on the part of the trial court. Peter currently pays child support of $662.00 per month.

was designated as the primary residential parent. The decree (and subsequent amendment) also awarded the marital residence to Ann, and ordered that Peter's mortgage obligation be terminated within six months by either Ann's refinancing of the mortgage or by the sale of the residence.[7] Ann was also ordered to pay Peter $32,000.00, which represented his share of the equity in the marital residence.

Peter appealed the maintenance award to this Court, claiming that the amount awarded was excessive and that the trial court had failed to properly consider his expenses.[8] Specifically, Peter claimed that his yearly income was approximately $70,000.00 and not the $84,000.00 figure used by the trial court. Thus, Peter argued that the maintenance and child support awards were grossly excessive as they represented over 75% of his net income and he asked this Court to remand the matter for both prospective and retroactive relief from the maintenance award. While this Court acknowledged that the maintenance award placed a very heavy burden on Peter, it held that the award was not excessive. This Court also noted that there was ample evidence in the record to support the trial

[7] The amendment referred to is an order of the trial court entered on November 1, 1999, which was in response to Peter's motion to alter, amend or vacate the maintenance award. The order also made numerous dispositions of other marital and personal property which are not the subject of this appeal.

[8] See Jarvio v. McCarte, 1999-CA-002831-MR, rendered March 2, 2001, not to be published.

court's decision to set Peter's annual income at $84,000.00 as opposed to $70,000.00.

Peter did not seek discretionary review of this Court's Opinion by the Supreme Court and the Opinion became final on November 15, 2001. Instead, Peter returned to the trial court and filed a motion to modify the maintenance award, arguing that under the present circumstances the award constituted a manifest inequity.[9] This motion was denied on July 25, 2001.[10] Peter then filed a CR 59.05 motion to alter, amend or vacate the July 25, 2001, order denying his motion for modification, arguing CR 60.02 as grounds for relief. The trial court denied Peter's CR 59.05 motion on August 23, 2001. This appeal followed.[11]

In his first assignment of error Peter challenges the soundness of the Supreme Court's holding in Dame, supra, claiming the case is at odds with the clear intent of the Legislature as set forth in KRS[12] 403.250(1). In Dame, the

[9] In support of his argument Peter pointed out that as of April 15, 2001, Ann had acquired a full-time job teaching English as a second language to adults. The position is based on a grant that pays approximately $30,000.00 per year.

[10] The trial court cited Dame v. Dame, Ky., 628 S.W.2d 625 (1982), as the basis for denying Peter's motion. In addition, the trial court properly characterized the award as a "lump sum award", which has been defined as a fixed sum payable over a specified period of time. See Low v. Low, Ky., 777 S.W.2d 936, 937 (1989).

[11] As noted above, Peter appeals from both the July 25, 2001, order and the August 23, 2001 order.

[12] Kentucky Revised Statutes.

Supreme Court construed KRS 403.250(1) as precluding the modification of "lump sum" maintenance awards.[13] KRS 403.250(1) provides 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.

The Supreme Court interpreted the statute as applying to open-ended awards only. In the words of former Justice Sternberg, the Court reasoned as follows:

> 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.[14]

Accordingly, it is quite clear that the underlining theme throughout the Supreme Court's opinion is the notion that the law favors finality to litigation.

Peter argues that the Dame Court improperly interpreted the language of KRS 403.250(1). In response to this argument, we need only point out that KRS 403.250(1) reads precisely as it did over 20 years ago when Dame was decided. If the Supreme Court's interpretation of the statute was truly in

[13] Dame, 628 S.W.2d at 627.

[14] Id.

conflict with the intent of the Legislature, certainly the Legislature has had ample opportunities to amend the statute to correct any error. Moreover, Dame has been cited and relied upon as authority on numerous occasions by our state's highest courts.[15] Thus, under Kentucky law it has become a well established principle that a divorce decree awarding a fixed sum for maintenance, payable either in one distribution or in installments, is not modifiable.

In furtherance of his argument, Peter cites this Court's decision in Roberts v. Roberts,[16] and claims that the case represents a retreat from Dame. Peter refers to the following language in support of his argument:

> We comment only that while the law may favor finality, the legislature does not in this aspect. KRS 403.250(1) plainly says that "the provisions of any decree respecting maintenance . . . may be modified . . . ."[17]

Peter's reliance on Roberts is misplaced, however, as the case concerned the modification of a lifetime maintenance award, not a lump sum maintenance award.[18] Thus, any criticism of Dame

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[15] See Bishir v. Bishir, Ky., 698 S.W.2d 823, 825 (1985); John v. John, Ky.App., 893 S.W.2d 373, 374 (1995); Clark v. Clark, Ky.App., 782 S.W.2d 56, 62 (1990); and Courtenay v. Wilhoit, Ky.App., 655 S.W.2d 41, 42 (1983).

[16] Ky.App., 744 S.W.2d 433 (1988). Peter also cites a Wisconsin Supreme Court case in support of his argument.

[17] Id. at 437.

[18] Id. at 434.

contained in the Roberts opinion is mere dicta. Regardless, we lack the authority to overturn the precedent set by the Supreme Court and we are required to follow same.[19] Accordingly, Peter's first assignment of error is without merit.

Peter next argues that his case fits into the exception to the bright-line rule enunciated in Dame that was fashioned by the Supreme Court in Low. In Low, the Supreme Court granted discretionary review to reconsider its decision in Dame in order to determine whether the occurrence of any circumstances would authorize the trial court to modify a lump sum maintenance award. Burnell Low had been ordered to execute an interest-bearing promissory note in favor of his ex-wife, Judy Low. The purpose of the promissory note was to permit Burnell to retain his retirement benefits while providing both parties with an equitable share of the marital resources. Based upon this allocation of marital property, the trial court then awarded Judy maintenance in the amount of $50.00 per week for a period of three years. The decree was later modified to provide that so long as Judy received maintenance payments, Burnell would only be required to pay interest on the promissory note. Burnell, however, subsequently filed for bankruptcy and listed the promissory note as an indebtedness. The bankruptcy court

[19] Kentucky Rules of the Supreme Court 1.030(8)(a). "The rule is fundamental and is absolutely necessary in a hierarchical judicial system." See Special Fund v. Francis, Ky., 708 S.W.2d 641, 642 (1986).

discharged Burnell from this obligation and, consequently, Judy filed a motion for an increase and extension of her maintenance award. The trial court determined that the bankruptcy proceeding amounted to "a change of conditions that is (so) substantial and continuing as to require the court to provide some relief."[20] Accordingly, the trial court extended Judy's maintenance award for a period of two years beyond the original termination date.

Burnell appealed the trial court's order and this Court reversed, relying on the Supreme Court' decision in Dame. However, the Supreme Court reexamined Dame, reversed this Court, and reinstated the trial court's ruling.[21] The Supreme Court reasoned that it could not "approve prospective application of one provision of a decree when another and essential provision of the same decree has failed entirely."[22] The Supreme Court, however, qualified its holding by limiting the modification of lump sum maintenance awards to an occurrence of "an event causing manifest inequity."

Peter relies on Low and argues that certain events have occurred in his case resulting in a manifest inequity. First, Peter claims that he has been ordered to pay his ex-wife

[20] Low, 777 S.W.2d at 937.

[21] Id. at 938.

[22] Id.

a disproportionate amount of his income in the form of maintenance and child support, rendering him incapable of meeting his own needs.[23] Next, Peter argues that Ann is currently employed full-time and that she earns approximately $30,000.00 per year, thereby obviating the underlying purpose of the maintenance award, which was to provide Ann with adequate support until she was able to adequately provide for herself. Peter further argues that under the present circumstances, "Dame [should] not be used as a shield to prevent restoration of the underlying purpose of the decree."

As to the first instance of inequity cited by Peter, we decline to address the merits of this argument since this issue was resolved in Peter's first appeal. Accordingly, any attempt to relitigate the issue of the conscionability of the original maintenance award is barred by the law-of-the-case doctrine.

> The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an

[23] Specifically, Peter claims that his annual income is approximately $70,000.00 per year and not the $84,000.00 figure used by the trial court. Peter maintains that after paying child support and maintenance, he is left with just 12% of his net income, with the other 88% going to his ex-wife.

> appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." 5 Am.Jur.2d, Appeal and Error, Sec. 744.[24]

In the case sub judice, Peter is attempting to relitigate the conscionability of the original maintenance award. More specifically, Peter argues on appeal that after paying child support and maintenance, he is left with just 12% of his net income, with the other 88% going to his ex-wife. As a result, Peter claims the maintenance award constitutes a manifest inequity as he is unable to meet his own needs.

In his first appeal, Peter also argued that the award of maintenance was excessive and that the trial court did not properly consider his ability to meet his own needs. In support of this argument Peter claimed that a disproportionate amount of his income was going to his ex-wife in the form of maintenance

[24] Inman v. Inman, Ky., 648 S.W.2d 847, 849 (1982).

and child support. This is precisely the same issue Peter is attempting to litigate in the case sub judice. This issue was resolved in Peter's first appeal and this Court determined that the award could not be properly characterized as excessive. This Court also found that there was ample evidence in the record to support the trial court's decision to set Peter's annual income at $84,000.00. In addition, the percentage of income with which Peter was left to meet his needs was crucial to this Court's determination that the maintenance award was not excessive. Accordingly, any arguments pertaining to the conscionability of the original maintenance award are barred by the law-of-the-case doctrine.

Peter also argues that Ann is currently earning $30,000.00 per year as a full-time teacher, thereby obviating the underlying purpose of the maintenance award, which was to provide Ann with support until she was able to adequately provide for herself.[25] This argument is noteworthy since Ann's inability to support herself through full-time employment provided an essential element of the trial court's maintenance award. The trial court based the maintenance award in large part on Ann's testimony that it would take her a minimum of two to three years to acquire the education necessary to obtain a full-time teaching position. Through good fortune, however, Ann

[25] The law-of-the-case doctrine does not bar our consideration of this argument as the issue was not raised by Peter in his first appeal.

was able to obtain a full-time teaching position within 17 months of the trial date. Thus, Ann's increase in earnings appears to have created a substantial change in circumstances. Nonetheless, we do not believe that these events rise to the level of a manifest inequity necessary to justify the modification of a lump sum maintenance award.[26]

As previously discussed, the maintenance award in Low was predicated upon the allocation of the parties' marital property. Mr. Low was allowed to retain his pension plan in exchange for executing an interest-bearing promissory note in favor of his ex-wife. The maintenance award was then set based upon this division of marital resources. Mr. Low, however, attempted to subvert the underlying purpose of the maintenance award by filing for bankruptcy and the trial court responded by extending the maintenance award for two years beyond its original termination date. The Supreme Court determined that modification was proper as the maintenance award was left without a sufficient legal predicate.

The case sub judice is factually distinguishable from Low. Unlike Mr. Low, Ann did not attempt to subvert the underlying purpose of the maintenance award. Moreover, we do not believe the maintenance award in the case sub judice was left without a sufficient legal predicate as a result of Ann's

[26] Low, supra.

increased earnings. We recognize that the maintenance award was based in large part on Ann's lack of employment history and her need for education and training to be able to adequately support herself. However, at least to some extent, these needs still exist. Ann is currently pursuing a Masters Degree from the University of Kentucky in addition to working in her teaching position. Thus, the underlying purpose of the maintenance award still exists. Accordingly, we cannot hold that the case at bar comes within the narrow exception fashioned by the Supreme Court in Low.[27]

In his final assignment of error, Peter cites CR 60.02 and claims that the portion of the decree fixing the maintenance award is no longer equitable and should not have prospective application.[28] Peter first claims that a mistake occurred when this Court improperly characterized the award as representing 75% of his net income and not 88%, thereby bringing this Court's prior opinion within the purview of CR 60.02(a). This argument is easily disposed of, however, as we have already determined that ample evidence existed to justify the trial court's

[27] "This decision should not be read as significant departure from Dame." Low, 777 S.W.2d at 938.

[28] Peter appears to argue each provision of CR 60.02 as grounds for relief, thus, we will address these arguments in turn. Moreover, we note at the outset that any arguments predicated upon CR 60.02(a), (b), or (c) may not be brought more than one year after the original judgment was entered. See Copley v. Whitaker, Ky.App., 609 S.W.2d 940 (1980). Regardless, Peter's contentions in this regard are wholly without merit.

decision to set Peter's annual income at $84,000.00.[29] Any arguments pertaining to CR 60.02(b)—newly discovered evidence—are similarly disposed of as we have already determined that Ann's increased earnings are insufficient to warrant modification of the maintenance award.

Peter further argues that Ann perjured herself and defrauded the trial court in the process by grossly overstating the amount of training she needed and by understating her earning capacity while training.[30] We disagree with Peter's assertions. As previously discussed, Ann testified at trial that she believed it would take her two to three years of full-time schooling to get a teaching certificate and that she hoped to obtain an elementary school certification. While perhaps inaccurate, Ann's statements were far from perjurous.[31] As to Peter's allegations of fraud, the record simply does not support his contentions. We found no evidence indicating that Ann attempted to conceal or misrepresent any information relating to her training needs or earning capacity. Moreover, we assume any information pertaining to the length of time necessary to obtain

[29] Moreover, Peter apparently fails to recognize that it is clearly within the trial court's discretion to consider his pre-trial income as a basis for his ability to pay maintenance under KRS 403.200(2)(f). See Lovett v. Lovett, Ky., 688 S.W.2d 229, 333 (1985).

[30] See CR 60.02(c) and (d).

[31] The recertification requirements are still not clear from the record. It is our understanding that Ann's current position does not require recertification.

a teaching certification was readily accessible and Peter could have introduced such evidence had he chosen to do so. As this Court stated in McMurray v. McMurray,[32] "[b]are allegations will not suffice to establish 'fraud affecting the proceedings.'" Accordingly, Peter has failed to meet his burden of establishing the level of fraud necessary to justify relief under CR 60.02(d).

Peter also argues that the portion of the decree fixing the maintenance award is no longer equitable and should not have prospective application.[33] We disagree for the reasons previously stated.[34] Furthermore, relief is not available under CR 60.02(f) unless the asserted grounds for relief are not recognized under subsections (a), (b), (c), (d) or (e) of the rule.[35] Finally, Peter's claim that the trial court abused its discretion by refusing to award him attorney's fees is without merit.

We now turn to Ann's request for attorney's fees. Ann cites CR 73.02(4) and claims that Peter's arguments on appeal

[32] Ky.App., 957 S.W.2d 731, 733 (1997).

[33] See CR 60.02(e).

[34] Once again, Peter is attempting to argue the conscionability of the maintenance award, however, we have already addressed this argument.

[35] McMurray, 957 S.W.2d at 733.

are frivolous.[36] CR 73.02(4) provides as follows:

> If an appellate court shall determine that an appeal or motion for discretionary review is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion for discretionary review is frivolous if the court finds that the appeal or motion is so totally lacking in merit that it appears to have been taken in bad faith.

We are unable to characterize Peter's appeal as frivolous. Although several of Peter's arguments are repetitive and are in direct conflict with Supreme Court precedent, we cannot conclude that these arguments have been made without a good faith basis to challenge and change precedent. Accordingly, Ann's request for attorney's fees is denied.

Based on the foregoing reasons, we affirm the orders of the trial court denying Peter's motion for modification of the maintenance award and his request for relief pursuant to CR 60.02.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
|---|---|
| Peter D. Jarvio, Pro Se<br>Lexington, Kentucky | Lois T. Matl<br>Catherine C. DeLoach<br>Lexington, Kentucky |

[36] Specifically, Ann claims that Peter's appeal seeks to overturn well-established precedent without offering any justification for doing so.