

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001873-MR

REBECCA ELLIOTT DEATON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE CHRISTOPHER J. MEHLING, JUDGE  
ACTION NO. 02-CI-02508

CHESTER M. ELLIOTT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND MOORE, JUDGES, AND GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: Rebecca Elliott Deaton (wife) appeals the order of the Kenton Family Court denying her motion to reconsider and motion for relief from the court's prior order denying her motion for contempt. After a careful review of the record, we affirm.

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<sup>1</sup> Senior Judge Daniel T. Guidugli, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Deaton and Chester M. Elliott (husband) were married in 1982, and they subsequently had one child. They separated in 2002 and later entered into a separation and property settlement agreement (agreement). The agreement provided, *inter alia*, as follows:

### 11. MAINTENANCE

The Husband, as maintenance to the Wife, shall pay off the present mortgage on the residence at 13 Pike Street, Bromley, Kenton County, Kentucky 41016. In the event the Husband is late on any of these payments, he shall be responsible for any and all late fees and any other fees associated with his being late or failure to pay.

\* \* \*

### 16. BANKRUPTCY AND MODIFICATION OF SEPARATION AGREEMENT:

Both parties agree that this Agreement, as it relates to both real and personal property and to the assignment of responsibility for marital debts, shall inure to the benefit of, and be binding on, the parties and their respective heirs, executors, administrators, successors, and assigns, and may not be modified or changed other than by future agreement by the parties in writing, with the exception of the following: if either party files a bankruptcy and seeks a discharge of any of the debts referenced specifically or generally in this Separation Agreement, then the parties agree that this Court retains jurisdiction to set aside this Separation Agreement and provide for an equitable division of marital assets and debts as between Husband and Wife, taking into consideration the discharge of debt by the party filing the bankruptcy.

The family court entered its findings of fact and conclusions of law, then entered a decree of dissolution. The decree stated that the court found the parties' agreement "not to be unconscionable," and the court incorporated the

agreement by reference as part of the decree. The parties were ordered to perform the agreement's terms.

Almost two years later, the wife filed a motion for contempt, asking the family court to hold the husband in contempt for failing to pay the maintenance amounts awarded to her under their agreement. In support of this motion, the wife filed her own affidavit, attesting that she "was awarded maintenance in an amount equal to the mortgage payments and mortgage balance due on her home," and that she had "been informed that [the husband] ha[d] not been making mortgage payments as ordered by [the family court.]" The wife specifically attested in her affidavit that the mortgage payments were "in the form of maintenance." The affidavit further stated that the wife had "received a notice of foreclosure." The foreclosure involved the residence for which the husband had been ordered to make mortgage payments.

The family court held a hearing on the motion. In November 2006, the court entered an order finding that the husband filed for Chapter 7 Bankruptcy in 2005

and was granted a Discharge; [a] foreclosure action was begun by Fifth Third Bank in reference to the residence of [the wife]; [the husband had] not made payments toward the mortgage obligation as was contemplated in paragraph 11 of the Separation Agreement filed and entered in this matter; [and the wife had] recently had to file a Chapter 13 Bankruptcy in an effort to stop the foreclosure and pay back the mortgage arrearage.

The family court then ordered the husband to pay

\$611.00 per month for the current monthly mortgage payments that are due; . . . [to] pay the sum of \$800.00 per month to [the wife]; [to meet] the mortgage arrearage obligation currently now being paid thru (sic) [the wife's] bankruptcy case. . . ; [to] make adjustments to his payment schedule to [the wife] in order to ensure that the entire amount of mortgage arrearage is paid off during the duration of [the wife's] 5 year Chapter 13 Plan; [and to] make all payments . . . to [the wife] not later than the 7th day of each month following the entry of this order.

The husband subsequently moved for relief from the family court's order, pursuant to CR 60.02(a) on the grounds that the wife had re-married "on or about December, 2005"; "[t]hat this marriage was not disclosed to the Court at its hearing on October 17th, 2006"; [t]hat there was no provision in the separation agreement or decree of divorce between the parties specifically stating that maintenance payments would survive the re-marriage of the party receiving the maintenance"; and "[t]hat KRS 403.250(2) specifically provides that '[u]nless 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.'"

The family court entered an order noting that it had not been advised before it entered its order granting the wife's motion for contempt that the wife had "remarried on or about January 1st, 2006." The court found that, pursuant to KRS 403.250(2), the husband's maintenance obligation terminated "upon the [wife's] remarriage." The court then determined that the maintenance payments had been agreed upon "as a lump sum arrangement payable in installments," and that the

husband's "responsibility to make payments on the mortgage terminated when [the wife] remarried." The family court then overruled the wife's motion for contempt and held that because the husband's maintenance obligation terminated upon the wife's remarriage, he was "only liable for the monthly mortgage payments that had vested in the months prior to [her] remarriage."

The wife filed a motion for reconsideration and motion for relief from the family court's order. She asked that the order be amended "to provide for the allocation of the mortgage debt of the parties, or in the alternative, for an order setting this matter for hearing to determine the allocation of the mortgage debt. The wife argued that "[a] review and allocation of debt is appropriate under paragraph 16 [of the parties' agreement] in light of both [parties'] bankruptcy filings."

The family court denied the wife's motion to reconsider and motion for relief from the court's prior order. The court reasoned that "the issue regarding the allocation of the mortgage debt of the parties is a moot issue," because the court had previously determined that

the mortgage debt was classified as maintenance in the separation agreement, such that the [husband's] payment of the mortgage debt to Fifth Third was to be classified as maintenance to the [wife]. The maintenance responsibility terminated upon the [wife's] remarriage. Therefore, the [wife] is liable for the mortgage debt accumulated after her remarriage and the [husband] is responsible only for the mortgage debt accumulated prior to her remarriage. This result is harsh. However, the parties, by agreement, classified the payment of the mortgage as "maintenance" and not as a "debt" payment.

As maintenance, it was not bankruptable, but subject to termination upon remarriage. [The wife] was in total control of whether she remarried.

The wife now appeals, contending that she is entitled to a hearing as to the allocation of assets and debts following the bankruptcy filings of both parties.

## II. ANALYSIS

Paragraph Eleven of the parties' separation agreement specifically provided that the husband's mortgage payments were maintenance. Both parties agreed to this, and it became part of the divorce decree. Although the husband filed for bankruptcy, "[n]ot all marital debts are dischargeable in bankruptcy." *Holbrook v. Holbrook*, 151 S.W.3d 825, 827-28 (Ky. App. 2004). Specifically, maintenance is not dischargeable in bankruptcy. *See id.* at 828 (citing 11 U.S.C. § 523(a)(5)). Therefore, the mortgage payments that the husband was obligated to make under the separation agreement were not dischargeable in his bankruptcy proceedings, and he remained liable for those payments.

Pursuant to KRS 403.250(2), "[u]nless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon . . . the remarriage of the party receiving maintenance." In the present case, the parties' agreement and the divorce decree were silent concerning the effect that the wife's remarriage would have on the husband's maintenance payment obligation. Therefore, when the wife remarried, the husband's obligation

to make future maintenance payments, in the form of mortgage payments, terminated. *See Messer v. Messer*, 134 S.W.3d 570, 573-74 (Ky. 2004).

The parties agreed that the mortgage payments would qualify as maintenance, rather than as some other form of marital debt. In fact, the wife, in her own affidavit that was filed in support of her motion for contempt, specifically attested that the mortgage payments were “in the form of maintenance.” Thus, because the payments were maintenance, the husband was obligated to make the payments that accrued before the wife remarried. He failed to make all such payments, and the family court properly ordered him to pay the mortgage payments that accrued prior to the wife’s remarriage. The family court also properly held that any mortgage payments owed from the months following the wife’s remarriage were her responsibility. Consequently, because the parties agreed that the mortgage payments constituted maintenance, the wife’s claim that the family court erred when it failed to hold a hearing to determine the reallocation of marital debts following both parties’ bankruptcies lacks merit. No hearing was necessary because the mortgage payments were not classified as “marital debts,” but were explicitly classified by the parties’ agreement as maintenance.

Accordingly, the order of the Kenton Family Court is affirmed.

GUIDUGLI, SENIOR JUDGE CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE  
OPINION.

CAPERTON, JUDGE, CONCURRING: I write separately to emphasize that my decision to concur is based upon the arguments presented by the parties. I hasten to add that no argument was made to our Court under *Dame v. Dame*, 628 S.W.2d 625 (Ky.1982), Cf. *Messer v. Messer*, 134 S.W.3d 570 (Ky.2004).

The case before us presents an agreement between the parties that Appellee “as maintenance to the Wife, shall pay off the present mortgage on the residence...”. Certainly such a sum is easily determinable and, in fact, was found by the trial court to be a lump sum award. As such, it would not be modifiable. See *Dame*.

The good graces of a future ex-spouse allowing the Appellee, at his option, to pay off the mortgage immediately or make payments (bearing interest on the amount of the mortgage, again easily determinable), doesn’t make a lump sum indeterminable. While the provisions continued and addressed the consequences of late payments and fees if the mortgage payments were not made timely, this does not alter the initial amount of the award, i.e., the amount of the mortgage.

BRIEF AND ORAL ARGUMENT  
FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT  
FOR APPELLEE:

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