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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001706-MR

KERRY DREW WOODSON — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 04-CI-502842

KIMBERLA WOODSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, STUMBO AND WINE, JUDGES.

ACREE, JUDGE: Kerry Drew Woodson appeals an Order of the Jefferson Circuit Court denying his motion to terminate or modify a previous award of maintenance to his former wife Kimberla Woodson. Bound by the Kentucky Supreme Court's decision in *Dame v. Dame*, 628 S.W.2d 625 (Ky. 1982), the circuit court determined that the prior maintenance award was a lump sum payment and

therefore not subject to modification. This court is likewise bound by the precedent set forth in *Dame* and must affirm.

In an agreement signed by the parties, Kerry agreed to pay monthly maintenance of $338.00 for a period of five years. The agreement was silent as to modification. *Dame* dictates that only open-ended awards are subject to modification. *Id.* at 627. Pursuant to *Dame*, an award payable in installments is characterized as a lump sum if it involves a fixed and determinable amount. 16 LOUISE E. GRAHAM & JAMES E. KELLER, KENTUCKY PRACTICE §16:21 (3d ed. 2008). So long as the court does not reserve jurisdiction to modify the amount, the amount is not open ended. *Id.* Therefore, pursuant to *Dame*, the definite award set forth in the parties' agreement in this case is a lump sum and is not modifiable.

While the holding in *Dame* is controlling in the instant case, this Court recognizes that the underlying concept set forth in *Dame* is under sharp criticism. This underlying concept is known as alimony (or maintenance) in gross. *Id.* Three primary and persuasive arguments challenge the soundness of the *Dame* decision. First, the inability to modify a maintenance award payable in fixed installments distorts the function of maintenance and is out of step with the Uniform Marriage and Divorce Act (U.M.D.A.). *Id.* Second, the text of KRS 403.250 lends no support to the rule. And finally, the cases on which the *Dame* ruling was based have since been overturned.

Graham and Keller, *supra*, state that "[w]hile the *Dame* rule may have created expectations and has the force of precedent to support it, it is also a

conceptual anomaly quite out of step with the property and maintenance scheme of the U.M.D.A." *Id.* In fact, two other U.M.D.A. states, Colorado and Missouri, have dispensed with the concept. *Id.*, *citing Sinn v. Sinn*, 696 P.2d 333 (Colo. 1985), *and Cates v. Cates*, 819 S.W.2d 731 (Mo. 1991).

Alimony in gross originated as a substitute for property division before the system recognized marital property. *Id.* However, "[w]hen a dissolution system has significant property distribution rules it is not necessary to import alimony in gross as a gloss on those rules." *Id.* Imposing such rules distorts the function of maintenance, which is intended to provide for spousal needs. *Id.* These awards should generally be limited to circumstances in which the requisite need exists. *Id.*

The desired function of maintenance is highlighted by the text of Kentucky Revised Statute (KRS) 403.250 which states:

> [T]he 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 . . .

(emphasis supplied). Thus, maintenance awards are not intended to be definite, but when the appropriate circumstances arise, should be changed to reflect those circumstances. Further, the statute governing maintenance was modified after the Court's holding in *Dame*. Yet the legislature chose not to limit modification to open-ended awards. *See* KRS 403.250. Instead, the statute instructs that "*any*

decree of maintenance may be modified," leaving no support for the *Dame* holding. *Id.*

In *Sinn v. Sinn*, the Supreme Court of Colorado determined that under the Colorado statute – which contains identical language to KRS 430.250 – all maintenance awards are modifiable absent express agreement by the parties. *See generally Sinn v. Sinn,* 696 P.2d 333 (Colo. 1985). This decision overturned *In re Marriage of Gallegos* on which the ruling in *Dame* was based. *Sinn*, 696 P.2d at 336; *see also Dame*, 628 S.W.2d at 627, *citing In re Marriage of Gallegos*, 41 Colo. App. 116, 580 P.2d 838 (1978).

Dame also relied on a decision of the Arizona Court of Appeals. *See Dame*, 628 S.W.2d at 627, *citing Lindsay v. Lindsay*, 115 Ariz. 322, 565 P.2d 199 (App. 1997). However, the Supreme Court of Arizona has since held that:

> [I]f a decree is silent as to modifiability, the trial court may, within the period of time periodic payments are decreed, modify the decree to either shorten or lengthen the term of periodic payments upon a showing of substantial and continuing change of circumstances affecting the purpose underlying the original spousal maintenance order . . . to be considered a non modifiable lump sum payment, spousal maintenance must be delineated as non-modifiable in the decree.

Schroeder v. Schroeder, 161 Ariz. 316, 778 P.2d 1212, 1219 (1989). The opinion noted that to the extent *Lindsay* was inconsistent with the holding, it was disapproved. *Id.*

The decisions mentioned above are not alone in their criticism of the maintenance in gross concept. In their concurring opinion in *Messer v. Messer*,

134 S.W.3d 570 (Ky. 2004), Justices Graves and Keller expressed their distaste for the *Dame* ruling. *Messer* at 574-75 (Graves, J. & Keller, J., concurring). The justices noted that the majority in *Messer* overruled *John v. John*, 893 S.W.2d 373 (1995), and "because *Dame* is the linchpin of *John*, [they] would also overturn *Dame* or at least sound its death knell louder than the majority[.]" *Id.*

Dame, strictly speaking, dealt with the "changed circumstances" provision of KRS 403.250(1), while *John*, and *Messer*, considered KRS 403.250(2), the provision for termination of maintenance upon death or remarriage. *Id.* However, "while the *John* Court may have broadened *Dame's* holding somewhat, *John's* holding hardly 'came out of left field'; it simply relied upon *Dame's* conclusion that lump-sum maintenance awards should be treated differently from open-ended maintenance awards[.]" *Id.*

Justice Graves and Justice Keller asserted that the broader issue set forth in *Dame* needed to be addressed. *Id.* Specifically, did the legislature in enacting KRS 403.250 intend to permit the modification or amendment of a lump sum award of maintenance as well as an open-ended one? "In [their] opinion, [the] Court answered the question incorrectly in *Dame*, and [the Court] need not and should not wait another twenty-two (22) years for another case to provide the correct answer and overrule *Dame*[.]" Instead, they believed *Messer v. Messer* should have overruled *Dame* at that moment, "for the benefit of the trial bench and the practicing bar." *Id.*

Although it has not been "another twenty-two (22) years," the issue in the case *sub judice* presents the opportunity Justices Keller and Graves thought *Messer* missed. This Court is fully aware of the strong arguments in favor of allowing modification of installment payments even if they involve a fixed and determinable amount. However, this Court lacks the authority to overturn *Dame*. Therefore, the decision of the Circuit Court is affirmed.

ALL CONCUR.

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