

RENDERED: MAY 25, 2007; 2:00 P.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001835-MR

MICHAEL LEE McMILLIAN

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 01-CI-00301

DIANA SHAW McMILLIAN

APPELLEE

OPINION VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Michael Lee McMillian appeals from an order of the Barren Circuit Court denying his motion to reduce his maintenance obligation. The circuit court determined that the original award was a lump sum maintenance award that thus was nonmodifiable pursuant to *Dame v. Dame*, 628 S.W.2d 625 (Ky. 1982).

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Because we conclude the original maintenance award was not a lump sum award, we vacate and remand for a consideration of Michael's motion upon the merits.

The parties were married on October 3, 1987. On May 23, 2001, Michael filed a Petition for Dissolution of Marriage. On February 13, 2002, the circuit court entered a decree dissolving the marriage. The decree awarded Diana maintenance of “\$1,000.00 per month until she reaches the age of 65, or until she is able to draw the full amount for which she is qualified from the retirement accounts from Eaton and Dana, whichever is first.”² The decree also provided that “[t]he Court notes that no evidence of the amount of the retirement benefit has been proffered. Therefore, Respondent may move to continue the maintenance payments, or a portion thereof, after she begins receiving the retirement benefits.”

On February 10, 2005, Michael filed a motion to reduce his maintenance obligation. In support thereof, he cited his deteriorating health and reduction in income. On July 26, 2005, the circuit court entered an order denying the motion on the basis that the original award was a lump sum maintenance award and, therefore, was nonmodifiable pursuant to the *Dame* case. Michael filed a motion to alter, amend, or vacate, which was denied. This appeal followed.

In the *Dame* case the Kentucky Supreme Court held that an award of maintenance that is a fixed amount to be paid over a definite period is considered a lump sum and cannot be modified pursuant to KRS 403.250(1) unless there is language in the

² The “retirement accounts from Eaton and Dana” refers to Diana's marital share of Michael's retirement accounts from these employers.

judgment specifically allowing for such modification.³ See also *Low v. Low*, 777 S.W.2d 936, 937 (Ky. 1989) (setting forth the only recognized exception to *Dame*), and *Baker v. Baker*, 785 S.W.2d 261 (Ky.App. 1989) (applying *Dame* to a situation analogous to the present case). Hence, except for a single disbursement situation, an indispensable feature of a *Dame* award is that it consists of a definite series of payments for a definite period of time such that the total maintenance obligation that will be paid is reasonably ascertainable from the outset. The maintenance award in this case does not meet that standard.

The relevant language of the maintenance award contained in the decree states as follows:

. . . . [Diana] is clearly unable to meet her needs with her share of the marital property, or through her employment. She is therefore entitled to maintenance, and the Court, considering the length of the marriage, the health and education of the parties, and the ability of Petitioner to meet his needs while paying maintenance, orders that the Petitioner shall pay Respondent \$1000 per month maintenance until she reaches the age of 65, or until she is able to draw the full amount for which she is qualified from the retirement accounts from Eaton and Dana, whichever is first. This payment shall be made no later than the 15th of each month for the month in which it is due, beginning January 15, 2002.

The Court notes that no evidence of the amount of the retirement benefit has been proffered. Therefore, Respondent may move to continue the maintenance payments, or a portion thereof, after she begins receiving the retirement benefits.

³ Maintenance payable in a single distribution is subject to the same rule.

Maintenance was to commence on January 15, 2002. Diana was born October 15, 1949, and will turn 65 on October 15, 2014. If the decree provided simply that maintenance would end when Diana turned 65, the maintenance award would clearly be an unmodifiable *Dame* award. Michael's maintenance obligation would be \$1,000.00 per month for 153 months, or \$153,000.00.

However, the provision "[Diana] may move to continue the maintenance payments, or a portion thereof, after she begins receiving the retirement benefits" opens the door to future increases or decreases in both the amount and the duration of Michael's maintenance obligation contingent upon future events. As such, the maintenance award does not fall within the scope of the *Dame* case.

Our reasoning that the award is not a *Dame* award is best illustrated by two examples which demonstrate the wide-ranging possibilities of the award. First, suppose Diana became qualified for retirement benefits on January 15, 2003, one year after she began receiving maintenance. If continuing maintenance were thereafter unjustified, Michael's maintenance obligation would end after total maintenance payments of only \$12,000 (\$1,000 x 12 months).

In contrast, suppose Diana did not become eligible for retirement benefits until January 15, 2014, and that upon proper motion and review the trial court determined that Diana remained entitled to receive maintenance at \$1,000 per month. Suppose further that this entitlement continued until January 15, 2032.⁴ Under this example,

⁴ We do not construe the language of the award as mandating termination of maintenance upon Diana's reaching age 65 if, prior thereto, she has qualified herself for ongoing maintenance upon becoming eligible for retirement benefits.

Michael's total maintenance obligation would amount to \$360,000 (\$1,000 x 12months x 30 years).

The foregoing examples - both of which are possible under the decree - readily demonstrate that the maintenance obligation as set forth within the decree is not a fixed sum payable in installments. As such, the maintenance award is not within the scope of the *Dame* case.

Our conclusion is supported by the holding in the *Baker* case. In *Baker*, a thrift plan accumulated through the husband's place of employment was a part of the marital property. The wife was awarded one-half of the thrift plan, but because of tax concerns in the event of an early withdrawal, the distribution was originally to be deferred until the husband activated his participation in the plan. As maintenance, the trial court directed the husband to "pay unto the [wife] maintenance in the sum of \$800.00 per month until . . . the commencement of her participation in the Thrift Plan[.]"⁵

The husband cashed in the thrift plan a few weeks after the decree was entered. He continued to pay maintenance for approximately ten months, at which point he informed the wife that he would give her her share of the plan and discontinue her monthly payments. The wife refused to accept the money, instead filing her petition requesting that the divorce decree be modified to continue her maintenance payments.

The *Baker* court held that the original maintenance award was not a nonmodifiable *Dame*

⁵ The award also provided for termination of maintenance upon the wife's remarriage or death; however, pursuant to KRS 403.250, that would have occurred in any event and is irrelevant to the present issue.

award because it was “terminable at an indefinite point in the future.” *Id.* at 263. As illustrated by the examples previously set forth, the award in this case is also “terminable at an indefinite point in the future.”

Because the trial court here erroneously construed Michael's maintenance obligation as a *Dame* award, we vacate its July 26, 2005, order and remand for the court to consider Michael's motion to reduce maintenance on the merits.

Michael also argues that the *Dame* case should be overruled. As this court is bound by the precedent of the Kentucky Supreme Court, we do not have the authority to grant the relief requested even if we were inclined to do so. *See* Rules of the Supreme Court 1.030(8)(a).

For the foregoing reasons, the judgment of the Barren Circuit Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bobby H. Richardson
John B. Gardner
Glasgow, Kentucky

BRIEF FOR APPELLEE:

Cheryl Berry
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