COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2010-SC-0053-D

KERRY DREW WOODSON **APPELLANT**

v.

BRIEF FOR THE APPELLANT KERRY DREW WOODSON

KIMBERLA WOODSON **APPELLEE**

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APPEAL FROM
KENTUCKY COURT OF APPEALS
OPINION NO. 2008-CA-001706-MR

Appellant's brief submitted by

Michael R. Slaughter
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Counsel for Appellant, Kerry Drew Woodson

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was this 29th day of December, 2010 mailed to the Honorable Dolly Wisman Berry, Jefferson Circuit Court, Family Division 4, Judicial Center 700 W. Jefferson Street, Louisville, Kentucky 40202 and Hon. James P. McCrocklin, 414 Kentucky Home Life Building, 239 South Fifth Street, Louisville, 40202, Attorney for the Appellee, and Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601.

Michael R. Slaughter

INTRODUCTION

This is an appeal from a Court of Appeal ruling regarding modification of maintenance pursuant to KRS 403.250. The Court of Appeals ruling expressed the need for overturning the current case law in *Dame v Dame*, 628 SW2d 625 (Ky. 1982). Exhibit 3, App 9 - 12

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STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that the issues on appeal are straight forward and therefore does not specifically request oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF MATERIAL FACTS

The Appellant/Respondent and Appellee/Petitioner were divorced on September 16, 2005 in Division 4 of Jefferson County's Family Court. A Property Settlement Agreement, signed by the parties, their attorneys, and the Court, was filed on September 7, 2005, included a paragraph requiring the Appellant/Respondent to pay monthly maintenance of $338.00 for a period of five (5) years to the Appellee/Petitioner effective September 20, 2004. There was no mention in the Agreement that this amount was, or was not, modifiable.

On July 25, 2008, the Appellant/Respondent filed a motion asking the Court to modify the Court Ordered maintenance paid by him to the Appellee/Petitioner, citing health issues experienced by his wife, who was also an income producer for the household, as well as himself due to a substantial and continuing change of circumstances. An affidavit in support was attached. At the motion hour to consider the motion, a hearing was scheduled for September 16, 2008 at 3:00pm. Subsequently to the setting of the hearing, the Appellee/Petitioner filed a response on August 13, 2008 to the motion citing *Dame v Dame*, 628 SW2d 625 (Ky. 1982). Exhibit 3, App 9-12. The Appellant/Respondent filed a response to the Appellee/Petitioner's response on August 18, 2008, citing the opinion of at least two of the Justices on the Kentucky Supreme Court that *Dame* should be overturned in a concurring opinion in *Messer v Messer*, 134 SW 3d 570 (Ky 2004). The Court entered the Order tendered by the Appellee/Petitioner without modification cancelling the hearing on September 2, 2008. (The Trial Court Opinion and Order is included in the Appendix as Exhibit 2, App 7-8)

The Appellant timely filed Notice of Appeal on September 10, 2008. On September 12,

2008, the Appellant filed his Prehearing Statement, AOC 070, with support documentation. After receiving a case number for the Appeal in a Receipt Notice dated September 15, 2008, the Appellant filed a motion to transfer the case to the Kentucky Supreme Court citing judicial expediency. The motion was mailed on September 24, 2008. The Respondent filed a response objecting to the transfer on October 2, 2008. The Kentucky Court of Appeals denied the Appellant's motion for transfer on October 8, 2008.

The Kentucky Court of Appeals, *Woodson v Woodson,* 2008-CA-001706- MR, (Ky. App. 2009) Unpublished, (Exhibit 1, App 1-6) after citing all of the Appellant's arguments, confirmed the Family Court's decision in an opinion entered on December 30, 2009, saying,

> "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." Exhibit 1, at App 6.

QUESTIONS OF LAW PRESENTED

The current Case Law, as presented in *Dame,* is at variance to the plain wording of the pertinent Kentucky Revised Statute with regard to modification of maintenance payments. Countless Court of Appeals and Kentucky Supreme Court decisions are based entirely on the plain wording of pertinent Kentucky Revised Statutes, even when the Court understands the difficulty of following such plain wording. The plain wording of KRS 403.250 states:

"The provisions of *any* (emphasis added) decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable . . ." Exhibit 5, App 16.

In *Dame,* the 1982 Kentucky Supreme Court utilized a legal fiction by deciding that a monthly maintenance payment was actually an installment payment on a lump sum agreed to by the parties or by the court which would be paid out over a series of months and years. The term for such a legal fiction is "alimony in gross." In actuality, monthly maintenance is never calculated by the parties, their attorneys, or a judge as a lump sum to be paid out in this manner. In practice, an amount needed by the recipient, and affordable by the provider, is established to allow the recipient to continue to live in a manner that was normal for the person until such time as that person can generate enough income to continue that life style without assistance, pursuant to KRS 403.200.

The theory propounded in *Dame*, based on this legal fiction known as "alimony in gross," distorts the function of maintenance and is at variance with the Uniform Marriage and Divorce Act (U.M.D.A.). See 16 LOUISE E. GRAHAM & JAMES E. KELLER, KENTUCKY PRACTICE Sec. 16:21 (3d ed. 2008). Exhibit 8, App 33-35.

The *Dame* decision was based on rulings in other states that have all been subsequently overturned by their respective appellate courts as cited by the Kentucky Court of Appeals in its opinion. Exhibit 1, at App 3.

ARGUMENT

I. The Court is controlled by the plain wording of Kentucky Revised Statutes in its decisions.

In countless Kentucky Court of Appeals and Kentucky Supreme Court decisions, the Courts cite the plain wording of a particular statute, or statutes, in formulating its decision regardless of whether or not the Court believes the decision is reasonable or not. *See Koerner v Koerner,* 270 S.W. 3d 413 (Ky. App. 2008) where the court was compelled to bifurcate jurisdiction over custody and visitation matters and child support modification matters because of the wording of the Uniform Child Custody Jurisdiction Action and the Uniform Interstate Family Support Act where those statutes effected a single child with parents in two different states. The Court in *Koener* at 417 said, "although arguably not a desired result, one state may retain jurisdiction to modify child support while another obtains subject matter jurisdiction over child custody and visitation."

The Supreme Court in *Lincoln County Fiscal Court v Department of Public Advocacy,* 794 S.W. 2d 162, (Ky, 1990) at 163, (Ex. 4, App 13-15) held "where the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written. . . An unambiguous statute must be applied without resort to any outside aids." Exhibit 4, at App 14. Obviously, the Court in *Dame* ignored the plain wording of KRS 403.250 and resorted to an outside aid by citing Professor Petrilli regarding lump sum awards, payable in periodic installments as being sometimes called "alimony in gross." *Dame v Dame,* 628 S.W. 2d 625 (Ky, 1982) at 627. Exhibit 3, at App 11.

KRS 403.250 (1) says:

> Except as otherwise provided in subsection (6) of KRS 403.180,
>
> the provisions of *any* (emphasis added) 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. Exhibit 5, App 16.

This statute was amended in 1990 by the Kentucky legislature, eight years after the Court issued its decision in *Dame.* Yet the legislature chose not to recognize the Court's position that only *some* (emphasis added) decrees respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.

In the instant case, the Court relied on a 1982 decision in *Dame* that is completely contrary to the plain wording of the statute regarding the issue before the court.

II The *Dame* decision relied on cases in other states that subsequently have been overturned by later decisions in those states, and so the ruling in *Dame* should also be overturned.

The Court relied on two foreign decisions in formulating it ruling in *Dame*. Those decisions were: *In Re Marriage of Gallegos*, 580 P.2d 838 (Colo. App, 1978) (Exhibit 3, at App 11) and *Lindsay v Lindsay*, 115 Ariz.322, 565 P. 2d 199 (1977). Exhibit 3, at App 11. Both of those cases have subsequently been overturned by their respective courts. See *Sinn v Sinn,* 696 P.2d 333 (Colo. 1985) (Exhibit 6, App 17-22) and *Schroeder v Schroeder*, 778 P. 2d 212 (Ariz.

1989). Exhibit 7; App 23-32.

III The *Dame* decision utilized a legal fiction known as "Alimony in Gross" which is now in disfavor and distorts the function of maintenance and is at variance with the Uniform Marriage and Divorce Act.

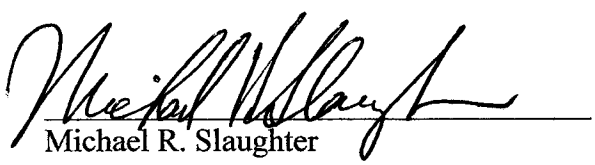
In 16 LOUISE E. GRAHAM & JAMES E. KELLER, KENTUCKY PRACTICE Sec. 16:21 (3d ed. 2008) (Exhibit 8, App 33-35) the authors state that "Alimony in Gross" was fashioned as a substitute for property division in a system that did not recognize marital property. In the Kentucky Revised Statutes regarding dissolution of marriage significant attention is paid to the equitable division of marital property. Consequently, according to Graham and Keller, it is not necessary to utilize a legal fiction to attempt to accomplish the same thing. Exhibit 8, at App 33.

The theory of "Alimony in Gross" was an "outside aid" used by the Court in the *Dame* case. The use of such outside aids are prohibited when the plain wording of a statute is unambiguous, pursuant to the finding by the majority in *Lincoln County Fiscal Court.* See Exhibit 4, at App 14.

CONCLUSION

Kentucky law is clear that the appropriate court may consider modification of maintenance payments in instances of a change of circumstances. The ruling in *Dame* should be overturned.

Respectfully Submitted,



Michael R. Slaughter