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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
NOVEMBER 18, 2009
(FILE NO. 2009-SC-0442-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001059-MR

ROY SHANE HOWARD — APPELLANT

v.

APPEAL FROM LAUREL FAMILY COURT
HONORABLE DURENDA LAWSON, JUDGE
ACTION NO. 05-CI-01043

SONDRA HOWARD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

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[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: The issues presented here are whether the trial court was clearly erroneous in its determination that Appellant was voluntarily underemployed, thereby justifying the trial court's refusal to modify its prior child support order; and whether the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. Sections 523(a)(5) and (15), precludes discharge in bankruptcy of Appellant's obligation to pay for the Dodge Durango automobile as required by the court's final decree.

The parties were divorced in 2006. Evidence was presented in that proceeding that while the divorce was pending Appellant quit his job as a federal prison guard claiming medical grounds. However, the trial court determined that Appellant was voluntarily underemployed and imputed income to him based on his prior earnings. KRS 403.212(d). As such, Appellant was ordered to pay $789.25 per month as child support.

In August 2007 Appellant sought modification of his child support obligation on grounds that his income had declined dramatically since his departure from employment as a federal prison guard. From the evidence, it appears that Appellant earns $9.50 to $11.00 per hour, a sum less than half of what he earned in his former employment. Nevertheless, the trial court herein reiterated its earlier finding that Appellant was "voluntarily underemployed for purposes of

child support" and in the post-decree proceeding, held that he had not presented anything new since the court's prior determination.

Upon appellate review, this Court is unable to conclude that the trial court's determination was clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. KRS 403.213 authorizes modification of a decree respecting child support only upon a showing of a substantial and continuing material change in circumstance. Appellant failed to make such a showing. His circumstance appears not to be materially different than at the time of the decree, and the trial court so found. In *Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459 (Ky. App. 2007), modification of child support was denied despite evidence that the movant no longer owned certain previously owned property and that he suffered from mental illness that prevented him from obtaining a high-paying job. Nevertheless, the Court determined that the requisite standard had not been met. The Court imposed on the appellant the duty to "put forth the necessary evidence required to establish that there had been a material change in circumstances requiring a modification of his child support obligation." *Id.* at 462. Concluding that the appellant in *Goldsmith* had failed to meet his burden, this Court affirmed the trial court.

A party seeking modification of the child support provision of a recent divorce decree bears a heavy burden. Such a party must meet the requirements of KRS 403.213 or relief will be unavailable. Accordingly, we affirm the trial court's determination that child support should not be modified.

In the modification proceeding that resulted in the May 22, 2008, order from which this appeal is taken, Appellant was held in contempt. His contempt was for failure to comply with a provision of the original decree requiring him to pay toward a deficiency judgment arising from the repossession of a Dodge Durango automobile. Subsequent to the decree, Appellant sought bankruptcy protection and his Dodge Durango indebtedness was listed as an obligation. He claims discharge, in part because Appellee did not object in bankruptcy court. Appellee asserts that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 precludes bankruptcy discharge under these circumstances. She states: "The practical affect [sic] of these new provisions is that <u>all</u> marital and domestic relations obligations, whether support, property division, or division of debts, are non-dischargeable, either through a Chapter 13 proceeding or a Chapter 7. 11 U.S.C. Section 1328(a)(2), 11 U.S.C. Section 523(a)(5), (15)."

At the outset, we observe that state courts are possessed of jurisdiction, along with federal courts, to determine whether an obligation is discharged under 11 U.S.C. Section 523(a)(15). *Mattingly v. Mattingly*, 164 S.W.3d 518 (Ky. App. 2005). *See also, Cunningham v. Cunningham*, 497 S.W.2d 941 (Ky. 1973), "A state court in construing its own judgment may decide in judgment enforcement proceedings whether an obligation imposed by the judgment falls within an exception stated in the Bankruptcy Act to the usual effect of a discharge."

We have carefully examined 11 U.S.C. Section 523(a)(15) and concluded that it applies here. This statutory provision denies discharge in bankruptcy to an individual debtor from any debt

> to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

As reflected in the August 14, 2006, decree of dissolution of marriage, Appellant's payment of the Durango debt was agreed to by the parties and imposed on Appellant by the court's final decree. As such, it was incurred by Appellant in connection with a divorce decree made pursuant to state law. While the court in a divorce proceeding may not absolve the parties of underlying contractual obligations to non-parties, it may allocate in a divorce decree responsibility for payment of such debts and enforce its orders by contempt power, as the court did here. Accordingly, there was no error in the trial court's resolution of the Durango debt issue.

Finally, Appellant also asserts trial court abuse of discretion in its award of $500 in attorney's fees. We have carefully reviewed this contention and, based on the court's resolution of the other issues raised, cannot conclude that there was an abuse of discretion in the attorney fee order.

For the foregoing reasons, the order entered herein on May 22, 2008, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas G. Benge
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BRIEF FOR APPELLEE:

Mary-Ann Smyth
Corbin, Kentucky