

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001777-MR

CURTIS D. AMON

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 89-CI-043

GLENDA R. AMON

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, GARDNER, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from a denial of a motion pursuant to CR 60.02 to set aside a judgment and a qualified domestic relations order (QDRO) for mistake or for equitable grounds. Finding no grounds for relief under CR 60.02, we affirm.

In 1989, the appellant, Curtis D. Amon (Curtis) filed a petition to dissolve his marriage to the appellee, Glenda R. Amon (Glenda). On July 23, 1991, the trial court entered a decree of dissolution which provided, in part, that Glenda would be

entitled to a sum equal to forty percent (40%) of Curtis' retirement benefits accruing to him from the date of the marriage to the date of the decree of dissolution. The decree directed both parties to submit a proposed QDRO based upon the appropriate computations. Curtis appealed the decree to this Court,¹ which affirmed the decree and specifically found that the trial court's apportionment of Curtis' retirement fund was not an abuse of discretion.

Following the decision by this Court, Curtis filed a number of motions with the trial court. On June 10, 1994, the trial court directed Curtis to file a QDRO as directed in the decree. While Curtis' former counsel filed some information from Curtis' employer, the QDRO was not forthcoming. Eventually, on September 18, 1996, in response to a motion to compel by Glenda, the trial court again ordered Curtis to submit the QDRO. The trial court entered further orders directing Curtis' compliance on November 8 and December 13, 1996. In the latter order, the trial court stated its understanding that the QDRO would be in accordance with the report filed by the certified public accountant (CPA) retained by Glenda. In addition, the December 13 order stated that Curtis owed Glenda \$45,062.85, representing her interest in Curtis' retirement pension.

On December 27, 1996, the trial court entered the QDRO tendered by Curtis' counsel, which set forth the division of Curtis' retirement plan as set forth in the report filed by the CPA. The QDRO further provided:

¹ Curtis D. Amon v. Glenda R. Amon, No. 91-CA-2007-MR (July 16, 1993).

13. It is further adjudged that should the Plan refuse to honor this order that the Respondent [Glenda] herein shall have and [is] entitled to and is granted hereby a judgement in the sums set out in the aforesaid letter of Jerry R. Harp, CPA, with applicable interest as enumerated herein.

On January 6, 1997, Curtis' counsel moved the trial court to reconsider the portion of the QDRO which provided that if the plan refused to honor the QDRO, then Glenda would have a judgment against Curtis for \$45,062.85, with applicable interest. Curtis argued that Glenda should be required to wait on her share of the retirement plan in the same manner that he must wait until it is paid out upon his retirement. He further asserted that he had insufficient assets to pay the judgment, and that he should not be required to pay the judgment out of his present assets. The trial court denied the motion to reconsider on March 4, 1997.

Thereafter, Glenda's counsel undertook execution and garnishment proceedings to collect the judgment. Curtis filed a motion to challenge the garnishment, claiming certain exemptions and asserting that his retirement plan would not permit a lump sum distribution to Glenda. The trial court agreed with Curtis as to the claimed exemptions, but denied Curtis' challenge to Glenda's execution on the judgment.

On March 25, 1997, the employee benefits manager of Curtis' retirement account notified Curtis' counsel that the plan had rejected the QDRO entered by the trial court. The letter states that the qualified domestic relations order is not "qualified" because:

The order requires not only that the [Personal Retirement Provision] be paid as a single sum, but that the monthly benefit also

be converted to a lump sum. The Plan does not permit this. The order directs the Plan to provide an option not otherwise available under the Plan and thus violates Section 414(p) (3) (A) of the Internal Revenue Code.

Subsequently, Curtis moved pursuant to CR 60.02 to amend the QDRO. He argued that the dissolution decree contemplated a deferred division of his retirement benefits. As a result, he asserted that the immediate offset award to Glenda set out in the trial court's orders of September 18 and December 13, 1996, as well as in the QDRO, were erroneous. As a basis for relief under CR 60.02, he argued that the orders were entered due to the errors or active deceit by Glenda's counsel, and as a result of erroneous calculations by the CPA. Curtis submitted an amended QDRO along with his motion. In addition, Curtis sought to reopen the proof to challenge the calculations made by the CPA.

In an order entered on June 20, 1997, the trial court denied Curtis' motion. The court found that Curtis had failed to show a mistake which would justify relief under CR 60.02(a). The court also rejected his assertion of "fraud affecting the proceedings" under CR 60.02(d). The court further found that Curtis was not entitled to relief under CR 60.02(f): "any other reason of an extraordinary nature justifying relief." The trial court also denied Curtis' motions to enter an amended QDRO, for a new trial under CR 62.01, and to submit additional proof by avowal.

Curtis now brings an appeal from the trial court's memorandum order of June 20, 1997, which denied his motions: (1) for relief from the QDRO and from the prior orders of the court;

(2) to stay execution of the judgment; (3) to enter an amended QDRO; (4) for an evidentiary hearing; and (5) to offer avowal testimony. Curtis again argues that the orders entered by the trial court, and the QDRO, were not in conformity with the decree of dissolution and were based on an inaccurate calculation of the value of his retirement account. Curtis blames the mistakes on incorrect assumptions by the trial court, inaccurate calculations by the CPA, and upon errors by his former counsel. As a result, Curtis contends that he was entitled to relief from the QDRO and the September 18 and December 13, 1996, orders by the trial court. In the alternative, Curtis asserts that he was entitled to reopen the proof to make his case on these issues.

CR 60.02 sets out grounds for relief from a judgment due to (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which could not have been discovered before trial by the exercise of due diligence; (c) perjury or falsified evidence; (d) fraud affecting the proceedings; (e) the judgment is void, or has been satisfied, released, discharged, or a prior judgment upon which it is based has been reversed or vacated; or (f) any other reason of an extraordinary nature justifying relief. To be entitled to relief under CR 60.02, a party must show that he has a valid defense, and explain why he did not present the defense prior to judgment. Richardson v. Brunner, Ky., 327 S.W.2d 572, 573 (1959).

Curiously, Curtis does not bring this appeal from the QDRO or from the judgment itself. Rather, he is seeking to have the QDRO set aside and a new QDRO entered. Relief under CR 60.02 is not available for judicial errors or mistakes. McMillen v.

Commonwealth, Ky.App. 717 S.W.2d 508, 509 (1986); Roberts v. Osborne, Ky., 339 S.W.2d 442 (1960); James v. Hillerich & Bradsby Company, Ky., 299 S.W.2d 92 (1956). Likewise, negligence of an attorney is imputable to the client and also is not a ground for relief under CR 60.02(a) or (f). Vanhook v. Stanford-Lincoln County Rescue Squad, Inc., Ky.App., 678 S.W.2d 797, 799 (1984).

Curtis also seeks to reopen the proof in order to establish that the calculations made by the CPA were erroneous. Relief under CR 60.02 is not appropriate where the grounds relied upon for relief were known or could have been ascertained by the exercise of due diligence prior to the entry of the questioned judgment. Board of Trustees of Policemen's and Firemen's Retirement Fund v. Nuckolls, Ky., 507 S.W.2d 183, 186 (1974). The trial court adequately explained its reasons for denying Curtis' relief as follows:

The Rule relating to mistake also provides grounds to grant the relief sought for surprise, excuse[able] neglect or inadvertence. No mention is made of there being a surprise. Therefore the Court need not address the matter. No real argument has been made regarding there being excusable neglect or inadvertence, but it should be noted that where counsel failed to introduce evidence or misunderstand the request to set aside the Judgment or Order under this Rule has been denied. [citations omitted] An attorney has authority to manage a case and the Court can rely on the attorneys. {citations omitted}.

Curtis failed to present any reason why he could not have presented his proof prior to the entry of the judgment. Indeed, Curtis supplied the information underlying the QDRO to the CPA, and Curtis' former counsel prepared the QDRO.

Therefore, the trial court properly denied his motions to set aside the QDRO, or to reopen the proof.

Thus, the sole question before this Court is whether the QDRO and the prior orders by the trial court were manifestly contrary to the provisions of the dissolution decree. The July 23, 1991 decree provided that Glenda "shall be entitled to a *sum equal to 40%* of the Petitioner's retirement benefits accruing to him from and after the date of the marriage of the parties hereto to the date of the decree of dissolution." (*Emphasis added*).

The decree further directed the parties to submit a QDRO based upon the appropriate calculations. Since the purpose of a QDRO is to provide a deferred division of marital pension benefits to a non-participant spouse, Curtis argues that the decree contemplated that Glenda would receive her share only upon his retirement. As a result, he contends that the orders granting her a present judgment for the value of her interest in his retirement plan were contrary to the terms of the decree and are clearly erroneous.

In order for a domestic relations order to be "qualified", it must conform with the terms of the retirement plan which it seeks to divide, with the Internal Revenue Code, and with the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. §§ 1001, et seq. If the order is non-complying, the plan administrator may reject the order as non-qualified. Thus, the trial court's entry of the QDRO does not necessarily complete the division of a retirement plan. Consequently, a trial court retains continuing jurisdiction under

CR 60.01 to modify or correct a QDRO, particularly in situations where the amendment does not change any substantive right of either party. Brosick v. Brosick, Ky.App., 974 S.W.2d 498, 504 (1998).

A QDRO must not provide any option to an alternate payee that is not otherwise provided to a plan participant. Thus, if the plan participant has no option for a lump sum distribution, the alternate payee may not elect a lump sum distribution. Louise E. Graham & James E. Keller, 15 Kentucky Practice, Domestic Relations Law, § 15.35, p. 552 (2d ed., 1997). In the present case, the plan administrator rejected the trial court's QDRO because a lump sum distribution is not available under the plan. Indeed, the trial court's QDRO required the plan to pay lump sum benefits to Glenda "in the form set out herein irregardless [sic] of any provision in the plan in conflict thereto." This provision in the order was in direct conflict with the terms of the retirement plan and rendered the domestic relations order non-qualified under ERISA.

As a general rule, the trial court would have authority to amend the QDRO to conform with the terms of Curtis' retirement plan. However, the QDRO and the trial court's order of December 13, 1996, both specifically provided that if the plan refused to honor the QDRO, then Glenda would be entitled to a judgment in the amount of \$45,062.85, plus interest from the date of the decree. In dividing a vested pension plan, a court may divide the plan prospectively, postponing payment of benefits until the participating spouse's retirement. Foster v. Foster, Ky.App., 589 S.W.2d 223 (1979). In the alternative, a court may divide

the plan immediately, by crediting the non-participating spouse's interest in the division of other marital property. Combs v. Combs, Ky.App., 622 S.W.2d 679, 681 (1981). See also; Duncan v. Duncan, Ky.App., 724 S.W.2d 231 (1987). The trial court's orders contemplate such a present division of Curtis' retirement benefits.

Curtis is actually seeking to set aside the judgment contained in the QDRO and in the trial court's order of December 13, 1996. While there is some question when these orders became final, the trial court's memorandum order of April 16, 1997, overruling Curtis' challenge to the execution and wage assignment brought by Glenda, would clearly be a final and appealable order. Relief from a judgment under CR 60.02 is not available under these circumstances. Moreover, the validity of the trial court's monetary judgment to Glenda has not been raised on appeal. As a result, this Court finds no basis to set aside the trial court's exercise of discretion denying Curtis' motion for relief under CR 60.02

Accordingly, the judgment of the Garrard Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Russell Marshall
Nicholasville, Kentucky

BRIEF FOR APPELLEE:

James D. Decker
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