RENDERED: December 10, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001343-MR

MARY DIANE CLEMENTS — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 96-CI-01177

JAN HARRIS, EXECUTRIX OF THE
ESTATE OF THOMAS LEROY CLEMENTS — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The Daviess Circuit Court entered a decree of dissolution of marriage and ordered a distribution of property in the marriage of Thomas Leroy Clements (Leroy) and Mary Diane "DeDe" Clements (DeDe). DeDe argues the court was without jurisdiction because Leroy was a not a resident of Kentucky for the required statutory period immediately preceding the filing of the petition. Leroy has since died and the personal representative of his estate was substituted as a party to this action. We affirm the dissolution but reverse the property disposition and remand.

Leroy and DeDe met at church functions in Owensboro, Kentucky, and after dating for some time, decided to move to Florida, where they intended to marry and purchase a home together. The couple moved to Florida in June of 1996, and were married in Florida on July 19, 1996. Following their wedding, Leroy and DeDe purchased a home near Orlando, Florida for $183,000. The closing on this home took place on August 7, 1996. Leroy obtained the purchase money by cashing in several annuities, closing out the Individual Retirement Accounts from his previous employment and by taking money from his savings in Owensboro. The money was transferred over time to Leroy's new bank in Florida. Although Leroy transferred the bulk of his assets to his newly established Florida account, approximately $3,000 remained in the Owensboro accounts. At some point contemporaneous with the couple's move to Florida, Leroy put his Owensboro residence up for sale and later found a buyer.

On October 2, 1996, Leroy was arrested for acts of domestic violence against DeDe, and, after posting bond, Leroy returned to Kentucky and began living with his daughter. On October 11, 1996, after returning to the Commonwealth, Leroy filed a Petition for Dissolution of Marriage. In addition to the divorce petition, Leroy also filed a motion to obtain possession of the marital domicile, to freeze the disposition of all personal property, to obtain possession of his personal papers, and to compel DeDe to execute a deed to complete the sale of his Owensboro residence.

On October 17, 1996, a summons was purportedly served in Florida since Dede remained there after Leroy moved out.

However, the "proof of service" indicated the process server left a copy of Leroy's complaint and a summons with a "white female over the age of fifteen," who "advised she was a relative and a resident of 525 Lake St., Windermere, Florida." On October 31, 1996, the Domestic Relations Commissioner entered a Recommended Order on Leroy's motion. The issues regarding possession of the marital domicile, vehicle, personal property, and personal papers were held in abeyance. The Domestic Relations Commissioner did recommend, however, that the circuit court issue an order to execute a deed on the Owensboro property conveying all of DeDe's interest to the waiting buyer.

On November 11, 1996, the circuit court entered an order authorizing the Master Commissioner to execute a deed to the Owensboro property on behalf of DeDe, selling the property to a third party. The proceeds from this sale were to be placed in an interest-bearing escrow account where they could not be disbursed without court order or a written agreement by both parties. On December 9, 1996, DeDe filed a Special Appearance Motion to Dismiss for Lack of Jurisdiction. On that same day, the Master Commissioner entered a pendente lite order granting the proceeds of the sale of the Owensboro property to Leroy in the amount of $80,202.74.

On April 30, 1997, Leroy filed a Motion to Submit for a Decision Before the Commissioner. Leroy stated that he had completed his proof, and that DeDe had failed to submit any contradictory proof. On May 21, 1997, DeDe filed a Special Appearance Reply to Response, concerning Leroy's response to her earlier motion to dismiss for lack of jurisdiction.

On September 12, 1997, the Domestic Relations Commissioner issued his report, finding among other things that DeDe and Leroy were both residents of the state of Kentucky and recommending that the vast majority of the real and personal property be awarded to Leroy. The Commissioner also determined DeDe had been properly served, and the Daviess Circuit Court had jurisdiction over her. Ten days later, DeDe filed objections to the Commissioner's Report and renewed her motion to dismiss for lack of jurisdiction.

DeDe Clements was personally served in Florida on December 17, 1997, and the Orange County (Florida) Sheriff's Return of Service was filed with the court on December 31, 1997. On January 7, 1998, DeDe again renewed her motion to dismiss. A copy was delivered to Leroy's attorney, but the motion was not heard.

On April 14, 1998, Leroy filed a Motion for Entry of Decree. Despite another objection and motion to dismiss by DeDe, on May 12, 1998, the Daviess Circuit Court entered the decree, finding that both parties had been residents of the Commonwealth for the 180 days immediately preceding the filing of the petition and awarding the vast majority of real and personal property to Leroy.

DeDe puts forth several grounds for reversing the court below. The first is a two-part question concerning service and jurisdiction. DeDe also alleges that she has been denied due process of law in that the court below refused to rule on her numerous motions to dismiss.

It is clear from the record that DeDe became a resident of the state of Florida sometime in June of 1996, and she remained a resident of that state during the pendency of the action in circuit court. Leroy tried several times to obtain personal service of his divorce petition on DeDe. Although numerous attempts were made, including leaving a complaint with an underage resident of the Florida home, proper personal service under CR 4.04(8) was not accomplished until December 17, 1997. DeDe maintains service under CR 4.04(8) was improper because she was not a resident of the state of Kentucky. While we agree that DeDe was not a resident of the Commonwealth, we believe service under CR 4.04(8) was proper. CR 4.04(8) states in pertinent part:

> Service may be had upon an individual out of this state, other than an unmarried infant, a person of unsound mind or a prisoner, either by certified mail in the manner prescribed in Rule 4.01(1)(a) or by personal delivery of a copy of the summons and of the complaint (or other initiating document) by a person over 18 years of age. . . .

Id. Under this rule, the individual to be served must be absent from this state, but nowhere in the statute is Kentucky residency a prerequisite, so service under this rule was proper, and DeDe's arguments to the contrary are not persuasive. The fact remains that DeDe accepted personal service, although that personal service on DeDe did not occur until December 17, 1997. The court below disposed of DeDe's interest in the Owensboro property by executing a deed on her behalf on November 11, 1996, nearly a year before personal service on DeDe was obtained. CR 4.04(8) also states:

> Such service without an appearance shall not authorize a personal judgment, but for all other purposes the individual summoned shall be before the courts as in other cases of personal service.

Id. Clearly, the execution of a deed to the Owensboro property on behalf of DeDe was improper, as it was executed before service of process.

Also, the trial court did not have jurisdiction to make a property disposition. In the Commonwealth of Kentucky, the dissolution of a marriage is governed by KRS Chapter 403. KRS 403.140(1) states in pertinent part:

> The circuit court shall enter a decree of dissolution of marriage if: (a) The court finds that one of the parties, at the time the action was commenced, resided in this state, or was stationed in this state while a member of the armed services, and that the residence or military presence has been maintained for 180 days next preceding the filing of the petition;

Id. Clearly, one of the parties to the action must have resided in this state for the last 180 days immediately prior to the filing of the petition for dissolution of marriage. The court below found that both Leroy and Diane were residents of the state of Kentucky for purposes of the statute, but we must disagree.

The trial court found that Leroy remained a resident of the Commonwealth at all times, and his absence from this state was temporary in nature. The court made this determination from

the facts that Leroy had retained a Kentucky driver's license; his motor vehicle was still registered in Kentucky; he still had a bank account in Kentucky; and he maintained a residence in Kentucky. The trial court relied heavily on the case of McGowan v. McGowan, Ky. App., 663 S.W.2d 219 (1983). In the McGowan case, we upheld a finding of jurisdiction where the parties were not present in this state for the required 180-day period. However, the parties had left this state so that the husband could receive advanced training in oral surgery. The parties used the wife's parents' address as their permanent address. Furthermore, the couples' vehicles were still registered and insured in the state of Kentucky. The couple indicated they always intended to return to Kentucky, and they only intended to be temporarily absent from the jurisdiction. Id. The case at bar is much different. Although Leroy did maintain a Kentucky license and registration for his vehicle, the record clearly indicates Leroy listed his house in Owensboro, Kentucky for sale. Leroy also cashed in various annuities, retirement accounts, and life insurance policies so that he could purchase a home in Florida which cost in excess of $180,000. Although some $3,000 remained in a Kentucky account, the vast majority of Leroy's assets were transferred to the state of Florida. The weight of the evidence simply does not suggest that Leroy intended to be only temporarily absent from the Commonwealth. In fact, following the couple's move to Florida and their subsequent marriage, Leroy often listed his home address as Florida, and he transferred many of his personal papers to the Florida residence. It was not until the incident involving the charge of domestic

violence that Leroy returned to Kentucky and changed his tune about his residency. Actual residence, as opposed to legal residence or domicile, is necessary to give the court jurisdiction over a divorce suit. Lanham v. Lanham, Ky., 188 S.W.2d 439 (1945). The trial court should have found that Leroy was a resident of Florida, even if only for a brief time. Therefore, the trial court did not have jurisdiction as Leroy did not meet the 180-day next residency requirement. Ironically, although Leroy was a resident of the state of Florida, he would not have satisfied their residency requirements for seeking a divorce, and the Florida courts would have also lacked jurisdiction.

After deciding that Leroy did not meet the residency requirement imposed by KRS 403.140, there is little that this Court can do as to the decree of dissolution. Where the question of jurisdiction in a divorce action has been raised in the lower court and there is any evidence to show the jurisdictional residence of the parties, the lower court's judgment granting a decree of dissolution based upon a determination that it has jurisdiction is not void and cannot be questioned on appeal, regardless of the fact that the determination may be against the overwhelming weight of the evidence and be clearly erroneous. KRS 22A.020(3); Elswick v. Elswick, Ky., 322 S.W.2d 129 (1959). Therefore, we cannot disturb the granting of the decree of dissolution by the court below and the decree of dissolution must be affirmed.

On the other hand, we are not powerless to address the other issues in the case at bar. Where KRS 21.060, the

predecessor to KRS 22A.020(3), forbade the reversal by the Court of Appeals of a judgment granting a decree of divorce, the court could review the evidence to determine whether the judgment was correct in all other respects. Smith v. Smith, Ky., 180 S.W.2d 275 (1944). Hence, we can determine whether the court below had service or jurisdiction to make a property disposition. We believe the lower court did not have service on DeDe at the time her interest in the Owensboro property was deeded out and did not have jurisdiction to make a property distribution.

Finally, we address DeDe's contention that she has been denied due process of law. The record clearly shows that DeDe put forth numerous motions to dismiss. These motions were never heard, presumably because DeDe did not schedule them for hearing at the time the motions were filed. DeDe argues it was the court's responsibility to schedule the motions for hearing, and failure to do so was a denial of due process.

Under CR 6.04, we believe it is the movant's responsibility to see that a motion is brought on for a hearing. CR 6.04(1) states in pertinent part:

> A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing, . . .

Id. It would seem that the responsibility of setting the time for a hearing lies with the moving party. This is why courts have regularly scheduled motion hours and motion dockets. Under the local rules of the Daviess Circuit Court, anyone who wishes to bring a motion before the court must call the clerk's office to determine an available time. The movant then notifies the

clerk of the half hour on which he wants to be heard and shall include the designated time in the notice to opposing counsel. Daviess Cir. Ct. R.P. 20(b). An almost identical situation involving CR 6.04 and the scheduling of motions was addressed by the then Kentucky Court of Appeals in Carnahan v. Yocum, Ky., 526 S.W.2d 301 (1975). In Carnahan, the Court stated, "The Rules of Civil Procedure are designed to provide for a speedy disposition of proceedings in court." Id. at 304. The Court specifically addressed CR 6.04 saying:

> Clay in his comments on CR 6.04, Comment 2, page 112, said: "The apparent intent of the Rule is that a notice of hearing of motions required to be served should be given in all cases as a part of the motion procedure. Since one of the underlying purposes of the Rules is to expedite the disposition of cases, and motions for delay purposes should be condemned, a speedy hearing on all motions is imperative. Thus it might be argued that a party has not properly made a motion by simply serving and filing it without giving notice of some hearing date. The better uniform practice would be to serve such required notice with all motions. . . ."

Carnahan, 526 S.W.2d at 304. Although the Court did stop short of saying that a motion without notice is per se no motion at all, the Court did say that where the moving party made no attempt to obtain a hearing or ruling on the motion, it is the same as "no motion at all." Id. In our case, DeDe failed to comply with the Civil Rules and the local rules of the Daviess Circuit Court and, thus, cannot say that she has been denied due process of law.

For the reasons stated above, the decision of the Daviess Circuit Court is affirmed with regard to the entry of the decree of dissolution of marriage. The decision of the Daviess

Circuit Court as to the property disposition is reversed, and the case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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