RENDERED: DECEMBER 7, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001069-MR

STEVEN G. SMITH APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 93-CI-00049

TERESA FAYE SMITH APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BARBER, JUDGE: Appellant, Steven G. Smith ("Steve"), seeks review of an order of the Green Circuit Court denying his motions to reduce child support and to set aside a judgment as it applies to an award of child support under CR 60.02. Finding no error, we affirm.

Steve and the Appellee, Teresa Faye Smith ("Teresa"), were married on December 28, 1984. They have a son, Corey, born November 29, 1990. Teresa filed for dissolution of the marriage on May 7, 1993, seeking custody and child support. It is uncontroverted that Steve was served with a copy of the summons

and petition via certified mail on May 11, 1993. Steve did not seek independent counsel, nor did he file any responsive pleadings.

On August 4, 1993, the court entered a final decree enjoining Steve from going about Teresa at any time or place. The court also determined that Teresa was the proper person to have custody subject to reasonable visitation by Steve. The court ordered Steve to pay $69.00 per week in child support starting August 6, 1993.

On January 29, 1999, Teresa filed a motion for a rule to issue against Steve to show cause why he had failed to comply with the court's final decree on the ground that he was arrears $19,113.00 in child support, from August 3, 1993 through December 31, 1998. On March 3, 1999, Steve filed motions seeking: (1) a reduction in child support and (2) to set aside the judgment pursuant to CR 60.02 as it applies to the award of child support, "on the grounds that it is in error and that it is not substantiated by evidence." On April 5, 1998, Steve filed a motion for a rule to issue against Teresa, claiming that she had failed to allow him to exercise his visitation rights. By order entered April 17, 1999, the various motions were set for hearing.

At the May 18, 1999 hearing, Steve claimed that he had not received a copy of the decree until February 1999 (when he obtained a copy from the courthouse). The address on the decree, 1079 Elkhorn Road in Campbellsville, is the same address where Steve was admittedly served with the petition and summons. It is

the address of the shop where Steve was working in August 1993, when the decree was entered.

Steve testified at the hearing that he was not represented by counsel at the time of the divorce because "[w]e had an agreement on everything, and there was no reason to have counsel." Steve testified that Teresa was to keep everything and that "all I got was an old truck and my clothes and no child support." Steve claimed that he had worked out this agreement with Teresa "[a]fter she filed." Steve admitted that there was no written agreement. Steve testified that he and Teresa had lived together "a couple or three months" after the divorce; however, his testimony at the hearing reflects that he did not know when this occurred. He also testified that he did not know whether he and Teresa were divorced at the time, or not, only that they had been separated. Steve never paid any child support for his son, Corey. Steve had been married and divorced before and had paid child support to his former spouse.

At the May 18, 1999 hearing, Steve testified that Teresa had discussed his not having to pay child support, if he would give up his parental rights. According to Steve, that conversation had taken place "maybe over a little over a year ago." Steve claimed that he was not aware that he owed child support at the time of the alleged conversation. According to Steve, Teresa had said she was "going to go for child support."

Teresa had testified by deposition on July 29, 1993, that she really did not know what Steve's gross earnings were from his self-employment at B & S Body Shop. When asked to

compare Steve’s gross earnings to her own (as a social worker in a nursing home Teresa grossed $948 every two weeks) she testified that, “I would say I probably make more than he does.” Teresa was asked if Steve would gross $500 a week, and she responded, “I would say so.” Teresa agreed that Steve’s earnings from his self-employment in a body shop would be approximately equivalent to what she makes. At her 1993 deposition, Teresa testified that Corey was living with her and that she wanted permanent care and custody. Teresa also testified that she would like for the court to award her child support. Teresa expressed a desire for Steve’s visitation with Corey to be supervised at the present time. Teresa named Steve’s sister, Sherri Rhodes, as a person she would trust to supervise visitation. Teresa believed that supervised visitation would be in Corey’s best interest.

Teresa testified at the 1999 hearing that she had received the residence in the divorce. The house was bought for $20,013.00 and sold for $26,750.00. At her 1993 deposition, Teresa testified that the balance on the loan was $15,300.00, and she was making the payments. The decree reflects that the house was being purchased under a lease/purchase agreement. The record contains a copy of a deed dated August 7, 1995, conveying the property to Teresa. Teresa claimed she did not make a profit from the sale of the house because “I had a lot of upkeep and things I had to do.” Teresa testified that she makes $34,000.00 a year; she has been employed by Greenville Manor for eight years.

On December 10, 1999, Steve filed a memorandum in support of his motion for relief pursuant to CR 60.02. Steve asserted that Teresa had obtained the 1993 decree "by fraud and/or falsified evidence and/or that there is no basis for the assessment of said child support . . . ." Steve also asserted that Teresa was estopped because of her "agreement" that Steve would not be required to pay child support, if he did not file an answer to the divorce petition, and if he did not take any of the marital property.

By order entered April 3, 2000, the court found:

> The Petitioner filed a Petition for Dissolution of Marriage and the Respondent was served with same via certified mail on May 11, 1993.
>
> The Respondent did not file an answer or participate in the divorce proceedings.
>
> The Petitioner's deposition was taken on July 29, 1993, wherein she stated she believed the Respondent's income to be at least $500 per week.
>
> On August 4, 1993, the Green Circuit Court entered a Final Decree of Dissolution and Findings of Fact and Conclusions of Law, which awarded child support to the Petitioner in the amount of $69.00 per week.
>
> On March 3, 1999, the Respondent filed a motion requesting that child support payments be reduced and the August 4, 1993 judgment be set aside pursuant to CR 60.02. As grounds, the Respondent stated the judgment was "in error and that it is not substantiated by evidence."
>
> That the Respondent testified that he thought he had an oral agreement with Petitioner that the Respondent would not be required to pay any child support.
>
> That the Respondent should be able to earn at least a minimum wage of $5.15 per hour which

> would result in an annual income of
> $10,712.00.
>
> That the child support award in the Decree entered August 4, 1993 is not inequitable nor unconscionable.
>
> That the Respondent has made no child support payments since the Decree was entered herein. That the Respondent owes $23,667.00 to Petitioner for child support arrearage through March 31, 2000.

The Court concluded that CR 60.02 requires a motion to relieve a party from final judgment based upon the ground of mistake to be made within one year; further, Steve was not entitled to relief because he had filed his motion more than five years after the judgment was entered. The Court also concluded that Steve had failed to prove the existence of any private, oral agreement waiving support rights. The Court denied Steve's motion to reduce child support determining that he is not entitled to a reduction and continues to owe $69.00 per week.

CR 60.02 provides:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. **The motion shall be made**

> **within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.** (Emphasis added.)

On appeal, Steve argues that his CR 60.02 motion was not filed "too late" because the one year limitation only applies to motions brought on grounds (a),(b) or (c) of the rule. Steve maintains that his CR 60.02 motion was not brought under any of those subsections. Steve argues that his motion was "qualified for continued consideration," under either subsection (d), (e) or (f). Steve has failed to provide, at the beginning of the argument, a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner as required by CR 76.12(4)(c)(v). It is not apparent that Steve raised the issue that he was entitled to relief under subsection (e) or (f) of the rule in the trial court; thus, we will not consider it.

Steve's motion filed on March 3, 1999, nearly six years after entry of the final decree states "[pursuant] to CR 60.02 . . . [the judgment] is in error and is not substantiated by evidence." We agree with Teresa that the court acted within its discretion in interpreting Steve's motion for relief as an untimely motion under CR 60.02(a) on the ground of mistake. At the hearing, the court made it clear that "the real question is going to be whether you're going to survive under rule 60.02." Steve's counsel argued that under the rule "motions shall be made within a reasonable time and on grounds "a", "b" and "c", not

more than one year after judgment, and we've also alleged fraud, judge which is "d". The court responded that Steve's motion could still be time-barred — any allegations of fraud based upon Teresa's 1993 deposition testimony would be subject to the one year limitation because perjury and falsified evidence fall under subsection (c) of the rule.

On appeal, Steve argues that the one-year time bar does not apply because there was fraud affecting the proceedings -- in essence, that Teresa lulled him into inaction by virtue of an oral agreement to waive child support.[1] The trial court did not believe that there was any fraud affecting the proceedings because the trial court did not believe that there was any oral agreement. The trial court found that Steve had "failed to prove with reasonable certainty any private, oral agreement waiving support rights." In the context of a private, oral agreement to modify child support, Kentucky law requires that such agreements must be proven with "reasonable certainty" before they will be enforced by the courts against the parties. Whicker, supra.

The trial court did not err in finding that Steve failed to prove the existence of an oral agreement. Where, as here, the factfinder finds against the party with the burden of proof, the standard of review on appeal is whether or not the evidence compelled a finding in that party's favor. The evidence presented did not compel a finding in Steve's favor. The evidence was not so overpowering that no reasonable person would

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[1] A parent=s obligation to support a child may not be absolutely waived by any contract between the parties. Whicker v. Whicker, Ky. App., 711 SW2d 857 (1986).

fail to be persuaded by it. Morrison v. Trailmobile Trailers, Inc., Ky., 526 S.W.2d 822 (1975).

"CR 60.02 addresses itself to the sound discretion of the trial court. . . . . The trial court's exercise of discretion will not be disturbed on appeal except for abuse." Fortney v. Mahan, Ky., 302 S.W.2d 842, 843 (1957). We find no abuse of discretion in the trial court's denial of Steve's motion to set aside the judgment.

Steve also contends that the trial court erred in failing to reduce or adjust his child support obligation because the amount was excessive based upon his income.

> Child-support awards may be modified only as to installments accruing after notice of the motion for modification and then "only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). As with the original determination of a child support award, the decision whether to modify an award in light of changed circumstances is within the sound discretion of the trial court.

Snow v. Snow, Ky. App., 24 S.W.3d 668, 672 (2000).

On appeal, Steve only argues that the child support award was inaccurate based upon his income; however, the standard to be applied is a material change in circumstances that is substantial and continuing. Our review of the record does not reveal evidence of changed circumstances. To the contrary, Steve makes essentially the same argument as he did in regards to the amount of child support awarded in the 1993 decree. We cannot say that the trial court abused its discretion in concluding that Steve was not entitled to the relief sought.

In light our determinations herein, we need not reach the remaining issues Steve raises on appeal. We affirm the order of the Green Circuit Court entered April 3, 2000.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Elmer J. George
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Edwin H. Clark
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Frankfort, Kentucky