

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002227-MR
AND
NO. 2003-CA-002481-MR

TINA PARSONS REAMS

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 00-CI-00127

BRIAN K. REAMS

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: Tina Parsons Reams appeals from an order denying a CR¹ 60.02 motion seeking to re-open a divorce decree on the basis that a marital asset was omitted from the separation agreement incorporated into the decree. The circuit court held that the motion was not filed within a reasonable time. We agree.

¹ Kentucky Rules of Civil Procedure.

Before discussing the merits we must address a procedural issue. No appellee's brief was filed in this case. The appellant's brief was filed April 13, 2004. CR 76.12(2)(a) requires that the appellee's brief be filed within 60 days after the date on which the appellant's brief was filed; therefore the brief should have been filed on June 13, 2004. On November 22, 2004 appellee's counsel filed a motion to file a late brief, giving no reason for the delay in filing other than "counsel's inadvertence". The motion was denied. The appellant's objection to the motion to file a late brief was also filed late, and a motion to permit the late filing of the objection was denied as moot due to the denial, by that time, of the motion to file the late brief.

The penalties for failure to file an appellee's brief are found at CR 76.12(8)(c). Imposition of these penalties is discretionary, not automatic. Blades v. Commonwealth, 957 S.W.2d 246, 249 (Ky. 1997). In the event of conflict between the two we may accept the appellant's statement of the facts and issues as correct pursuant to CR 76.12(8)(c) only to the extent that we can say that the trial court's findings are clearly erroneous. Whicker v. Whicker, 711 S.W.2d 857, 858 (Ky. App. 1986). As discussed below we cannot say that the trial court's findings in this case are clearly erroneous.

Tina and Brian Reams were divorced on September 5, 2000 and a separation agreement dividing the assets and the debts of the parties was incorporated into the decree. There was no further controversy between the parties until June 26, 2003 when Tina filed a motion to re-open the divorce to determine ownership of certain property located at 618 Line Creek Road, London, Kentucky where she and Brian resided during the marriage and where she continued to reside following the divorce. Included in her motion was a request to add Nancy Reams, Brian's mother (who claimed ownership of the residence) as a party.

Tina alleges that the property was a gift from Brian's parents and that the residence was constructed with money given as a wedding gift from Brian's parents. According to Tina, there was an oral agreement that upon divorce, she was to receive the residence. During the three years after the divorce, she continued to reside there without objection from Brian or his mother. However, in 2003, Nancy filed an action in the Laurel District Court claiming she owned the residence and seeking Tina's eviction. The record reveals that by a deed recorded on June 5, 1973 in the Laurel County Clerk's Office, the disputed property was deeded to William and Nancy Reams. Subsequent to the entry of the dissolution decree, William died and Nancy became the sole title owner of the property. Nancy's

eviction proceeding was successful and although Tina appealed the eviction order the circuit court record does not indicate the result of her appeal.

The Domestic Relations Commissioner found that Tina's CR 60.02 motion was not timely and recommended that her motions to re-open the divorce to determine the ownership of the property, add a claim against Nancy, and permit her to remain in the residence pending resolution of her claims, be denied. On July 31, 2003, the Commissioner signed a notice of filing of a report and Tina filed exceptions. The exceptions were overruled on September 30, 2003 and Tina appealed. However, after it came to the attention of the court that it failed to sign an order accepting the commissioner's recommendations, the order was signed and entered on November 14, 2003. Tina filed a second appeal and both appeals have been consolidated.

In Fry v. Kersey, 833 S.W.2d 392, 393 (Ky. App. 1992) the court held that CR 60.02 motion may be a proper vehicle for reopening a decree when a party seeks to recover unassigned property in which he or she had an interest at the time of the decree. Only CR 60.02(d), permitting relief where there has been fraud affecting the proceedings, or CR 60.02(f) where there

is a reason justifying extraordinary relief, have possible application to Tina's motion.²

The facts do not warrant a consideration of relief under subsection (d). The rule relates to "extrinsic fraud" and is reserved for those cases where the fraud is perpetrated against the court and involves egregious conduct that subverts the integrity of the court. Fraud between the parties alone does not rise to the required level. Rasnick v. Rasnick, 982 S.W.2d 218, 200 (Ky. App. 1998). While we accept the facts presented by Tina as accurate, there is no suggestion that any fraud was committed against the court. This was a simple case where the parties entered into an agreed settlement. The court heard no evidence on the property issues; there was not, therefore, even an opportunity to practice deceit upon the court. Subsection d is not applicable.

Subsection (f) is a "catch-all" provision and requires that the motion be brought within a reasonable time. Although applicable to divorce decrees, it is to be applied in limited circumstances:

In pertinent part, KRS 403.250(1) provides that "the provisions [of a dissolution decree] 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

² Subsections A, B, and C, require that the motion be made within one year after the judgment or order. On the facts presented Subsection e is not applicable.

the laws of this state." The law of this state relating to the reopening of decrees is found in CR 60.02. Under the residual clause of that rule, a judgment may be set aside for "reason[s] of an extraordinary nature justifying relief." CR 60.02(f). Kentucky's highest court has warned, however, "because of the desirability of according finality to judgments, this clause must be invoked only with extreme caution, and only under most unusual circumstances. Fry, supra, at 392-394 (citations omitted).

The determination whether to grant relief from a judgment or order pursuant to CR 60.02 is one left to the discretion of the trial court and one of the chief factors to consider is the moving party's ability to present his claim prior to the entry of the order sought to be set aside. Schott v. Citizens Fidelity Bank & Trust Co., 692 S.W.2d 810, 814 (Ky. App. 1985).

If as Tina alleges, she and Brian owned the residence by virtue of a marital gift, then she had to have known that it was a marital asset at the time of the decree and when she entered into the separation agreement dividing the assets and debts of the parties.³ We find no credible explanation why she waited well over three years to seek to have the property divided as a marital asset. Tina claims that

³ See Taylor v. Taylor, 598 S.W.2d 764 (Ky. App. 1980) where the court permitted the reopening of a divorce decree pursuant to CR 60.02 when at the time of the decree the movant and the court were unaware of a tax warrant due on marital property awarded to the movant.

at the time the decree was entered Nancy told Tina she could live in the house, that the property would be deeded to her, and that because of Nancy's promise, she was induced to delay bringing an action to claim ownership. However, the basis for Tina's motion to reopen the decree is based on the contention that she and Brian owned the property. So, following Tina's logic, she was given permission by Nancy to live on property Tina and Brian owned. We find Tina's explanation is insufficient to justify the three-year delay in raising the issue of the property as a marital asset and that her motion pursuant to CR 60.02 was not made within a reasonable time.

The order of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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