RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001694-MR

DALE RODGER DAUGHERTY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN L. GARVEY, JUDGE
CIVIL ACTION NO. 92-FC-000342

JEAN DAUGHERTY — APPELLEE

OPINION AND ORDER
(1) DENYING APPELLEE'S MOTION TO DISMISS
AND
(2) VACATING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

MINTON, JUDGE: Dale Daugherty appeals from two orders of the Jefferson Family Court denying his motions to set aside a Qualified Domestic Relations Order ("QDRO"). Finding that the

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

family court's basis for denying Dale's motions to set aside was erroneous, we vacate and remand for additional findings.

Dale married Jean Daugherty (now Henderson) in 1975. In 1992, Jean filed a petition for dissolution of her marriage to Dale. In July 1992, Dale and Jean entered into a property settlement agreement that recited that Dale's interest in his pension from Ford Motor Company "shall be divided . . . equally through the date of the Decree entered herein." In October 1992, the Jefferson Circuit Court entered a decree of dissolution of marriage that incorporated Dale and Jean's property settlement agreement by reference. In November 1992, the Jefferson Circuit Court entered an agreed QDRO. That QDRO ordered, in relevant part, as follows:

> 1. That the alternate payee, Jean Daugherty, has a right to $282.63 per month payable from the pension benefits due the plan participant, Dale Rodger Daugherty, at the time the plan participant begins receiving an unreduced pension benefit, or earlier at a reduced amount, if permitted by the plan. The said $282.63 is 50% of the calculated monthly benefit of the plan participant at age 65 as of October 6, 1992 [the date the decree of dissolution of marriage was entered].
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> . . . .
>
> 5. The court reserves the right to amend or modify this Order, if necessary, in order to carry out the intent of the Qualified Domestic Relations Order through compliance with the

> requirements of the Equity Retirement Act of 1984 and/or any other state or federal law dealing with this subject, compliance with which is necessary in order to carry out the parties' intention to permit the alternate payee to share in the participant's qualified pension plan benefits to the precise extent provided herein above. *No amendment or modification of this Order may alter the amount to be transferred as specified herein above* (emphasis added).

Nothing germane to this appeal happened between the parties until Dale retired in 2003. It was then discovered that the QDRO had never been submitted to Dale's pension plan administrator. When Dale finally submitted the QDRO to the pension plan administrator later in 2003, the administrator rejected it for reasons that are not apparent from the record.[2]

As she was not receiving any benefits from Dale's retirement funds, Jean filed a motion to enter a revised QDRO in January 2004. Dale filed no objections, and the court approved Jean's tendered QDRO in March 2004. Jean contends that before the court's approval of the 2004 QDRO, Dale's then-counsel had informed her counsel that Dale agreed to the QDRO; conversely, Dale states, correctly, that the record does not reflect any such agreement. Furthermore, we have not been provided tapes of any of the hearings held on this issue. Thus, all that can be

[2] Dale's brief merely states that the QDRO was rejected for unspecified "technical deficiencies[.]" Appellant's Brief, p. 2.

definitively ascertained from the record is that Jean filed her motion to approve the QDRO in late January 2004 and that Dale filed no written objections to it before its approval by the court on March 4, 2004.

Three months after the QDRO was approved, Dale, with a new attorney, filed a motion to set it aside, asking the court to approve his tendered QDRO instead. The family court denied Dale's motion, ruling that Dale had not attached a proposed QDRO and, furthermore, that any future motions to set aside must be accompanied by a "detailed affidavit setting forth specific facts as to why the prior QDRO, which is currently in pay status, is not in conformance with the terms of the Property Settlement Agreement and should be set aside."

In July 2004, Dale, through the first attorney who represented him in 2004, filed a brief motion to set aside the 2004 QDRO. Dale argued that the 2004 QDRO violated the parties' 1992 property settlement agreement because that agreement provided that Jean's interest in Dale's pension had an accrual date of the date of the divorce decree; whereas, the 2004 QDRO used the date of Dale's retirement as Jean's benefit accrual date. In response, Jean filed a motion to quash Dale's motion to set the 2004 QDRO aside. In her motion to quash, Jean argued, among other matters, that Dale, through counsel, had already agreed to the 2004 QDRO.

In late July 2004, the family court denied Dale's motion to set aside the 2004 QDRO. The court noted that Jean was receiving $774.08 per month from Dale's retirement, an amount well over that agreed to by the parties in 1992, but found that such an amount was proper because the parties had evidenced a desire to split the marital portion of Dale's retirement equally.[3] Unfortunately, the family court's order did not address Jean's argument that Dale had previously agreed to the terms of the 2004 QDRO.

Still dissatisfied, in August 2004, Dale, represented by a third attorney, filed another motion to set aside the 2004 QDRO. Again, Dale noted the fact that under the terms of the 2004 QDRO, Jean was receiving nearly $500 per month more than what was specifically agreed to by the parties in 1992 due to the fact that the 2004 QDRO divided Dale's pension through the date of his retirement rather than through the date of the divorce decree. Unimpressed by Dale's arguments, the family court simply handwrote "Overruled" on the last page of Dale's tendered QDRO. Three days later, Dale filed this appeal.

Before we begin to address Dale's appeal on its merits, we must resolve Jean's motion to dismiss. Jean contends

[3] "The Court finds that the Agreement clearly states that the parties are to divide the marital portion of the pension benefits **equally**. The only manner in which this can be accomplished is for both Ms. Crawford's [Jean's] and Mr. Daugherty's portions to be based on the amount of Mr. Daugherty's pension at the time of his retirement from Ford."

that Dale may not appeal the 2004 QDRO because he did not file an appeal of it within the thirty days allotted for appeals under CR[4] 73.02(1)(a). Jean is correct in that Dale did not appeal the 2004 QDRO within thirty days of its entry. But Jean's argument ignores Dale's later motions to set aside that QDRO.

CR 60.02 authorizes a party to file a motion to amend a final order based upon grounds such as mistake, inadvertence, fraud, etc. A motion for relief under CR 60.02 must be made "within a reasonable time[.]" In the case at hand, Dale's motions to set aside the 2004 QDRO, which were timely brought within a few months of the entry of the March 2004 QDRO, were not specifically denominated as having been brought under CR 60.02. But that lack of specificity is of no moment as the motions clearly sought CR 60.02-type relief; and a party seeking CR 60.02 relief need not use the magic phrase, "A Motion Seeking Relief Under CR 60.02," in its pleadings.[5] Furthermore, an order

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[4] Kentucky Rules of Civil Procedure.

[5] *See* Powell v. C. Hazen's Store, Inc., 322 S.W.2d 483, 485 (Ky. 1959) ("the name given to a pleading is not controlling, as its character is always to be determined by the averments in the pleading. . . . The rule applicable in such cases was succinctly stated in Rubenstein v. United States, 10 Cir., 227 F.2d 638, 642 [(1955)], wherein it was said: 'There is no controlling magic in the title, name, or description which a party litigant gives to his pleading. The substance rather than the name or denomination given to a pleading is the yardstick for determining its character and sufficiency.'").

denying CR 60.02 relief is final and appealable;[6] and there is no doubt that Dale filed this appeal within thirty days of the family court's denial of his last two motions to set aside the 2004 QDRO. Thus, we reject Jean's contention that Dale's appeal is untimely.

Jean's final argument in her motion to dismiss is that Dale's appeal must be dismissed because he is appealing a QDRO to which he had previously agreed. As noted earlier, the inadequate record of this case does not support Jean's contention. The record certainly does not contain a written objection from Dale to the entry of the 2004 QDRO. By the same token, it does not contain Dale's written agreement to the terms of the 2004 QDRO. Thus, dismissal is improper, since we cannot dismiss an appeal based on an alleged agreement that does not appear in the record.[7]

Having determined that Jean's motion to dismiss must be denied, we now turn our attention to the merits of Dale's appeal. More specifically, we first look to whether the 2004 QDRO is, in fact, materially different from the terms agreed to by the parties in 1992.

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[6] *See, e.g.,* Hackney v. Hackney, 327 S.W.2d 570, 571-572 (Ky. 1959).

[7] This does not mean, however, that Dale's silence at the time the 2004 QDRO was approved does not constitute a waiver of Dale's right to later object to the 2004 QDRO, a subject to which we will shortly return.

As stated earlier, the parties' 1992 property settlement agreement provided that Dale's pension benefits were to be divided equally "through the date of the Decree entered herein." Based on that formulation and a decree date of October 6, 1992, the 1992 QDRO specifically provided for Jean to receive $282.63 per month from Dale's retirement income. Furthermore, the 1992 QDRO plainly states that "[n]o amendment or modification of this Order may alter the amount to be transferred as specified herein above."

In contrast, under the 2004 QDRO, it is uncontested that Jean receives well over $700 per month from Dale's retirement income. This discrepancy is due to the fact that the 2004 QDRO states that Jean's benefits are to be determined as of Dale's benefit commencement date—the date of Dale's retirement. So the 2004 QDRO is materially different from the 1992 QDRO and property settlement agreement. Because the parties' property settlement agreement is a valid, enforceable contract,[8] which was incorporated by reference into the decree of dissolution of marriage, its terms must be enforced. Thus, we hold that the trial court abused its discretion by first approving the 2004 QDRO[9] and, then again, by declining Dale's request to set

[8] *See* Pursley v. Pursley, 144 S.W.3d 820, 826 (Ky. 2004).

[9] Duncan v. Duncan, 724 S.W.2d 231, 234-235 (Ky.App. 1987) ("it is axiomatic that a trial court retains broad discretion in valuing

aside the 2004 QDRO,[10] which contains at least one crucial, materially different term than what is called for by the parties' property settlement agreement and the 1992 agreed QDRO.

This is not the end of our inquiry, however, because in a corollary to her earlier argument that Dale had explicitly agreed to the terms of the 2004 QDRO, Jean argues that Dale's silence constitutes a waiver of his right to object to the erroneous 2004 QDRO. Since even a palpable error may be waived,[11] Jean's waiver argument may not be ignored. But due to the paucity of the record, neither may it be resolved.

Jean first raised a waiver argument to the family court in her motion to quash. That court made no waiver-related findings. Furthermore, there is nothing in the record to show what, if anything, Dale's original 2004 counsel said to either the court or to Jean's counsel regarding his approval or disapproval of the 2004 QDRO before the court approved that QDRO. In other words, we have nothing in the record from either of the parties (such as a written letter by Dale's counsel to

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pension rights and dividing them between parties in a divorce proceeding, so long as it does not abuse its discretion in so doing[.]").

[10] Schott v. Citizens Fidelity Bank and Trust Co., 692 S.W.2d 810, 814 (Ky.App. 1985) (holding that "the determination to grant relief from a judgment or order pursuant to CR 60.02 is one that is generally left to the sound discretion of the trial court[.]").

[11] Sherley v. Commonwealth, 889 S.W.2d 794, 798 (Ky. 1994) ("Even palpable error can be waived.").

Jean's counsel expressing agreement to the terms of the 2004 QDRO), or the family court (such as findings on the waiver issue), with which to resolve Jean's waiver argument. So we must remand this matter to the Jefferson Family Court with direction to make findings concerning whether Dale has waived his right to contest the 2004 QDRO.[12] If the family court finds that Dale voluntarily waived his right to object to the 2004 QDRO, then that document may stand, despite its errors. But if the family court finds that Dale did not waive his right to object to the 2004 QDRO, then that flawed document must be withdrawn; and the family court must enter a new QDRO in accordance with the parties' 1992 property settlement agreement and QDRO.

For the foregoing reasons, Jean Daugherty's motion to dismiss this appeal is denied; the trial court's orders denying Dale Daugherty's CR 60.02 motions are vacated; and this case is remanded with direction for findings in accordance with this opinion.

ALL CONCUR.

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[12] *See* 5 Am.Jur.2d *Appellate Review* § 689 (1995) ("But review is generally not possible where, by reason of the trial court's failure to make findings, the reviewing court is left in doubt as to just what the trial court believed the facts to be and is left to speculate the basis for the judgment. Where the trial court's findings of fact are insufficient to permit adequate review, the proper course of action, regardless of the parties' mutual disregard of the trial court's error in failing to make sufficient findings of fact, is for the appellate court to remand the case and direct the lower court to make findings.

ENTERED: September 23, 2005 /s/ John D. Minton, Jr.
JUDGE, COURT OF APPEALS

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