

RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002144-MR

MARK STEVEN THOMAS

APPELLANT

APPEAL FROM OLDHAM CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 07-CI-00248

RITA ROSE THOMAS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,¹ SENIOR
JUDGE.

TAYLOR, CHIEF JUDGE: Mark Steven Thomas brings this appeal from a
September 16, 2009, order of the Oldham Circuit Court setting aside an April 23,

¹ Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

2009, Qualified Domestic Relations Order (QDRO) as unconscionable and reinstating an August 22, 2008, QDRO. We affirm.

Mark and Rita's marriage was dissolved by decree of dissolution of marriage in the Oldham Circuit Court, Family Court Division in May of 2008. Concomitant therewith, the family court effectuated a division of marital property. In its division, the family court determined that Rita was entitled to one-half of Mark's retirement plan at Ford Motor Company. The family court ordered the following division:

9. **RETIREMENT PLAN**. The Court finds that during the marriage, [Mark] worked at Ford, and that [Mark] contributed to his retirement or pension plan with marital funds. [Rita] is entitled to credit for one-half of the amount of money that said plan accumulated during the years of marriage. [Rita]'s counsel shall prepared [sic] a Qualified Domestic Relations Order effectuating same.

Subsequently, a QDRO was prepared by Rita, signed by the family court, and entered of record. Thereafter, the QDRO was submitted to the plan administrator for Ford Motor Company Retirement Plan (Plan). The Plan administrator determined that the QDRO was "not qualified" as it did not conform with the requirements of the Plan.

As a result, an amended QDRO was prepared by Rita's counsel and submitted for court approval. Upon the family court's signature, the amended QDRO was entered of record on August 22, 2008 (first amended QDRO). The

Plan administrator determined that this QDRO was “qualified.” Both parties operated thereunder until December 15, 2008.

On that date, Mark filed a motion to amend the QDRO. He argued that the first amended QDRO mistakenly listed Rita as beneficiary of Mark’s interest in the Plan upon his death. His counsel drafted a second amended QDRO to correct such mistake. The second amended QDRO was signed by the family court and entered of record on April 23, 2009. It was later deemed qualified by the Plan administrator.

To Rita’s surprise, her monthly benefit under the Plan decreased to \$115.37 from its previous level of \$639.32 upon qualification of the second amended QDRO. Rita was also informed of this decrease by letters from the Plan’s administrator dated May 14, 2009, and May 28, 2009. In June 2009, Rita’s counsel contacted Mark’s counsel and attempted to resolve the matter by agreement of the parties.

As the parties were unable to reach such agreement, in August of 2009, Rita filed a motion to amend the second amended QDRO with the Oldham family court. By order entered September 16, 2009, the family court set aside the second amended QDRO as “unconscionable” and “reinstated” the first amended QDRO originally entered on August 22, 2008. This appeal follows.

Mark contends that the family court erred by setting aside the second amended QDRO entered April 23, 2009. In support thereof, Mark specifically argues: (1) the Kentucky Rules of Civil Procedure (CR) 59 motion to set aside the

second amended QDRO was untimely, (2) the CR 60.02 motion was not made within a reasonable time and failed to set forth sufficient grounds for relief, and (3) the first amended QDRO did not comport with the Plan's rules and with the family court's original order relating to division of the retirement plan.

To begin, we do not view Rita's August 18, 2009, motion to amend the second amended QDRO as being brought under CR 59. Rather, we think Rita's motion is more appropriately considered as a motion under CR 60.02. *See Powell v. C. Hazen's Store, Inc.*, 322 S.W.2d 483 (Ky. 1959).

Under CR 60.02(f), a claimant is entitled to relief for any "reason of an extraordinary nature justifying relief." Furthermore, it has been recognized that "[r]elief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made." *Com. v. Bustamonte*, 140 S.W.3d 581, 583 (Ky. App. 2004)(quoting *Bishir v. Bishir*, 698 S.W.2d 823, 826 (Ky. 1985)). The appropriate standard of review where relief has been granted under CR 60.02(f) is whether the circuit court abused its discretion. *Bustamonte*, 140 S.W.3d 581.

The record reflects that the second amended QDRO effectively decreased Rita's monthly benefit from \$639.32 to \$115.37. Such a drastic reduction to Rita's monthly benefit clearly constitutes an "extraordinary and compelling equity" in light of the family court's original order to divide the Plan equally between Mark and Rita. The first amended QDRO better comports with the family court's original intent and order equally dividing the Plan. Moreover, when the family court set aside the second amended QDRO, it "reinstated" the first

amended QDRO. As the first amended QDRO was previously “qualified” by the plan administrator, we reject Mark’s argument that such QDRO does not conform with the Plan’s rules.

We also believe that Rita sought CR 60.02(f) relief within a reasonable time. The second amended QDRO was entered in the family court of record on April 23, 2009. Rita was informed by letters from the Plan administrator dated May 14 and May 28 that her benefits would decrease. In June, Rita’s attorney then contacted Mark’s attorney in an effort to resolve the matter through agreement of the parties. When an agreement could not be reached, Rita promptly filed a motion to set aside the QDRO on August 18, 2009. Considering the above facts, we conclude that Rita’s motion for CR 60.02(f) relief was timely.

In sum, we do not believe the family court abused its discretion by granting Rita’s CR 60.02 motion and setting aside the April 23, 2009, order.

For the foregoing reasons, the order of the Oldham Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Victor E. Tackett, Jr.
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BRIEF FOR APPELLEE:

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