

RENDERED: JUNE 24, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001326-MR

CHARLES L. WILSON, JR.

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 02-CI-00474

ANGELA KAY WILSON

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellant, Charles Wilson, Jr., appeals the June 11, 2010, order of the Muhlenberg Circuit Court, denying his motion pursuant to CR 60.02 for relief from an April 13, 2004, order requiring Charles to pay, upon his retirement, the amount of \$604.88 per month to the Appellee, his ex-wife Angela

Kay Wilson, for as long as his pension was received. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

The parties filed for dissolution of their marriage on October 8, 2002, and were divorced on September 24, 2003. A Separation and Property Settlement Agreement was filed on October 9, 2003. Paragraph 10 of that Agreement stated as follows:

The parties' retirement benefits shall be equally divided pursuant to agreement of the parties or as otherwise ordered by the Court, it being acknowledged that as of date of entry of the Decree of Dissolution of Marriage, all retirement benefits of HUSBAND and WIFE are marital. In the event the parties cannot agree upon the method of said division, same shall be adjudicated by the Court upon subsequent motion.

On February 19, 2004, Charles filed a motion requesting that the court adjudicate the retirement benefits, as the parties had been unable to agree on same. Accordingly, on April 13, 2004, the court entered an order determining that Angela was to receive 32% of Charles's total retirement benefits as of the date of the entry of the decree. Those benefits totaled \$43,004.23, which meant that Angela would receive \$13,761.35, to be paid in increments of \$604.88 per month for as long as

Charles received those benefits.¹ Charles did not appeal the order dividing the retirement benefits.

Thereafter, on May 12, 2010, Angela filed a motion for judgment and order of contempt alleging that Charles had retired and was receiving his retirement benefits but was not paying Angela her share. Charles filed a CR 60.02 motion requesting relief from the order entered on April 13, 2004. At that time, an August 24, 2009, letter from Charles R. Lewis, CPA, was presented to the court. That letter stated that no amount was vested at the time of the decree and that Charles was only entitled to his own contribution of \$42,828.00. Thus, it was argued that Angela should only be entitled to 32% of that amount. Moreover, Lewis stated that allowing Angela to receive that amount for the rest of her life² could result in her receipt of an amount greater than the total assets at the time of divorce, thus converting the payments essentially to alimony as opposed to a property settlement.

As noted, on June 11, 2010, following a hearing held on June 4, 2010, the court entered an order denying Charles's CR 60.02 motion. In denying that

¹ The order stated as follows: "Petitioner shall receive her retirement benefits clear of any interest of respondent and petitioner shall further receive 32% of respondent's benefits as of date of entry of decree of dissolution of marriage, respondent's interest being \$42,004.23, petitioner's interest therein totaling \$13,761.35 and therefore petitioner shall receive the amount of \$604.88 per month commencing upon respondent's receipt of his benefits and to continue as long as respondent should receive said benefits. Said benefits shall be taxable to petitioner and respondent shall be directed to immediately forward said sum to petitioner upon his receipt of same."

² We note that Charles characterizes Angela's receipt of these benefits as being "for the rest of her life," when in fact the court's order stated that Angela was to receive the benefits only for as long as Charles received the benefits.

motion, the court found that Charles had failed to satisfy the requirements of CR 60.02(f), and that his motion for relief had not been filed within a reasonable time. This appeal followed.

On appeal, Charles argues that the trial court abused its discretion in denying his motion pursuant to CR 60.02(f).³ He argues that the April 13, 2004, order required him to pay an unconscionable amount, thereby justifying extraordinary relief. Charles correctly notes that the court ordered \$13,761.35 to be paid to Angela in its April 13, 2004, order. Charles asserts that if he were to make payments of \$604.88 as ordered by the court, then the entire amount owed would be paid in 23 months. Charles thus argues that in awarding the amount to be paid for as long as Charles receives the benefits, the court created an extremely unconscionable result which would give Angela a windfall to Charles's detriment. Charles argues that the ruling of the court is internally inconsistent, highly inequitable, and would be unreasonable and arbitrary as applied to him. He therefore asserts that the court abused its discretion in denying his CR 60.02 motion.

In response, Angela first asserts that Charles's motion for relief pursuant to CR 60.02 was untimely. She notes that Charles is seeking relief from an order entered more than six years ago from which he never appealed. Angela

³ CR 60.02(f) provides, in pertinent part: "On motion, a court may, upon such terms are just, relieve a party or his legal representative from its final judgment, order, or proceedings upon the following grounds . . . (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 taken. A motion under this rule does not affect the finality of a judgment or suspend its operation."

further notes that during that six year period of time, Charles retained numerous attorneys who filed multiple motions on his behalf relating to other matters, and not addressing the order concerning his pension benefits. Angela argues that none of the elements justifying the extraordinary relief required by CR 60.02(f) are present *sub judice*. She thus argues that the trial court did not err in denying Charles's motion.

Moreover, Angela asserts that the court correctly divided the parties' pensions *sub judice*. She asserts that the record reflects that Charles requested the court to use the delayed division method in dividing the parties' respective requirement benefits.⁴ She notes that the delayed division method consists of a formula used to determine the division at the time of entry of the dissolution of the marriage and takes into consideration the fact that the actual payments of monies will not occur until the pension is received. *See Young v. Young*, 314 S.W.3d 306 (Ky.App. 2010). Angela argues that the trial court divided the monies properly according to this method.

In reviewing the arguments of the parties, we note that we review a court's denial of a CR 60.02 motion for an abuse of discretion. *See Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327 (Ky. 1994). Further, we note that what constitutes a reason of extraordinary nature is left to judicial construction, which must incorporate consideration of three specific factors: (1) that relief under subsection (f) of CR 60.02 will not be available unless "none of

⁴ See Paragraph 9 of Appellant's Motion for Visitation, to Determine Child Support, and for Division of Retirement.

that rule's other specific provisions apply"; (2) whether the moving party had a fair opportunity to present his claim at trial on the merits; and (3) whether the granting of the CR 60.02 motion would be inequitable to other parties. *See Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky.App. 2009). We further note that the relief afforded a party pursuant to CR 60.02 was an incorporation of the common law writ of "coram nobis". *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). The purpose of coram nobis was to bring before the Court pronounced judgment errors which either had not been heard or litigated, which were not known nor could have been known by the party through the exercise of due diligence, or which the party was prevented from presenting due to duress, fear, or some other sufficient cause. *Baze v. Commonwealth*, 276 S.W.3d 761 (Ky. 2008).

Having reviewed the record and the arguments of the parties, we are in agreement with Angela that Charles's motion was not filed within a reasonable time as required by CR 60.02. In so finding, we believe our holding in *Fry v. Kersey*, 833 S.W.2d 392 (Ky.App. 1992) to be on point in this instance. In that case, the trial court, while distributing the assets of the parties, failed to divide or allocate the pension plan. More than five years later, Fry filed for a motion pursuant to CR 60.02(f). The court found that nearly five years had elapsed between the entry of the decree and the filing of the motion. The court noted that during that time Fry had numerous opportunities to file motions concerning his assets with the court, but did not do so. Accordingly, the court concluded that

Fry's motion, filed five years after entry of the judgment was not filed within a reasonable time.

Sub judice, the facts are very similar. The order with which Charles takes issue was entered six years ago. Between that time and the present, Charles has retained numerous attorneys and filed multiple motions with the court. In none of those did he take issue with the April 13, 2004, order. Accordingly, we find that his CR 60.02(f) motion was not filed within a reasonable time and that the trial court did not err in denying same.

In the alternative, we note that even had Charles's motion been timely, we are of the belief that the trial court correctly divided the pension *sub judice*. We note that the "delayed division" method of dividing the pension initially requested by Charles⁵ was established in *Poe v. Poe*, 711 S.W.2d 849 (Ky.App. 1986).⁶ In the delayed division method, a formula is used to determine

⁵ See Paragraph 9, Appellant's Motion for Visitation, to Determine Child Support, and for Division of Retirement.

⁶ Other methods utilized by Kentucky courts include the "net present value" method, and the "reserve jurisdiction" method. In the net present value method, the trial court calculates the present value of the pension and awards a percentage of that amount in a lump sum to the non-employee spouse. This lump sum award is generally granted in the form of an equivalent value of property rather than as a cash award. Thus, this method requires the availability of significant additional marital assets to equalize the property distribution. Under this method, the employee spouse retains all rights to the pension free of any claims from the non-employee. This method has likewise been favorably utilized in Kentucky. *See generally, Duncan*, 724 S.W.2d at 233.

In the reserve jurisdiction method, the percentage of the pension to be received by the non-employee spouse is not determined until the pension is fully vested and has matured. This method utilizes the employee's salary at the time of retirement rather than at the time of divorce to calculate the amounts due to the non-employee spouse. Although utilized by some of our sister jurisdictions, this method has received unfavorable treatment in our courts. *See Armstrong*, 34 S.W.3d 83 at 85-87 (Ky. App. 2000)(Holding that precedents in Kentucky militate against use of the reserve jurisdiction method).

the division at the time of the decree but the actual distribution of monies is delayed until payments under the pension are received. Each party then receives the appropriate percentage of the pension payments as they are paid out in accordance with the formula. The use of this method has long been approved in this Commonwealth. *See Poe; Duncan v. Duncan*, 724 S.W.2d 231 (Ky.App.1987); *Foster v. Foster*, 589 S.W.2d 223 (Ky.App.1979).

Certainly, a trial court retains broad discretion in valuing pension rights and dividing them between parties in a divorce proceeding, so long as (1) a trial court does not abuse its discretion and (2) its findings are supported by the evidence and therefore not clearly erroneous. CR 52.01; *Ghali v. Ghali*, 596 S.W.2d 31 (Ky.App. 1980). *See also Light v. Light*, 599 S.W.2d 476 (Ky.App.1980). In this instance, the court utilized the method of division requested by Charles and did so correctly. Accordingly, we decline to reverse on this basis.

Wherefore, for the foregoing reasons, we hereby affirm the June 11, 2010, order of the Muhlenberg Circuit Court, the Honorable Brian Wiggins, presiding.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Corey Morgan
Russellville, Kentucky

BRIEF FOR APPELLEE:

Ralph D. Vick
Greenville, Kentucky