

Cite as 2011 Ark. App. 343

ARKANSAS COURT OF APPEALS

DIVISIONS I AND II

No. CA10-709

ROBBIE FAYE ZIMMER

APPELLANT

V.

THOMAS RAY WRIGHT

APPELLEE

Opinion Delivered May 11, 2011APPEAL FROM THE SCOTT
COUNTY CIRCUIT COURT
[NO. DR-2006-132-II]HONORABLE DAVID H.
MCCORMICK, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from two orders arising out of the trial court's enforcement of its prior divorce decree. Appellant raises several arguments on appeal, all of them turning on her assertion that the trial court lacked jurisdiction to modify the divorce decree. We affirm.

The parties were married in 1998 and were divorced by a decree entered on June 11, 2009. The status of five certificates of deposit had been contested at trial, and the decree contained a finding that the certificates of deposit bearing both of the parties' names were marital property. On July 23, 2009, appellee filed a motion asserting that appellant was in contempt of court for failing to give him one-half of the value of the certificates of deposit. Appellee requested that the trial court award him \$26,469.96 as his share of the value of the certificates of deposit, as well as interest accrued on the certificates from the day of separation. Appellant filed a response denying that she had violated any court orders because none of the

Cite as 2011 Ark. App. 343

certificates of deposit were ever titled in appellee's name. Appellant presented proof of this assertion at the contempt hearing, and, on March 11, 2010, the trial court entered an order finding that all five certificates of deposit were marital property and awarding appellee half of the interest on the certificates.

Rule 60(a) of the Arkansas Rules of Civil Procedure generally prohibits the trial court from modifying a judgment, decree, or order more than ninety days after entry; Rule 60(c) allows modification of a decree after the expiration of ninety days for certain enumerated reasons. Appellant argues that the trial court lacked jurisdiction to enter these orders on March 11, 2010, more than ninety days from the original decree of June 11, 2009, because the orders appealed from constituted modifications of the original decree. We hold that the ninety-day limitation of Rule 60 is inapplicable because the March 11 orders did not modify the original decree but instead interpreted and enforced it.

The trial court retains jurisdiction beyond ninety days to interpret its decree to resolve any ambiguity and clarify what the court actually intended. *York v. York*, 2010 Ark. App. 343; *Abbott v. Abbott*, 79 Ark. App. 413, 90 S.W.3d 10 (2002). Appellant argues that there were no ambiguities because the court's order was clear: divide the certificates of deposit that were held in the names of both of the parties. We do not agree. At the contempt hearing, a bank official testified that appellee's name did not appear as co-owner on any of the five certificates in question. This evidence, which was not before the court at the time of the divorce hearing,

Cite as 2011 Ark. App. 343

gave rise to a latent ambiguity¹ in the divorce decree, which clearly contemplated based on the evidence presented at the original hearing that there were in existence certificates of deposit in the joint names of the parties. The trial court had jurisdiction to resolve this ambiguity and clarify its actual intent.

Finally, appellant argues that the trial court erred in failing to consider documents that she proffered at the contempt hearing to determine ownership of the certificates of deposit. We find no error. The issue at the contempt hearing was not the ownership of the accounts but instead the interpretation and enforcement of the decree that the trial court had actually entered. The documents in question were Chambers Bank records that were available to appellant at the time of the divorce hearing but were not offered by her as evidence at that time. The issue of ownership was fully litigated and decided in the original hearing, and appellant was barred from relitigating that issue in the contempt hearing. *See McAdams v. McAdams*, 357 Ark. 591, 184 S.W.3d 24 (2004). We note, too, that these latter documents were prepared after the documents that were considered at the original hearing, which were sent by Chambers Bank before the parties separated. Given that appellant was employed as a loan officer at Chambers Bank, we cannot say that the pre-separation records were not more accurate, or that the trial court erred in refusing to consider the later records proffered by her at the contempt hearing to show ownership of the accounts.

¹A latent ambiguity arises when a written instrument on its face appears clear and unambiguous but collateral facts exist that make its meaning uncertain. *Countryside Casualty Co. v. Grant*, 269 Ark. 526, 601 S.W.2d 875 (1980).

Cite as 2011 Ark. App. 343

Appellant's request for reimbursement of the cost of the supplemental record designated by appellee, consisting of the testimony and exhibits submitted at the hearing on the motion for contempt, is denied. Those materials were necessary for our understanding of the issues presented on appeal. Likewise, appellee's motion for attorney's fees for abstracting the necessary supplemental record is granted in the amount of \$1000. Other costs will be assessed in the mandate.

Affirmed.

GLADWIN, MARTIN, and HOOFFMAN, JJ., agree.

HART and BROWN, JJ., dissent.

JOSEPPHINE LINKER HART, Judge, dissenting. In the majority's extraordinarily brief opinion, it glosses over or completely omits key facts in this case that I believe are essential to a proper discussion and understanding of the matter that we have before us. In Wright's fourteen-page contempt petition, he alleges that Zimmer was in contempt because she failed to surrender to him his marital share of five certificates of deposit, as required by the June 11, 2009 divorce decree. Significantly, these certificates of deposit were not specifically identified in the divorce decree. The provision in the decree that Wright claimed that Zimmer violated stated:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all certificates of deposit which contain the name of both Mr. and Mrs. Wright are marital property. Although Ms. Wright testified that some of these certificates were purchased with excess proceeds of the City Lake property, (Zimmer's non-marital property) the Court finds that by placing Mrs. Wright's name on them, the proceeds lost their status as non-marital property and became marital property.

Cite as 2011 Ark. App. 343

In the petition, Wright acknowledges that he discovered that Zimmer had removed his name from the certificates of deposit “on or about May 7, 2007.” That was more than two years before the divorce decree was entered. Most of the rest of the fourteen-page petition *argues* that the certificates of deposit should have been considered marital property—a tacit admission that, as it was currently written, the divorce decree failed to award the funds to Wright.

In defending herself against Wright’s contempt petition, Zimmer presented proof that the certificates of deposit that Wright sought did not “contain the name of both Mr. and Mrs. Wright.” This proof included copies of the certificates of deposit that were faxed to Wright’s attorney. These certificates of deposit listed Zimmer as the owner and showed that Wright had previously been listed as a pay-on-death beneficiary, but his name had been removed by Zimmer. The majority correctly notes that the trial court disregarded this evidence. I agree with Zimmer that it was error to do so.

Instead, the trial court relied on monthly Chambers Bank statements that were mailed to Wright and Zimmer when they were living together as husband and wife. These statements did not disclose how the certificates of deposit were titled, but did include them as a line item on the statement. How the trial court could conclude that these statements and not the certificates of deposit themselves were the best proof of whether they “contain the name of both Mr. and Mrs. Wright” is disturbing. In the order appealed from, the trial court even goes so far as to recite that the evidence in question “might have resulted in a different decision being reached in the Decree of Divorce.” Simply stated, the trial court is compelling Zimmer

Cite as 2011 Ark. App. 343

to relinquish half ownership in funds that she proved in the contempt hearing, but not in the divorce hearing, were not marital property. The majority's conclusion that "the issue at the contempt hearing was not the ownership of the accounts but instead the interpretation and enforcement of the decree" is mystifying.

I also find merit in Zimmer's argument that the trial court erred by modifying the divorce decree more than 90 days after it was entered. I agree with Zimmer that under Rule 60(a) of the Arkansas Rules of Civil Procedure, the trial court was without jurisdiction to modify the decree. As noted previously, the certificates of deposit that are at issue were not specifically identified in the divorce decree. In the order appealed from, the trial court accepts Wright's argument that it should have found the certificates of deposit were marital property and specifically identifies the certificates of deposit that Wright sought in his petition. To reach this result, the trial court allowed Wright to relitigate this issue, as he prayed to do in his fourteen-page contempt petition. Significantly, the trial court completely abandons its previous means of identifying which certificates of deposit were marital property, that is, those that had Wright's name on them. I do not disagree that Wright's counsel did a better job with his second bite at the apple, although I hasten to add that his success was in no small part due to the trial court's refusal to consider evidence that would make its ruling untenable. Should Zimmer have been required to prove that the certificates of deposit were *not* marital property? I decline to speculate. I do know that Wright presented inadequate proof whereby the specific certificates of deposit could be found to be marital property under the divorce decree. Rule

Cite as 2011 Ark. App. 343

60 does not allow Wright a second opportunity. I would reverse and dismiss this case.

BROWN, J., joins.