DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, Judge

CA05-821

APRIL 12, 2006

RONALD M. OSBORNE

APPELLANT

v.

ASHLEY SALMON, JOHN P. SALMON TRUST ONE, and STEVEN W. SMITH, TRUSTEE

APPELLEES

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[PT 1998-1721]

HONORABLE MACKIE MCCLELLAN PIERCE, CIRCUIT JUDGE

AFFIRMED

On its own motion, the trial court in this case set aside a judgment it had entered against a garnishee to satisfy a child support obligation finding that the payor and payee had colluded to remove monies from the garnishee trust. Appellant Ronald Osborne, the father of the minor child and payee, alleges three points of error on appeal: (1) The trial court erred by vacating the valid judgment against the payor for child support arrears; (2) The trial court erred by vacating the valid judgment against the garnishee for child support arrears; (3) The trial court erred by considering hearsay testimony to make a finding of fraud. Two appellees are named on appeal: Ashley Salmon as the payor of the child support, and Steven W. Smith, Trustee of the John P. Salmon Trust One as the garnishee. We find no error and affirm.

On February 14, 2003, an order entitled Agreed Order to Modify Child Support was entered by the Circuit Court of Pulaski County, Ninth Division. This order stated the matter came before the court with Mr. Osborne and his counsel appearing, with Ms. Salmon not appearing, and submitted to the court upon Mr. Osborne's motion, due service, and the testimony of Mr. Osborne. The order also set forth the following facts: On August 19, 1997, a son was born to Ronald Osborne and Ashley Salmon. Paternity was established and custody of the minor

child was initially placed with Ashley Salmon subject to the reasonable visitation rights of Mr. Osborne, and Mr. Osborne was ordered to pay support for the minor child. On January 9, 2003, an agreed order to change custody and for specified visitation was entered by the court. That agreed order placed custody of the minor child with Mr. Osborne; however, the parties failed to address child support in the agreed order. The modification order stated that Ms. Salmon was not employed, but was able to provide financial support through a managed trust fund, from which she supports herself. Specifically, the court ordered "[t]hat Ashley Salmon should pay $2,000.00 per month for the support of [the minor child.]"

On July 30, 2004, Mr. Osborne filed a motion to appear and show cause naming Ms. Salmon and Mr. Smith as Trustee of the John P. Salmon Trust as defendants and asking them to explain why each should not be held in contempt. The motion states that the trustee had refused to pay the child support obligation from the trust, that Ms. Salmon had not paid child support, and that "Steve Smith is the trustee of the John P. Salmon trust in which Ashley Salmon is a named beneficiary, and he should be required to appear before this Honorable Court and show cause why he should not be held in contempt." An order to appear and show cause was entered on October 6, 2004, naming only Ashley Salmon as a defendant.

On November 3, 2004, a hearing on Mr. Osborne's motion was held with both Mr. Osborne and Ms. Salmon present, but no mention of Mr. Smith. On November 4, 2004, an order and judgment naming only Ashley Salmon as defendant was entered setting the amount of arrears in the amount of $41,640, for costs of $125, and attorney fees in the amount of $4,164. This order was signed by the 17th Division judge. In December 2004, the trial court entered a judgment identifying Ashley Salmon as defendant and John P. Salmon Trust One, Steven W. Smith, Trustee as garnishee. This judgment found that the garnishee was indebted to defendant in excess of the judgment and ordered the trustee to release the monies to Ronald Osborn and his attorneys to satisfy the November 4, 2004, judgment in the amount of $46,276. Then in January 2005, the 17th Division judge signed an order to appear and show cause directing Steven Smith to

appear and show why he should not be held in contempt for failing and refusing to obey the court's previous order.

On April 18, 2005, the trial court entered an order finding that the garnishee Steven Smith testified that he refused to comply with the garnishment because, Ashley Salmon had advised him in the last week of December, 2004, that she had colluded with the plaintiff to secure judgment against the garnishee trust in order to remove monies from said trust. The trial court further found that the Mr. Osborne and Ms. Salmon had colluded without the knowledge of attorneys to remove monies from the trust. Based upon these findings, the trial court on its own motion, set aside the judgment against Ashley Salmon that had been entered on November 4, 2004. The court further dismissed the judgment against the garnishee rendered on December 8, 2004.

When an order setting aside a judgment is entered by a circuit court more than ninety days after the judgment was originally filed, it is a final and appealable order. *Schueck Steel, Inc. v. McCarthy Bros. Co.,* 289 Ark. 463, 717 S.W.2d 816 (1986). It is within the discretion of the circuit court to determine whether it has jurisdiction under Rule 60 to set aside a judgment, and

the question on appeal becomes whether there has been an abuse of that discretion. *Burns v. Madden*, 271 Ark. 572, 609 S.W.2d 55 (1980); *Hendrix v. Hendrix*, 26 Ark. App. 283, 764 S.W.2d 472 (1989). Ark. R. Civ. P. 60, which addresses relief from a judgment, was amended in 2000, and the amendment eliminates the distinction between intrinsic and extrinsic fraud.

Rule 60 of the Arkansas Rule of Civil Procedure states in part:

> (a) Ninety-Day Limitation. To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.

(b) Exception; Clerical Errors. Notwithstanding subdivision (a) of this rule, the court may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(c) Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days. The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:

(1) By granting a new trial where the grounds therefore were discovered after the expiration of ninety (90) days after the filing of the judgment, or, where the ground is newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule 59(b), upon a motion for new trial filed with the clerk of the court not later than one year after discovery of the grounds or one year after the judgment was filed with the clerk of the court, whichever is the earlier; provided, notice of said motion has been served within the time limitations for filing the motion.

(2) By a new trial granted in proceedings against defendants constructively summoned, and who did not appear, upon a motion filed within two years after the filing of the judgment with the clerk of the court, or within one year after a certified copy of the judgment has been served upon the defendant, whichever shall be the earlier, upon security for costs being given; provided notice of the filing of said motion has been served upon the adverse party within the time limitations for filing the motion.

(3) For misprisions of the clerk.

(4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.

(5) For erroneous proceedings against an infant or person of unsound mind where the condition of such defendant does not appear in the record, nor the error in the proceedings.

(6) For the death of one of the parties before the judgment in the action.

(7) For errors in a judgment shown by an infant within twelve (12) months after reaching the age of eighteen (18) years, upon a showing of cause.

(d) Valid Defense to Be Shown. No judgment against a defendant, unless it was rendered before the action stood for trial, shall be set aside under this rule unless the defendant in his motion asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such defense.

Ark. R. Civ. P. 60(a)--(d) (2004). The trial court's order setting aside the earlier judgments cites Arkansas Rule of Civil Procedure 60 for its authority to do so; however, it appears to refer to subsection (a) as well. Subsection (a) is not applicable. Under Rule 60(a), a court may vacate or modify a judgment within ninety days from the date of filing. Because more than ninety days had elapsed between entry of the original order and entry of the order setting aside the judgment, the circuit court did not have the authority to exercise jurisdiction under subsection (a). Furthermore, the court here *vacated* the earlier order. Thus, the court was not acting pursuant to Ark. R. Civ. P. 60(b), which authorizes the court to correct clerical mistakes in the judgment at any time.

The circuit court does, however, have the power to modify or vacate a judgment more than ninety days after entry of the judgment for reasons other than to correct a clerical error under the following conditions: (1) granting a new trial based upon newly discovered evidence; (2) granting a motion for new trial in proceedings against a constructively summoned defendant; (3) for misprisions of the clerk; (4) for misrepresentation or fraud; (5) for erroneous proceedings against an infant or incompetent; (6) for the death of a party prior to judgment; or (7) for errors in judgment shown by an infant within twelve months of reaching majority. Ark. R. Civ. P. 60(c); *Taylor v. Zanone Properties*, 342 Ark. 465, 30 S.W.3d 74 (2000).

Our supreme court recently reiterated that under subsection (c), a circuit court may modify or set aside its order beyond the ninety-day limitation only if these specifically enumerated conditions listed in Rule 60(c) exist. *New Holland Credit Co., LLC v. Hill*, --- Ark. ---, --- S.W.3d --- (May 12, 2005) (*citing Slaton v. Slaton,* 330 Ark. 287, 956 S.W.2d 150 (1997)).

All of the issues raised in the court below are before us for decision, and a trial de novo on appeal in equity cases involves the determination of fact questions as well as legal issues. *See Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000). We will uphold the trial court's decision unless it is clearly erroneous, and we can affirm a trial court if it reaches the right result for the wrong reason. *Hooten v. Jensen*, --- Ark. App. ---, --- S.W.3d --- (Feb. 8, 2006) *(citing Middleton v. Lockhart,* 355 Ark. 434, 139 S.W.3d 500 (2003)). In this case, it is clear from the context of the trial court's findings and remarks that it was setting aside the earlier judgment because it believed that the parties were perpetrating a fraud upon the court.

The trial court in this case took the matter under advisement before issuing its ruling. Prior to dismissing the parties from the hearing, the court stated, "I want to see the child supported properly, but I don't want this court to be utilized as a mechanism to perpetrate a fraud in any manner." The trustee had testified that he had not paid pursuant to the order because he believed that a fraud was being perpetrated against the trust and the court. This belief was based upon Ms. Salmon's admission to him that she and Mr. Osborne had concocted a scheme to agree to $2000 a month child support and split the money distributed by the trust, and that they had conspired together after the trustee had begun withholding monies from the trust following his determination that funds were being wasted. Therefore, the trial court was setting aside the earlier judgments based upon Rule 60(c)(4).

First, we address appellant's third argument that the trial court erred by considering hearsay testimony to make a finding of fraud. The trial court did not err in admitting this testimony. Arkansas Rule of Evidence 804(b)(3) allows a hearsay statement to be admitted if the

declarant is unavailable and if the statement, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true. Furthermore, we have held that such declarations against interest are admissible against all who succeed to the declarant's interest or who claim under him. *Smith v. Clark*, 219 Ark. 751, 244 S.W.2d 776 (1952). *See also Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996) (holding that testimony concerning the decedent's statement that he did not want his son to be a beneficiary or payee of certain annuities was admissible because the statement was against the interest of his estate). Here, Ms. Salmon was unavailable because no one knew her location and attempts to find her had proved unavailing. Ark. R. Evid. 804(a)(4). Moreover, Ms. Salmon's statements that she had colluded with Mr. Osborne were admissible because such statements were declarations against the pecuniary interest of her estate. *See O'Fallon v. O'Fallon ex rel. Ngar*, 341 Ark. 138, 14 S.W.3d 506 (2000). Therefore, the trial court did not err by admitting Ms. Salmon's statement to the trustee. Furthermore, the statement supports the trial court's finding that Mr. Osborne and Ms. Salmon were perpetrating a fraud upon the court.

That finding also supports the trial court's vacating the judgment for child support arrears and the judgment against the garnishee. Rule 60(c)(4) of the Arkansas Rules of Civil Procedure authorizes the trial court to modify or vacate an order, at any time, for fraud practiced by the successful party in obtaining the judgment.

In this case, the two conspired to obtain a garnishment against the trust. That was accomplished by first obtaining a judgment against Ms. Salmon for child support arrears and then against the garnishee for payment of the arrearage. The trial court recognized that the collusion threatened the integrity of the court. The court's action was consistent with its statement that it did not want the court system to be used as a mechanism to perpetrate a fraud. Manipulation of the judicial system to gain an unfair advantage is unacceptable. *See Lewis v. Crelia*, --- Ark. ---,

--- S.W.3d --- (Feb. 16, 2006) (noting that the doctrine of judicial estoppel is to be applied only when the conduct is tantamount to a knowing misrepresentation to or even fraud on the court).

Under these circumstances, we find no error in the trial court's decision to vacate the judgment for child support arrears and the subsequent judgment against the trustee. *See Schaap v. Robinson*, 133 Ark. 113, 201 S.W. 292 (1918)(holding that agreement between two creditors to bid at bankruptcy sale so as to give false appearance of competition and thus induce confirmation of sale is not void against public policy, but constitutes fraud authorizing court refusal to confirm sale or enforce contract). We note that the trial court did not vacate the underlying child support obligation and our opinion does not address that issue.

Accordingly, we affirm.

PITTMAN, C.J., and ROBBINS, J., agree.