

RENDERED: August 8, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-001095-MR
and
NO. 96-CA-001856-MR¹

JUDITH CLAIRE ROLWING

APPELLANT

V. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
CIVIL ACTION NO. 91-CI-001702

RAYMOND H. ROLWING

APPELLEE

OPINION AND ORDER

DISMISSING APPEAL NO. 95-CA-001095-MR

AND

OPINION

AFFIRMING IN PART,

REVERSING IN PART AND REMANDING

APPEAL NO. 96-CA-001856-MR

** ** * * * * *

BEFORE: EMBERTON, HUDDLESTON and SCHRODER, Judges.

HUDDLESTON, JUDGE. Judith Claire Rolwing appeals from three orders that distributed property between her and her former husband,

¹ These two cases were appealed separately and at different times to this Court. We consider the issues raised in each together.

Raymond H. Rolwing, and denied her request for maintenance, an attorney's fee and expert witness fees.

The procedural history of this case is complicated and is important to the issues we consider. Judith and Raymond were married in 1986. However, by 1991, they were no longer living together, and, on December 28, 1992, their marriage was dissolved. The court reserved several issues for later disposition, one being the division of property between Judith and Raymond.

A "supplemental order," entered September 26, 1994, decided a number of issues in contention between Judith and Raymond. As pertinent to this opinion, that order provided that Judith was entitled to one-half the contributions made during the marriage to Raymond's pension plan at the University of Cincinnati, that is one-half of \$140,696.00. The order also determined Judith and Raymond's interest in the marital residence and directed that Judith purchase Raymond's share by a date certain. The court noted that Raymond had made unknown dollar amounts of mortgage payments on the house and instructed the parties to prepare a schedule of payments that had been made so that those amounts could be set-off against the equity in the home. The party making less payments was then to reimburse the other for one-half the difference in payments. Finally, the court instructed each party to continue to pay one-half the mortgage payments until the residence was sold. Lastly, the order stated it was final and appealable.

Judith made a motion to alter, amend or vacate the supplemental order. On March 28, 1995, an order was entered

clarifying some aspects of the supplemental order not at issue here and denying Judith's request for maintenance, an attorney's fee, and expert witness fees. At this point, Judith filed her first appeal, No. 95-CA-001095-MR, in which she contests the court's division of Raymond's pension plan and the denial of maintenance, an attorney's fee, and expert witness fees.

The parties continued to spar in the circuit court. Raymond filed a motion in aide of execution in which he claimed that Judith owed him a total of \$25,938.00. This precipitated a series of hearings which culminated in the court requesting the parties to file a memorandum with stipulations as to those items on which the parties agreed. Both Raymond and Judith filed stipulations, but the items purportedly agreed to were not identical.

The court then made a ruling in which it states, as pertinent to the issues raised here, that the parties agreed: (1) that Judith was owed \$70,348.00 from Raymond's pension plan; (2) that Raymond had paid \$58,232.00 in mortgage payments up to January 1995; (3) that the difference between Raymond's payments on the mortgage and Judith's payments at the date of Judith's purchase of the residence was \$11,032.00; and (4) that the outstanding loan balance on the house at the time of closing was \$85,082.00. The order went on to divide various credit card debts using the date of separation, rather than the date of dissolution, as the operative starting point. Finally, based upon extensive findings, the court concluded that Judith owed Raymond \$19,924.94, plus interest at the rate of twelve percent from September 26, 1994.

Following entry of this final order, Judith filed a motion to alter, amend or vacate which was denied. Thereafter, she filed her second appeal, No. 96-CA-001856-MR, in which she contests the court's division of equity in the marital residence and the treatment of mortgage payments and credit card debts.

The issue of the division of Raymond's pension plan, raised in case No. 95-CA-001095-MR, is first under consideration. To begin with, we do not believe that the supplemental order entered September 26, 1994, which determined Judith's interest in the plan was final and appealable. Obviously, the court made further orders and determinations which altered provisions made in the order. Further, the order contemplated continued interaction with the court because not all the issues between the parties were resolved.

The fact that neither party raised the issue of finality is not a bar to our considering it sua sponte. Hook v. Hook, Ky., 563 S.W.2d 716, 717 (1978). Our view of the September 26, 1994, order is similar to the Supreme Court's view of the judgment it considered in Hale v. Deaton, Ky., 528 S.W.2d 719, 721 (1995):

The judgment entered by the trial court in the proceeding before us could not and does not adjudicate all the rights of all the parties. Actually, it merely prefaces the entry of additional orders by the trial court, their context being dependent upon facts developed by the accounting required by the judgment. The . . . judgment was interlocutory and nonappealable.

That the circuit court included finality language in its September order is irrelevant. Hook, supra; Hale, supra at 722.

In any event, the questions raised by Judith regarding her portion of Raymond's pension plan are now moot by virtue of the order entered May 1, 1996, in which the court notes that, based upon its review of the record and the arguments made to it, the parties agree on the amount Judith is entitled to from Raymond's pension plan. Judith's motion to alter, amend or vacate that order does not mention the ruling on the pension plan. Therefore, that issue is settled and need not be considered by this Court.

We consider that the remaining issues raised in Judith's first appeal are incorporated by reference in the second appeal and proceed to consider them. The first of those issues is her contention that the circuit court erred when it failed to award her maintenance. She contends that there is a great disparity in income and that the court did not make sufficient findings in its March 28, 1995, order to support its denial of maintenance. In that order the court found that Judith had sufficient marital and nonmarital property apportioned to her to provide for her needs.

Whether to award maintenance is within the sound discretion of the circuit court. Its decision will not be reversed absent abuse of that discretion. Gentry v. Gentry, Ky., 798 S.W.2d 928, 937 (1990); Clark v. Clark, Ky.App., 782 S.W.2d 56, 60 (1990). Before an award of maintenance is proper it must be established that the spouse seeking maintenance lacks sufficient property, including the marital property apportioned to her, to provide for

her own needs and that she is unable to support herself through employment outside the home. Dotson v. Dotson, Ky., 864 S.W.2d 900, 902 (1993); Gentry, supra at 936.

Given that Judith has been awarded at least \$360,000.00 upon dissolution of the marriage, that she is employed by Proctor & Gamble at a salary of \$50,000.00 per year, and that she acquired the marital residence (worth approximately \$374,000.00), we cannot say that the circuit court abused its discretion when it found that she has sufficient property and income to support herself so that maintenance is unnecessary. Drake v. Drake, Ky.App., 721 S.W.2d 728, 730 (1986); Owens v. Owens, Ky.App., 672 S.W.2d 67, 69 (1984).

Judith next argues that the court should have awarded her an attorney's fee and expert witness fees. In its March order, the court denied the fee requests because it found that Judith had sufficient income and property from which to pay these fees. Ky. Rev. Stat. (KRS) 403.220 allows the court, after considering the financial resources of the parties, to award costs and attorney fees in its discretion. Such an award is entirely within the discretion of the trial court; it is not mandatory. Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512, 514 (1975); Underwood v. Underwood, Ky.App., 836 S.W.2d 439, 444 (1992). For the reasons outlined in the discussion of maintenance, above, we do not believe the court abused its discretion in denying Judith the fees she sought.

Turning to other issues raised by Judith, we first consider the modification of the home mortgage balance and reallocation of equity in the marital residence. In its May 1,

1996, order, the circuit court noted certain figures that Judith and Raymond agreed to regarding the home. One of those figures was the mortgage balance on the date of the sale and another was the amount of money Raymond had paid toward the mortgage before completion of the sale. Judith contends that the court should have used the amount outstanding on the mortgage as stated in the September order. She argues that the court, in its May 1996 order, had no authority to alter the amounts stated in the September order.

We disagree. First, as noted above, the September order was not a final and appealable order. Therefore, the court could reconsider any matter contained therein until a final adjudication. Bank of Danville v. Farmers Nat'l Bank of Danville, Kentucky, Ky., 602 S.W.2d 160, 164 (1980). Judith also objects on the ground that different judges rendered the September 1994 and May 1996 decisions. She argues that a successor judge does not have the ability to review her predecessor's orders. This argument is without merit. As Herring v. Moore, Ky.App., 561 S.W.2d 95, 98 (1977), makes clear, a successor judge may reconsider issues upon timely motion or sua sponte. Since the September order was not final, the successor judge had the authority to interpret and apply that order.

With regard to the merits of the issue regarding adjustment of the mortgage balance and the equity in the marital residence, there was no error. The court took figures upon which the parties agreed and found that Raymond's payments on the

mortgage exceeded Judith's by \$11,032.00. It thereupon ordered Judith to pay Raymond one-half of that amount. This method was in accordance with that contemplated by the September order and not in error. A similar method has been approved in Drake v. Drake, Ky.App., 809 S.W.2d 710, 712 (1991).

Judith next contends that the court erred in allocating the marital debts and mortgage payments. Issues of valuation are matters within the court's discretion. Clark, supra at 60. The findings of the court are not subject to reversal unless they are clearly erroneous. Cochran v. Cochran, Ky.App., 746 S.W.2d 568, 569 (1988). The circuit court considered all the evidence and made a decision on the debts and mortgage payments that is supported by substantial evidence of record. That decision is not clearly erroneous and, thus, will not be reversed.

Judith continues by insisting that the court erred by not making specific findings upon her motion regarding matters disposed of in the May 1996 order. Judith's motion to alter, amend or vacate made in the circuit court goes partly to the merits of the decision and partly to the issue of the court's authority to interpret the September 1994 order and does not seek, for instance, merely clarification. With respect to the merits of the decision, the court was not obligated to make further findings when it had already made sufficient findings in the May 1, 1996, order. As Judith's argument pertains to the authority of the court to consider the case, we have answered this contention above by determining that the court did have this authority.

Finally, Judith argues that the court erred in granting post-judgment interest to Raymond from September 26, 1994, on the \$19,924.94 found to be owing to him. We agree with this argument. Post-judgment interest is authorized from the date of judgment by KRS 360.040. The date of judgment was May 1, 1996 -- the date that all claims between Judith and Raymond were settled. While Raymond may be entitled to prejudgment interest, it must be at a rate not exceeding the legal rate of interest, or eight percent. KRS 360.010. Because the decision to award prejudgment interest is within the discretion of the circuit court, Church and Mullins Corp. v. Bethlehem Minerals Co., Ky., 887 S.W.2d 321, 325 (1992), the case will be remanded for purposes of determining whether prejudgment interest should be awarded.

In conclusion, with regard to appeal No. 96-CA-001856-MR, we affirm in part, reverse in part and remand for a determination as to whether Raymond should be awarded pre-judgment interest on the sum of \$19,924.94. Appeal No. 95-CA-001095-MR is dismissed.

ALL CONCUR.

ENTERED: August 8, 1997

/s/ Joseph R. Huddleston
JUDGE, COURT OF APPEALS

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