

RENDERED: December 19, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-001417-MR

JACK DARRELL SAMMONS

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 90-CI-00504

RITA ANN SAMMONS

APPELLEE

OPINION
REVERSING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON and JOHNSON, Judges.

JOHNSON, JUDGE: Jack Darrell Sammons (Jack) appeals following an order by the Pike Circuit Court that was entered on May 3, 1996, that denied his motion to alter, amend or vacate the amended findings of fact, conclusions of law and decree of dissolution of marriage entered on August 25, 1995. We reverse.

This appeal has been aptly described by Jack's counsel as a "procedural quagmire into which we must now attempt to extricate ourselves." To completely explain what occurred in this divorce case, we have no choice but to start at the petition for dissolution of marriage which was filed by Jack on April 17, 1990. The appellee wife, Rita Ann Sammons (Rita) filed a response to the petition on May 3, 1990. While Rita requested an award of

maintenance in her response, she did not file a counter-petition. The trial court entered a decree of dissolution of marriage on May 16, 1990, that reserved for determination by the trial court the issues of division of property, maintenance, and payment of debts, court costs and attorneys' fees. On May 22, 1990, the trial court ordered that Jack pay Rita temporary maintenance consisting of a rent payment of \$300.00 per month and \$350.00 per month temporary maintenance beginning on May 18, 1990. The matter was referred to the Special Commissioner for the taking of proof and the making of a recommendation to the trial court. After extensive proof was taken, the Special Commissioner filed a report on February 5, 1991, that recommended that Rita be awarded no maintenance. Both parties filed exceptions to the Special Commissioner's recommendations, and the trial court heard arguments from counsel. On October 30, 1992, after a nineteen-month delay, the trial court finally entered findings of fact, conclusions of law and a supplemental decree which awarded Rita "maintenance in the sum of \$200.00 per month for a period of 36 months from and after the date of this Judgment." It is rather apparent that this nineteen-month delay contributed to the procedural woes of this case. What follows is a series of convoluted pleadings and rulings that are, to put it mildly, a challenge to decipher.

On November 9, 1992, Rita filed a pleading entitled "Motion to Reopen Evidence,"¹ in which she moved "the Court for the re-opening of evidence for the purpose of presenting evidence

¹ Kentucky Rules of Civil Procedure (CR) 59.01 sets forth the grounds for which a trial court may grant a new trial.

concerning the state of the Respondent's health, her reduced income ability and the failure of the Petitioner to properly notify the Respondent about the cancellation of her health insurance which resulted in her becoming uninsurable." In support of her motion, Rita pointed out that the exceptions had been pending before the trial court for almost nineteen months, and that she had experienced unfortunate occurrences such as illness, increased medical expenses, cancellation of medical insurance and reduced income. Rita also filed on November 9, 1992, a "Motion to Alter, Amend, and Vacate,"² in which she sought, among other things, an award of open-ended maintenance. By an order entered on November 30, 1992, the trial court denied Rita's motion to alter, amend or vacate as it related to maintenance.

A notice of appeal (92-CA-3083-MR) was filed by Rita on December 18, 1992. While the appeal was pending on January 6, 1993, Rita filed a "Motion for 60.02 Relief." In her motion, Rita pointed out that "a Motion to Reopen Evidence was filed and never ruled on." In her CR 60.02 motion, Rita restated the allegations that she had made in her other two post-trial motions and additionally claimed "these physical and emotional problems may have prevented the Respondent from adequately assisting in the preparation of her case, evidence of which the Respondent should be allowed to develop."

The Court of Appeals on February 2, 1993, entered an order that granted Rita's motion to abate the appeal pending

² CR 59.05 provides for "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one. . . ."

disposition of her CR 60.02 motion. On February 12, 1993, the trial court entered an order that granted Rita's motion to reopen evidence and, insofar as it had been rendered moot, denied the CR 60.02 motion. The trial court found that during the pendency of this action "certain events and/or changes in circumstances have occurred relevant to the issues of" maintenance and marital property, and ordered that the matter be remanded to the Special Commissioner "for the taking of evidence and making of a report and recommendations relevant thereto[.]" Jack vehemently objected to the taking of additional proof on the grounds that the trial court lacked jurisdiction and that there was no basis to support a new trial.

In a report filed on August 27, 1993, the Special Commissioner recommended that Jack pay Rita "maintenance in the sum of \$300.00 per month for her lifetime or until she remarries, whichever shall first occur." Jack filed exceptions to the Special Commissioner's report, but they were not ruled upon for almost two years. Finally, on August 25, 1995, the trial court entered "Amended Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage," wherein it made findings of fact that stated in part as follows:

1. That subsequent to the first Commissioner's hearings on September 4, 1990 and October 9, 1990, the Respondent become [sic] disabled to the extent that she had to quit her job at Food City and as a part-time secretary at a church. This was due to her hospitalization for prescription drug abuse. . . . She was subsequently hospitalized beginning June 21, 1991 for five (5) weeks which resulted in a medical bill of eighteen thousand (\$18,000.00) dollars. . . .

Respondent testified that her health insurance was canceled in December, 1990 and she did not receive any notice of same from the Petitioner or his employer in time to file for COBRA benefits. Respondent did not receive notice of this termination of benefits until approximately May 11, 1991.

. . .

4. The Court **FINDS** that the Respondent was suffering from a drug dependency at the time of the first hearings, and although it did not totally prevent the Respondent from fully testifying to issues involved in the action, it did impair her to some extent.

The trial court ordered that Jack pay Rita "the sum of three hundred (\$300.00) dollars a month maintenance, each and every month, commencing on the 1st day of September, 1995, until her death or she remarries."

On August 31, 1995, Jack filed a "Motion to Alter, Amend or Vacate Decree as Amended." This motion was not denied by the trial court until May 3, 1996. The appeal currently before this Court followed.

However, and unfortunately, following the entry of the amended decree but during the pendency of Jack's CR 59.05 motion, this Court removed the first appeal from abatement. In its opinion rendered on December 1, 1995, that affirmed the trial court, this Court referred to this case's "somewhat checkered procedural history" and noted that the trial court had resolved various issues by the amended decree. This Court stated: "After the trial judge complied with the directive from this Court by order dated August 25, 1995, the case was at last ready for appellate disposition."³

³ Apparently, the amended decree was entered following an order by this Court for the trial court to act.

Unfortunately, this statement by this Court overlooked Jack's pending CR 59.05 motion.

This Court in its December 1, 1995 opinion referred to the maintenance issue briefly as follows:

The case is not factually complex and appellant's complaint with respect to the denial of maintenance for life has been rendered moot by the trial judge's order of August 25, 1995. We would note, however, that in the context of the evidence as a whole, adduced in the five years this case has been pending, the maintenance award could not be disturbed as an abuse of discretion were the matter properly before us. Clark v. Clark, Ky. App., 782 S.W.2d 56 (1990).

Having thoroughly reviewed this case's contorted procedural history, we will now address the merits of this appeal.⁴

We accept Jack's argument that the trial court erred in granting Rita relief pursuant to CR 59. CR 59.01 states as follows:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

(b) Misconduct of the jury, of the prevailing party, or of his attorney.

⁴ Rita indicates in her brief that she remarried on June 4, 1996. Accordingly, the total maintenance award in issue is approximately \$2,300.00. The October 30, 1992 decree ordered maintenance of \$200.00 a month for 36 months. The August 25, 1995 amended decree increased the amount to \$300.00 commencing on September 1, 1995, and continuing until Rita remarried on June 4, 1996. Thus, there was a \$100.00 increase for the remaining two months of the original 36-month period totalling \$200.00, and the additional seven months at \$300.00 per month equals \$2,100.00.

(c) Accident or surprise which ordinary prudence could not have guarded against.

(d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.

(e) Error in the assessment of the amount of recovery whether too large or too small.

(f) That the verdict is not sustained by sufficient evidence, or is contrary to law.

(g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

(h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

Obviously, since this matter was tried by the court and not a jury, the trial court proceeded under CR 59.07 which provides as follows:

On motion for a new trial in an action tried without a jury, the court may grant a new trial or it may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

While the trial court in its amended findings of fact, conclusions of law and decree of dissolution failed to even refer to CR 59, we can only assume that it was relying upon CR 59.01(g) which allows for a new trial because of "[n]ewly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." The flaw in the granting of this relief is that the trial court based its decision on "certain events and/or changes in circumstances" that occurred after the hearings before the Special Commissioner on September 4, 1990, and October 9, 1990, but before

the entry of the decree on October 30, 1992. The proper procedure for Rita to have followed if she wanted to supplement her proof following the October 9, 1990 hearing was to have moved the trial court for leave to submit additional evidence before final judgment. Even after the Special Commissioner filed his report on February 5, 1991, and while the exceptions were pending for almost nineteen months and before final judgment was entered on October 30, 1992, Rita could have sought to supplement her proof. To allow Rita to wait to see if the trial court was going to rule favorably to her before deciding if she wanted to submit additional proof, would be an abuse of the rules of civil procedure. In Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997), the Supreme Court discussed the broad discretion of the trial court as follows:

With respect to the [domestic relations commissioner's] report, the court may adopt, modify or reject it, in whole or in part, and may receive further evidence or may recommit it with instructions. In sum, the trial court has the broadest possible discretion with respect to the use it makes of reports of domestic relations commissioners.

Thus, the evidence relied upon by the trial court in granting Rita CR 59 relief was not new evidence. Rather, it was evidence available to her prior to entry of judgment on October 30, 1992. Accordingly, the trial court abused its discretion in allowing the taking of additional evidence when the requirements of CR 59.01(g) were not met. See Sanders v. Drane, Ky., 432 S.W.2d 54 (1968); and Walker v. Bencini, Ky., 374 S.W.2d 368 (1964). The judgment of August 25, 1995, is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Lawrence R. Webster
Pikeville, KY

BRIEF FOR APPELLEE:

Hon. Kathryn Burke
Pikeville, KY