RENDERED: April 14, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002924-MR

RANDY RICHARDSON APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 95-CI-00501

JAMIE RICHARDSON (NOW SHIELDS) APPELLEE

OPINION and ORDER
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Randy Richardson has appealed from the judgment of the Warren Circuit Court entered on October 17, 1997, which denied his motion pursuant to CR[1] 60.02(f) to set aside the property settlement agreement resolving the issues arising from the parties' dissolution action. After a thorough review of the record, we affirm.

Randy and the appellee, Jamie Richardson, were married on April 8, 1994. The parties separated on March 1, 1995, shortly before the birth of their only child, Michael, on March

[1]Kentucky Rules of Civil Procedure.

20, 1995. Jamie, who was nineteen-years old and unemployed, filed a petition seeking the dissolution of the marriage in May of that year. Randy was twenty-years old and had a seventh grade education and a limited work history as a roofer and an auto mechanic. Randy was served with a summons on September 27, 1995. In December 1995, no further action having been taken since the filing of the petition, the Domestic Relations Commissioner, Brian Reeves, gave notice to the parties of the action's impending dismissal. Neither Jamie nor her attorney of record, appeared. Randy, who did not have an attorney, appeared at the show cause hearing and informed the commissioner that he wanted the action to proceed. The commissioner continued the hearing until January 1996.

After a hearing, the commissioner entered a report on January 29, 1996, recommending that Jamie be given temporary sole custody of Michael, that Randy have visitation every other weekend, and that Randy pay child support of $56.57 per week. Jamie moved to amend the commissioner's report with respect to visitation, and after a hearing that Randy did not attend, the commissioner altered his previous recommendation pertaining to visitation. He eliminated overnight visits and allowed Randy temporary visitation with Michael between 10:00 a.m. and 6:00 p.m. on both Saturday and Sunday of alternate weekends.

The case was scheduled for trial to commence on March 26, 1996. Randy appeared and told the commissioner that he had tried, unsuccessfully, to obtain an attorney. He requested that the commissioner enter an order for a social worker to come to

his home for the purpose of evaluating his home to assist the commissioner in ruling on the issue of visitation. Commissioner Reeves expressed his frustration with Randy's failure to be prepared to try the case. He denied Randy's request for a social worker to assess his residence, and began a trial on all issues.[2] The commissioner explained to Randy how the trial would proceed and suggested that Randy might want to discuss the possibility of settlement with Jamie's attorney. After conferring for a short time, Randy and Jamie's attorney informed the commissioner that they had reached an agreement on all issues, which Jamie's counsel recited to the commissioner, including Randy's agreement to pay child support of $56.57 per week and to exercise his visitation during the days of alternate weekends under the supervision of his sister, Marie Whobrey.

Several months passed without a decree of dissolution being entered. In October 1996, Jamie moved for entry of a property settlement agreement and for a finding that Randy was in contempt for failing to pay child support. A hearing was conducted on these motions before Commissioner Ralph Beck on December 5, 1996. At this hearing Randy, still without counsel, informed the commissioner that he had not signed the agreement prepared by Jamie's attorney because he could not read. The commissioner read the various provisions to Randy, and Randy stated that he had previously agreed to the terms as written.

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[2]The parties had no property to divide; there was no request for maintenance; and, Randy did not challenge Jamie's desire for sole custody of Michael. The only issues to be litigated between Randy and Jamie concerned visitation and child support.

At the same hearing, Randy told the commissioner that he was having problems exercising visitation. Although he acknowledged that he had previously agreed to visitation supervised only by his sister, he testified that his sister worked on weekends and he had therefore been unable to visit with Michael for many months. The commissioner told Randy that he was not going to modify the parties' agreement that day, that he was only going to ascertain what terms Randy had previously agreed to, and that if Randy wanted to modify the visitation arrangement he would need to file a motion to modify. The commissioner suggested that Randy obtain legal counsel to advise him in those matters.

The commissioner then proceeded to hear Jamie's motion to hold Randy in contempt. At no time did the commissioner inform Randy that he was entitled to an appointed attorney to represent him in the civil contempt hearing.[3] In his own defense, Randy explained that he had been unemployed for many months, that he had not received unemployment compensation and that he lived with his parents. He stated that he had started working the previous week at a garage and earned $6 per hour. The commissioner told Randy that if he would agree to pay $103 a week, ($56.57 for current child support, $43.43 towards the $2,262.73 arrearage, and $3 for administrative fees), and to a wage assignment, he would recommend that Randy not be found in

[3] See Lewis v. Lewis, Ky., 875 S.W.2d 862 (1993).

contempt.[4] Randy so agreed and executed the property settlement agreement which was entered on January 30, 1997.

Randy's job at the garage did not last long. On January 29, 1997, Jamie filed another motion for contempt alleging that Randy had not paid any child support. Randy finally obtained counsel who alleged that Randy was under duress

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[4]Randy characterizes the exchanges between the commissioner and Jamie's attorney with him at this hearing to a "good cop/bad cop" routine. Regardless of the accuracy of that characterization, given Randy's level of education, his immaturity and low IQ, the commissioner's failure to inform him of his right to have appointed counsel before the issue of contempt could be considered, and the added fact that the commissioner had required Randy's mother to leave the courtroom, there is no question that Randy was intimidated and overreached when he agreed to pay the sum of $103 per week to address the support arrearages, as is evident from the following:

> Attorney Thornton: " I don't see why he can't pay $100 a week. If he lived off of nothing at home before, ah, but I'll do whatever you think appropriate.
>
> Commissioner Beck: "It's not me. It's whatever you can agree on. If you can't agree, I'll let you take him before Judge Minton to see if he'll lock him up for it.
>
> Randy: "I can't afford no $100 cause I got other bills I owe."
>
> Commissioner Beck: "Tell me which one of those bills will put you in jail if you don't pay it?"
>
> Randy: "Child support."
>
> Commissioner Beck: "Then why are you telling me about other bills?"
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> . . .
>
> Randy: "I guess I'll just pay $100 a week. That's all I can do."

when had agreed to pay more support that he was able to pay. He also filed a counter motion and asked the commissioner to find Jamie in contempt for failing to allow him visitation. The commissioner denied Randy's motion and gave him 30 days to find employment before imposing sanctions for failing to pay child support.

On March 26, 1997, Randy moved the trial court to modify visitation and to reduce child support nunc pro tunc. He alleged that he had been unable to keep a job because he "lack[ed] the necessary skills," and further, that "[u]nless his child support [was] reduced retroactively and presently, [he] [would] never be able to overcome the child support arrearages he was forced to agree to by being threatened with jail time."

The hearing before the commissioner on April 17, 1997, on these issues is not contained in the record on appeal. At the conclusion of that hearing, the commissioner recommended that visitation continue to be supervised by Randy's sister, Marie Whobrey. With respect to the issue of child support, the report stated as follows:

> **IT IS FURTHER RECOMMENDED** that the Motion to Reduce Child Support be overruled, as it appears from the initial discussions of the parties that had the respondent not withdrawn the Motion to Reduce Child Support, it would have actually increased [emphasis original].

The commissioner further recommended that the matter be continued to May 16, 1997, to determine whether or not Randy had made significant progress on the arrearage, and to recommend sanctions to be imposed, if necessary.

At the next hearing conducted by the commissioner on

May 16, Jamie testified that Randy was, in her opinion, capable of working and that he had not paid any support since the April hearing. Randy did not testify, but his attorney informed the commissioner that Randy was attempting to obtain Supplemental Security Income (SSI) based on his mental disability. Randy's counsel asked the commissioner to hold the contempt motion in abeyance until the social security administration made a ruling on his application for benefits. She argued that Randy did not have the funds to obtain the expert proof necessary to presently establish his disability to work.

The commissioner found that Randy had not made significant progress on his arrearage. He determined that the child support arrearage had accumulated to $3,496.28, and recommended that Randy be incarcerated for thirty days unless he purged himself within 15 days for his failure to pay the court-ordered child support. Randy filed exceptions to these recommendations in which he alleged that his child support had never been based on his actual earnings and that there was no proof indicating a necessity for supervised visitation. The trial court found that Randy was a mechanic and able to find employment, and overruled the exceptions. The trial court in an order entered on July 16, 1997, ruled that since Randy had not paid any child support since the last hearing, he would be ordered to jail for one week. Randy did not appeal from the order finding him in contempt and imposing sanctions.

The commissioner heard yet another motion for contempt filed by Jamie on August 14, 1997. At that hearing, Randy

testified that he had some skills working on cars, such as changing brake pads, putting in spark plugs and changing oil, but he also testified that he had a difficult time keeping employment as he “gets mad” easily and “tears up stuff” and ends up paying more for his mistakes than he earns. The commissioner recommended that the action be passed for two weeks to give Randy time to make an effort to pay his child support, and if no effort was made, he would recommend that Randy return to jail. Randy filed exceptions to this report, which were again overruled. On August 28, the Commissioner recommended that Randy serve 30 days in jail.

On August 28, 1997, Randy filed exceptions to the commissioner’s report; and he also filed a motion pursuant to CR 60.02 to set aside the property settlement agreement. Randy alleged that at the time he entered into the agreement that he was not represented by counsel; that he lacked the mental capacity to match wits with the commissioner and Jamie’s attorney at the hearing before Commissioner Beck on December 5, 1996; that his agreement to pay child support and arrearages of $103 per week was the result of duress and overreaching; that he lacked the mental ability to earn an income sufficient to pay $103 per week; that he was induced to marry Jamie; and that there was no proof offered to justify the imposition of supervised visitation. In support of this motion, Randy submitted an evaluation prepared by Ollie Dennis, a clinical psychologist, who examined Randy in July 1997, in connection with his application for SSI benefits. The report indicated that Randy has an overall IQ of 72, which

falls within the "borderline range" and which exceeds only 3% of other individuals his age; that he has marked "deficits in reading and math ability;" that he had "an emerging alcohol abuse problem;" and, that he suffers from depression.

In its order of October 17, 1997, from which this appeal has been taken, the trial court stated that it was "simply not moved" by any of Randy's arguments. It further stated that

> [Randy] could have secured counsel prior to trial, but for some unknown reason chose not to employ an attorney. Like everyone, [Randy] must live with and accept responsibility for the decisions he has made.
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> . . .
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> Further, the Court need not remind [Randy] that it takes two people to enter into a marriage and, obviously enough, conceive children. Therefore, the Court is unsympathetic to [Randy's] contentions that he was "wooed by [Jamie]" into marrying her. In conclusion, the Court simply does not consider any of the above-mentioned allegations as a "reason of extraordinary nature" justifying the relief now sought by [Randy].

The trial court did not address the issue of duress or overreaching, or Randy's argument that he did not have sufficient intellectual abilities to appreciate the agreement he had made.

Randy makes the same arguments in this appeal that he made in the trial court and one new argument. He now argues for the first time that Commissioner Reeves had a conflict of interest that he did not disclose. Randy states that Commissioner Reeves was represented in his own post-dissolution litigation by a member of the same firm representing Jamie in this case. Although Jamie's attorney contends that Randy "is

mistaken and flatly misrepresents this matter to this court," he does acknowledge that his firm did represent Commissioner Reeves as recently as the fall of 1995.

The civil rule upon which Randy relies, CR 60.02(f), provides that:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (f) any other reason of an extraordinary nature justifying relief.

The standard this Court employs in reviewing an order denying relief under CR 60.02 is whether the trial court abused its discretion.[5] The two factors which the trial court should consider in exercising that discretion are "(1) whether the moving party had a fair opportunity to present his claim at the trial on the merits and (2) whether the granting of CR 60.02(f) relief would be inequitable to other parties."[6] In the context of setting aside a property settlement agreement, the trial court must consider the "'economic circumstances of the parties and any other relevant evidence'" and determine whether the separation agreement is "'manifestly unfair and unreasonable.'"[7]

While we are not unsympathetic to Randy, or

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[5]Bethlehem Minerals Co. v. Church & Mullins Corp., Ky., 887 S.W.2d 327 (1994).

[6]Id. at 329 (citing Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957)).

[7]Shraberg v. Shraberg, Ky., 939 S.W.2d 330, 333 (1997) (trial court's order granting husband's motion for relief from property settlement agreement in which he agreed to pay $160,000 of his $200,000 annual earnings for child support and maintenance affirmed by this Court and Supreme Court) (citing McGowan v. McGowan, Ky.App., 663 S.W.2d 219 (1983)).

unappreciative of his situation, we are not able to conclude that the trial court abused its discretion in denying the motion to set aside the agreement. That is, Randy has not convinced this Court that the terms of the agreement of which he complains are unfair, much less manifestly unfair. For that matter, we are not convinced from our review of the record, that Randy's support obligation or his visitation rights would have been resolved any differently had he litigated these issues instead of settling them by agreement.

Randy argues that "[p]ublic policy should not require a person with [his] mental ability and who is functioning on a second grade level, to be bound by an agreement that placed an obligation on him to pay child support in excess of his earnings per week." The problem with this argument is that there was no evidence before the trial court that Randy was "functioning on a second grade level." There was testimony at the various hearings from which the trial court could glean that Randy was not able to read, that he had limited skills, that he was easily frustrated and could not cope when things did not go as he expected, and consequently, that he had difficulty keeping employment. However, the record reveals that it would not have been unfair and unreasonable for the trial court to have imputed minimum wage earnings to Randy had he not agreed to pay $56 per week in support. In fact, Randy does not argue that $56 per week exceeds the amount he would have been required to pay under the guidelines if minimum wages had been imputed to him. Our statutory scheme allows a trial court to impute potential

earnings to support obligors with only two exceptions, those who are physically or mentally incapacitated and those caring for a child three years of age or under.[8] Randy argued below, as he argues in this appeal, that he is mentally incapacitated.[9] However, the record, including the psychological evaluation, does not definitively establish that Randy was incapacitated from performing all minimum wage jobs that would allow him to meet his obligation to support his child, or which would compel the trial court to conclude his agreement to pay $56 weekly to be unreasonable.

With respect to visitation, we are again unable to find an abuse of discretion. The commissioner conducted a hearing in February 1996 and heard some disturbing information implicating serious health and safety issues at the home of Randy's parents where he resided. Randy did not attend this hearing. He alleges that he was not provided notice of the hearing, yet the record indicates otherwise. In any event, Randy attempted to get the visitation agreement modified, but he has not provided this Court with a transcript of the April 1997 hearing in which that request was denied. Simply, there is nothing in the record suggesting that the restrictions on Randy's visitation to which he agreed are unfair.

In conclusion, any possible breach in ethics committed by Commissioner Reeves is beyond the purview of this appeal for

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[8]Kentucky Revised Statutes 403.212(2)(d).

[9]We have been informed by Randy's counsel that he was awarded SSI during the pendency of this appeal.

several reasons, including the fact that it was not raised below, there is no factual predicate established for the issue in the record, and Randy does not contend how the alleged breach affected the fairness of the agreement he reached. Further, while we do not endorse the action taken by Commissioner Beck in getting Randy to agree to a schedule to pay the arrearages, the terms of the agreement which Randy contends are unconscionable were reached prior to Commissioner Beck's involvement in the matter and thus his conduct is not germane to the issue at hand. Further, both the issues of visitation and child support are matters that are subject to modification by the trial court. The fact that Randy has been unsuccessful in his efforts to obtain modification of these issues, efforts made after he obtained counsel and was given an opportunity to present any evidence he had, further suggests that the original agreement he wishes to avoid was not so unfair as to warrant relief under CR 60.02(f).

Finally, Randy has moved this Court for an oral argument. He contends that since the judgment was entered he was awarded SSI "based in part on his lack of intelligence." He states that the "Court needs to be updated on the status of [his] child support" and that his SSI must not be considered in calculating his child support. The fact that Randy has been awarded SSI benefits does not bear on the issue of whether the trial court abused its discretion in ruling on his CR 60.02 motion. Also, any effort to modify Randy's child support obligation must be made in the Warren Circuit Court. Modification is not a matter within this Court's jurisdiction.

Accordingly, the judgment of the Warren Circuit Court is affirmed and the motion for oral argument is hereby DENIED.

ALL CONCUR.

Entered: April 14, 2000

/s/ Rick A. Johnson
Judge, Court of Appeals

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