RENDERED: JUNE 2, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002992-MR

MARY ANN WEST APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 96-CI-00102

TERRY WAYNE WEST APPELLEE

<u>OPINION</u> <u>AFFIRMING</u> ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE, AND MILLER, JUDGES.

MILLER, JUDGE: Mary Ann West brings this appeal from an "Order Modifying Final Decree" of the Lyon Circuit Court entered November 9, 1998. We affirm.

We are somewhat handicapped in evaluating this case inasmuch as we are furnished with only appellant's brief. We rely heavily upon the revelations therein. We try to understand the situation as best we can.

¹We can well understand why appellee did not file a brief. This is a civil action gone criminal. Appellee has, of course, little or no interest in the criminal proceeding.

Mary Ann West and Terry Wayne West were married in Crittenden County, Kentucky, on April 16, 1994. One child, Jordan Danielle West, was born to the marriage. On July 10, 1996, Mary Ann filed a petition for divorce in the Lyon Circuit Court. Terry did not contest the petition. On September 23, 1996, the parties, each being represented by counsel, entered into a "Marriage Dissolution Agreement With Children." On October 7, 1996, Mary Ann moved the court to enter a decree of dissolution. She noticed the motion for Monday, October 21, 1996, at the hour of 9:30 a.m. It appears that neither party, nor their respective counsel, showed for the hearing. The court, rather than entering the decree of dissolution as per the settlement agreement, made a handwritten notation which we, not without some difficulty, decipher as follows:

Passed subject to re-notice -- on Request of counsel for Petitioner.

10-21-96 /s/ Bill Cunningham Judge

On December 18, 1997, Mary Ann exchanged marital vows with another individual. Subsequent thereto, we are told Mary Ann had a "falling-out" with Terry's mother, Jane West, emanating from Jane's visitation privileges with her grandchild, Jordan Danielle. Somewhere along the way, Jane learned that Mary Ann and Terry's divorce decree had not been signed on October 21, 1996, and she perceived Mary Ann a bigamist. We are told that as a weapon in her dispute with Mary Ann, Jane presented the matter of Mary Ann's moral breach to the Commonwealth Attorney of Livingston County. Thereupon, an indictment was returned on

October 22, 1998, charging Mary Ann with bigamy. Kentucky Revised Statutes 530.010.

On October 28, 1998, Mary Ann, through counsel, moved the court to enter a decree of dissolution. On November 2, 1998, the court entered "Findings of Fact, Conclusion of Law and Decree of Dissolution of Marriage." The decree provided that it was to be effective October 21, 1996, nunc pro tunc.

On November 4, 1998, for some inexplicable reason,
Terry, through counsel, filed a document styled "Response to
Motion to Submit." Therein, he stated that the parties had
reconciled and lived together after the execution of the
"Property Settlement Agreement". The response further stated
that "matters of child custody and support have changed in that
the child is now living with Terry's mother pursuant to an Order
of the Marshall District Court." He suggested the matter was not
ripe for final determination in absence of additional proof.

On November 9, 1998, the circuit court entered an "Order Modifying Final Decree", which provided in part:

that the Conclusion of Law and Decree entered on November 2, 1998, are hereby MODIFIED to delete the words "effective October 21, 1996, nunc pro tunc;" and the divorce shall be effective as of the date of the entry of the Decree, more specifically November 2, 1998.

This appeal ensued.

²Doubtless, he was referring to the "Marriage Dissolution Agreement With Children" of September 23, 1996.

Appellant contends the decree was properly entered *nunc* pro tunc and the court erroneously modified the decree to negate same. We disagree.

Ky. R. Civ. P. 52.02 provides:

Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

In the case at hand, the decree was modified within ten days of its entry. Thus, the circuit court clearly acted within its jurisdiction to amend same. We must also conclude the court's amendment was proper.

A nunc pro tunc order may be entered only "for the purpose of placing in the record evidence of judicial action that has actually been taken, and not to . . . supply an omission of judicial action." <u>Carroll v. Carroll</u>, Ky., 338 S.W.2d 694, 696 (1960) (citations omitted). Indeed, in <u>Hundley v. Hundley</u>, Ky., 198 S.W.2d 971, 973 (1947), the court emphasized that:

the entering, recording, or signing the judgments are mere ministerial acts separate from the judicial act rendering the judgment. The judicial act is the rendering of the judgment. The recording of and signing the judgment is the ministerial act.

We do not think there exists a basis for a nunc pro tunc entry of judgment. This is not a case where a mere ministerial act remained unaccomplished. Rather, the record suggests the judicial act of rendering judgment did not take place until the actual decree was entered on November 2, 1998. As such, we are

of the opinion the circuit court did not commit reversible error by modifying the decree.

We view appellant's remaining contentions moot.

For the foregoing reasons, the order of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

James E. Story Eddyville, Kentucky