

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000304-MR

DALE CHARLES HERBST

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 96-CI-00162

TERRI ANN HERBST

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. Dale Charles Herbst appeals from orders of the Carter Circuit Court regarding the disposition of marital property in a dissolution of marriage action. The issue is whether the trial court erred in entering a judgment dividing the marital property after a hearing where Herbst was not present and not represented by counsel. We find no error in the court's judgment or in its order denying Herbst's motion to alter, amend, or vacate. Thus, we affirm.

Herbst and his wife, Terri Ann Herbst (now Perry), were married in 1985. On May 29, 1996, Perry filed a petition for dissolution of the marriage in the Carter Circuit Court. After

Herbst was served by warning order attorney and failed to respond, a default judgment was entered against him on November 6, 1996. After a new summons was issued for Herbst, he filed a pro se response on January 26, 1998. A final hearing before the domestic relations commissioner (DRC) was initially scheduled for April 28, 1998. At that hearing, Herbst's original attorney, W. Jeffrey Scott, entered an appearance on Herbst's behalf and requested a continuance. The final hearing was rescheduled for June 9, 1998. In the meantime, the trial court entered a decree on May 11, 1998, divorcing the parties.

On the day before the scheduled June 9, 1998, hearing, Perry filed a motion to compel Herbst to comply with discovery requests. On the day of the hearing, the court ordered Herbst to comply with discovery requests and reset the final hearing for July 7, 1998. On the rescheduled hearing date, Perry filed a motion for the court to sanction Herbst for his failure to comply with the discovery order. Herbst was not present at the hearing, and the court ordered the motion held in abeyance and rescheduled the hearing to August 25, 1998. On the day following the scheduled July 7, 1998, hearing, Herbst's attorney sent him a letter advising him of the new hearing date, suggesting that he be present for the hearing, and directing him to complete and return the discovery information.

On the August 25, 1998, final hearing before the DRC, Herbst again failed to appear and again failed to comply with the court's discovery order. His attorney orally moved the court to allow him to withdraw as Herbst's counsel, and the court entered

an order on September 1, 1998, granting the motion. On November 3, 1998, the DRC entered his findings and recommendations which stated in part that "[t]he Respondent is hereby precluded from defending herein pursuant to CR 37.02 for his failure to comply with the court's orders on discovery." In addition to awarding custody of the parties' child to Perry, the DRC's recommendations provided that Perry would be awarded one-half of Herbst's pension and savings plan, one-half of the equity in the marital residence, one-half of other marital personal properties, and one-half of Herbst's savings accounts. Further, Herbst was directed to assume responsibility for all marital debts.

On November 12, 1998, Perry filed a motion to confirm the DRC's recommendations and gave notice that the motion would be heard on November 17, 1998. On the date of the hearing, Herbst faxed a letter to the trial judge stating that he was in West Palm Beach, Florida, and asking for a continuance so that he could obtain new counsel and be present for the hearing. The court then entered an order rescheduling the hearing for December 7, 1998. At this rescheduled hearing, Herbst's new attorney, MaLenda Haynes, appeared to represent him, but Herbst once again was not present. The trial judge then adopted the DRC's recommendations, and the order was entered by the clerk on the following day.

On December 15, 1998, Herbst's attorney filed a response to Perry's motion to confirm the DRC's recommendation

and entered her appearance of record as Herbst's attorney.¹ On December 18, 1998, Herbst filed a motion to alter, amend, or vacate the court's judgment. On January 11, 1999, the court entered an order denying the motion. On February 10, 1999, Herbst filed a notice of appeal from the court's judgment and its order denying his motion to alter, amend, or vacate.

The gist of Herbst's appeal is his argument that his attorney should not have withdrawn from representing him prior to the August 25, 1998, hearing and that his improper withdrawal from the case left him without representation and resulted in an inequitable apportionment of the marital property. He further asserts that the trial court should have continued the hearing after it allowed Herbst's counsel to withdraw. Among the several arguments raised by Perry in her brief,² she contends that any representation of Herbst at the hearing would have been to no avail since the court had precluded him from defending due to his failure to comply with the discovery order. See CR³ 37.02(2).

Herbst has not attacked the portion of the trial court's ruling that he was precluded from defending due to his failure to comply with the discovery order. Further, it does not

¹ The response was obviously untimely because the court had already entered an order approving the DRC's recommendations.

² Perry also argues that this court lacks jurisdiction to consider Herbst's appeal because the notice of appeal was not timely filed. We have considered this argument and determined that it is without merit. She further asserts that Herbst's brief should be stricken for failure to comply with the appellate procedural rules, but we decline to address this issue because we affirm the trial court on the substantive issues.

³ Kentucky Rules of Civil Procedure.

appear that the trial court abused its discretion by ruling in this manner. See Greathouse v. American Nat'l Bank & Trust Co., Ky. App., 796 S.W.2d 868, 869-70 (1990). See also Nowicke v. Central Bank & Trust Co., Ky. App., 551 S.W.2d 809, 811 (1977). Therefore, in light of the trial court's ruling precluding Herbst from further defending the case, we find no error in the court's allowing his attorney to withdraw or in its refusal to continue the hearing. For this reason alone, his argument that CR 7.02, CR 6.04, and CR 5.01 were not followed has no merit.

The judgment and order of the Carter Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

MaLenda S. Haynes
Grayson, KY

BRIEF FOR APPELLEE:

Philip D. McKenzie
Grayson, KY