

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001032-MR

HOWARD POTEET

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 97-FC-000422

SHIRLEY J. POTEET

APPELLEE

OPINION AND ORDER  
DISMISSING APPEAL  
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BEFORE: BARBER, EMBERTON AND KNOPF, JUDGES.

BARBER, JUDGE: The Appellant, Howard Poteet, ("Howard"), seeks review of the Jefferson Circuit Court's order denying his CR 59.05 motion to set aside a qualified domestic relations order (QDRO) providing for surviving spouse benefits for the Appellee, Shirley Poteet ("Shirley"). Finding that this appeal was not timely filed, we dismiss.

The parties are undoubtedly familiar with the underlying facts which we will not repeat here. Howard raises two issues on appeal: (1) that the circuit court lacked jurisdiction to confer "surviving spouse" status on Shirley by subsequent order, where the findings of fact and conclusions of

law entered April 15, 1998 did not address surviving spouse benefits under Howard's (Philip Morris) retirement plan; and (2) that entry of a QDRO conferring surviving spouse status to Shirley following Howard's remarriage is reversible error.

A review of the April 15, 1998 findings of fact and conclusions of law reflects that the trial court determined Shirley's dollar amount share of Howard's deferred profit sharing plan. The trial court also determined Shirley's monthly benefit from the pension plan. The court directed the parties "to execute whatever documents that are necessary to carry out the order of the Court."

Thereafter, both parties tendered QDROs. On September 2, 1999, Shirley filed a "Response Regarding Surviving Spouse Benefits" explaining that, at an August 27 hearing, Howard's counsel had stated Philip Morris could not honor a QDRO with a surviving spouse benefit. However, Shirley's counsel had received a letter from Philip Morris that surviving spouse benefits were, in fact, available. On September 21, 1999, both parties' previously-tendered QDROs were "overruled," and trial court entered the following order: "IT IS HEREBY ORDERED that the Qualified Domestic Relations Order shall contain a surviving spouse benefit for the Petitioner. Effective date of Participation April 15, 1998." (Emphasis original.)

By motion filed January 21, 2000, Shirley tendered a QDRO containing a surviving spouse benefit provision. On February 1, 2000, the circuit court entered that QDRO. On February 11, 2000, Howard filed a motion under CR 59.05 to set

aside the QDRO. As grounds, Howard stated that "inclusion of Survivor's Benefits in the QDRO where the Decree is silent to their inclusion violates the Employee Benefit Retirement Income Security Act of 1974. Samaroo v. Samaroo 193 F.3d 185 (cite to be provided) [(3<sup>rd</sup> Cir. 1999)]."

On March 28, 2000, the circuit court entered an order denying Howard's motion:

CR 54.01 states "that a judgment is a written order of Court adjudicating a claim or claims in an action or proceedings. A final order or appealable Judgment is a final order adjudicating all the rights of the parties in an action or proceeding, or a Judgment made final under Rule 54.02.

The Petitioner [sic] argues that the Court's Judgment of September 21, 1999, was not a final Judgment, but the final judgment occurred when the Court entered the Qualified Domestic Relations Order on February 1, 2000. The Court, in reading the rule as well as case law, finds that the Court's Order of September 21, 1999, was a final Judgment as defined in CR 54.01. Therefore, the Respondent's Motion to set aside the Qualified Domestic Relations Order of February 1, 2000, is improper.

The Qualified Domestic Relations Order carried out the Court's Order of September 21, 1999. In that Order, the Court granted the ultimate relief sought in this action which was the Petitioner's request to find that she was entitled to surviving spouse benefits. It is that Order which adjudicates the rights of the parties. The Qualified Domestic Relations Order only effectuates the intent and purpose of the Order. The Qualified Domestic Relations Order would have no effect if the Court had not already made a finding that the party was entitled to receive a benefit. The determination of the entitlement is what determines that this was a final and appealable order. See Brumley v. Lewis, 340 S.W.2d 599, Ky. (1960) [sic] and Burroughs v. Bake Oven Supply Co., 434 S.W.2d 32 Ky. (1968) [sic]. Therefore, the

Respondent's Motion to alter the February 1, 2000, Qualified Domestic Relations Order is overruled. The Respondent failed to timely file any Motion to alter, amend the September 21, 1999 Order of the Court, therefore the September 21, 1999, Order of the Court continues to be in effect and the Qualified Domestic Relations Order entered February 1, 2000, will not be set aside. (Emphasis original.)

Howard appeals from the circuit court's March 28, 2000 order. Shirley points out that the issue on appeal is not the one that Howard "attempts to identify"; rather, the issue is whether the trial court's September 21, 1999 order was final and appealable. We agree. In his Appellant's brief, Howard simply ignores the basis for the court's March 28, 1999 order. By way of reply brief, Howard does respond that the trial court's September 21, 1999 order was not final and appealable, citing Brown v. Brown, Ky., 430 S.W.2d 458 (1968). Brown is distinguishable on its facts. There, the wife filed an action for divorce. By amendment, she sought an annulment as an alternative relief. The trial court entered judgment refusing to grant annulment but providing that an interlocutory decree for divorce would be entered when appropriately tendered. Instead of tendering the judgment for divorce, the wife appealed. The appeal was dismissed because it was not prosecuted from a final order or judgment.

We agree with the circuit court's analysis of the issue before us. The September 21, 1999 order mandated that the QDRO contain a surviving spouse benefit for Shirley. There was nothing more to adjudicate. The subsequent filing of the QDRO in

compliance with the court's direction does not alter the finality of the September 21, 1999 order. See Security Federal Sav. & Loan Assn. v. Nesler, Ky., 697 S.W.2d 136 (1985).

It is therefore ORDERED that this appeal be, and it is, DISMISSED.

EMBERTON, JUDGE CONCURS.

KNOPF, JUDGE, DISSENTS.

KNOPF, JUDGE, DISSENTING: Respectfully, I dissent from the result reached by the majority opinion. CR 54.01 declares: ". . . [a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." The trial court's order of September 21, 1999, merely directed the parties to submit a qualified domestic relations order (QDRO) which contains a surviving spouse benefit for Shirley. Furthermore, that order did not recite that it was a final and appealable order, as required by CR 54.02(1). Therefore, the order was interlocutory because it did not finally and conclusively adjudicate the rights of the parties regarding the division of the profit sharing plan

Rather, the trial court's ruling regarding the inclusion of a surviving spouse benefit did not become final until the court entered the QDRO on February 1, 2000. Howard filed a timely motion under CR 59.05 to alter, amend or vacate that order. As a result, the time for filing an appeal did not commence to run until March 28, 2000 -- when the trial court entered its final and appealable order denying Howard's motion to

set aside the QDRO. Accordingly, I would hold that his appeal was timely, and that this Court has jurisdiction to consider the merits of Howard's appeal.

ENTERED: April 12, 2002

/s/David A. Barber

JUDGE COURT OF APPEALS

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