

RENDERED: DECEMBER 19, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001786-MR

WANDA LEE HUGHES

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 99-CI-00367

BENJAMIN HUGHES

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BAKER, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Wanda Hughes appeals from an order of the Perry Circuit Court setting aside its previous order dismissing the petition for dissolution of marriage filed by her former spouse, Benjamin Hughes. Because it appears that the order dismissing the petition was entered mistakenly, we affirm the trial court's decision to set it aside.

Benjamin initiated a divorce action in the Perry Circuit Court on July 1, 1999. He also requested exclusive use of the marital residence consisting of a 1978 mobile home

situated on property which his parents had given the couple. Wanda requested an emergency protection order directing Benjamin to vacate their residence. Eight days later, she filed a response to his divorce petition, a motion for exclusive use of the marital residence and a motion for temporary maintenance. The trial court granted Wanda's motion to use the home, but denied her request for maintenance.

In addition to the mobile home, the parties owned a 1995 Buick Regal, valued at \$9,475.00; a 1978 Chevrolet truck, valued at \$100.00; a Honda Magnum, value unknown; and some household furniture. The Domestic Relations Commissioner (DRC) held a final hearing regarding Benjamin's petition on November 22, 1999, with both parties present and represented by counsel. Benjamin and Wanda advised the DRC that they had agreed on a property settlement. Benjamin promised to pay the \$5,129.60 debt on the Buick Regal and transfer the title to Wanda. In addition, he was to pay her \$5,000.00 for her interest in their 1978 mobile home. The household furnishings had already been divided. The DRC ordered a judgment approving the separation agreement as fair and equitable to be entered and recommended that the circuit court enter a final decree of dissolution.

Benjamin's counsel prepared an agreed order dissolving the marriage and forwarded it to Wanda's attorney. It was never signed or entered, and the circuit court, pursuant to Kentucky

Rule of Civil Procedure (CR) 77.02(2), sent counsel for the parties a notice to dismiss based on lack of prosecution. A show cause hearing was held on January 22, 2001, and an order dismissing Benjamin's petition for dissolution was entered on February 1, 2001; however, his counsel never received a copy of the order.

On August 15, 2001, Benjamin's counsel filed a motion requesting that a decree of dissolution be entered. Upon finding out that the petition for dissolution had been dismissed, counsel filed a CR 60.02 motion requesting that the dismissal order be set aside due to mistake, inadvertence, surprise or excusable neglect. As grounds, counsel noted that the parties had entered into a separation agreement which was approved by the DRC, a draft divorce decree was sent to Wanda's counsel to be signed and entered, and, after receiving the circuit court's CR 77.02(2) notice to dismiss for lack of prosecution, Benjamin's counsel had forwarded a dissolution decree to the circuit court to be entered.

The circuit court entered an order setting aside the dismissal for lack of prosecution on November 16, 2001, and remanded the case to the DRC to review the separation agreement. The DRC held another hearing and, once again, determined that the separation agreement was not unconscionable. The circuit court entered a decree of dissolution on March 13, 2002. Wanda

filed an order to amend, alter or vacate alleging that the evidence did not support a finding that the settlement agreement was fair. The circuit court entered an order denying Wanda's motion, and this appeal followed.

Wanda argues that the circuit court had no authority to set aside the order dismissing Benjamin's petition for dissolution or, in the alternative, the property settlement agreement reached by the parties is unconscionable. Benjamin points out that Wanda failed to preserve her argument about the circuit court's alleged lack of jurisdiction by including it as a ground in her motion to amend, alter, or vacate the decree of dissolution. Moreover, the petition was dismissed pursuant to CR 77.02(2) which allows trial courts to review their dockets annually and dismiss, without prejudice, cases where an insufficient answer to a notice of pending dismissal for lack of prosecution is made. In the case *sub judice*, Benjamin's counsel responded to the circuit court's notice by forwarding a decree of dissolution, incorporating the terms of the settlement agreement, to the circuit court to be entered. Although the circuit court received an adequate answer to its notice to dismiss for lack of prosecution, Benjamin's petition was dismissed and his counsel was not notified of the order of dismissal. Consequently, we agree with his counsel that the circuit court's February 1, 2001 order dismissing the petition

was the result of mistake or inadvertence and, therefore, setting aside the order was proper pursuant to CR 60.02.

Wanda also contends that the evidence did not support the DRC's finding that the settlement agreement was not unconscionable. The only marital property owned by the parties was a 1978 mobile home, a 1995 Buick Regal, a 1978 pickup truck, a motorcycle, and some household furnishings. Both parties were represented by counsel when they entered into the settlement agreement. The furnishings had already been divided, and the parties agreed that Wanda would receive the Buick, which had a value of close to \$10,000.00, and an additional \$5,000.00 for her share in the mobile home. Benjamin would be required to pay off the debt on the Buick before transferring the title to Wanda. The DRC made a finding that the settlement agreement was fair after holding a hearing on November 22, 1999. After the circuit court set aside its order dismissing the petition for dissolution, the case was remanded to the DRC for another hearing. After a hearing held November 26, 2001, the DRC once again found that the settlement agreement was not unconscionable. We believe that the DRC's finding regarding the fairness of the settlement agreement was not clearly erroneous; therefore, we are bound to uphold the circuit court's order dissolving the Hughes' marriage and dividing their property in

accordance with the provisions of the settlement agreement.

Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980).

For the forgoing reasons, the judgment of the Perry
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank C. Medaris, Jr.
Hazard, Kentucky

BRIEF FOR APPELLEE:

Denise M. Davidson
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