

RENDERED: April 16, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-001546-MR (DIRECT)
AND
NO. 2002-CA-001685-MR (CROSS)

RYAN ESTRIDGE

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 00-CI-00172

CRYSTAL TILLERY ESTRIDGE

APPELLEE/CROSS-APPELLANT

OPINION AND ORDER

DISMISSING APPEAL AND CROSS-APPEAL

*** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE. Ryan Estridge appeals from a decree of dissolution of marriage and an order denying his motion to alter, amend or vacate the divorce decree, both entered by the Jackson Circuit Court. Ryan contends the circuit court did not have jurisdiction to enter the order denying the motion to alter, amend or vacate, and alternatively, objects to the child custody award and one aspect of the property division under the divorce decree. Crystal disputes Ryan's claim that the circuit

court lost jurisdiction and brings a cross-appeal seeking a modification in the child custody award with respect to the period during summer vacation. After reviewing the record, the applicable law and the arguments of counsel, we dismiss the appeal and the cross-appeal.

Ryan and Crystal Estridge were married in December 1993. During the marriage, they had two children, a son born in February 1996 and a daughter born in March 1997. Ryan filed a petition for dissolution of marriage in August 2000. After an unsuccessful attempt at reconciliation, the parties separated in January 2001. In March 2001, both parties filed motions for temporary custody of the children. Ryan also filed a motion requesting a psychological evaluation of Crystal alleging that she was mentally unstable. In May 2001, the circuit court entered an order granting joint temporary child custody with alternating weekly custodial periods. The circuit court also ordered psychological, as well as home evaluations, of both parties. Additionally, the circuit court entered an agreed order allowing each party to review and copy Crystal's medical records.

On October 9, 2001, the Domestic Relations Commissioner conducted an evidentiary hearing in which Crystal's mental stability was a major issue. On March 26, 2002, Circuit Court Judge Cletus Maricle entered a decree of dissolution of

marriage, which, inter alia, awarded the parties joint custody of the children with neither parent being designated the primary custodian. However, Crystal was to have possession of the children during the week and Ryan on the weekend with alternating possession on various holidays, and each parent was to have four weeks of uninterrupted possession during summer vacation. The circuit court also divided the parties' property.

On April 2, 2002, Ryan filed a motion to alter, amend or vacate the divorce decree pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, challenging the custody award. Crystal filed a response requesting that the motion be denied. On April 25, 2002, Ryan filed a notice of appeal to this Court from the divorce decree, prior to the entry of a decision by the circuit court on the CR 59.05 motion.¹

On May 29, 2002, Ryan filed a motion to transfer the case to the newly established Family Court and a motion renouncing his CR 59.05 motion for a hearing before Family Court Judge Gene Clark. On June 4, 2002, Judge Maricle indicated in a calendar entry that the file was to be submitted to Judge Clark. On June 11, 2002, Judge Clark held a hearing and granted a continuance on the CR 59.05 motion. On June 14, 2002, Crystal filed a response to the CR 59.05 motion in Family Court and a

¹ Appeal No. 2002-CA-000930-MR.

motion asking Judge Clark to recuse himself because of his prior contacts with the parties with respect to their divorce. On June 18, 2002, Judge Clark granted the motion to recuse. The next day, Judge Clark entered an order under Kentucky Revised Statute (KRS) 26A.015(2)(b) certifying the need for the assignment of a special judge by the Chief Regional Judge due to the recusal. The order noted the need to consider the pending CR 59.05 motion to alter, amend or vacate the divorce decree. On June 26, 2002, Judge Maricle entered an order summarily denying Ryan's CR 59.05 motion. On June 27, 2002, Chief Regional Judge, Lewis Hopper, entered an order assigning the case to Circuit Court Judge Roderick Messer, pursuant to KRS 26A.015.²

Meanwhile, on July 3, 2002, this Court entered an order dismissing Ryan's first appeal filed in April 2002, because the appeal had been filed prematurely before the circuit court had ruled on the CR 59.05 motion. On July 18, 2002, Ryan filed a second notice of appeal referencing the March 26, 2002 divorce decree and the June 26, 2002 order of Judge Maricle denying the CR 59.05 motion. On August 3, 2002, Crystal filed a notice of cross-appeal from the divorce decree and the order denying Ryan's CR 59.05 motion.

² Judge Maricle's order denying the CR 59.05 motion was executed on June 25 but not entered until June 26. Judge Hopper's order assigning a special judge was executed on June 24, but not entered until June 27. Thus, it appears each judge was unaware of the action of the other.

Before reaching the merits, we are compelled to address our jurisdiction in this case. Ryan has raised the issue of jurisdiction with respect to Judge Maricle's authority to rule on the CR 59.05 motion. He contends that Judge Maricle relinquished jurisdiction to rule on the motion after he transferred the case to Judge Clark, and that Judge Maricle could not reassume jurisdiction following Judge Clark's recusal. Accordingly, Ryan asserts that Judge Maricle's order denying the CR 59.05 motion is null and void, and that this appeal is not ripe for review. On the other hand, Crystal maintains that Judge Maricle merely "submitted" the case to Judge Clark and retained jurisdiction until the order appointing a special judge was entered. As a result, she claims that Judge Maricle's order denying the motion was valid as it was entered one day before the entry of the order appointing the special judge, and that this appeal should proceed.

In this appeal, Ryan relies on the case of Wedding v. Lair, Ky., 404 S.W.2d 451 (1966). Prior to the criminal trial of Nimrod Wedding, Jr., Judge John Lair recused himself because he had previously assisted in the prosecution of the case, and appointed Lloyd E. Rogers to act as Special Judge. In November 1961, Wedding was convicted of murder, and the former Court of Appeals initially affirmed the judgment of conviction. Relatives of Wedding hired attorney John Y. Brown to file a

Petition for Rehearing, which the Court of Appeals granted, and the judgment of conviction was reversed. Upon remand, Judge John Lair, who had originally disqualified himself entered an order appointing Brown to represent Wedding in the retrial. Brown challenged this order claiming that Judge Lair did not have authority to issue the order. In our original action seeking a Writ of Prohibition; the former Court of Appeals held that Judge Lair's February 1966 order was invalid because he had lost jurisdiction of the case when he "voluntarily vacated the bench," and he could not reassume jurisdiction. Id. at 452-53.

Crystal argues that Wedding is distinguishable because a special judge had been appointed prior to Judge Lair's action in November 1966. In the present case, Judge Maricle's order denying the CR 59.05 motion was entered one day before Judge Messer was appointed as the Special Judge. It is difficult to determine from the discussion in Wedding whether Judge Lair lost jurisdiction only after the appointment of the special judge because he recused himself and appointed the special judge at the same time. The language in the opinion suggests that the act of recusal was the operative act, rather than the appointment of the special judge. However, our case does not involve an act of recusal by Judge Maricle, but rather a submission of the case to Judge Clark. Given the ambiguity, we

are reluctant to declare Wedding determinative on the issue of Judge Maricle's authority to enter the June 26, 2002, order.

Nevertheless, we believe Judge Maricle's order denying the CR 59.05 motion is invalid under the principles espoused in Johnson v. Commonwealth, Ky., 17 S.W.3d 109 (2000). In Johnson, the appellant filed several motions for a new trial and for a judgment notwithstanding the verdict (J.N.O.V.), and then filed a notice of appeal of the conviction after the trial court had entered a judgment of conviction, but before the trial court had entered an order ruling on the motions.³ After the notice of appeal had been filed, the trial court denied the pending motions for new trial and J.N.O.V. The Supreme Court of Kentucky rejected the arguments that a party abandons his post-judgment motions by filing a notice of appeal before a ruling is entered on the motions, or that the filing of a notice of appeal has no effect on the trial court's authority over the case and does not divest authority to rule on motions while the appeal is pending. The Supreme Court took the position that the filing of a notice of appeal temporarily divests the trial court of jurisdiction during the pendency of the appeal and that any ruling of the trial court during that period is a nullity. The Supreme Court dismissed Johnson's appeal as premature because of the lack of a final and appealable order and remanded the case

³ In fact, the trial court's judgment stated the motions would be treated as if filed post-sentencing and would remain under submission.

to the trial court for a valid ruling on the motions. See, e.g., Kentucky Rules of Criminal Procedure (RCr) 12.04(3).

In the present case, Ryan's CR 59.05 motion suspended the time for the filing of a notice of appeal, and the divorce decree will not become final and appealable until the circuit court enters a valid ruling on the motion. See Bates v. Connelly, Ky., 892 S.W.2d 586 (1995); Kurtsinger v. Board of Trustees of Kentucky Retirement Systems, Ky., 90 S.W.3d 454 (2002); CR 73.02(1)(e). At the time Judge Maricle entered his order denying the CR 59.05 motion, the first appeal of the divorce decree was still pending before this Court.⁴ The circuit court had no jurisdiction to dispose of the CR 59.05 motion following the filing of the notice of appeal while it was pending before this Court. Regardless of whether Judge Maricle lost jurisdiction by transferring the case to Judge Clark, the June 26, 2002 order denying the CR 59.05 motion was a nullity and the second notice of appeal was premature because of the lack of a valid order disposing of the CR 59.05 motion. As a result, we must dismiss the present appeal and cross-appeal.

Having decided these appeals must be dismissed, the question remains as to which trial court judge should preside over the case. While Wedding v. Lair, supra, may be ambiguous with respect to Judge Maricle's authority to act on June 26,

⁴ This Court's order dismissing the first appeal was entered on July 3, 2002.

2002, it is instructive on the issue of proper assignment at the present time. Judge Messer having now been assigned as special judge of the Jackson Circuit Court to handle this case, ruling on the CR 59.05 motion and any subsequent proceedings should be decided by him.

It is ORDERED that the appeal and cross-appeal, No. 2002-CA-001546-MR and No. 2002-CA-001685-MR be DISMISSED.

ALL CONCUR.

ENTERED: April 16, 2004

/s/ William E. McAnulty
JUDGE, COURT OF APPEALS

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