

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000689-MR

RITCHIE BRACK

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 01-CI-00132

NELDA BRACK

APPELLEE

OPINION AND ORDER

(1) AFFIRMING

(2) DENYING COSTS AND ATTORNEY FEES

** ** * * *

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: Ritchie L. Brack appeals the denial of a CR 60.02 motion which asked the court to make a division of a wage settlement received by Nelda Brack prior to their divorce. The settlement proceeds were traced to a CD which was awarded to the

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

wife in a division of the marital assets, which implies that the asset was treated as marital property. Therefore, we affirm.

The parties were divorced and a final hearing was held on February 17, 2004, to divide the marital and non-marital property. Appellant did not appear at the final hearing nor did his attorney of record. However, an attorney friend of appellant's attorney appeared and announced ready. At the hearing, the court had before it, each party's financial statement. Nelda's financial statement was filed with the court on December 21, 2001. On page two of the disclosure, Nelda lists a 1997 Park Avenue Buick with a balance owed of \$14,193.01. On page three, she listed a CD, valued at \$15,000.00, as collateral for a loan. Neither party is listed as possessing the CD. Ritchie's financial statement of the same date lists a \$10,000.00 CD in possession of both. On June 18, 2003, Nelda Brack filed, pro se, a "Requested List Of Items From The Former Marital Residence" with the circuit court clerk. In that list, Nelda requested "Full current value of the CD." (Only one CD was listed in either financial statement filed with the court). On February 6, 2004, Nelda Brack filed a memorandum for the contested final hearing which stated: "The Petitioner would receive the Certificates of Deposit, which were purchased with monies from her income and a Corvette for which she paid \$5,626.41." Ritchie's pretrial memorandum only mentions one CD,

valued at \$12,000.00, with an attached mediation memorandum which lists the value of a CD at \$11,537.64, in July of 2003.

By supplemental decree filed on February 20, 2004, the court awarded Nelda the CD (#206401422). On March 1, 2004, Ritchie filed a motion to vacate, set aside and correct the judgment pursuant to CR 60.02, which acknowledged Nelda received the \$12,000.00 CD, and asserts that division of assets was unconscionable, but the motion does not contend the CD represents lost wages. The motion was denied on March 30, 2004. An order was entered on March 31, 2004, (dated March 29, 2004) which specifically mentioned "the division of a \$19,000.00 wage settlement received by the Petitioner prior to separation, said issue not being raised at the final hearing of this matter, nor was said issue set out in the Pretrial Memorandum filed by the Respondent on or about February 12, 2004; therefore, any claim of the Respondent to said wage settlement is waived;" The court then denied the motion to vacate, set aside and correct. The notice of appeal refers to the March 30, 2004, order. A supplemental notice refers to an order dated March 29, 2004.

On appeal to this Court, appellant contends there is one issue, whether wages earned during a marriage are marital property. He argues that he listed the item on his financial disclosure and the trial court merely forgot to divide it, and

that is the remedy he sought in his CR 60.02 motion. The appellee counters that the remaining funds from the settlement were listed as a CD in appellee's financial settlement and if the appellant had attended the final hearing, he would have learned that fact. Therefore, appellee contends, the appellant should not be allowed to raise the issue for the first time on appeal.

From a review of the record, we note that both parties acknowledged a CD on their financial disclosures. Both parties acknowledge in their briefs that the CD represents the remaining proceeds from a wage settlement of \$19,000.00 or \$19,500.00. At the final hearing, the trial court awarded the CD to the appellee. Appellant's CR 60.02 motion to vacate contended the distribution was unfair but made no argument about the origin of the funds to purchase the CD. The first mention of the CD representing the proceeds of a settlement appear in the trial court's order dated March 29, 2004, and entered March 31, 2004. In said order, the court acknowledged appellant's argument and ruled it was waived since it was not argued at the final hearing.

We agree with the trial court. The purpose of a CR 60.02 motion is to bring before the court errors that had not been put into issue and were unknown and could not have been known to the party by exercise of reasonable diligence in time

to have been presented to the court before judgment. Davis v. Home Indem. Co., 659 S.W.2d 185, 188 (Ky. 1983). The court's division of assets makes no specific finding that the CD represents lost wages and is marital or non-marital. However, it was awarded to the appellee in the division of assets, suggesting it was considered marital. If appellant wanted further findings of fact, he should have asked for them at the final hearing as he was aware of the CD and what it represented, or he could have learned those facts at the final hearing, or before, with a little diligence. Nelda's memorandum filed for the contested final hearing listed the certificate of deposit "purchased with monies from her income" Whether it represented a settlement or wages, all appellant had to do was ask. He snoozed, so he loses. McLean County v. Meuth Carpet Supply, 573 S.W.2d 340, 341 (Ky. 1978).

Appellee requests that the appellant's appeal should be considered frivolous and the appellee awarded cost and attorney fees. Appellant filed no reply. CR 73.02(4) allows an appellate court to award single or double costs for a frivolous appeal. Lake Village Water Ass'n v. Sorrell, 815 S.W.2d 418, 421 (Ky.App. 1991) authorizes attorney fees for frivolous appeals. In order to find an appeal frivolous, it must be totally lacking in merit in that no reasonable attorney could assert such an argument and bad faith can be inferred. Leasor

v. Redmon, 734 S.W.2d 462, 464 (Ky. 1987). We do not believe the facts in the record are clear enough to deem the appeal as frivolous. Therefore, we deny the requests for costs and attorney fees.

For the foregoing reasons, the judgment of the Ballard Circuit Court is affirmed, and the request for costs and attorney fees denied.

ALL CONCUR.

ENTERED: June 24, 2005

/s/ Wil Schroder
Judge, Court of Appeals

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Tod D. Megibow
Paducah, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Ben J. Lookofsky
Mayfield, Kentucky