RENDERED: JUNE 27, 1997; 2:00 p.m.

MODIFIED: JULY 18, 1997; 10:00 a.m.
MODIFIED: SEPTEMBER 12, 1997; 10:00 a.m.
ORDERED NOT TO BE PUBLISHED BY THE KENTUCKY SUPREME COURT: DECEMBER 10, 1997 (97-SC-000799)

NO. 95-CA-002005-MR

KENNETH MONNETT — APPELLANT

APPEAL FROM GARRARD CIRCUIT COURT
V. HONORABLE ROBERT J. JACKSON, JUDGE
CIVIL ACTION NO. 89-CI-000067

GEORGIA ANN (MONNETT) CRANK — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON and KNOPF, Judges.

HUDDLESTON, JUDGE. Kenneth R. Monnett appeals pro se from a Garrard Circuit Court order that denied his request for reimbursement of money paid to Georgia Ann (Monnett) Crank in support of a child now known not to be his biological son. Althougwith the circuit court's reasoning, "we are bound to affirm the decision of the trial court under the rule that a

correct decision shall be upheld [even if] it [was] reached by an improper route or reasoning." White v. Board of Educ. of Somerset Indep. Sch. Dist., Ky.App., 697 S.W.2d 161, 162 (1985).

On January 27, 1976, Garrard Circuit Court dissolved Georgia's first marriage to R. L. Osborne. Even though the parties had separated on August 31, 1975, Georgia was pregnant at the time of the dissolution.[1] Just over one month later, on March 2, 1976, Georgia married Kenneth Monnett. Kenneth was aware that Georgia was pregnant when he married her. Five months later, on August 10, 1976, the child was born and named Kenneth Monnett III after his presumed father. Kenneth ultimately adopted two other children that had been born to Georgia during her marriage to Osborne. On April 18, 1981, Kenneth and Georgia had another child.[2] Eight years later, on May 1, 1989, the parties separated. In her petition seeking dissolution of their marriage, Georgia alleged that there were "two living infant children of the parties."[3] Garrard Circuit Court entered a decree dissolving the marriage on October 13, 1989. By virtue of a "Custody and Visitation and Property Settlement Agreement" which was incorporated into the decree,

---

1 The circuit court found that Osborne was the father of the child with whom Georgia was pregnant at the time of the dissolution of that marriage.

2 The paternity of the child is not in dispute.

3 Since the decree identifies these children as Kenneth III and the child born April 18, 1981, we presume that the two children that Kenneth adopted had reached the age of majority at the time the dissolution action was instituted.

Kenneth was ordered to pay child support in the amount of $100.00 per week for the two children until each child reaches the age of majority.

In August 1994, nearly five years after the dissolution, Georgia and her son, Kenneth III, got into an argument because Kenneth III wanted to live with Kenneth (his presumed father). At this point, around Kenneth III's eighteenth birthday, Georgia told her son that Kenneth was not his father. Rather, she said, he was Osborne's son. After Kenneth III told him what Georgia had said, Kenneth filed a "Motion for Hearing to Determine Paternity of Kenneth Richard Monnett III"[4] in Garrard Circuit Court on August 15, 1994 -- five

4 Kenneth's motion stated:

> Comes the Respondent herein and moves the Court to have a hearing, to determine the true paternity of Kenneth Richard Monnett III, the alleged oldest child of the Parties. For his grounds Respondent would state that Petitioner herein has told the child, subject matter of this Motion, that he is not the child of Respondent, and attached hereto is the child's Affidavit to that affect (sic). Further, attached hereto is a Findings of Fact and Commissioner's Report from Garrard Circuit Court Action Number 2115, which was the divorce of Petitioner from her first husband, R. L. Osborne, which states in finding number 11 that "the child which Georgia Osborne is carrying is the child of R. L. Osborne". This being the same child as Kenneth Richard Monnett III born August 10, 1976. Movant would point out that the finding was made on January 27, 1976.
>
> Movant would further state that Petitioner herein has defrauded the Court, either in Action No. 2115 in which she stated under oath that the child she was carrying was the child of R. L. Osborne, or she has perjured herself in this Civil Action in that she testified that the child was the child of Respondent herein.
>
> Respondent would further move the Court for blood tests to determine the paternity of the child, and further would ask for a Judgment against Petitioner in the amount of $10,606.50 which is one-half of the total amount of child support he has paid through July 1, 1994.

days after the child's eighteenth birthday. Georgia responded by insisting that Kenneth always knew that he might not be the biological father of this child.

When the matter was referred to a domestic relations commissioner, Georgia objected to the commissioner hearing matters other than those permitted by Ky. R. Civ. Proc. (CR) 53.03.[5] Blood tests eventually confirmed that Kenneth was not his namesake's father. Nevertheless, on April 4, 1995, the commissioner filed a report concluding that Kenneth's motion was really in the nature of a CR 60.02 motion, but that "[a] refund of support would not appropriately address [Georgia's] cruelty" because "it must be assumed that the money was utilized to support Ken III" who Kenneth "now wishes to adopt as an adult."

On May 26, 1995, after considering the commissioner's report and Kenneth's exceptions, Garrard Circuit Court entered an order stating that Georgia's objection to the commissioner hearing matters outside the scope of CR 53.03 should have been sustained and that the judgment should be vacated "on the

---

5 Ky. R. Civ. Proc. (CR) 53.03(3) provides that "[t]he local rules of each circuit court may provide for the referral to the domestic relations commissioner of domestic relations matters, including: contested and uncontested matters arising from actions for the dissolution of marriage, child custody, support and maintenance under KRS chapter 403, except that incarceration resulting from a finding of contempt shall be imposed only after a hearing before the court, at which time the court shall permit additional evidence and shall give the party charged with contempt an opportunity to purge himself of such contempt. Proceedings for restraining orders and injunctions shall be heard only by the court. Local Rules providing for the referral of domestic relations matters to the domestic relations commissioner shall include specific standards for the prompt disposition of all matters before the commissioner."

grounds of fraud or for other extraordinary reasons as provided for by [CR] 60.02 and Cain v. Cain, [Ky.App.,] 777 S.W.2d 238 [(1989)]." In this order, the court went on to say that Georgia "shall be liable to pay any support monies that are proven to have been incurred by the support obligation." Shortly thereafter, Georgia filed a "Motion to Vacate and Set Aside [the] Order" of May 26, 1995.

On June 21, 1995, the court granted Georgia's motion to set aside the May 26, 1995 order and entered a second order in which it concluded that:

> 1. A paternity action must be filed in the District Court unless there is a related and integral custody issue pending, at which time the Circuit Court would have jurisdiction.
>
> 2. The Circuit Court has jurisdiction over custody, visitation and support issues (requests to increase or decrease, but not reimbursement of vested support obligation after a child attains the age of majority).
>
> 3. The Circuit Court has jurisdiction to alter, amend or vacate a decree pursuant to [CR] 60.02 and pursuant to case authority cited: Cain v. Cain, [777 S.W.2d at 238]; Spears v. Spears, [Ky.App., 784] S.W.2d 605 [(1990)]; [Crowder] v. Commonwealth, [ex

rel.] Gregory, [Ky.App.,] 745 S.W.2d 149 [(1988).]

4. The Domestic Relations Commissioner has the authority to hear cases pursuant to a general order of reference that provides for consideration of cases brought pursuant to [Ky. Rev. Stat. (KRS)] Chapter 403. The Domestic Relations Commissioner is without authority to hear actions brought to determine paternity, actions to alter or amend a judgment pursuant to [CR] 60.02, and actions to consider any case outside the statute providing for said action.

5. An objection to jurisdiction of a Court can be raised at any time and exceptions need not be taken. (Citations omitted.)

In accord with these conclusions, the court held that "the Commissioner was without jurisdiction or authority to hear a paternity action, because the child . . . had attained the age of majority; that no issue of custody was presented; that support was vested and the Commissioner is without authority to consider an action pursuant to [CR] 60.02." Since the order effectively denied Kenneth's request for reimbursement, this appeal followed.

First, the parties, and even Garrard Circuit Court to some extent, seem to be confused about the role of domestic

relations commissioners. As CR 53.03 explains, domestic relations commissioners merely make recommendations to the circuit court. A commissioner's report, in and of itself, has no legal effect because "[a]ll temporary and final decrees and orders shall be entered by the court upon review of the report of the . . . commissioner." CR 53.03(4). See also Basham v. Wilkins, Ky.App., 851 S.W.2d 491, 494 (1993). The court is under no obligation to follow the commissioner's recommendations. Basham, 851 S.W.2d at 494. In fact, the court "may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions." CR 53.06(2). See also Basham, 851 S.W.2d at 494. The commissioner is, in effect, nothing more than an assistant to the circuit court. According to CR 53.03(3), the circuit court can refer any domestic relations matter to the commissioner for recommendations. Of course, if the circuit court lacks jurisdiction, the commissioner lacks jurisdiction.

Here, the circuit court correctly explained that KRS 406.021 vests the district court with exclusive jurisdiction to determine issues of paternity. However, since the circuit court has jurisdiction over issues of custody, visitation and support, the circuit court has authority to determine paternity where it is contested in circuit court dissolution cases involving such

issues. See generally Basham, 851 S.W.2d at 493; and Sumner v. Roark, Ky.App., 836 S.W.2d 434, 437 (1992). While it is true that Kenneth's motion was entitled "Motion for Hearing to Determine Paternity . . . ," he effectively sought CR 60.02 relief from the decree of dissolution.[6] Since the decree was entered by Garrard Circuit Court, that is the proper forum in which to bring a CR 60.02 motion to alter, amend or vacate the decree.[7] Whether the matter was initially reviewed by a commissioner has no effect on the validity of the order ultimately entered by the circuit court.

CR 60.02 governs the reopening of decrees in this state, Fry v. Kersey, Ky.App., 833 S.W.2d 392, 393 (1992), and "[a] CR 60.02 motion can be used to reopen the issue of paternity which was adjudicated in a dissolution proceeding." 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 60.02, cmt. 12 (5th ed. 1995). See also Ralph S. Petrilli, Kentucky Family Law § 27.12 (1988) (explaining that one defense available to non-custodial parents seeking to avoid past-due child support

---

6 CR 8.06 requires that all pleadings are to be "so construed as to do substantial justice." Although a CR 60.02 motion is not a "pleading," we believe that the same rule should apply to such motions.

7 It is also significant that, while a separate and independent paternity action might have been filed in the district court, the district court would not have jurisdiction to consider the issue of reimbursing Kenneth for child support paid under a decree entered in circuit court. Furthermore, since KRS 406.031 provides that paternity actions brought under the provisions of KRS 406.021(1) must be "commenced within eighteen (18) years after the birth. . . ," a district court action would have been time-barred because Kenneth III turned eighteen a few days before Kenneth filed the motion.

payments is "to reopen the judgment on proper grounds and limitations thereon listed in the Civil Rules of Procedure").

CR 60.02 provides that:

> On motion, a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment,[8] order or proceeding was entered or taken. A motion under this Rule does not affect the finality of a judgment or

8 A decree of dissolution is the equivalent of a final judgment.

suspend its operation. (Emphasis supplied.)

Since Kenneth's motion was filed nearly five years after the decree of dissolution was entered, the first question that must be addressed is: Which section of CR 60.02 is implicated by Kenneth's claim that Georgia lied about the paternity of Kenneth III? Because a motion brought under CR 60.02(a), (b) or (c) is time-barred, we must decide whether Kenneth's motion may be brought under CR 60.02(d), (e) or (f). As Kenneth does not allege that "the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application" to justify reopening under CR 60.02(e), we need only consider the possibility of invoking CR 60.02(d) and (f).

The type of "fraud affecting the proceedings" necessary to justify reopening under CR 60.02(d) generally relates to extrinsic fraud. Philipps, Kentucky Practice at CR 60.02, cmt. 6. Extrinsic fraud "covers fraudulent conduct outside of the trial which is practiced upon the court, or upon the defeated party, in such a manner that he is prevented from appearing or presenting fully and fairly his side of the case." Id. As CR 60.02(d) indicates by specifically excluding

"perjury" from the meaning of "fraud affecting the proceedings,"[9] "perjury by a witness or nondisclosure of discovery material is not the type of fraud to outweigh the preference for finality." Id. at cmt. 5. See also Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245, 64 S.Ct. 997, 1001, 88 L.Ed. 1250 (1944), overruled on other grounds, Standard Oil Co. v. U.S., 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) (a "case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury" does not constitute fraud on the court); Gleason v. Jandrucko, 860 F.2d 556, 559 (2nd Cir. 1988) ("[a]fter-discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of 'fraud upon the court'"); H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118 (6th Cir. 1976) (alleged perjury of a witness is not a ground for an action for fraud upon the court); Tandra S. v. Tyrone W., 336 Md. 303, 315, 648 A.2d 439, 445 (1994) (perjury in paternity proceedings constitutes "intrinsic fraud," which is not the type of fraud necessary to vacate or revise a judgment); and Wise v. Nirider, 261 Mont. 310, 862 P.2d 1128 (1993) ("fraud between the parties, without more, does not rise to the level of fraud upon the court").

9 The distinction between "perjury" and "fraud affecting the proceedings" in CR 60.02 requires Kentucky attorneys to continue drawing a distinction between extrinsic and intrinsic fraud even though this traditional approach has been criticized in recent decisions. 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 60.02, cmt. 6 (5th ed. 1995).

CR 60.02(f) permits reopening for "any other reason of an extraordinary nature justifying relief." Relief is not available under CR 60.02(f) unless the asserted grounds for relief are not recognized under subsections (a), (b), (c), (d) or (e) of the rule. Emergency Beacon Corp. v. Barr, 666 F.2d 754, 758 (2nd Cir. 1981). See also Philipps, Kentucky Practice at CR 60.02, cmt. 8. The asserted ground for relief in this case constitutes "perjury" which is commonly understood to mean "[t]he deliberate, willful giving of false, misleading, or incomplete testimony under oath." The American Heritage Dictionary 924 (2nd ed. 1985). Since "perjury" is covered by CR 60.02(c), Kenneth cannot rely upon CR 60.02(f) to reopen the decree.

Based upon this analysis of CR 60.02, Kenneth's motion properly falls under CR 60.02(c) instead of CR 60.02(d) or (f). Kenneth's motion was filed nearly five years after the decree was entered. Since CR 60.02(c) motions must be brought within one year of the date the decree was entered, Kenneth's motion comes too late.

We recognize that a panel of this Court permitted the CR 60.02 reopening of a decree outside of the one-year limitation under somewhat similar circumstances in Cain v. Cain, 777 S.W.2d at 238. The appellee did not file a brief and the Cain panel did not undertake a thorough analysis of CR 60.02.

Despite the CR 60.02(d) language excluding "perjury," the reopening was permitted apparently on the basis of "fraud affecting the proceedings." We, like the domestic relations commissioner in this case,[10] believe that CR 60.02(c), pertaining to perjury, was the provision that should have been invoked in Cain.

We are, however, able to distinguish Cain from the present case. First, there is no indication that Cain involved a request for reimbursement of child support already paid. Reimbursement is the primary issue Kenneth raises. Furthermore, since the children in Cain were six and three, the child support order imposed a continuing obligation upon Mr. Cain. Since Kenneth III had turned eighteen and was no longer in high school, Kenneth owed no future support obligation to him. It is also significant that Cain is based upon the authority of Crowder v. Commonwealth ex rel. Gregory, Ky. App., 745 S.W.2d 149 (1988). While it is true that Crowder involved similar facts, the Crowder reopening was based upon CR 60.02(e) -- not CR 60.02(d).

Several other states have addressed the issue of whether money previously paid as child support can be refunded

---

10 Discussing Cain, the Garrard Circuit Court Domestic Relations Commissioner stated: "In Cain, the Court of Appeals noted that Mrs. Cain had committed fraud by misleading the Court to believe that Mr. Cain was the father of the child in question. (Why this 'fraud' was not perjury which required objecting within one year is a mystery which will remain unanswered)." (Emphasis supplied.)

when paternity is subsequently disestablished. These cases reflect a number of different reasons to deny reimbursement in situations such as this. While other jurisdictions have taken varied approaches to this issue, we are particularly impressed by the analysis set forth in the following cases.

In State of Iowa ex rel. Blackwell v. Blackwell, 534 N.W.2d 89 (Iowa 1995), the Supreme Court of Iowa refused to quash a mandatory income withholding order for delinquent child support after paternity was disestablished. The Court pointed out that courts cannot reduce or cancel accrued child support retroactively after child support obligations accrue and rights vest.[11] Id. at 91. It is similarly well established in Kentucky that child support obligations "become vested when due and courts are without authority to 'forgive' vested rights in accrued unpaid maintenance" under Kentucky law. Mauk v. Mauk, Ky.App., 873 S.W.2d 213, 216 (1994). The Iowa court also explained that "strong policy reasons, such as preservation of judgments, support of dependents, and protection of vested interests, overcome . . . 'fairness' argument[s], even though the . . . court later determined that [Blackwell was] not [the] biological father." Blackwell, 534 N.W.2d at 91.

Similarly, in V.P. v. L.S., 656 A.2d 1157 (D.C. 1995), when paternity was disestablished nine years after an order of

11 "Vest" means "[t]o give an immediate, fixed right of present or future enjoyment" or "[t]o accrue to; to be fixed; to take effect." Black's Law Dictionary 1563 (6th ed. 1990).

paternity had been entered, the District of Columbia Court of Appeals refused to order a refund of child support paid under the original order. There, the court held that Fed. R. Civ. Proc. (FRCP) 60(b),[12] which is available to set aside a prior order or judgment, "cannot be used to impose additional affirmative relief." Id. The court observed that since "[c]laims for affirmative relief beyond the reopening of a judgment cannot be adjudicated on a Rule 60(b) motion but must be asserted in a new and independent suit," a reimbursement order would not be proper. Id. at 1158.

The Supreme Court of Alaska also recently addressed the issue in State of Alaska, Dept. of Revenue, Child Support Enforcement Div. v. Wetherelt, 931 P.2d 383 (Alaska 1997). Although a 1983 dissolution decree "effectively determined . . . that [the child in question] was not a child of the Wetherelt's marriage," the Court held that the dissolution decree did not terminate the legal relationship between Wetherelt and the child. Id. at 386, 388. Since the child was born to Wetherelt's wife while they were married and Wetherelt was named as the father on the child's birth certificate, he was presumed to be the child's father under the Alaska rule equivalent to KRS 406.011. Id. at 387. The court explained that, since the presumed father/child relationship was not terminated until 1994

12 Fed. R. Civ. Proc. (FRCP) 60(b) is the federal equivalent of Kentucky's CR 60.02.

"when the court issued an express order declaring that while Wetherelt was not [the child's] father," he "owed a duty of support until 1994."[13] Id. at 388.

Based upon our analysis of CR 60.02 and the reasoning of our sister states on the issue of reimbursement, we believe that the circuit court achieved the proper result when it denied Kenneth's motion for reimbursement. Interestingly, while Kenneth has requested reimbursement for money paid in support of Kenneth III in the past, he has said that had he known Kenneth III was not his child he would have adopted him at the time of his birth; and even now, he has expressed an interest in adopting his namesake as an adult.

The order denying Kenneth's demand for reimbursement of child support previously paid is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth R. Monnett, pro se
Lexington, Kentucky

BRIEF FOR APPELLEE:

Georgia Ann (Monnett) Crank, pro se
Crab Orchard, Kentucky

13 Although Wetherelt's paternity was ultimately disestablished, "[t]he parties do not dispute that[,] prior to 1983[,] Wetherelt owed [the child] a duty of support" based upon his presumed paternity. State of Alaska, Dept. of Revenue, Child Support Enforcement Div. v. Wetherelt, 931 P.2d 383, 387 (Alaska 1997).