

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002271-MR

DEBORAH M. TAYLOR

APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 04-CI-00378

ROBERT LEE TAYLOR; MONTICELLO
BANKING COMPANY; AND
JOHN PAUL JONES II

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: Deborah M. Taylor has appealed from rulings of the Wayne Circuit Court that vacated a decree of dissolution of marriage and judgment, and set aside an order of contempt against her husband, Robert Lee Taylor, due to lack of proper service. Deborah argues that the circuit court erred in so ruling, as Robert was properly served pursuant to CR 5.02. We affirm.

Robert and Deborah were married in Montgomery County on June 2, 1980. They separated on October 9, 2004, and Robert filed a Petition for Dissolution of Marriage two days later. Both parties filed domestic violence petitions against the other, which were eventually dismissed when a temporary restraining order was entered. During their marriage, Robert and Deborah amassed a sizeable marital estate, including a residence and four businesses (three grocery stores and a gas/convenient store). At the same time, they incurred a large amount of debt related to these properties. Monticello Banking Company, which held mortgages and notes on the properties in a combined amount of \$1.4 million, eventually intervened in this action and filed separate foreclosure actions in order to protect its interests.

By March 2005, Robert stopped appearing in court. At the end of the month, his attorney moved to withdraw. This motion was granted on April 12, 2005, and Robert was provided twenty days to retain new counsel. In the order, the circuit court also indicated that Robert's whereabouts were unknown and that his copy of the order would be sent to his brother. However, the clerk's certificate does not indicate that Robert was served with a copy of the order at his brother's address. The action proceeded without any further appearances by Robert or new counsel.

On July 6, 2005, the circuit court entered its Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment, dividing the marital assets and debts between both Robert and Deborah. According to the judgment, as drafted by Deborah's counsel, Robert was awarded \$4.8 million in marital assets as well as marital debts in the amount of \$661,809.99. Deborah was awarded \$1.5 million in assets and almost \$1.3 million in debts. To correct this disparity, the circuit court ordered Robert to pay Deborah the amount of \$1.95 million in maintenance over twenty years, which amounted to \$8,125 per month. The payments were to begin in July 2005. The order provided that Robert would be subject to the contempt powers of the court and appropriate sanctions if the payments were not timely made.

On August 9, 2005, Deborah moved the circuit court to hold Robert in contempt and to issue an arrest warrant for his failure to pay the July and August maintenance payments as well as for failing to make any payments on the debts assigned to him. The circuit court granted the motion on August 15 and issued an order for Robert's arrest. Robert was arrested pursuant to this order on August 22, 2005.

Once he had been arrested, Robert retained counsel and three days later filed motions to alter, amend, or vacate the order of contempt and to vacate the decree, stating that he was

not notified of the time frame to retain a new attorney or of any subsequent court dates. In an affidavit attached to the motion to vacate, Robert indicated that before the April hearing date on his former attorney's motion to withdraw, he told his attorney "I could no longer face my wife nor fight with her and that she could have everything." He did not think he would need another attorney because he thought his wife would be awarded the entire marital estate, including both the assets and the debts. He also indicated that he did not see a copy of the order granting his attorney's motion to withdraw until after he had been arrested. Robert's brother, Billy Taylor, also provided an affidavit in which he stated that never received a copy of the April 12, 2005, order for his brother. The circuit court held a hearing on this matter on September 6, 2005, during which Robert testified that after discussing the motion to withdraw with his attorney, he received no further court documents until the time of his arrest. He also stated that he had a post office box in Bronston, Kentucky, where he received mail. He had previously received his mail at the Monticello Shop Wise until he was ordered to leave that business in February 2005.

On September 7, 2005, the circuit court entered an order granting Robert's motions, thereby setting aside the contempt and arrest orders and vacating the decree:

This matter coming before the Court upon the motion of Petitioner Robert Lee Taylor to set aside the Order of Contempt entered in this action on August 15, 2005, and the Decree of Dissolution of marriage entered herein on July 6, 2005, and the Court having reviewed the pleadings and heard arguments of counsel, and the Court determining that various pleadings were not served upon Petitioner at his last known address, and the Court being further convinced that the brother of Petitioner was not served with a copy of the Order allowing counsel to withdraw and granting the Petitioner 20 days to obtain additional counsel, and the testimony being that the Petitioner has not received mail at 412 N. Main Street, Monticello KY 42633 since February 2005, and the Court reaching the conclusion that proper service under Rule 5.02 was not made following the entry of the Order allowing counsel to withdraw and subsequent Motions and Orders, it is hereby ORDERED as follows:

1. That the Order of Contempt and Order of Arrest entered August 15, 2005 in this action is hereby set aside, vacated and held for naught.

2. That the Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage entered in this action on July 6, 2005, are hereby vacated and set aside and held for naught.

3. That the Wayne County Jail shall no longer hold the Petitioner, Robert Taylor, on the Contempt charge following receipt of a copy of this Order.

Deborah then filed a motion to alter, amend or vacate the September 7th order, pointing out that the orders were all served on Robert at his last known addresses in compliance with

CR 5.02. Furthermore, she asserted that Robert could not be permitted to disappear for five months, and then have everything set aside. The circuit court denied Deborah's motion in an order entered October 4, 2005, more specifically setting out the facts supporting its earlier order:

1. On April 5, 2005, this Court's docket entry reflected the following: "Court sustained the motion filed by Hon. Jesse M. Stockton, Jr., requesting that he be allowed to withdraw as counsel of record for the petitioner. Notice of Mr. Stockton's withdrawal as counsel to be sent to petitioner's brother due to the fact that the petitioner's whereabouts are unknown. The petitioner shall have 20 days from the date herein in which to retain new counsel."

2. This Court finds that Hon. Jesse M. Stockton, Jr., tendered an Order allowing him to withdraw as counsel for the petitioner and allowing the petitioner 20 days to obtain new counsel. That Order was entered April 12, 2005. The Order did not include in the distribution the name and address of the brother of the petitioner.

3. This Court finds that further orders including an order submitting this action for final orders and a Decree of Dissolution of Marriage and Judgment included in the distribution two (2) addresses for Robert, namely, 412 North Main Street, Monticello, Kentucky 42633, and Old Route 90, Loop 2, Waitsboro Road, Apartment 1, Bronston, Kentucky 42518. Another address for Robert was listed as Route 2, Box 4225, Monticello, Kentucky 42633.

4. This Court finds that testimony was adduced at the September 6, 2005, hearing

from Billy Ray Taylor,¹ the brother of Robert, that his address was 1077 North Main Street, Monticello, Kentucky 42633. Billy testified he had moved, but did not give his new mailing address. Billy testified that he had never received any notices in this action.

5. Robert testified that he had never received any notices since Hon. Jesse M. Stockton, Jr., withdrew as his attorney of record. He testified that he had not been present at 412 North Main Street, Monticello, Kentucky 42633, or the location of the Shop Wise business since February 7, 2005, when this Court ordered him out of this business. He stated that his son, Robert Taylor, Jr., is managing that business, but that he had never received any notices or mail pertaining to this action from his son.

Robert additionally testified that he has lived on Old 90, Loop 2, Apartment 1, Bronston, Kentucky 42518 since October 2004. He testified that he has a post office box, which he listed as P. O. Box 195, Bronston, Kentucky 42518.

From the above prefatory remarks, it is obvious that the last known address of Robert was Old 90, Loop 2, Apartment 1, Bronston, Kentucky 42518, however, the record is completely devoid of any evidence indicating that Robert received his mail at this above address.

CR 5.02² states in pertinent part that service of notices upon a party "shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is shown, by leaving it

¹ Hereinafter referred to as "Billy." (Footnote 3 in original.)

² Rules of Civil Procedure. (Footnote 4 in original).

with the clerk of the court". (Emphasis added).

Applying the ratio decendi derived from the discussion herein, it is evident from the testimony heard by this Court that Robert did not receive the notices at his last known address. Simply stated, there was no evidence that Robert received any legal notices at the place where he lived and resided. If he had received legal notices at the place where he last resided, it is incumbent for Deborah to establish that fact. Consequently, the motion to alter, amend or vacate the September 7, 2005, Order is hereby OVERRULED.

This is a final and appealable Order, and there is no just cause or reason for delay.

This appeal followed.

Deborah makes three arguments in her brief: 1) that Robert was properly served with notice of the decree and contempt order; 2) that the circuit court incorrectly interpreted and applied CR 5.02; and 3) that the circuit court improperly granted Robert's motions when he failed to monitor the proceedings. On the other hand, Robert argues that he did not receive notice of the April 12, 2005, order allowing his attorney to withdraw and granting him time to retain new counsel. He also argues that the circuit court did not abuse its discretion in setting aside the decree and order pursuant to CR 60.02. We have distilled Deborah's three arguments into two, namely whether Robert was properly noticed and whether the

circuit court abused its discretion in its rulings. We shall address each issue in turn.

A) NOTICE

Deborah maintains that Robert was properly served with notice following the withdrawal of his attorney, and that the circuit court improperly interpreted and applied CR 5.02 in determining that he was not properly served. She states that the circuit court relied in error on its finding that Robert never received legal notices, when CR 5.02 does not require proof of actual receipt of notice, but only that it was mailed. On the other hand, Robert points out that for service by mail to be sufficient, the address must be correct, and he had never (or no longer) received mail at the addresses listed on the various court documents.

The Kentucky Rules of Civil Procedure set forth the proper method for providing service when service is required under the Rules: "Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address. . . . Service by mail is complete upon mailing." CR 5.02. In *Benson v. Benson*, 291 S.W.2d 27 (Ky. 1956), the former Court of Appeals examined CR 5.02 shortly after the adoption of the Rules of Civil Procedure in 1953. The *Benson* court relied upon the statement of the law on notice contained in *Mrs. W.R. Klappert M & S. Warehouse v.*

Muehlenkamp, 256 Ky. 506, 76 S.W.2d 597 (1934): "The opinion held, where notice by mail is authorized under a statute and the statute was duly complied with in respect to posting the notice, the validity of the service was not affected by a failure to receive the notice." *Benson*, 291 S.W.2d at 29. However, the same result is not reached in cases where notice is improperly posted: "A notice mailed to an incorrect address and not received by the addressee is not in compliance with CR 5.02." *McAtee v. Wigland of Louisville*, 457 S.W.2d 265, 265 (Ky. 1970). Even in cases where notice is properly made, the *Benson* court held that "appellant is not without a remedy, provided he can establish any of the grounds enumerated in CR 60.02 for voiding the order entered[.]" 291 S.W.2d at 30.

In the present case, we must agree with the circuit court that Robert was not properly served pursuant to CR 5.02 following the entry of the April 12, 2005, order allowing his counsel to withdraw. Robert was not served with a copy of the order by the clerk, as evidenced by the certificate of service attached to the order, nor was Robert's brother sent a copy of the order pursuant to the circuit court's docket order entered at motion hour. While subsequent motions and orders, including the decree, were apparently served on Robert at various addresses, including the Monticello Shop Wise address and his residence, he was not at served at his post office box in

Bronston, Kentucky, where he actually received his mail.

Furthermore, Robert's brother stated in his affidavit that he did not receive a copy of the April 12, 2005, order for Robert at his address.

Based upon the record before us, it appears that Robert was not properly served with notice following the withdrawal of his attorney in April 2005. He was not served at the proper last known address as required by CR 5.02, and has testified that he never received any court filings or orders until after his arrest. Therefore, the circuit court correctly held that Robert was not properly served, and we perceive no error in this ruling.

B) CR 60.02

The second issue in this appeal concerns the propriety of the circuit court's decision to vacate the decree and the orders of contempt and arrest. Deborah relies upon the former Court of Appeals' decision in *Mussman v. Pepples*, 243 Ky. 674, 49 S.W.2d 592 (1932), for its holdings that "a party is chargeable with notice of what the court does" and that "[a] judgment will not be set aside on account of mistake or neglect of parties or their counsel." *Id.* at 593. She argues that Robert should not be permitted to ignore the proceedings, and then have them set aside outside of the deadlines for seeking relief. Robert argues that the circuit court did not abuse its

discretion in setting aside the prior rulings, based upon the huge amount of maintenance he was ordered to pay pursuant to the decree, coupled with his inability to present his case due to lack of notice.

Although no rule was cited in the motion, Robert sought to vacate the decree and orders pursuant to CR 60.02, which provides relief from a judgment upon six grounds: "(a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence . . .; (c) perjury or falsified evidence; (d) fraud affecting the proceedings . . .; (e) the judgment is void . . .; or (f) any other reason of an extraordinary nature justifying relief." In *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957), the former Court of Appeals addressed a trial court's power under CR 60.02:

CR 60.02 in addition provides the trial court with extensive power to correct a judgment even after recourse has been had to the usual methods of attack. On motion, the court is empowered to relieve a party from a final judgment under certain extraordinary circumstances and upon such terms as it deems just. CR 60.02 addresses itself to the sound discretion of the trial court.

The *Fortney* court then identified two factors for a trial court to consider when exercising its discretion: "whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought would be inequitable to other parties." *Id.* Finally, regarding the

level of appellate review afforded to such rulings, the *Fortney* court stated that a trial court's exercise of discretion can only be disturbed if it is abused. *Id.* See also *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002); *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327 (Ky. 1994).

Applying the law to the facts of this case, we hold that the circuit court did not abuse its discretion in granting Robert relief under CR 60.02(f) from both the decree and the orders holding him in contempt and for his arrest. The situation that resulted in this case (the decree required Robert to pay Deborah maintenance in the amount of \$8,125 per month for 20 years) along with Robert's lack of notice certainly is of an extraordinary nature so as to justify relief. Robert's somewhat naïve assumption that Deborah would receive both the assets of the marital estate, as well as its debts, was obviously not reflected in the decree as drafted by Deborah's attorney and entered by the circuit court. Instead, Robert was left with a considerable amount of debt as well as \$1.95 million to pay in maintenance over the next twenty years. As to whether the granting of relief would be inequitable to other parties, in this case such a result would not be inequitable to Deborah because she will still have the opportunity to present her case

and to obtain a fair and equitable distribution from the marital estate.

Despite this holding, we recognize that *Musselman*, relied upon by Deborah, holds parties accountable for notice of what a court does, whether or not that party is present when, or has no actual knowledge that, an order is entered. However, based upon the facts of this specific case, we hold that the circuit court did not abuse its discretion in vacating the decree and the subsequent orders relating to Robert's contempt and arrest. Furthermore, the circuit court did not abuse its discretion in denying Deborah's motion to alter, amend or vacate its previous order.

For the foregoing reasons, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Stephen E. Neal
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BRIEF FOR APPELLEE, ROBERT LEE
TAYLOR:

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