

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002035-MR

CAROLE ANN TRAU GOTT

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
CIVIL ACTION NO. 05-CI-00095

JAMES MICHAEL TRAU GOTT

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * *

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

HUDDLESTON, SENIOR JUDGE: Carole Ann Traugott appeals from a decree entered on September 1, 2005, that dissolved her marriage with James Michael Traugott and from an interlocutory order entered on August 18, 2005, that denied her objections to and adopted Boyd Circuit Court's domestic relations commissioner's (DRC) report and recommendation that she be awarded maintenance of \$300.00 per month for four months. Carole argues that the

¹ Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

circuit court abused its discretion when it awarded inadequate maintenance. Unfortunately, Carole's appeal must be dismissed because her notice of appeal was not timely filed.

The Traugotts were married in November 1979 and separated in November 2004. They have no children. Both parties are approximately fifty years old and have lived in Ashland, Kentucky, throughout most of their marriage. James is currently employed by AK Steel and had gross earnings in 2004 of \$5,417.00 per month or \$65,800.00 per year. Carole was employed by General Telephone for 17 years earning \$13.00 per hour, and by Ashland Electric Power Company (AEP) for a few years, but she left both jobs after declining to accept job transfers to new cities following restructuring within the companies. Carole participated in a retraining assistance program provided by AEP to its displaced employees and earned an associate degree from Ashland Community College in office system technology with medical coding in May 2005. Carole was unable to procure employment in the office system technology field, so she took a job as a secretary/receptionist at Buchanon Sound at \$8.00 per hour with gross earnings of approximately \$1,386.00 per month or \$16,650.00 per year.

The parties reached an agreement to divide their property pursuant to which Carole received \$35,000.00 in cash and a vehicle. On May 31, 2005, the DRC conducted a hearing on

the question of maintenance for Carole during which she requested \$1,000.00 per month in permanent maintenance. The DRC issued her report on July 6, 2005, recommending that Carole be awarded maintenance of \$300.00 per month for a period of four months. On July 19, 2005, Carole timely filed exceptions to the report asserting that the maintenance award was against the great weight of the evidence and constituted an abuse of discretion. After James filed a response to Carole's objections, the circuit court conducted a hearing on August 12, 2005. On August 18, 2005, the court overruled the objections and confirmed the DRC's report and recommendations. On the same date, that is, August 18, 2005, a decree of dissolution of marriage, which, *inter alia*, adopted the DRC's report, was entered and James was ordered to pay Carole maintenance of \$300.00 per month for four months. However, on September 1, 2005, a second, quite similar decree of dissolution of marriage that again awarded Carole maintenance of \$300.00 for four months was entered. Carole filed a notice of appeal to this Court on September 29, 2005.

In his brief, James argues that Carole's appeal should be dismissed because her notice of appeal was filed untimely. Kentucky Rule of Civil Procedure (CR) 73.02(1)(a) requires the filing of a notice of appeal within 30 days after the date the

circuit court clerk places the notation of service of the judgment or order under CR 77.04(2) on the circuit court docket.

In discussing CR 73.02, numerous early cases stated that the filing of a notice of appeal was jurisdictional and mandatory.² More recently, the Kentucky Supreme Court has modified the early view by indicating that the filing of a notice of appeal is the procedural device prescribed by the Rules of Civil Procedure by which a litigant may invoke the exercise of jurisdiction of an appellate court and is a matter of procedure, rather than jurisdiction.³ Thus, compliance with CR 73.02 falls within the Supreme Court's inherent authority to promulgate rules of court,⁴ rather than within the ambit of constitutionally delegated jurisdiction.⁵ Nevertheless, CR 73.02(2) provides that "[t]he failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial."⁶ In *Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc.*,⁷ the Supreme

² See, e.g., *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990); *Electric Plant Bd. v. Stephens*, 273 S.W.2d 817 (Ky. 1954); *Burchell v. Burchell*, 684 S.W.2d 296 (Ky. App. 1984).

³ *Johnson v. Smith*, 885 S.W.2d 944, 950 (Ky. 1994).

⁴ See *Hutchins v. General Elec. Co.*, 190 S.W.3d 333, 337 (Ky. 2006) (citing *Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455 (Ky. 2004)).

⁵ *Id.*; *Norwest Bank Minnesota v. Hurley*, 103 S.W.3d 21 (Ky. 2003); *Foxworthy v. Norstam Veneers, Inc.*, 816 S.W.2d 907 (Ky. 1991).

⁶ Emphasis supplied.

⁷ 37 S.W.3d 713 (Ky. 2001).

Court said that "our holding today, that a tardy notice of appeal is subject to automatic dismissal and cannot be saved through application of the doctrine of substantial compliance, is a policy decision that is reflected in CR 73.02."⁸ As a result, the timely filing of a notice of appeal is considered mandatory as a policy matter designed to promote the finality of judgments.⁹

The civil rules do provide for an extension of time to file a notice of appeal. For instance, under CR 73.02(1)(e), the time for filing a notice of appeal is tolled by the filing of a timely post-judgment motion under Rules 50.02, 52.02 or 59, so that an appellant has a full 30 days to file a notice of appeal upon the entry of an order denying the post-judgment motion. In addition, CR 73.02(1)(d) allows the trial court to extend the time for filing the notice of appeal for a period of 10 days upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or order which affects the running of the time for taking an appeal.

In this case, the decree of dissolution of marriage that overruled Carole's exceptions to the DRC's report and

⁸ *Id.* at 716.

⁹ *Id.*; *Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918, 921 (Ky. App. 1998). The mandatory approach to the filing of a notice of appeal can be contrasted with the issue of the payment of filing fees, where the Supreme Court has applied a more lenient, discretionary approach. See *Norwest and Foxworthy*, *supra*, note 5.

adopted her proposed findings of fact, conclusions of law and recommendations was entered on August 18, 2005. The decree explicitly adopted the DRC's recommendation that James pay Carole maintenance in the sum of \$300.00 per month for a period of four consecutive months following entry of the decree. The decree recites that it is a final judgment and that there is no just cause for delay.¹⁰ Thus, this decree was a "final judgment" subject to appeal.¹¹ The Boyd Circuit Court clerk certified and entered the decree of record with notation of service on the docket, and mailed a copy to the parties' attorneys, all on August 18, 2005. Carole did not file her notice of appeal until September 29, 2005, which was well beyond the 30-day time frame allowed for filing a notice of appeal.

However, the record also contains a second decree of dissolution of marriage, entered on September 1, 2005, that, while worded differently in certain respects, is substantially similar to the decree entered on August 18, 2005. It is not clear from the record why a second decree was entered. There were no post-judgment motions, such as a CR 52.02 motion requesting amendment to or additional factual findings or a CR 59.05 motion to alter, amend or vacate the judgment, filed by

¹⁰ See CR 54.02.

¹¹ CR 54.01.

either party.¹² Generally, “‘a trial court loses control of a judgment ten (10) days after entry of the judgment, except to the extent an authorized, timely motion under CR 59 is made.’”¹³ Carole’s notice of appeal states an intention to appeal from the divorce decree entered on September 1, 2005,¹⁴ but the circuit court no longer had jurisdiction to enter this second decree because it was outside the 10-day time period permitted for amendments to prior judgments absent a timely motion extending the court’s authority to amend the judgment or grant additional

¹² Although there were some differences between the two decrees, there is nothing in the September decree indicating that it was entered pursuant to CR 60.01 to correct a clerical mistake in the August decree. In any event, action under CR 60.01 does not extend the time for filing an appeal from the underlying judgment. See, e.g., *United Tobacco Warehouse, Inc. v. Southern States Frankfort Cooperative, Inc.*, 737 S.W.2d 708 (Ky. App. 1987).

¹³ *Marrs Electric Co. v. Rubloff Bushford LLC*, 190 S.W.3d 363, 367 (Ky. App. 2006) (quoting *Kentucky Farm Bureau Ins. Co. v. Gearhart*, 853 S.W.2d 907, 910 (Ky. App. 1993)). In addition to CR 59, the trial court retains jurisdiction to amend or add factual findings to its judgment pursuant to a motion filed by a party under CR 52.02 within 10 days after entry of the judgment. The trial court also may obtain jurisdiction to amend a prior final judgment pursuant to other timely post-judgment motions such as CR 60.01 or 60.02, but a motion under these rules does not affect the finality of the judgment or extend the time for filing a notice of appeal from the underlying judgment. See *Brozowski v. Johnson*, 179 S.W.3d 261, 263 (Ky. App. 2005) (involving CR 60.02); *United Bonding Ins. Co., Don Rigazio, Agent v. Commonwealth*, 461 S.W.2d 535, 536 (Ky. 1970) (a party may not resort to CR 60.02 to gain an additional extension of time to prevent application of CR 73.02); *United Tobacco Warehouse, id.*

¹⁴ The notice of appeal also states an intention to appeal from the order entered on August 18, 2005, which confirmed the DRC’s report and recommendations. This order was interlocutory, but it became appealable once a final and appealable judgment was entered. Since the decree of dissolution entered on August 18, 2005, was a final and appealable judgment, any notice of appeal from the August order had to be filed within 30 days from the date of the final judgment. As a result, the September 29, 2005, notice of appeal seeking to appeal the August 18, 2005, order was untimely.

time to file the notice of appeal under CR 73.02(1)(e).¹⁵ Under the circumstances, we are obligated under CR 73.02(2) to dismiss the appeal for failure to timely file a notice of appeal.¹⁶

Therefore, it is ORDERED that the above-styled appeal is DISMISSED.

ALL CONCUR.

ENTERED: December 1, 2006

/s/ Joseph R. Huddleston
SENIOR JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Rodney S. Justice
Ashland, Kentucky

BRIEF FOR APPELLEE:

Gordon J. Dill
Ashland, Kentucky

¹⁵ Carole did not file a reply brief or otherwise respond to the question of the timeliness of the notice of appeal raised in James's brief nor has she filed a motion seeking permission to file a belated appeal

¹⁶ See also *Fox v. House*, 912 S.W.2d 450, 451 (Ky. App. 1995).