

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001362-MR

BYRON HOWARD

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 06-CI-00182

RUTH GOLDEN HOWARD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

DIXON, JUDGE: Byron Howard appeals from the findings of fact, conclusions of law and decree of dissolution of marriage from the Whitley Circuit Court dissolving the marriage between Byron and Appellee, Ruth Golden Howard.

Byron and Ruth were first married in 1975 and divorced in early 1983. After divorcing, the parties reconciled, but did not remarry until May 10,

1995. Byron, an attorney, and Ruth, an accountant, had two children during their second marriage.

The parties separated in June 2005, and Ruth filed a petition for dissolution in Bell Circuit Court on July 25, 2005. Byron was served with the petition and summons on September 23, 2005. Thereafter, on October 28, 2005, Byron, pro se, filed an untimely motion to dismiss for improper venue. The Bell Circuit Court denied Byron's motion to dismiss on November 21, 2005.

Inexplicably, Byron failed to participate in any further proceedings, including Ruth's deposition. In February 2006, Byron retained an attorney, Mr. Cline, for the limited purpose of challenging venue. Thereafter, Byron, through counsel, filed a second motion to dismiss for improper venue. On February 20, 2006, rather than dismiss the case, Bell Circuit Court entered an order transferring the case to Whitley Circuit Court.

On March 15, 2006, Byron underwent open-heart surgery and remained hospitalized for two weeks. On March 28, 2006, Mr. Cline, after consulting with Byron, moved to withdraw as counsel.¹ Also on March 28, Ruth moved for a final hearing on the decree of dissolution. The hearing was held on April 10, 2006, and the court rendered findings of fact, conclusions of law, and a decree of dissolution. Byron did not attend the hearing, as he had re-entered the hospital on April 3, due to surgical complications. Likewise, Mr. Cline did not attend the hearing on Byron's behalf. Shortly thereafter, Byron retained new

¹ The Whitley Circuit Court granted the motion to withdraw on May 5, 2006.

counsel and filed a motion to alter, amend or vacate the decree. Following a hearing on May 8, 2006, the court denied the motion. This appeal followed.

Byron contends the decree constituted a default judgment against him. He relies on *Childress v. Childress*, 335 S.W.2d 351 (Ky. 1960) for the proposition that, “[b]ecause of public concern, the court should be liberal in divorce proceedings in permitting the raising of issues so that there may be full opportunity to present all the evidence.” *Id.* at 353-54. In *Childress*, the husband, who was illiterate, asked the court for leave to file a belated answer and affidavit challenging his wife’s allegations. *Id.* at 352. The husband’s request came one month after the filing deadline and prior to the entry of the divorce decree. *Id.* The trial court denied the husband’s motion and entered a default judgment of divorce. *Id.* On review, Kentucky’s highest court reversed, noting that the movant had made a prima facie challenge to the divorce action. *Id.* at 354. As Byron points out, the *Childress* court observed that default judgments in divorce cases are disfavored. *Id.* However, the court went on to say, “delay in pleading without reasonable excuse cannot always be overlooked.” *Id.*

Byron also relies on *Sunrise Turquoise, Inc. v. Chemical Design Co., Inc.*, 899 S.W.2d 856 (Ky. App. 1995). In *Sunrise*, a panel of this Court elucidated that, to set aside a default judgment, “the moving party must show: (1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party.” *Id.* at 859.

Byron argues that he was entitled to present evidence in his defense challenging the division of an investment account and his ability to pay child support. He claims his absence from the final hearing was excusable because he was hospitalized, and alternatively, because he believed Ruth would postpone the hearing after she informally signed a note on April 3, 2006, giving him additional time to respond to the petition.

While we acknowledge Byron's hospitalization during the end of March 2006, it is unrefuted that Byron was an attorney in good standing with the Kentucky Bar Association. In his arguments to this Court, Byron ignores the fact that his initial motion to dismiss in Bell Circuit Court was untimely, and he does not address his failure to participate in the litigation after his first motion to dismiss was denied in November 2005. Furthermore, he does not explain his failure to seek permission to file a belated response to Ruth's petition once the case was transferred. *See* Kentucky Rules of Civil Procedure 6.02 (movant may seek enlargement of time to file belated response based on "excusable neglect"). Instead, Byron asserts that once venue was established in Whitley Circuit Court, he was prepared to "actively pursue" the case, but his mid-March hospitalization prevented it.

We, like the trial court, find Byron's excuses unpersuasive. We note that, "[a]lthough default judgments are not favored, a trial court is vested with broad discretion when considering motions to set them aside, and an appellate court will not overturn the trial court's decision absent a showing that the trial court

abused its discretion.” *PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.*, 139 S.W.3d 527, 530-31 (Ky. App. 2003) (citation omitted). After thorough consideration of the record, we conclude the trial court did not abuse its discretion in denying Byron’s motion to set aside the decree.

For the reasons stated herein, the judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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