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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001489-MR
AND
NO. 2007-CA-001506-MR

CECIL R. RODGERS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 81-CI-00033

EDWINA MAE RODGERS — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART
VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

ACREE, JUDGE: Cecil Rodgers appeals from an order of the Casey Circuit Court entering a supplemental and final decree regarding division of property and child support arrearages. Edwina Rodgers cross-appeals from that portion of the

supplemental decree awarding her only eight percent interest on child support arrearages. We affirm in part, vacate in part, and remand for further proceedings.

The parties were divorced in 1982 after twenty-two years of marriage. At the time of their divorce, the parties had two minor children and one adult child who was a mentally handicapped dependant. Edwina sought and obtained custody of the three and Cecil was ordered to pay $70.00 per week in child support and provide their health insurance. The parties were ordered to divide their personal property and sell their real property, with the proceeds to be equitably divided after payment of existing marital debts. The circuit court's order of July 7, 1982, retained jurisdiction of the case until such time as all property had been sold or divided between the parties. Further, the decree contained no recitation of finality, pursuant to Kentucky Civil Rule (CR) 54.02.

Litigation between the parties continued for the next five and one-half years, with disputes about the sale and division of property and the payment of child support. Meanwhile, Edwina continued to live in the marital residence which was never sold. Cecil lived in a house in Cincinnati, also jointly owned by the parties. In 2001, Edwina obtained new counsel who began to try to finalize the division of the parties' marital property. Discovery was conducted through 2005, and a supplemental and final order was not entered until May 1, 2007. The circuit court ordered the parties' homes to be sold, with the proceeds equally divided between them, and divided personal property accumulated during the marriage between them. Stock and dividends from stock owned during the marriage were

also ordered equally divided. Cecil was ordered to pay Edwina $28,480.00 for child support arrearages and $35,818.31 in interest on unpaid child support. The circuit court refused her request to set the interest rate at twelve percent per annum and instead set the interest at eight percent. Cecil was granted credit for various marital expenditures relating to the parties' homes. The circuit court designated this order as final and appealable, pursuant to the requirements of CR 54.02.

Cecil then filed a motion to amend, alter, or vacate the supplemental decree. The circuit court issued an order on June 22, 2007, amending the decree to reflect additional taxes paid by Cecil and relieving him of the obligation to provide health insurance to the parties' dependant, adult daughter. His remaining requests were denied. The circuit court again included language designating the order as final and appealable. This appeal and cross-appeal followed.

Cecil raises three issues on appeal. He first argues that the decree entered in August 1982 was a final judgment and that Edwina's motions filed in 2001 are barred by laches, the statute of limitations, and estoppel. We disagree. Not only did the 1982 divorce decree not contain language designating it as final and appealable under CR 54.02, the circuit court *specifically* stated that the case "is to be retained on this Court's docket until all property is sold or divided." Even when the supplemental decree was entered in 2007, the parties still owned marital property which had yet to be sold or divided. We further note that Cecil has completely failed to cite any statutes or cases which support his argument.

The case of *Neal v. Neal*, 122 S.W.3d 588 (Ky.App. 2002), does not hold that a spouse is barred from seeking relief from a divorce decree after the passage of fifteen years as claimed by Cecil. The spouses in *Neal* had only been divorced for twelve years when the wife filed her first motion for relief under CR 60.02, but our opinion dealt with a second motion, filed fifteen years after the divorce. The circuit court relied, in part, on the length of time since the divorce decree when it refused to grant the requested relied. However, this Court's opinion was based on a determination that the wife failed to meet the requirements for relief under CR 60.03 which allows independent actions seeking equitable relief. The opinion is simply inapplicable to the situation at hand.

Cecil next contends that the circuit court erred in admitting a copy of a child support order which may have been altered to replace a portion of the record which was missing. The order in question was entered on June 30, 1986, and increased Cecil's child support obligation from $70.00 per week to $150.00 per week. Some time in the months that followed, the order was lost from the court file. Upon learning of this, Edwina's attorney instructed her to file her copy of the order in the record. The clerk accepted Edwina's copy and, after redacting some personal notes which Edwina had written on the bottom of the page, filed it in the official court record. This copy remained in the record without objection from 1987 until the current controversy between the parties.

On appeal, Cecil argues that Edwina failed to prove the authenticity of the 1986 order increasing his child support obligation. The circuit court held a

hearing in March 2005 and heard testimony regarding the entry of the order. Judge Paul Barry Jones, who entered the 1986 order, was called as a witness in the action below. Although he had no personal recollection of the hearing on Edwina's motion to increase child support, he did state that he recognized his signature on the order and the date also was in his handwriting. Robert Bertram, Esq., who represented Edwina in 1986, testified that he filed a motion to increase child support on June 18, 1986, which was heard on June 23, 1986. After the motion was granted, he drafted the order which the circuit judge subsequently signed and entered. When he found out that the order was missing from the record, he asked Edwina to give the circuit clerk a copy of the signed order to place in the file. Bertram then used the copy of the order placed in the record as the basis for a motion, filed in November 1987, to hold Cecil in contempt. He told the circuit court that there had been no hearing to rescind or amend the 1986 order by the time he withdrew from the case in 1988.

At the hearing Cecil testified that the 1986 order had, in fact, been entered. His defense at that time was that the circuit court entered a subsequent order rescinding the June 1986 order. In its supplemental decree, the circuit court found that Cecil had made a judicial admission that the 1986 order was entered. The circuit court further found that Cecil failed to prove that the 1986 order was ever rescinded. CR 52.01 states, in part, that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." We are required to affirm

the circuit court's factual determinations unless they are clearly unsupported by the evidence. *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky.App. 2007). Since Cecil has previously admitted the existence of the 1986 order and, further, failed to offer concrete evidence that it was ever rescinded, we are bound to uphold the circuit court's determination that the order increasing his child support obligation was in force.

Cecil's final argument on appeal is that the circuit court erred in awarding Edwina any portion of the Proctor & Gamble stock which accumulated subsequent to the 1982 decree dissolving the marriage. He contends that the stock's increase in value subsequent to the original divorce decree resulted from his nonmarital efforts. The circuit court also took proof regarding this matter. During the marriage, Cecil worked for Proctor & Gamble and acquired 808.001 shares of stock which were marital property. Before the original decree granting the divorce was entered, Cecil sold the stock and invested the funds in a guaranteed investment contract without consulting Edwina. The funds remained invested from 1982 through 1991, at which point they were converted to Proctor & Gamble stock. In 1996, Cecil retired and transferred 3,560 shares of stock from his Proctor & Gamble account into a new investment account with Merrill Lynch. Of those shares, 1,616.002 were marital shares and 1,943.998 were Cecil's nonmarital property.

Edwina introduced expert testimony from a stock broker showing how many shares someone who owned 808.001 shares in shares in 1991 would own at

the time of the hearing in 2005 due to stock splits and the amount of dividends such a holder would have been paid. Further, the circuit court had before it deposition testimony from an employee of Proctor & Gamble which allowed it to trace the proceeds from the marital shares into the current investment held by Cecil. Finally, Cecil's own account statements were introduced to show which shares had been sold and how many marital shares remained in his possession at the time of the hearing.

Although Cecil agrees that he purchased 808.001 shares of stock in 1991 with marital funds, he contends that the Merrill Lynch account also contained stock purchased with nonmarital funds which Cecil accumulated after the original divorce decree was entered. At the hearing, Cecil testified that he had previously paid Edwina for her one-half interest in the guaranteed investment account. However, he admits that he made no effort to track which stock was purchased with marital funds and which stock came from nonmarital funds. He now claims that it is impossible to trace the marital stock because it has been commingled with his personal stock for fourteen years.

Based on the evidence before it, the circuit court made a factual finding that Cecil had received $69,641.60 in dividends from marital stock and ordered these dividends divided between the parties. In addition, the supplemental decree contained a finding that

> **Edwina** has successfully traced a "guaranteed investment contract" owned at the date of the divorce into its current form of **6,464** (actually now 6,200) shares of Proctor &

> Gamble common stock presently held by Merrill Lynch Pierce Fenner & Smith in an account in the name of **Cecil**. This stock is marital to be divided in kind herein.

(Supplemental and final decree, entered May 1, 2007)(emphasis in original). Cecil has not established on appeal that the circuit court's findings were clearly contrary to the evidence presented at the trial. Thus, we are bound to affirm the circuit court. *Lawson*, 228 S.W.3d at 21.

Edwina argues on cross-appeal that the circuit court erred in setting the interest rate on the child support arrearages at eight percent, rather than twelve percent as she requested. She contends that the circuit court's decision was erroneous since, as a matter of law, she is entitled to twelve percent interest. ("A judgment shall bear twelve percent (12%) interest compounded annually from its date." Kentucky Revised Statute (KRS) 360.040.)

The circuit court, citing *Pursley v. Pursley*, 144 S.W.2d 820 (Ky. 2004), concluded that "**Edwina** is entitled to simple interest at the rate of 8% per annum upon each unpaid installment of child support from the date it became due." (Supplemental and final decree, entered May 1, 2007)(emphasis in original). We note that the Supreme Court in *Pursley* did not address the effect of KRS 360.040. Rather, in that opinion the issue was the noncustodial parent's entitlement to prejudgment interest, set by statute at eight percent. KRS 360.040(1). Further, this Court has subsequently recognized that KRS 360.040 applies to child support arrearages.

> It is clearly discretionary with the court to award interest on a child support arrearage; if there are factors making it inequitable to require payment of interest it may be denied. However, in this case, the trial court did not make a finding of such inequity. . . .
>
> The general rule is that interest should be allowed on deferred payments of a fixed amount. KRS 360.040 contains the definitive formula for calculating interest on child support arrearages. Once a payment becomes delinquent, it becomes a judgment, and interest generally runs from the payment's due date until it is paid. KRS 360.040 states, in pertinent part, "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." The statute clearly and unambiguously requires interest calculated therein to be compounded annually.

Gibson v. Gibson, 211 S.W.3d 601, 611 (Ky.App. 2006)(footnotes omitted).

As a consequence of our decision in *Gibson*, the circuit court's conclusion that Edwina would be entitled only to simple interest in the amount of eight percent per annum was incorrect. Nonetheless, Edwina's argument that she is entitled, as a matter of law, to receive interest on the child support arrearages owed to her is also incorrect. The circuit court has the discretion to deny a request for interest on child support arrearages if it finds that imposing such interest on the child support obligor would be inequitable. However, the circuit court failed to make a determination in this case regarding the inequity of applying KRS 360.040 to Cecil's unpaid child support obligation. Thus, we must vacate the portion of the supplemental decree awarding Edwina interest at the rate of eight percent per annum and remand the case for further proceedings.

For the foregoing reasons, this case is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT AND CROSS-APPELLEE:

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