

RENDERED: FEBRUARY 6, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000423-MR
&
NO. 2008-CA-000739-MR

JACKIE HILL

APPELLANT

v. APPEAL FROM MARSHALL FAMILY COURT
HONORABLE ROBERT DAN MATTINGLY JR., JUDGE
ACTION NO. 07-CI-00123

CYNTHIA HILL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND WINE, JUDGES.

LAMBERT, JUDGE: Jackie Lee Hill, petitioner in action below, appeals from two orders entered by the Marshall Family Court. He first appeals from an order entered February 15, 2008, in which the court ordered Jackie to pay his ex-wife, Cynthia Faith Hill, respondent in action below, one-half of his disability benefits and held him in contempt for failing to pay Cynthia this amount after originally

being ordered to do so in November 2007. He additionally appeals from an order entered April 3, 2008, in which the court awarded Cynthia 100% of Jackie's "divisible" railroad retirement benefits. After careful review, we affirm both orders of the Marshall Family Court.

Jackie and Cynthia were married on November 4, 1978, separated on September 30, 2006, and their marriage was dissolved on November 27, 2007. On November 12, 2007, against the legal advice of his then attorney, Jackie signed a settlement agreement, which provides in pertinent part as follows:

3. Marital Property

3.2 Petitioner shall receive and be the sole owner of the following items, free of any claim of Respondent: ½ of any proceeds from lawsuits, actions, or claims made pursuant to his employment, dismissal from work, or related claims, if any.

3.3 Respondent shall receive and be sole owner of the following items, free of any claim by petitioner: ½ of any proceeds from any lawsuits, actions, or claims made pursuant to his employment, dismissal from work, or related claims, if any.

6. Maintenance

The parties recognize Respondent's need for maintenance, but also recognize Petitioner's current inability to pay maintenance (due to his dismissal from employment). The parties agree that Respondent's maintenance claim shall remain pending and can be re-opened at any time prior to Petitioner's 65th birthday on a showing of substantially changed circumstances (e.g. Re-employment, new employment, etc.).

Also contained in the settlement agreement was a clause stating that the agreement may not be modified by any court, unless in writing and executed by both parties.

At the time the settlement agreement was being negotiated by the parties, Jackie had a pending claim against his former employer for occupational disability. Jackie was subsequently awarded occupational disability based on post-traumatic stress disorder. He received his first check on November 1, 2007, and signed the settlement agreement on November 12, 2007, against the advice of counsel and knowing that he had been awarded his disability.

The settlement agreement was presented to the court for adoption on November 21, 2007. At that same time, Jackie's counsel requested an order allowing him to withdraw. The court granted the motion to withdraw, giving Jackie twenty days to find substitute counsel and setting the matter for hearing on January 15, 2008. Despite having set the matter for hearing in January, on November 27, 2007, the court entered an order dissolving the parties' marriage and adopting the settlement agreement of the parties.

The parties appeared before the court on January 15, 2008, at which time the court acknowledged that the settlement agreement had previously been adopted on November 27, 2007. Jackie appeared at the hearing without counsel, had not attempted to retain counsel, and did not object to the settlement agreement being entered. Jackie did object, however, to paying Cynthia half of his disability pension, therefore the court set a contempt hearing for future proceedings. Cynthia followed the court's motion for contempt with her own motion, and a hearing was set for February 1, 2008.

A full and complete hearing was held on February 1, 2008. Jackie, with new counsel, responded to the motion for contempt with a motion to modify the settlement agreement. The court addressed the motions of both parties, denying Jackie's motion to modify and holding him in contempt for failure to pay Cynthia half of his disability benefits in November and December of 2007 and January and February of 2008.

By motion filed March 12, 2008, Cynthia sought post-judgment relief by seeking an order to enforce the property settlement agreement by directing the Railroad Retirement Board to pay the tier II divisible portion of Jackie's railroad retirement benefits to Cynthia. On April 3, 2008, the Marshall Family Court entered an order dividing Jackie's railroad retirement benefits. The court found that the Railroad Retirement Act prohibits any allocation of Jackie's tier I benefits but that the tier II benefits are marital/community property under the Railroad Retirement Act and may be allocated by the court. Therefore, the court ordered that Cynthia be awarded an amount equal to one hundred percent of Jackie's tier II monthly disability benefit. Jackie now brings this consolidated appeal of the February 15, 2008, order and the April 3, 2008, order.

Jackie first argues that the court erred as a matter of law when it ordered that one hundred percent of his tier II railroad retirement benefits be paid to Cynthia.

Jackie argues that the instant case is on point with *Holman v. Holman*, 84 S.W.3d 903 (Ky. 2002), in which the Kentucky Supreme Court said that

disability retirement benefits were properly classified as marital and nonmarital property according to the character of the property they replaced. He would have this Court conduct an analysis to determine the character of the property replaced by his railroad retirement benefits in order to determine if they are marital or nonmarital. However, Jackie ignores the fact that unlike *Holman*, there is a federal statute directly on point to deal with the classification of *railroad* retirement benefits in the instant case. We find that the trial court did not err in its finding that the Railroad Retirement Act states that tier II benefits are marital property subject to division by the courts.

Jackie then argues that the trial court abused its discretion in holding him in contempt and then in refusing to recuse. We find these allegations without merit.

First, Jackie contends that it was an abuse of discretion for the court to enter an order adopting the settlement agreement on November 27, 2007, when he had been given twenty days from November 21, 2007, to obtain new counsel. Although we and the lower court agree that it mistakenly entered the order on that date, there was no motion to alter, amend, or vacate the November 27 decree, nor was there an appeal or 60.02 motion for relief even as late as the January 15, 2008, hearing. In fact, on February 1, 2008, Jackie testified he was willing to live by the intent of the settlement agreement. More to the point, Jackie was held in contempt because he told the court on multiple occasions that he was not going to pay Cynthia half of his retirement benefits. At no point did he seek a stay of

proceedings or attempt to post a supersedeas bond, even after he obtained new counsel and was put on notice of a contempt hearing. Therefore, we do not find the trial court abused its discretion in holding Jackie in contempt.

As to his contention that the trial court abused its discretion by refusing to recuse, we find it equally meritless. He essentially asserts that because the court found him in contempt that it was biased and should have recused from all further proceedings. Since we do not agree that it erred in holding him in contempt, we in turn do not find that it abused its discretion by refusing to recuse.

Finally, Jackie argues that the trial court erred in failing to modify the settlement agreement based upon changed circumstances. First, Jackie is seeking to modify the agreement as it pertains to property disposition. But once a property settlement agreement is incorporated into a decree, it becomes part of the judgment and may not be modified “unless the court finds the existence of conditions that justify the reopening of a judgment...” KRS 403.250(1). The conditions for reopening a judgment are found in CR 60.02, which states that an order may be set aside for:

- (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.

Jackie did not file his motion to modify pursuant to any section of CR 60.02.

Consequently, there was no proper motion to reopen the decree before the trial court, and the trial court did not abuse its discretion in denying Jackie's motion to modify based on changed circumstances.

We accordingly affirm both the order awarding one-half of Jackie's disability benefits to Cynthia and holding him in contempt for failure to pay and the order awarding Cynthia one hundred percent of his tier II railroad retirement benefits.

ALL CONCUR.

BRIEF FOR APPELLANT:

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