

RENDERED: AUGUST 28, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001387-MR

RALPH WAYNE ABELL

APPELLANT

v. APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
ACTION NO. 04-CI-00094

YOLANDA ABELL

APPELLEE

OPINION AND ORDER DISMISSING

** ** * * * * *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: Ralph Wayne Abell (Ralph), appeals from the Webster County Family Court's order awarding Yolanda Abell (Yolanda), a portion of his disability pension. For the following reasons, we dismiss.

FACTS

The parties married on July 1, 1978. In 1994, Ralph, who was a coal miner, became eligible for disability benefits under the United Mine Workers'

Health and Retirement Fund (the UMWA Pension Plan). Ralph also became entitled to social security disability benefits and to workers' compensation benefits from the Special Fund.

On April 14, 2004, Ralph filed a petition for dissolution of the parties' marriage. The court entered an order dissolving their marriage on February 8, 2005. That order incorporated the parties' property settlement agreement (the Agreement). In the Agreement, the parties divided debt and personal property; provided for the sale of the marital residence, leaving to the court how to divide any proceeds; and stated that:

The parties shall each be entitled to one-half the portion of Ralph's miner's pension earned during the marriage. (Approximately 6 years of the pension are non-marital). Ralph shall keep all the disability income including the Special Fund settlement, [sic] is solely entitled to the non-marital portion of this pension. A QDRO should be entered to reflect the above agreement.

Following entry of the decree, neither Ralph's attorney nor Yolanda's prepared a Qualified Domestic Relations Order (QDRO). Yolanda contacted a different attorney regarding an unrelated matter and that attorney advised Yolanda that she needed to get a QDRO. Yolanda then contacted her current attorney who prepared a QDRO and forwarded it to the UMWA Pension Plan. On April 13, 2006, an analyst from the UMWA Pension Plan advised Yolanda's attorney that the language in the QDRO was acceptable and would be followed once signed by the parties and approved by the court.

It appears that Ralph would not sign the QDRO; therefore, on September 22, 2006, Yolanda filed a *pro se* motion to enforce the provision in the Agreement awarding her a portion of Ralph's pension. The family court judge held a hearing on Yolanda's motion and advised her that he needed additional information before he could make a ruling. Yolanda then obtained counsel who filed a motion asking Ralph to show cause why he had not complied with the above cited provision of the Agreement. In addition, Yolanda asked the court to order Ralph to execute the QDRO and to award attorney fees, her proportionate share of past due benefits, and interest. In his response, Ralph argued that his pension benefits were "disability income" and not subject to division and that Yolanda had not timely filed the QDRO. Furthermore, Ralph argued that, if the pension benefits were divisible, he should get credit for income taxes he paid on any past due benefits owed to Yolanda. Following receipt of briefs, the court took the matter under submission.

Based on the parties' briefs, the Agreement, and a copy of the UMWA Pension Plan, the court determined that Ralph's retirement pension benefits were divisible and that a QDRO should be entered. In doing so, the court found that Ralph was 39.5 years old when he began drawing his pension benefits in 1994; that he began drawing social security disability benefits at that time; and that he had received a settlement from the workers' compensation Special Fund. The court noted that the UMWA Pension Plan provided that a miner with ten or more years of service who was found to be eligible for social security disability benefits was

entitled to receive disability pension benefits “as if it were a normal retirement pension.” However, a disabled miner with less than ten years of service would only be entitled to receive the “minimum disability pension.” The court then found that Ralph’s disability pension was the only pension in which he obtained a vested interest during the marriage and was the pension referred to in the Agreement. The court found that the pension should be divided as of “March 2005, the first month following the entry of the Decree of Dissolution of Marriage” and that the amount Yolanda receives should be determined as of May 2006, the date the UMWA approved her tendered QDRO. Because he had not offered any proof on the issue, the court found that Ralph was not entitled to any credit for taxes he paid on disability income he had received. We note that the court did not rule on the amount of “back payments” due. Rather it ordered the parties to make that calculation and, if they could not agree, to return to court. Furthermore, the court “reserved until the ‘back payment’ has been established and the QDRO is in effect” the issues of Yolanda’s entitlement to interest, attorney fees, and court costs. The court did not state that the order was final and appealable or that there is no just reason for delay. It is from this order that Ralph appealed.

After Ralph filed his notice of appeal, Yolanda filed a motion asking the court to enter the QDRO she had prepared and to order payments under the QDRO to be deposited in an escrow account. The court entered the QDRO on August 23, 2007. On January 28, 2008, the parties entered into an agreed order indicating that, pending resolution of the issues on appeal, Ralph owes Yolanda

\$6,952.39 in back payments. The agreed order also set forth a payment schedule for those payments and that interest accrued at the rate of eight percent. However, the court “held in abeyance” any award of attorney fees, pending payment of the arrearage. This order also did not contain any language stating that it was final and appealable or that there was no just reason for delay.

On appeal Ralph argues that his UMWA retirement pension benefits are "disability income" under the Agreement and exempt from division. Ralph also argues that, if the pension benefits are divisible, Yolanda waited too long to seek enforcement of the Agreement and entry of the QDRO was, therefore, inappropriate. Finally, Ralph argues that, if entry of the QDRO was appropriate, he should not have to pay interest on any past due payments and any payments should take into account the fact that he already paid income tax on benefits he received.

FINALITY OF ORDER

To be final, a judgment must either adjudicate “all the rights of all of the parties in an action or proceeding” or be made final under Kentucky Rule of Civil Procedure (CR) 54.02. CR 54.02(1) provides that:

[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated,

which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Because it did not address all of the claims made by Yolanda, the court's order finding that Ralph's disability pension was subject to division under the Agreement was required to comply with CR 54.02(1). The court's order did not state that it was final and appealable and it did not state that there is no just reason for delay. Therefore, pursuant to CR 54.02(1), the order is not final and appealable and this appeal must be dismissed.

ALL CONCUR.

ENTERED: August 28, 2009

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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