

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001834-MR

DAVID BARKER

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 05-CI-00385

PHYLLIS BARKER

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * ** * ** *

BEFORE: NICKELL AND WINE, JUDGES; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: David Barker appeals from a judgment of the Letcher Circuit Court. He argues that the trial court erred by dividing his retirement accounts without offsetting the value of Phyllis Barker's teacher's retirement

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

benefits, which were exempted from division. Mr. Barker also argues that he is entitled to reimbursement for payments he made on the marital residence, property taxes, insurance, and repairs. After reviewing the record and briefs, we dismiss this appeal on jurisdictional grounds.

David Barker and Phyllis Barker were married in Letcher County, Kentucky, in 1973. Ms. Barker is a retired school teacher and Mr. Barker is employed by Parsley Tire Company. The parties separated in 2005. At a hearing² before the domestic relations commissioner (DRC), the parties agreed to a partial division of marital property and allocation of marital debt. This agreement was reflected in the partial decree of dissolution of marriage entered on January 17, 2007. The remaining issues were addressed at a hearing before the DRC and the DRC's recommended findings of fact, conclusions of law, and judgment were tendered on July 2, 2007. The DRC made a recommended finding that Ms. Barker's teacher's retirement benefits were non-marital and were not subject to any division or offset. The DRC also made a recommended finding that there were six retirement accounts, which were marital property and subject to division:

- (1) Hillyard & Lyons, \$243,245.74
- (2) Charles Schwab, \$125,993.74
- (3) Ameriprise Financial, \$15,000.00
- (4) Community Trust Bank IRA, \$15,000.00
- (5) Community Trust Bank, \$15,000.00
- (6) American Express Investment, \$137,000.00

² Apparently, neither the May 31, 2006, initial hearing nor the 2008 exceptions hearing before the DRC were recorded or transcribed.

The DRC recommended that each party be awarded one-half of the value of each account. However, the DRC did not make any recommended findings as to the origin and nature of these accounts.

Mr. Barker filed exceptions to the recommendations of the DRC. Following a hearing, the Letcher Circuit Court overruled the exceptions by an order entered on September 2, 2008. This appeal followed.

As a preliminary matter, we must determine whether a properly entered judgment exists from which an appeal can be taken. In the notice of appeal, Mr. Barker states that he is appealing from the “Order overruling Exceptions entered September 2, 2008, which is attached hereto as Exhibit ‘A’ and Findings of Fact and Conclusions of Law, and Judgment entered on November 28, 2007, which is attached hereto as Exhibit ‘B.’” The Findings of Fact, Conclusions of Law, and Judgment attached as Exhibit “B” was not entered on November 28, 2007. There is another order attached, which awards certain items of property unrelated to the issues raised on appeal. This order was dated November 29, 2007, and was entered on December 11, 2007. The Findings of Fact and Conclusions of Law, and Judgment which are the subject of this appeal were signed by the DRC, dated June 29, 2007, and tendered to the Circuit Court Clerk on July 2, 2007. However, the Judge did not sign the Findings of Fact and Conclusions of Law, and Judgment nor was this document specifically entered. The order entered on September 2, 2008, overruling the exceptions did not specifically adopt the Findings of Fact and Conclusions of Law.

Kentucky Rules of Civil Procedure (CR) 58(1) states in pertinent part:

Before a judgment or order may be entered in a trial court it shall be signed by the judge. The clerk, forthwith upon receipt of the signed judgment or order, shall note it in the civil docket as provided by CR 79.01. The notation shall constitute the entry of the judgment or order, which shall become effective at the time of such notation[.]

The Rules of Civil Procedure apply to all proceedings under KRS Chapter 403 unless otherwise provided by the chapter. KRS 403.130. In *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005), our Supreme Court explained the rules of appellate jurisdiction as follows:

We begin with CR 73.02. “The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04.” CR 77.04(2) mandates that the clerk of the court immediately serve a notice of entry of a judgment or final order, among other things, upon every party to the proceeding who is not in default for failure to appear. CR 54.01 defines a final or appealable judgment as a final order “adjudicating all the rights of all the parties in an action or proceeding.” CR 54.02 does provide a limited exception where there are multiple parties or multiple claims. It allows for an appeal when less than all the rights of all the parties have been adjudicated, but only upon a determination that it is final and that there is no just reason for delay. In the absence of such finality and a recitation thereof, the order is interlocutory and subject to modification and correction before becoming a final and appealable judgment or order.

Further, this Court must determine for itself whether jurisdiction exists. *Id.*

Jurisdiction cannot be conferred by the consent of the parties. *Id.*

In the present case, the Judge did not sign the DRC’s recommended Findings of Fact, Conclusions of Law, and Judgment, and therefore, it was never

entered. The recommended Findings of Fact, Conclusions of Law, and Judgment were neither adopted nor incorporated into the September 2, 2008, order overruling the exceptions to the DRC's recommendations. The September 2, 2008, order also did not contain the CR 54.02 recitation of finality language. Therefore, we are constrained to dismiss this appeal on jurisdictional grounds.³

According, the above-styled appeal is dismissed on jurisdictional grounds.

ALL CONCUR.

ENTERED: November 20, 2009

/s/ William R. Harris
SENIOR JUDGE,
COURT OF APPEALS
BRIEF FOR APPELLEE:

BRIEF FOR APPELLANT:

Alison C. Wells
Hazard, Kentucky

James W. Craft, II
Whitesburg, Kentucky

³ Although this Court is constrained to dismiss this appeal for lack of a final and appealable judgment, after reviewing the record and briefs, we would note that KRS 403.190(4) plainly provides for the offset of a teacher's retirement benefits against the retirement benefits of the other spouse. *Shown v. Shown*, 233 S.W.3d 718 (Ky. 2007). Further, the September 2, 2008, order overruling the exceptions and the recommended findings of fact, conclusions of law and judgment apparently failed to consider Mr. Barker's properly raised arguments regarding his entitlement to reimbursement for payments he made on the marital residence, property taxes, insurance, and repairs during the pendency of the dissolution proceedings.