

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001310-MR

DAVID A. GOLDSMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 07-CI-504635

JESSICA S. GOLDSMITH

APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** * * * * *

BEFORE: ACREE, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Divorce decrees are given a special deference in Kentucky.

Except when there is an utter lack of jurisdiction in the trial court, divorce decrees

cannot be reversed by this Court. Nevertheless, David A. Goldsmith, *pro se*,

(“David”), brings this appeals from the June 9, 2008, divorce decree that ended his

marriage with Jessica S. Goldsmith (“Jessica”). David claims the decree is void

because the family court entered the decree by default after David failed to respond

to the petition for divorce. David argues that, because he was never served with the petition, the trial court had no jurisdiction to grant the dissolution. Because of the clear language of Kentucky Revised Statute (“KRS”) 22A.020(3), and because there is absolutely no evidence of fraud, we are compelled to dismiss the appeal.

Factual and Procedural Background

David and Jessica were married on March 7, 2000. On December 13, 2007, Jessica filed a petition for dissolution of marriage with the Jefferson Family Circuit Court. On April 2, 2008, Jessica’s attorney filed an affidavit for a warning order attorney, alleging that David was a non-resident of the Commonwealth of Kentucky or may be absent therefrom. The request for an appointment of a warning order attorney was granted. Notice was sent to the apartment the couple formerly shared. Shortly thereafter, the warning order attorney mailed a certified letter to that same address. For unknown reasons, although the street address was correct, the purported zip code was not. The certified letter was returned to the warning order attorney on or about May 4, 2008, with a notation by the United States Postal Service advising the apartment was vacant. On June 5, 2008, Jessica’s counsel filed a motion for default judgment.¹

On June 9, 2008, the court entered an order (1) finding David had not answered or defended against the allegations in the petition; (2) finding it had

¹ It is interesting to this panel that the copy of the proposed default judgment attached as an exhibit to David’s appeal brief lacks any markings on the judge’s signature line. However, the copy in the court’s file reveals a signature line on which a signature was “whited out”, suggesting David had a copy of this document independent of the court file.

jurisdiction to decide the case; (3) restoring the parties' non-marital property to each respective party; (4) reserving the issue of division of marital property until further order of the court; and (5) restoring to Jessica her maiden name. A copy of the order was mailed to David, again utilizing an incorrect address. In his brief, David concedes that he learned the marriage had been dissolved. He made no effort pursuant to the Kentucky Rules of Civil Procedure ("CR") 52.02, 60.01, or 60.02(b), to seek relief from the trial court to amend or vacate the judgment. Instead, on July 9, 2008, he filed a notice of appeal, along with a petition to proceed *in forma pauperis*.² David failed to file his brief in a timely manner, and this Court issued a show cause order on November 17, 2008. On December 16, 2008, David requested additional time to file a brief which he attached to the motion. Subsequently, the Court granted the motion. Jessica never filed a brief.

Analysis

KRS 22A.020(3) states that, "[n]otwithstanding any other provision in this section, there shall be no review by appeal or by writ of certiorari from that portion of a final judgment, order or decree of a Circuit Court dissolving a marriage." The only exception to this rule is when a judgment is proven to be void.

Appellate review of a divorce decree has been addressed in *Clements v. Harris*, 89 S.W.3d 403 (Ky. 2002). In *Clements*, the wife appealed from a decree of dissolution claiming the judgment was void because her husband had not

² Attached to his affidavit of indigency was a record from the Social Security Administration dated July 7, 2008, indicating a monthly income of \$744.50.

satisfied the residency requirements. The Court held that, although the husband was not a resident of Kentucky, the decree of dissolution was nonetheless valid. Further, even when a procedural irregularity occurs, such as a clerk failing to serve a notice of filing of a commissioner's report, the decree of dissolution is not void, rather erroneous. *Elswick v. Elswick*, 322 S.W.2d 129 (Ky. 1959). Moreover, the *Elswick* Court held,

Where the question of jurisdiction in a divorce action has been raised in the lower court, and there is any evidence to show the jurisdictional residence of the parties, the lower court's judgment granting a divorce based upon a determination that it has jurisdiction is not void and cannot be questioned on appeal regardless of the fact that the determination may be against the overwhelming weight of the evidence and be clearly erroneous.

Id. at 131. Absent clear and convincing proof of an utter lack of jurisdiction, a divorce decree cannot be reversed. *Kenmont Coal Co. v. Fisher*, 259 S.W.2d 480, 482 (Ky. 1953). We believe that Jessica's sworn testimony before the Court completely satisfied the jurisdictional proof requirements of KRS 403.025. Only when fraud has been practiced in order to obtain jurisdiction can a judgment be set aside as void. *Self v. Self*, 293, Ky. 255, 168 S.W.2d 743, 744 (1943). David does not make a specific allegation of fraud, nor can we find evidence of any in the pleading before the Court.

We see no basis to support David's claim that this decree is void. David argues that the family court judge failed to give him an opportunity to respond to the allegations in the petition. However, he fails to show where or how

he would refute the basic jurisdictional statements in the petition. Rather, in his brief, David states, “I personally did not want the divorce but would not have contested the Appellee’s wishes. I would like the Court Records to reflect that the Decree was Uncontested rather [than] Default.” However, the judgment makes no reference to either “default” or “uncontested”.

The judgment was not void; therefore, we have no authority to review the merits of David’s appeal.

For these reasons, this Court ORDERS that this appeal be DISMISSED.

ALL CONCUR.

ENTERED: December 18, 2009

/s/ Thomas B. Wine
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

David A. Goldsmith, *pro se*
Louisville, Kentucky