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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002104-MR
AND
NO. 2010-CA-001615-MR

LINDA R. LAMPING — APPELLANT

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 06-CI-502153

CHARLES D. GREENWELL — APPELLEE

OPINION AND ORDER
DISMISSING APPEAL NO. 2009-CA-002104-MR
AND
AFFIRMING APPEAL NO. 2010-CA-001615-MR

** ** ** ** **

BEFORE: ACREE, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Two consolidated appeals are presently before the Court from orders of the Jefferson Circuit Court, Family Division Three, in the dissolution action between Linda R. Lamping, formerly Greenwell, and Charles D. Greenwell. We dismiss Linda's first appeal as untimely, and affirm the family court as to the

second appeal because Linda did not demonstrate any extraordinary circumstance justifying relief under CR[1] 60.02.

FACTUAL AND PROCEDURAL BACKGROUND

Linda and Charles Greenwell were married in 1986, and both are attorneys. A dissolution action between the parties was initiated on June 2, 2006. As will be more fully discussed, the heart of both appeals presently under review is a 401(k) account acquired by Charles during his employment with Middleton & Reutlinger, P.S.C. Because the resolution of this matter involves the various orders and the dates on which they were entered, we will summarize these where relevant.

On January 26, 2009, the family court entered an order assigning non-marital property between Linda and Charles, dividing the marital estate, and awarding maintenance and attorney's fees. Neither party referenced the 401(k) presently at issue prior to the court order; consequently, the 401(k) was not included in the court's detailed order dividing the parties' property. Both parties filed timely motions to alter, amend, or vacate the order, pursuant to CR 52 and CR 59. However, these motions did not reference the 401(k) or ask the court to amend its order to include a division of the 401(k). *Inter alia*, Linda's motion included a specific request that the family court

> 1. Alter and amend the "Order" of January 26, 2009 to read "Findings of Fact, Conclusions of Law, Judgment and Amended Decree of Dissolutions of Marriage." CR 54. The order of January 26, 2009 adjudicated all of the claims between

[1] Kentucky Rule of Civil Procedure.

the parties. The captioned "Order" may leave the Court of Appeals, if an appeal is filed, with the impression that it is an interlocutory order rather than a final judgment.

2. Alter and amend the Order of January 26, 2009 to add the language that it is "a final and appealable judgment and that this [sic] is no just reason for delay." CR 54.02.

On July 10, 2009, the family court issued an order making multiple amendments to the January 26, 2009 order based on the parties' separate motions.[2] And, specifically the family court noted that Linda had requested finality language, and the court granted the same.

On August 26, 2009, Linda filed a motion requesting an order to require Charles to produce certain documents and arrange a meeting to transfer certain assets as ordered by the family court. Included in the request for documents was a request for statements pertaining to the 401(k) account at issue. This was the first time the issue of the omitted 401(k) account was raised. The family court heard Linda's motion on August 31, 2009, at which time Charles agreed to provide all of the requested documents except those pertaining to the 401(k), as it was not addressed by the family court's previous orders. The family court did not order Charles to provide documentation regarding the 401(k). The court did not enter a written order memorializing its oral directives, and Linda did not seek a written order from the court.

[2] The family court's July 27, 2009 order addressed only typographical errors and failed to change the substance of the family court's January 26, 2009 or July 10, 2009 orders. Further, because a motion brought under CR 60.01 and/or CR 60.02 fails to affect the time for a timely filed appeal, these events had no bearing on the running of time to appeal. *See* CR 73.02(1)(e).

On September 10, 2009, Linda filed a motion to amend the "order" of August 31, 2009, requesting that the court divide Charles' 401(k).[3] Charles objected to the motion, arguing that the "order" of the family court only required him to provide certain documents to Linda relevant to accounts that the court had previously divided.[4] On October 7, 2009, the family court denied Linda's motion. Thereafter, on November 6, 2009, Linda filed a notice of appeal with this Court, citing the October 7, 2009 order as the order being appealed (Case No. 2009-CA-002104). Linda's notice of appeal also identified the family court's January 26, 2009 and July 10, 2009 orders as being appealed from "to the extent that such order[s] failed to divide the said pension." Linda filed her prehearing statement with this Court, describing the issue to be raised on appeal as whether the family court clearly erred or abused its discretion in failing to require the division of Charles' 401(k).

Despite the pending appeal in Case No. 2009-CA-002104, in which Linda requested that this Court grant relief from the family court regarding the 401(k) at issue, Linda also filed a CR 60.02 motion with the family court on July 12, 2010, again requesting the family court amend its August 31, 2009, "order" to include an equal division of the 401(k). As noted *supra*, the August 31, 2009

[3] While it is unclear whether Linda sought to amend under CR 52 or CR 59, it appears that Kentucky Courts treat the motions interchangeably. *See Chenault v. Chenault*, 799 S.W.2d 575, 579 (Ky. 1990); *Lilly v. Citizens Fidelity Bank & Trust Co.*, 859 S.W.2d 666, 674 (Ky. App. 1993); *Henry Clay Mining Co., Inc. v. V&V Mining Co., Inc.*, 742 S.W.2d 566, 566 (Ky. 1987).

[4] Linda did not argue in this motion that Charles failed to carry out any of the directives of the court regarding production of documents to Linda necessary for the division of assets.

rulings of the family court were not memorialized in writing and only directed the production of documents necessary to effectuate the division of assets the court had previously ruled on.

On July 30, 2010, the family court issued a written order denying Linda's CR 60.02 motion. In that order, the family court noted that Linda sought to modify "an oral directive to the parties issued August 31, 2009 at the Court's motion hour." Thereafter, the court noted that in January of 2009, the court had entered an order "resolving all issues arising from the parties' marriage." The court noted that it did not address the 401(k) plan at issue and that the parties had timely filed motions to alter or amend the January 2009 order, but that those motions did not include a reference to the 401(k) plan that Linda later disputed. The court further noted that Linda's August 26, 2009 motion was one in reference to production of documents to effectuate the transfer of court ordered divided accounts. However, the 401(k) at issue was not one of these accounts. The family court, in its order entered on July 30, 2010, construed Linda's motion as one to modify its January 26, 2009 order and indicated that Linda's failure to address the issue of the 401(k) was untimely pursuant to CR 60.02. The court noted that Linda "was fully aware of the omitted asset at the time of the trial and the time of the filing of her motion to alter or amend filed pursuant to CR 59." Consequently, the family court denied Linda's motion as untimely.

Following the family court's July 30, 2010 order, Linda filed another notice of appeal on August 26, 2010 (Case No. 2010-CA-001615). The notice of

appeal identified the July 30, 2010 order denying the CR 60.02 motion as the order being appealed. And, the prehearing statement identified the issues to be raised as: (1) whether the family court erred or abused its discretion in failing to require the division of the 401(k); and (2) whether the July 12, 2010 CR 60.02 motion was timely. This Court consolidated the two appeals.

ANALYSIS

The issue before us on both appeals is whether the trial court erred in refusing to reopen the January 26, 2009 order in order to award a portion of the 401(k) to Linda. We will address each of these appeals in turn.

1. Appeal No. 2009-CA-002104

Linda's first appeal is untimely. Linda argues that her appeal arises from the family court's "order" of August 31, 2009. We do not believe that the August 31, 2009 order is the appropriate order from which to appeal with respect to the 401(k). Upon review of the August 31, 2009 hearing, it appears that no appealable order was made regarding the 401(k). At that hearing, the family court addressed a motion for production of documents relevant to the assets that had been previously allocated in its January 26, 2009 order and as modified by the July 10, 2009 order. The family court declined to address division of the 401(k) and verbally indicated that Linda had failed to raise the issue previously; therefore, it

was not within the court's jurisdiction to address the issue.[5] The family court also declined to make any written determination regarding the 401(k). For these reasons, we conclude that the August 31, 2009 order was not the appropriate order from which to appeal with respect to the 401(k).

Ordinarily, the 401(k) would have been addressed in the family court's January 26, 2009 order or modified by the July 10, 2009 order dividing the marital estate. Linda had adequate opportunity to address this omission. However, Linda did not file a direct appeal from that order nor did she address the omission in her motion to alter or amend that order. When ruling on the parties' motions to alter or amend on July 10, 2009, the family court granted Linda's request that finality language be included in order. It was incumbent upon Linda to ask the court to amend its order to include a finding relevant to the 401(k) at issue no later than ten days from the entry of the July 10, 2009 order, CR 52.02 and CR 59.05, or to file a notice of appeal within 30 days after the date of notation of service of the judgment or order being appealed. CR 73.02(1)(a) & (e). "The filing of the notice of appeal within the time limit prescribed is mandatory and jurisdictional, and the appeal must be dismissed if the appellant fails to comply." *Hardin v. Waddell*, 316 S.W.2d 367, 368 (Ky. 1958). Linda failed to timely raise the issue before the family court and also failed to timely appeal. Hence, Appeal No. 2009-CA-002104 is hereby DISMISSED as untimely.

[5] When hearing Linda's motion for request for production of documents, the family court acted pursuant to CR 70, which gives a court authority to enforce its previously entered judgments. However, a court may not otherwise alter or amend its judgments unless done so not later than ten days after entry. CR 52.02; CR 59.05

2. Appeal No. 2010-CA-001615

Turning to the second appeal, we first note that, as opposed to a CR 59.05 motion to alter, amend, or vacate a judgment, a CR 60.02 motion is the appropriate mechanism for seeking to reopen a final divorce decree. *Fry v. Kersey*, 833 S.W.2d 392, 393 (Ky. App. 1992). Even so, we find that the family court did not abuse its discretion when denying Linda's motion because Linda failed to demonstrate any extraordinary circumstance warranting a modification of the judgment to apportion the 401(k). *Dull v. George*, 982 S.W.2d 227, 229 (Ky. App. 1998).

As a preliminary matter, an interest a party had in property not disposed of in the divorce decree "is in the [same] posture as if the court had so adjudged their respective interests." *O'Neal v. O'Neal*, 122 S.W.3d 588, 590 (Ky. App. 2002) (quoting *Kidwell*, 564 S.W.2d at 536). Nevertheless, a final decree will not preclude a party from seeking a division of the property. *Fry*, 833 S.W.2d at 393.

Yet, because of this Court's policy in favor of finality of judgment, *id.* at 394 (citing *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959)), even where a party has an interest in the unapportioned property, a party must demonstrate that relief is warranted upon the basis of one of the following:

> (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. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken.

CR 60.02.

Here, Linda filed a CR 60.02 motion on July 12, 2010, which the family court properly construed as a motion seeking to reopen the January 26, 2009 order apportioning the parties' marital property and subsequently denied, reasoning that:

> The Petitioner seeks to have this Court modify an "Order" of August 31, 2009. The "Order" sought to be modified was an oral directive to the parties issued August 31, 2009 at the Court's motion hour.
>
> . . . .
>
> As noted above, the issue of the 401(k) plan was not submitted in the family pleadings or by motions to alter or amend. There was no motion to divide the 401(k) as an omitted asset presented to the Court prior to or on August 31, 2009. What was presented was a discovery motion and a request for transfer of "funds and accounts" addressed in the Court's Order and Judgment entered January 26, 2009. Petitioner's motion now before the Court, then, is in essence a motion to modify this Court's Order of January 26, 2009.
>
> The Court finds that the Petitioner seeks relief which cannot be afforded her pursuant to CR 60.02. She was fully aware of the omitted asset at the time of trial and the time of the filing of her motion to alter or amend filed pursuant to CR 59. This motion, made well more than a

> year after the entry of the Court's January 2009 order, is, therefore, untimely and will not be granted.

Although we agree with the result achieved by the trial court, our analysis differs. We may affirm the trial court on any basis that is supported by the record. *Kentucky Farm Bureau v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) (citing *Richmond v. Louisville & Jefferson County MSD*, 572 S.W.2d 601 (Ky. App. 1978)).

Linda does not cite to any particular subsection of CR 60.02 as a basis for relief; we therefore engage in a process of elimination. Because she filed her motion more than one year after the entry of the January 2009 order, Linda must prove that she is entitled to relief under CR 60.02(d), (e), or (f). However, Linda presents no argument which would entitle her to relief under subsections (d) or (e). We therefore restrict our analysis to CR 60.02(f), *i.e.*, "any other reason of an extraordinary nature justifying relief."

We believe that the *Fry* case is instructive on the issue with respect to whether relief is warranted under CR 60.02(f). In *Fry*, a wife filed a CR 60.02(f) motion, seeking to reopen a decree in order to recover her unassigned interest in her ex-husband's pension. Even after acknowledging that the wife did indeed have an interest in her ex-husband's pension plan, the court denied her motion, noting that

> [n]early five years elapsed between the entry of a decree dissolving the parties' marriage and the filing of Fry's CR 60.02(f) motion. Prior to that time, Fry had several occasions to discuss marital assets with the domestic

> relations commissioner and the trial court, but failed to mention the pension plan. . . . Fry offers no excuse for the failure to bring the existence of her former husband's pension plan to the attention of the commissioner or the court, nor does she suggest that after more than a decade of marriage she did not know of its existence. Neither does she offer any excuse for waiting five years following the entry of the decree of dissolution to first raise the issue. In these circumstances, we cannot say that the trial court erred in failing to find a "reason of an extraordinary nature" justifying the relief which she seeks.

Fry, 833 S.W.2d at 394.

In the case *sub judice*, Linda had many opportunities prior to the entry of the final decree to request that the court make a division of the 401(k). Moreover, she does not argue that she was unaware of its existence prior to the entry of the decree, nor does she offer any explanation for her failure to bring the 401(k) to the family court's attention prior to the entry of the decree. Under these facts, which are almost identical to those in *Fry*, we believe that Linda has not presented any reason of such an extraordinary nature to warrant reopening the decree to make a division of the 401(k). As such, we find that the trial court did not abuse its discretion when it found that Linda failed to make any showing that would warrant relief under CR 60.02(f).

For the reasons as stated, we hereby AFFIRM the Jefferson Circuit Court, Family Division in Appeal No. 2010-CA-001615-MR and hereby order DISMISSAL of Appeal No. 2009-CA-002104.

ALL CONCUR.

Entered: September 30, 2011 /c/ Joy A. Moore
JUDGE, KENTUCKY COURT OF APPEALS

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