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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001480-MR

EMMETT PAUL MOBLEY

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 09-CI-05097

ILSE MOBLEY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Emmett Paul Mobley (Paul) appeals from the findings of fact, conclusions of law and decree of dissolution entered by the Fayette Family Court on July 28, 2010. Paul argues that the family court's treatment of a marital pension plan violated the Employee Retirement Income Security Act (ERISA) and

his due process rights, and that the property division was inequitable and unsupported by the facts. We affirm.

Paul and Ilse Mobley were married on October 4, 1990, and have one child, Daniel. Paul is a physician who specializes in radiology. According to the parties' tax returns, he earned an annual income of \$321,559 in 2008, and \$263,842 in 2009. Ilse was not employed outside the home during the course of the marriage. At the time of the final hearing in July 2010, Ilse was sixty-one years of age, Paul fifty-nine and Daniel sixteen.

In September 2009, Paul left the family residence in Lexington and relocated to Hawaii to pursue missionary work. He rented a home in Hawaii for \$4,000 monthly and continued to work part-time as a radiologist. Ilse remained in the marital residence with Daniel. On September 28, 2009, Ilse filed a petition for legal separation in the Fayette Family Court, which was later amended to a petition for dissolution of marriage.

In November 2009, Ilse filed a motion for temporary relief requesting exclusive use of the marital residence, child support, maintenance and an order freezing a defined benefit pension plan belonging to Paul Mobley, M.D., P.S.C., containing approximately \$800,000. The motion stated that Ilse feared Paul would withdraw the funds from the plan and disappear. He was reluctant to allow the funds to be used for any other purpose and contended that any intrusion by the family court would violate his religious civil liberties and his right to privacy. At a hearing on December 18, 2009, Paul argued that Ilse was trying to freeze his funds

to prevent him from pursuing his calling as a missionary in Hawaii. Paul claimed that they had saved a large portion of his income in the pension plan in order to finance their retirement ministry.

The family court granted Ilse exclusive possession of the marital residence, allowed Paul to remove his personal property from the residence, ordered Paul to continue paying the first and second mortgages on the marital residence totaling approximately \$3,500 monthly, and an additional \$6,000 per month to cover Ilse and Daniel's expenses.

After Paul paid the mortgages in January, but only paid \$1,490 towards expenses, Ilse filed a motion to compel payment of the expenses. Following a hearing on January 29, 2010, wherein Paul was not present but was represented by counsel, the family court once again ordered Paul to pay the mortgages on the residence and \$6,000 monthly to Ilse. It further ordered that he not liquidate any portion of his pension accounts absent her written agreement. The family court later entered an order freezing Daniel's custodial accounts. Again, Paul failed to comply with the court's order to pay the mortgages and expenses.

On April 16, 2010, the family court conducted a hearing. Paul did not appear, was not represented by counsel, and did not participate by telephone. On April 20, 2010, the court entered an order directing him to pay the mortgages on the marital residence and stated that if he failed to do so, a show cause hearing would be scheduled. The order also allowed Ilse relief from the non-dissipation

order to access marital funds held in her German bank account to pay her living expenses.

Paul failed to abide by the order, and the family court entered an order scheduling a show cause hearing requiring Paul to appear in person or by telephone. Paul gave notice that he would not be appearing in person for the hearing, and he was unavailable by telephone when the court attempted to contact him on the day of the hearing. The family court found him in contempt of court for failing to abide by the court's earlier order requiring him to pay the mortgages and expenses and for failing to appear at the hearing in person or by telephone. To purge the contempt, the court ordered sums to be redeemed from the retirement account to cover various expenses including \$5,000 to Dr. David Feinberg for a custody evaluation requested by Paul, \$3,000 to Helen L. Bongard, the GAL for Daniel, and \$1,500 in accounting fees. The court characterized these redemptions as joint marital distributions. The remaining redemptions including sums to cover the mortgage arrears, a sum of \$18,000 to Ilse, and \$5,000 to her attorneys were characterized as distributions to Paul as an advance against his share of the marital estate. The family court also scheduled a final hearing and established pretrial compliance requirements.

On June 18, 2010, the family court entered an order following yet another hearing at which Paul failed to appear, request a telephonic hearing or file a written response. The court found that Paul failed to purge the contempt citations in its earlier order and imposed a sanction of sixty-days' incarceration at the Fayette

County Detention Center. After Paul failed to purge his contempt or to report to the detention center, the family court issued an order of arrest. The family court also granted Ilse's motion to join Paul Mobley, M.D., P.S.C. as a party to the action and appointed a receiver for the business. Paul was restrained from withdrawing funds or dissipating the assets of the business, and he was removed from his capacity as the "plan administrator" of the P.S.C.'s retirement plan. The receiver was appointed as administrator of the plan.

Paul did not comply with the family court's pretrial disclosure requirements. Specifically, he failed to file a witness list, an exhibit binder, or a final verified disclosure statement. Ilse successfully moved the court to exclude Paul's witnesses and exhibits and to deem her final verified disclosure statement as established.

The final hearing was held on July 28, 2010. Paul did not appear in person or telephonically, nor did counsel appear on his behalf. Ilse testified and presented evidence regarding the value of the marital estate, Paul's income and Daniel's expenses. Ilse stated that she would waive her claim for maintenance in light of Paul's ongoing refusal to pay her expenses and requested the court to award her a greater share of the marital estate.

In its findings of fact and conclusions of law, the family court ordered Paul to pay \$2,897.49 per month in child support. The court arrived at this amount after finding that Paul's monthly income was \$21,986, based on his proposed 2009 income tax returns. The court imputed income of \$2,083 per month to Ilse, after

noting that she had not worked outside the home for twenty years. Ilse testified that Daniel's reasonable monthly expenses are \$3,172. The family court found this to be reasonable noting that Daniel had always attended private schools and Paul had intended to enroll him in a private school in Hawaii at a cost of \$17,000 per year.

The family court restored to Ilse 17,000 Euros of nonmarital property in a German checking account. She was awarded the entire Paul Mobley M.D., P.S.C. pension plan account valued at approximately \$700,000. She also agreed to pay income tax liability of approximately \$60,000 and her attorney's fees of \$27,500. She was awarded the marital residence that was in foreclosure and had little or no equity. Ilse was also awarded a 2002 BMW automobile, all checking and savings accounts in her name and her German government pension plan. She was ordered to pay all credit card debt, consumer debt and personal debt, GAL fees, joint personal tax preparation fees, and fees to avoid foreclosure.

Paul was awarded two vehicles and their debt, a Chase joint checking account, all checking and savings accounts in his name, a defined benefit plan account valued at approximately \$6,000, an IRA account valued at approximately \$3,600, Paul Mobley, M.D., P.S.C. and all its assets and debts other than the pension plan, and all interest or receivables from Kentucky Medical Imaging Associates. The family court found the value of the medical practice to be \$400,000, or two times its annual earnings as shown on Paul's 2008 income tax return.

The court acknowledged that the division of property and debt was unequal but equitable due to the economic circumstances of the parties, including the fact that Ilse was not awarded maintenance. This appeal followed.

Paul presents three issues: (1) that violations of ERISA were used throughout the dissolution proceedings as a method of economic restraint and abuse; (2) that these ERISA violations resulted in violations of his civil liberties; and (3) that there was a lack of proper basis for the final property division, because it was based in large part on improper factual determinations introduced by Ilse's attorneys.

When disposing of property in a marital dissolution action, the trial court is required by KRS 403.190 to follow a three-step process: (1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) the trial court equitably divides the marital property between the parties. *Travis v. Travis*, 59 S.W.3d 904, 908-909 (Ky. 2001). "KRS 403.190(3) creates a presumption that all property acquired during the marriage is marital. This presumption must be rebutted by clear and convincing evidence." *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky.App. 1998). On appeal, we review the family court's findings of fact only to determine if they are clearly erroneous. CR 52.01. "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

Paul's first argument concerns the family court's treatment of the Paul Mobley, M.D., P.S.C. pension plan. Paul decided that he wanted to retire to Hawaii, pursue his vocation as a minister and work part-time. He argues that the court abused civil process to reverse his vocational choice and family religious ministry decision. Specifically, he contends that the orders entered by the family court concerning this pension plan were not in compliance with ERISA rules.

In *Smith v. Rice*, 139 S.W.3d 539 (Ky.App. 2004), this Court discussed the interaction between ERISA and state domestic relations law:

[T]he Employee Retirement Income Security Act (ERISA) . . . limits the divisibility of pensions. In order to qualify as an ERISA pension plan, a pension plan must "provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Accordingly, "alienation or assignment of benefits is generally prohibited under [an ERISA] pension plan." *Hogle v. Hogle*, 732 N.E.2d 1278, 1279 (Ind.Ct.App. 2000). However, "the Retirement Equity Act (REA) amendments to ERISA in 1984 created a limited exception for a state domestic relations order [which] is a 'qualified domestic relations order.'" *Id.* at 1279 (*citing Von Haden v. Supervised Estate of Von Haden*, 699 N.E.2d 301, 304 (Ind.Ct.App. 1998)).

A QDRO is a "judgment, decree, or order" "made pursuant to a State domestic relations law" that "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant[.]" 29 U.S.C. § 1056(d)(3)(B)(ii)(I). Such an order "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan[.]" § 1056(d)(3)(B)(i)(I). Further, a QDRO must clearly specify as follows:

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

§ 1056(d)(3)(C). Finally, an order qualifies as a QDRO only if it:

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

§ 1056(d)(3)(D).

Smith, 139 S.W.3d at 542.

Paul argues that all domestic relations orders in this case were nonqualified because they were not in compliance with the ERISA rules. Whether an order constitutes a valid QDRO under ERISA “is a question of law for this court to determine *de novo*.” *Id.* The standard for determining whether a QDRO is valid is substantial compliance. *Id.* Indeed, “[t]o require more specificity would defeat

the purpose of the provision creating an exception to inalienability for qualified domestic relations orders.” *Id.* at 543 (internal citations and quotations omitted).

Paul fails to explain with any specificity how the family court’s orders failed to substantially comply with the requirements outlined above. Our review of the orders indicates that they contained the names and address of the payees, the amounts they were to be paid, the number and period of the payments and the plan to which the order applied. “It is not our function as an appellate court to research and construct a party’s legal arguments, and we decline to do so here.” *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky.App. 2005).

Paul further argues the court improperly used the state police power of contempt to coerce him back into full-time professional employment, by imposing a large debt burden upon him.

We review the trial court’s exercise of its contempt powers for abuse of discretion, but we apply the clear error standard to the underlying findings of fact.

In a civil contempt proceeding, the initial burden is on the party seeking sanctions to show by clear and convincing evidence that the alleged contemnor has violated a valid court order. If the party is seeking compensation, it must also prove the amount. Once the moving party makes out a prima facie case, a presumption of contempt arises, and the burden of production shifts to the alleged contemnor to show, clearly and convincingly, that he or she was unable to comply with the court’s order or was, for some other reason, justified in not complying. This burden is a heavy one and is not satisfied by mere assertions of inability. The alleged contemnor must offer evidence tending to show clearly that he or she made all reasonable efforts to comply. If the alleged contemnor

makes a sufficient showing, then the presumption of contempt dissolves and the trial court must make its determination from the totality of the evidence, with the ultimate burden of persuasion on the movant.

Commonwealth, Cabinet for Health and Family Servs. v. Ivy, 353 S.W.3d 324, 332-333 (Ky. 2011).

Paul has made no references to the record showing that he made all reasonable efforts to comply with the court's orders. According to Paul's own submissions to the court, his income in Hawaii from part-time employment for the month of January 2010 was \$12,800. The family court ordered him to pay \$6,000 in expenses and \$3,500 in mortgage payments, leaving him with \$3,300 per month. Under the circumstances, there was no abuse of discretion.

Finally, Paul disputes the family court's valuation and division of the marital property. He argues that there were numerous unlisted debts and multiple improper factual statements that resulted in his award being over \$500,000 less and Ilse's award being over \$400,000 more than was listed in the final judgment. Specifically, he argues that his business, Paul Mobley M.D., P.S.C., should have been valued at \$23,000 rather than \$400,000, and the business was merely a tax vehicle for pension investments and possesses no significant assets. He further disputes the valuation of Kentucky Medical Imaging Associates Gross Accounts Receivable, which he claims had zero value rather than the \$80,000 stated by Ilse's lawyers. Next, he argues that the family court overlooked \$132,355 of Ilse's personal marital property consisting of furniture, appliances, household items and

personal effects in the marital residence. He argues that by failing to include this amount, the family court's overall property division is fundamentally unsound, unsubstantial, and without proper basis.

Paul was given adequate opportunities to present evidence to the family court at the final hearing regarding the valuation of these assets. He declined to do so by failing to comply with the court's pretrial disclosure requirements. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). Moreover, Paul did not make a motion for additional findings under CR 52.04, which prohibits reversal or remand for failure to make a finding of fact if the appellant did not request or move for such a finding. *Jones v. Jones*, 577 S.W.2d 43, 46 (Ky.App. 1979).

The findings of fact, conclusions of law and decree of dissolution entered by the Fayette Family Court is affirmed.

ALL CONCUR.

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