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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001961-MR

PATRICIA L. SULLIVAN (NOW SULLIVAN-SCHRENK) APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT, FAMILY DIVISION
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 10-CI-502172

ALVA R. SULLIVAN APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Patricia L. Sullivan (now Sullivan-Schrenk) has appealed from the September 15, 2010, order of the Jefferson Circuit Court, Family Division, denying her motion to modify the court's earlier order and decree related to the dissolution of her marriage to Alva R. Sullivan. Finding no error in the family court's ruling, we affirm.

Patricia initiated this action more than two decades ago when she filed a petition to dissolve her marriage to her former husband, Alva, in Jefferson Circuit Court on June 10, 1991. At that time, the parties were the owners of Sullivan Colleges Systems, Inc ("SCS"). The circuit court entered a decree dissolving the marriage on April 9, 1998. The decree contained extensive findings of fact and conclusions of law concerning the valuation and distribution of SCS. The court ultimately ordered a split of the SCS stock with 49.9% going to Patricia and 50.1% going to Alva, giving him the majority interest, but ordered the parties to enter into a contract setting forth protections for Patricia's minority interest. The decree was modified three times over the next year to include rulings concerning the protections as well as ordering the payment of an annual 10% dividend split between the parties. The court specifically declined Patricia's request to reconsider the amount of the stock dividend and to order a 50% dividend. The court then entered a Qualified Domestic Relations Order ("QDRO") in 2001 related to the transferring of assets from Alva's profit sharing plan to Patricia's in order to effectuate their agreement to balance the distribution of assets.

The matter returned to the circuit court in 2010 when Patricia filed her motion to modify, in which she requested a 70% dividend be paid to the parties. She argued that the 10% dividend was unconscionable in light of Alva's control over the school's finances and her allegations that he was hoarding corporate profits. In support, Patricia cited to Kentucky Rules of Civil Procedure (CR) 60.02 and Kentucky Revised Statutes (KRS) 403.250. Alva objected, stating that Patricia

had no legal authority to support her motion. The now-family court denied Patricia's motion in an order entered September 15, 2010.[1] This appeal now follows.

On appeal, Patricia continues to argue that she is entitled to relief pursuant to both CR 60.02(d) and (f) and KRS 403.250; that *res judicata* does not act to bar her request; and that the family court retained the authority to modify the prior distribution rulings because they were all interlocutory and subject to modification at any time. Alva disagrees with Patricia's assertions, arguing that the family court's ruling was correct and that Patricia failed to preserve the issue concerning finality of the decree by first raising it before the family court. Regardless of the preservation issue, Alva asserts that the decree was final at the latest in 2001 when the QDRO was entered and that Patricia failed to appeal from the rulings at that time.

We have thoroughly reviewed the family court's opinion and the parties' arguments in their respective briefs. Based upon our review, we believe that the family court's opinion is correct as a matter of law, and we shall adopt that opinion as our own:

> This case comes before the Court on Petitioner's June 9, 2010 motion, pursuant to KRS 403.250 and Civil Rule 60.02, to modify Findings of Fact, Conclusion of Law, and Decree entered April 9, 1998 and subsequently modified on November 2, 1998, February 12, 1999, and April 6, 1999 (cumulatively "Decree"). Petitioner, Patricia Sullivan-Schrenk ("Patricia"), filed memoranda

[1] On June 14, 2010, Jefferson Circuit Court, Division 2 transferred this case to family court as all dissolution of marriage cases are now allotted to the Circuit Court, Family Division.

supporting her position on June 9, and August 13, 2010. Respondent, Alva Sullivan ("Alva"), filed memoranda on July 14, and August 30, 2010 objecting to modification of the Decree.

This case originally began in Jefferson Circuit Court, Division 2[2] on June 10, 1991 when Patricia filed a petition for dissolution of marriage. The parties reconciled but then again separated in March 1992. They entered into an agreement on April 6, 1995. Jefferson Circuit Court, Division 2 entered an Order on April 16, 1996 finding that the April 6, 1995 agreement was a contract to negotiate, not a settlement of the issues. The April 16, 1996 Order directed the parties to schedule a trial date.

Prior to the January 1998 trial, the parties resolved all issues except those related to Sullivan University. Patricia's June 9, 2010 pleading was the first pleading filed since March 15, 2001 when Jefferson Circuit Court, Division 2 entered a Qualified Domestic Relations Order.

Following lengthy hearings and the filing of memoranda by both parties, under the Decree Alva was allocated 50.1% of the stock in Sullivan University, a Kentucky S corporation, with Patricia being allocated the remaining 49.9%. The Decree further awarded a 5% dividend to each party specifically overruling, following thoughtful analysis, Patricia's motion for a combined 50% dividend for the parties. Patricia now seeks a 70% total dividend or 35% to each party.

The basis for her claim is that Alva is allegedly controlling the finances of Sullivan University in a manner that prevents a larger dividend allocation to each party. She alleges that earnings are accumulated and taxed at twice the rate of earnings that are distributed (see Patricia's June 9, 2010 memorandum, p. 6); that this behavior is unreasonable in a business sense (p. 7); that accumulation of millions of dollars in earnings as assets

[2] On June 14, 2010, Jefferson Circuit Court, Division 2, transferred case number 91 CI 3781 to Jefferson Circuit Court – Family Division 5 as all dissolution of marriage cases are now allotted to the Circuit Court, Family Division.

causes Sullivan University to incur negative tax effects (p. 9); and that Sullivan University has incurred tax penalties (p. 2). Patricia also claims she is being denied access to corporate documents (p. 2). Alva notes that because of the considerable growth and success of Sullivan University under his leadership, the amount of each party's annual dividend has increased, according to Patricia's own figures, from $176,061 in 1998 to $963,996.15 (p. 6), or nearly $1 million for fiscal year 2009.

Statutory Remedies

Patricia's motion for modification of the Decree is basically an action by a minority shareholder dissatisfied with the actions of the majority shareholder. Jefferson Circuit Court, Division 2 issued an Order on September 20, 1999 advising the parties not to ignore statutory remedies. As stated on unnumbered page 3 of the September 20, 1999 Order:

> KRS 271B.16-010, et. Seq., permits a shareholder to have access to certain information such as minutes, accounting records, etc. The statutes also provide a procedure for obtaining such access when it has been refused.

Patricia appears to be ignoring KRS 271B.16-010, et. Seq. as well as other statutory remedies. KRS 271B.8-300, et. Seq. involves the standards of conduct for directors. Directors must act in a manner honestly believed to be in the best interest of the corporation. KRS 271B.8-300(1)(c). Monetary damages may be available if the director's action "constitutes willful misconduct or wanton or reckless disregard for the best interests of the corporation and its *shareholders*." KRS 271B.8-300(5)(b). Emphasis added.

KRS 271B.8-400, et. Seq. involves the standards and duties of officers. Officers must act in a manner honestly believed to be in the best interest of the corporation. KRS 271B.8-420(1)(c). Monetary damages

may be available if the officer's action "constitutes willful misconduct or wanton or reckless disregard for the best interests of the corporation or its *shareholders*." KRS 271B.8-420(5)(b). Emphasis added. This Court considers that the alleged intentional actions taken by a director or officer that causes Sullivan University to incur negative tax effects could be found by an appropriate court to be contrary to the best interest of Sullivan University. Patricia should not ignore statutory remedies available to her.

Res Judicata

During September 1998, Patricia submitted a position statement regarding corporate protections. In this pleading she sought annual distributions of at least 50% of the net income after taxes in addition to dividends sufficient for each party to pay taxes upon the subchapter S earnings of Sullivan University. Judge James Shake entered an Order on November 2, 1998 finding that a 50% dividend in addition to the distribution for taxes was far too high. November 2, 1998, unnumbered page 2. No appeal was taken from the final judgment. Patricia now seeks a 70% distribution.

> The doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and the privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998) (quoting 46 Am.Jur.2d *Judgments* § 514).

Res Judicata consists of two subparts: issue preclusion and claim preclusion.

> Claim preclusion bars a party from re-litigating a previously adjudicated cause of

> action and entirely bars a new lawsuit on the same cause of action. . . . Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical. The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action. *Id*. at 465.

Issue preclusion is also known as collateral estoppel and is applicable when the party to be bound was a party in the prior action. Collateral estoppel requires identity of issues; final decision on the merits; a full and fair opportunity to litigate the necessary issue; and a prior losing litigant. *Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997).

Patricia argues that the issue previously decided was how to split the marital property and that the subsequent event of Sullivan University's extraordinary financial growth is a different issue involving how that growth affects the allocation of property in the Decree. This Court disagrees.

Judge Shake detailed in the April 9, 1998 Order the growth Sullivan University incurred from 1962 to 1998. In 1998, Sullivan University was the 75th largest privately owned school in the nation. April 9, 1998 Order, Unnumbered page 3. The purpose of the Court ordering a dividend was that Patricia had needs to meet and that a vast disparity existed between Alva's salary and Patricia's salary. The Court set forth a dividend which is found to be equitable. November 2, 1998 Order, unnumbered page 2.

Patricia acknowledges that she and Alva are receiving the same annual dividend (which has grown by

nearly 550 percent since 1998) but she then notes that Alva receives a hefty salary and a large expense allowance. The disparity in income was previously addressed. In the November 2, 1998 Order, Patricia was to receive the salary and benefits that she enjoyed with a reasonable cost of living.

This Court finds that Patricia had a full and fair opportunity to litigate the amount of dividends to be distributed by Sullivan University and that a final decision on the merits was issued in the Decree. Patricia is now precluded from relitigating the amount of dividends in this action under the doctrine of Res Judicata.

KRS 403.250

Patricia's initial memorandum referred to KRS 403.250 and CR 60.02(d). In her second memorandum, Patricia also referred to CR 60.02(f). KRS 403.250 provides no additional assistance to Patricia in her motion to modify a property decree.

> (1) Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting *maintenance* may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.
>
> (2) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future *maintenance* is terminated upon the death of either party or the remarriage of the party receiving maintenance.

KRS 403.250. Emphasis added.

The majority of KRS 403.250 specifically involves claims for modification of maintenance. Maintenance modification is not the issue in Patricia's motion to modify the Decree. Patricia cites several cases involving only maintenance claims to support her motion to modify the Decree. Modification of *maintenance* requires a showing of changes circumstances.

The second sentence of KRS 403.250(1) does not involve changed circumstances and allows modification of a property disposition only under conditions "that justify the reopening of a judgment under the laws of this state." "The law of this state relating to the reopening of decrees is found in CR 60.02." *Fry v. Kersey*, 833 S.W.2d 392, 394 (Ky. App. 1992). For this Court to grant Patricia's motion to modify the Decree, she must meet at least one of the grounds set forth in CR 60.02. A change in circumstances is not one of the six grounds under CR 60.02 allowing a court to relieve a party from a final judgment.

CR 60.02(d)

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; . . . (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. A motion under this rule does not affect the finality of a judgment or suspend its operation.

CR 60.02

> Fraud affecting the proceedings is also referred to as extrinsic fraud. Extrinsic fraud involves conduct outside the courtroom that prevents a party from fully and fairly presenting his or her side of the case. Said conduct must occur *prior* to the entry of a judgment in order to impact the final judgment. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 818-819 (Ky. 2002). In this case, Patricia is not alleging conduct occurring while the action was pending; but alleged conduct by Alva up to ten and eleven years following the entry of the decree and final judgment. Extrinsic fraud is different from fraud perpetrated in [the] courtroom or by testimony under oath. Fraud perpetrated in the courtroom or by testimony under oath would be grounds for modification under CR 60.02(c) and subject to a one year limitation. *Id*.
>
> Patricia relies upon Alva's action post decree to support her CR 60.02(d) motion to modify the Decree. She has presented no evidence that Alva's action prior to entry of the Decree prevented her from presenting fully and fairly her side of the case. This Court will not modify a Decree involving non-contemporaneous post-decree claims.
>
> **CR 60.02(f)**
>
> Patricia fails to present any reason why she cannot obtain relief via statutory remedies; therefore, CR 60.02(f), which requires any other reason of extraordinary nature justifying relief, is not applicable.
>
> The Court being sufficiently advised, **IT IS ORDERED** that Petitioner's motion to modify the Decree is **DENIED** based on all the reasons set forth herein.
>
> This is a final and appealable Order.

The only remaining issue for this Court to consider is Patricia's alternative argument that the family court erred in refusing to consider her motion to modify

because all of the prior property distribution rulings were interlocutory and, therefore, were subject to modification at any time. She claims that she preserved the issue for our review in a footnote in her reply to Alva's response to her motion to modify. The footnote states in its entirety: "The record itself contradicts Sullivan's argument that the Decree was final in 1999. Litigation over the terms of the Decree and shareholder distributions continued into 2000, partially due to Sullivan's attempts to withhold the distributions. (*Sullivan v. Schrenk*, No. 91-CI-03781, Opinion and Order, Jan. 5, 2000)." The January 5, 2000, ruling addressed Patricia's motion for contempt related to the amount of the dividend payable for 1998.

Alva, on the other hand, contends that Patricia neither preserved this issue for our review in the family court nor timely appealed the prior rulings. We agree with Alva that Patricia failed to preserve this issue by first raising the issue of whether the decree was final in the family court. "The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court." *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980). Patricia's citation to a footnote in her reply is insufficient, by itself, to preserve this issue, especially in light of the fact that the family court did not address finality in its opinion on review.

Although the family court was not given an opportunity to consider this issue, we are inclined to agree with Alva that the matter was final by at least the

date the QDRO was entered in 2001. The record reflects that the parties continued to litigate matters related to the disposition of property following the entry of the decree. The circuit court acknowledged in its September 20, 1999, ruling that all of the parties' rights had not been adjudicated by that time because the documents of protection, upon which the decree was made subject, had not been prepared. Therefore, the court was free to consider the parties' motions and arguments until such time as all of the rights had been adjudicated. As stated by Alva, this occurred upon the entry of the QDRO, because at that time all of the parties' rights had been decided.

Furthermore, we also agree with Alva that for purposes of *res judicata* and collateral estoppel, the matter became final upon the entry of the decree in 1998. *See Moore v. Commonwealth, Cabinet for Human Resources*, 954 S.W.2d 317, 319 (Ky. 1997), quoting *Markert v. Behm*, 394 N.W.2d 239, 242 (Minn. App. 1986) ("a divorce decree constitutes a final judgment on the merits for the purposes of *res judicata* and collateral estoppel."). We further recognize that Patricia filed a timely CR 59.05 motion following the entry of the decree in 1998 as well as the CR 60.02 motion in 2010, both of which may only be filed from a final judgment. And there has been no finding that Patricia's CR 60.02(f) motion was "made within a reasonable time" pursuant to the statute. Accordingly, we reject Patricia's argument that the decree was interlocutory and subject to modification at any time.

For the foregoing reasons, the order of the Jefferson Family Court is affirmed.

CLAYTON, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

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