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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002051-MR

DANA WESLEY BARNES — APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 03-CI-00523

LORETTA BARNES — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND KELLER, JUDGES.

ACREE, CHIEF JUDGE: Dana Wesley Barnes appeals the September 8, 2009 order dismissing his various motions to amend the decree and dissolution of marriage because he failed to appear at the hearing on those motions. He also appeals that portion of the October 15, 2010 order by which the Hardin Family Court declined to credit his child support arrearage in the amount of a monthly

disability benefit payment received by his daughters, and to make termination of his spousal maintenance obligation retroactive. For the reasons stated below, we conclude that this Court lacks jurisdiction to address the September 8, 2009 order because Dana failed to file a timely notice of appeal from that order. With regard to the October 15, 2010 order from which a timely appeal was taken, we affirm in part, reverse in part, and remand for entry of an order consistent with this opinion.

Facts and procedure

Dana and Loretta Barnes were married on April 30, 1988, and had two children, the first born May 23, 1990, and the second born April 4, 1999. Dana and Loretta separated in 2003. The children resided with Loretta. Pending entry of the order of dissolution, the family court entered a temporary order establishing Dana's obligations of child support and maintenance. The parties subsequently modified the temporary order by entering into a separation agreement which they read into the family court's record on September 3, 2003. In addition to paying child support and maintenance, Dana agreed to repay a sizeable marital debt owed to the Fort Knox Credit Union. The decree of dissolution, entered October 4, 2004, incorporated the separation agreement.

It appears Dana never complied with the court's orders, including the temporary order, the separation agreement, and the decree incorporating the agreement, and a substantial arrearage rapidly accrued. To enforce its orders, the family court entered wage assignments; Dana was also prosecuted for flagrant nonsupport.

On February 25, 2009, Dana filed a motion to modify his existing obligations as follows: a reduction in child support from $953.70 monthly due to the emancipation of the parties' elder child; a reduction in the monthly maintenance payment he owed Loretta, arguably in accordance with the separation agreement; and a credit against Dana's child support arrearage to reflect the difference between the child care expenses allotted in the child support award ($420 monthly) and the amount Loretta actually spent on child care.

Dana also requested permission to appear by telephone and for any reduction in maintenance to be retroactive to the date Loretta began receiving military retirement benefits. The reason Dana gave for desiring to appear telephonically was that he resided in Maryland. In a motion dated July 1, 2009, Loretta requested that Dana not be permitted to testify telephonically; she represented her belief that Dana's wish to not appear in person was actually motivated by his desire to avoid arrest pursuant to a Kentucky bench warrant related to the flagrant nonsupport charge against him.

In another motion of the same date, Loretta demanded that Dana be ordered to pay her the outstanding balance he owed for maintenance, retirement benefits,[1] and the credit union loan.

The family court scheduled a hearing for July 9, 2009. Dana did not appear, but his attorney appeared on Dana's behalf. In an order entered September 8, 2009, the family court denied Dana's motions because he failed to appear at the hearing, despite never having ruled on his motion for permission to appear telephonically. The court also entered judgment against Dana for his unpaid maintenance obligation in the amount of $18,900; unpaid retirement benefits totaling $22,181.41 for the period beginning July 1, 2009; payments Loretta made on the credit union loan amounting to $16,473; and "CRDP"[2] from April 2004 to August 2009 totaling $30,085.12. Interest was also assessed on the retirement benefits and Loretta's payment of the loan from the credit union.

Precisely ten days later, on September 18, 2009, Dana filed a motion to alter, amend, or vacate the order of September 8, 2009, pursuant to Kentucky Rule of

[1] Loretta represented that, although she had been receiving some military retirement benefits, the amounts received were significantly less than what she should have received because Dana had converted a portion of his retirement account to a disability account for the purpose of depriving her of a substantial portion of the benefits to which she was entitled. Loretta received payment from Dana's "disposable retired pay." "Disposable retired or retainer pay," as defined in 10 U.S.C. § 1408, is simply the retired pay the Defense Finance and Accounting Service (DFAS) sends to the retiree after the government deducts: (A) what was previously overpaid by the government to the retiree while a service member, (B) forfeitures resulting from military discipline, (C) portions of the retired pay attributable to disability payments to the service member who retires for reasons of physical disability, and (D) annuities set up by the service member for the benefit of his spouse or children. 10 U.S.C. § 1408(a)(4)(A)-(D).

[2] "CRDP" is "Concurrent Retired and Disability Pay." As of January 1, 2004, qualified retirees with a disability rating over 50% could receive both pension and VA benefits, which the military calls Concurrent Retirement and Disability Pay (CRDP). Pub.L. 108–136 § 641, 117 Stat. 1392, 1511 (2003); 10 U.S.C. § 1414 (Supp. 2004).

Civil Procedure (CR) 59.05. The motion stated no grounds, stating only that "[a] memorandum in support of the motion shall be filed prior to the date of the motion."[3] The memo was filed on October 5, 2009. In it, Dana argued that his presence was not required either as a matter of law or for full litigation of the issues. The court did not immediately rule on the motion.

Dana filed another motion on November 24, 2009, in which he requested reductions of his various obligations to Loretta on essentially the same grounds as he raised in his motion of February 25, 2009. A hearing was set for May 27, 2010.

The family court entered an order on October 15, 2010. While the family court reduced Dana's child support arrearage and monthly child support obligation and ended his maintenance obligation effective November 1, 2010, it also made several rulings adverse to Dana. Dana's motion to alter, amend, or vacate filed September 18, 2009, was denied, as was the motion to offset his existing maintenance balance by retirement payments Loretta had received in the past. Finally, Dana's motion for a credit against his arrearage for the amounts his children received in monthly disability payments was denied.

Dana filed a single Notice of Appeal from the September 8, 2009 and October 15, 2010 orders on November 12, 2010. Before this Court he raises three arguments: (1) that the family court judgment of September 8, 2009, should be vacated because the court denied Dana's motion on an improper basis; (2) that the family court erred in declining to credit him with the monthly payments the

[3] "[P]rior to the date of the motion" apparently means prior to the date the motion would be heard.

children received in disability benefits; and (3) that the family court incorrectly declined to modify his maintenance obligation retroactive to the date Loretta began receiving her share of military retirement benefits.

Dana's appeal of the September 8, 2009 order is untimely

Dana believes the family court dismissed his first motion, filed February 25, 2009, on an improper basis. More precisely, Dana argues his presence was not required at the hearing on his motion, and the dismissal on that basis should be reversed.

We are not permitted to review the family court's order of September 8, 2009, however, because it is not the subject of a timely appeal.

Ordinarily, a timely CR 59.05 motion to alter, amend, or vacate an order of a trial court will toll the 30-day period the parties have to file a notice of appeal. CR 73.02(1)(e). When the motion states no grounds, however, it is deficient and does not toll the 30-day period in which to file a notice of appeal. *Matthews v. Viking Energy Holdings, LLC*, 341 S.W.3d 594, 597 (Ky. App. 2011)(citing the requirement of CR 7.02 that all motions "shall state with particularity the grounds therefor"). If not supplemented with grounds for the motion before the expiration of the ten-day period, the motion is rendered invalid, and the party must file a notice of appeal within thirty days of entry of the judgment or order. *Id.* Any appeal filed after that date is untimely and subject to automatic dismissal or denial. CR 73.02(2), *Stewart v. Kentucky Lottery Corp.,* 986 S.W.2d 918, 921 (Ky.App. 1998) (citing *Johnson v. Smith*, 885 S.W.2d 994 (Ky. 1994)).

Here, because Dana's motion to alter, amend, or vacate stated no basis[4] and was not supplemented by a memorandum until twenty-seven days after entry of the contested order, October 5, 2009, he was required to appeal the court's order of September 8, 2009, no later than October 8, 2009. CR 73.02(1)(a). Dana did not file his notice of appeal, however, until November 12, 2010, well after the time prescribed by CR 73.02. Having no jurisdiction to hear that appeal, we will not consider his arguments relating to the September 8, 2009 order.

Dana is entitled to credit against his child support arrearage for disability benefits paid to the minor children

Appeal from the October 15, 2010 order was timely. His first argument relating to that order concerns monthly benefits sent to Loretta for the children in the amount of $122.00, or $61.00 per child, due to Dana's disability. This payment was made from his CRDP account beginning August 1, 2005, and continued through entry of the family court's order on October 15, 2010. He asserts his child support arrearage should be offset by the total amount of payments made during that time, and cites KRS 403.211(15) in support of his argument.

[4] The entirety of his motion follows:

> Comes now the Petitioner, Dana Barnes, by and through counsel, and moves the court as follows:
>
> (1) Pursuant to CR 59.05, to alter, amend[,] or vacate the Order entered September 8, 2009[,] which grants a judgment for unpaid maintenance, military retirement benefits, CRDP[,] and other marital debt, and dismisses Petitioner's motions for failure to appear at the hearing addressing the motions. A memorandum in support of the motion shall be filed prior to the date of the motion.
>
> (2) To enter a written order concerning the Court's denial of Petitioner's motion to testify telephonically heard on July 7, 2009.

We may not reverse a child support determination of a family court lightly. "Within statutory parameters, the establishment, modification, and enforcement of child support obligations are left to the sound discretion of the trial court." *Jones v. Hammond*, 329 S.W.3d 331, 334 (Ky. App. 2010).[5]

KRS 403.211 provides in relevant part as follows:

> A payment of money received by a child as a result of a parental disability shall be credited against the child support obligation of the parent. . . . An amount received in excess of the child support obligation shall be credited against a child support arrearage owed by the parent that accrued subsequent to the date of the parental disability, but shall not be applied to an arrearage that accrued prior to the date of disability. The date of disability shall be determined by the paying agency.

KRS 403.211(15).[6]

This precise issue, whether a child support arrearage may be offset by disability payments to the minor children during the time the non-custodial parent failed to make child support payments, appears to be a matter of first impression in Kentucky.

As a general rule, child support obligations become vested when due, and a court may not "forgive" an arrearage accrued by a non-custodial parent; nor may a

[5] Although it would appear that the issue of whether Dana is entitled to a credit for the disability benefits paid to his children is a question of law reviewed *de novo*, the Supreme Court in *Board v. Board* analyzed a similar issue under the abuse of discretion standard. 690 S.W.3d 380, 381 (Ky. 1985) (The trial judge's finding that the social security benefits were a set-off against child support was within the court's discretion."). We are bound by the precedent of the Supreme Court. *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000).

[6] Dana has not argued that the monthly payment should be used to offset his current child support obligation to Loretta, which the statute plainly permits.

court retroactively reduce the amount of child support owed.[7] *Price v. Price,* 912 S.W.2d 44, 46 (Ky. 1995). Were we to characterize Dana's request to credit past disability payments against the arrearage as forgiveness of a vested obligation to Loretta, we would be required to prohibit it and affirm the family court.

That is not the proper characterization, however. The disability payments were actually made to and received by Loretta, and so should be credited against the arrearage. Discounting those amounts from the arrearage does not constitute retroactive modification of Dana's obligation, but recognition of the fact that a portion of Dana's child support obligation was already paid, albeit through no action of Dana's. *Board v. Board*, 690 S.W.2d 380, 381 ("There is a distinction between crediting an obligation with payment made from another source and increasing, decreasing or terminating, or otherwise modifying a specific dollar amount."). It was an abuse of discretion for the circuit court to rule otherwise.

Of course, the discount can apply only to the arrearage incurred subsequent to the date of Dana's disability, and cannot be used to offset the arrearage accrued prior to August 1, 2005, the date Loretta began receiving disability payments for the children.

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[7] A recognized exception to this rule is when the parents have agreed to a modification of child support. *Price,* 912 S.W.2d at 46 ("We have recognized that many parents do agree, without the aid of the courts, as to modifications of custody and child support. In those instances, a court has the power to recognize the modification of the child support obligation and reduce the arrearages accordingly.") (citations omitted).

Loretta has not filed a cross-appeal of the family court's decision to retroactively reduce Dana's child support arrearage by the difference between the childcare costs as allotted in calculation of his child support obligation and the childcare expenses Loretta actually incurred. We therefore will not disturb that ruling.

This opinion is consistent with the majority of other states which have ruled on the matter. *Pacana v. State,* 941 P.2d 1263, 1265 (Alaska 1997) ("More than ten states follow this rule in some form.") (citations omitted); *Louko v. McDonald*, 22 A.3d 433 (Vt. 2011) (allowing the credit and ruling it did not constitute modification of the order of child support); *Paulhe v. Riley*, 295 Wis.2d 541 (Wis.Ct.App. 2006) (holding that crediting a non-custodial parent for past disability payments is proper, even when that parent has no arrearage because he timely paid all child support obligations); *Crago v. Donovan*, 594 N.W.2d 726 (S.D. 1999); *In re marriage of Henry,* 622 N.E.2d 803 (Ill. 1993); *Weaks v. Weaks*, 821 S.W.2d 503 (Mo. 1991); *see also Children and Youth Services of Allegheny County v. Chorgo,* 491 A.2d 1374 (Pa. 1985).

That portion of the family court's order which declines to credit Dana's arrearage with past disability benefits paid to his minor children is reversed. We remand the matter for entry of an order reflecting our holding.

The settlement agreement did not require termination of maintenance on the date Loretta began receiving payments from Dana's retirement account

Dana argues the family court erred by failing to enforce the provision of the separation agreement which provides as follows:

> HUSBAND shall pay to WIFE the sum of $300.00 per month as spousal maintenance commencing on the first day of [the] month following the execution of this agreement, and continuing on the same day of each month thereafter until HUSBAND dies, WIFE dies, or WIFE remarrie[s], whichever shall first occur.

> The parties agree that the issue of maintenance shall be revisited when WIFE begins receiving her portion of HUSBAND's retirement as indicated below.

Dana maintains the above-quoted provisions evince the parties' intention that Loretta would not be entitled to additional maintenance once she began receiving payments from Dana's retirement account.

Proper application of this provision of the separation agreement, Dana argues, required the circuit court to make termination of his maintenance obligation retroactive to the date Loretta began receiving payment from the retirement account. That, in turn, would substantially reduce Dana's maintenance arrearage. We are not persuaded.

Maintenance obligations, like child support obligations, become vested when due, and a court may not retroactively reduce an arrearage absent statutory authorization or a prior agreement between the parties. *Pursley v. Pursley*, 144 S.W.3d 820, 828 (Ky. 2004); *see also Price v. Price*, 912 S.W.2d at 46; *see also* KRS 403.180(6). Because Dana believes the parties' separation agreement required modification of his maintenance obligation, we must interpret that agreement and discern the parties' intent by applying contract law.

"Terms of the [separation] agreement set forth in the decree . . . are enforceable as contract terms." KRS 403.180(5). "Questions relating to the construction, operation and effect of separation agreements between a husband and wife are governed, in general, by the rules and provisions applicable to the case of other contracts generally." *Richey v. Richey*, 389 S.W.2d 914, 917 (Ky.

1965)(citing 17A Am.Jur., Section 904, 92). The interpretation of a contract is a matter of law subject to *de novo* review. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). Our review of this matter is accordingly *de novo.*

Where the intention of the parties is clear from the plain language of the contract, it needs no interpretation, and "extrinsic evidence cannot be introduced to vary its terms." *C.C. Leonard Lumber Co. v. Reed*, 314 Ky. 703, 706, 236 S.W.2d 961, 962 (1951). Dana's entreaties that we rely upon the parties' testimony that they intended maintenance to end once retirement payments began will go unanswered because the contested portion of the settlement agreement is clear and unambiguous. The circuit court was correct in declining to rely upon evidence extraneous to the contract to determine the parties' intent.

We agree that Dana and Loretta's separation agreement *permitted* modification of the maintenance award once Loretta began receiving her portion of Dana's retirement benefits; we disagree that modification was *required* at that point. Rather, the plain language of the separation agreement, namely that portion declaring that the issue "shall be revisited," reveals only that the parties intended to re-negotiate or re-litigate the maintenance issue once retirement payments began; termination of Dana's maintenance obligation was not mandatory at that time, and the circuit court did not err in declining to make the order modifying maintenance effective when Loretta began receiving retirement payments.

Conclusions

Appeal of the September 8, 2009 order was untimely and, lacking jurisdiction to consider Dan's arguments relating to that order, we decline to address them. However, relative to the October 15, 2010 order, we conclude that Dana is entitled to an offset of his child support arrearage for disability benefits Loretta received on behalf of the children beginning August 1, 2005. The portion of the family court's order denying Dana that credit is reversed, and the matter is remanded for entry of an order consistent with this opinion. Any arrearage that accrued prior to that date is not subject to the credit. Dana has raised no other matters on appeal which mandate reversal, and we therefore affirm the remainder of the order.

KELLER, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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