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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002069-ME

ANTONIO SANCHEZ — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON S. FLEMING, JUDGE
ACTION NO. 87-CI-00829

VALERIE SANCHEZ, EX REL
THE COMMONWEALTH OF
KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

CLAYTON, JUDGE: This is an appeal of a decision of the Christian Family Court assessing an arrearage of child support on the appellant, Antonio Sanchez. Antonio brings this appeal asserting that the trial court should have granted him relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. After careful review, we reverse and remand.

BACKGROUND INFORMATION

Antonio and Valerie Sanchez were divorced on June 17, 1988, by a decree entered in the Christian Circuit Court. Custody of their three minor children, Antonie, Antoinette and Arrita, was awarded to Valerie.[1] Antonio was ordered to pay $300.00 per month, per child, in child support. Antonio lived in Illinois and was served by warning order, but since the parties were married in Kentucky and resided in Kentucky with their children during their marriage, the court found that it would have had personal jurisdiction over Antonio regardless.

Valerie's parents, Ollie and Verlie Henderson, obtained custody of the three children on September 7, 1989, and no child support was awarded to them for the care of the children. Antonio, however, made payments to the Henderson's to help defray the costs of raising them.

In 1994, an agreed petition was entered into between Valerie and Antonio in the Lake Superior Court of Lake County, Indiana, which stated that the youngest two Sanchez children were physically present in Indiana and were attending school there. Consequently, the Indiana court found that it was in the best interests of the children to remain with Antonio.

On November 22, 2000, an order altering and amending the final decree of dissolution of marriage was entered. In the order, an arrearage of $40,043.85 was declared due and owing to Valerie and the Commonwealth of Kentucky. That order was not appealed.

[1] The children are all adults now. We use their proper names because their initials are identical.

On September 5, 2002, Judge Judy Hall issued a docket order setting forth that Antonio owed Valerie an arrearage of $21,247.00 and the Commonwealth $23,896.85. On September 20, 2002, the court entered an order giving Antonio a credit and an offset amount of $7,388.36. The court found that Kentucky continued to have exclusive jurisdiction over the matter and that Antonio's original child support obligation had not been modified. This resulted in a balance for Valerie of $21,247.00 and of $17,069.49 to the Commonwealth. Antonio did not appeal this award.

On June 16, 2004, the award was amended to arrearage only as the youngest child, Arrita, had become emancipated and was no longer a student. On that date, the arrearage to the Commonwealth was $18,010.49 and $24,645.00 to Valerie. Antonio did not appeal these findings.

On July 22, 2005, Antonio filed a motion to reconsider or a motion to alter, amend or vacate pursuant to CR 60.02. He argued that the court had not had jurisdiction in 1998 to enter the divorce decree ending his marriage to Valerie. While he acknowledged that he knew about the 2002 hearing, he stated that he was unable to appear and did not retain counsel to represent him. Antonio also asserted that he had physical custody of two of the three children by agreement of the parties beginning in 1994 and, in 1997, by order of an Indiana court.

On September 8, 2005, Judge Hall denied Antonio's motion. She held that Antonio had waited seventeen years to contest the matter and that he did not set forth adequate grounds for the court to reopen the matter. Judge Hall based her

decision on a finding that three years from her previous order was not a reasonable time given the facts of the case. Antonio did not appeal this decision.

On August 27, 2009, Antonio filed a second motion for relief pursuant to CR 60.02. No new issues were raised in his motion and on October 26, 2009, Judge Jason Shea Fleming denied his motion. In denying the motion, Judge Fleming set forth the role of a successor judge in review the decisions of a prior judge. He found:

> The Court in its role as a successor Judge has to review the decisions of the previous Judge with great deference, and unless she abused her discretion in her findings of fact or was clearly erroneous in her conclusions of law, this Court was not going to disturb her findings.

Opinion at p. 3-4.

Judge Fleming went on to find that Antonio had been on notice since at least 1994 of his child support obligation. He also noted that Antonio had a Missouri attorney who would have known at least enough about procedure to advise him that appeals are time sensitive. At the same time, his 2002 judgment was not appealed. Judge Fleming also set forth the fact that Antonio's Kentucky counsel had not appealed the denial of his CR 60.02 motion. He found that Antonio's claims were estopped:

> This case is similar to *Carpenter v. Hines*, 2006 WL 504945 (Ky. App., 2006), in which the Court of Appeals of Kentucky found that in a case where the parties are the same, the causes of action were the same, and the action was decided on the merits, then a party is estopped from raising the issues again. *See Newman v. Newman*, 431 S.W.2d 417, 419 (Ky. 1970).

Opinion at p. 6.

Judge Fleming went on to hold that Antonio should have appealed Judge Hall's decision in 2002 or 2005 rather than relitigating the issue four years later with a different judge. This appeal followed Judge Fleming's ruling.

STANDARD OF REVIEW

CR 52.01 provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A judgment 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). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id. Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). With this standard in mind, we examine the merits of Antonio's appeal.

DISCUSSION

Antonio argues that the trial court erred in applying the law of the case doctrine and/or *res judicata* to deny him relief. He contends that the law of the case doctrine only applies to appellate decisions made in the case. The law of the case doctrine "is an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been." *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956). "The

doctrine is predicated upon the principle of finality.*"* *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007).

> The law of the case doctrine is similar to but distinct from the doctrine of *res judicata*. "There is a difference between such adherence (the law of the case doctrine) and *res adjudicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission." *Southern Ry. Co. v. Clift*, 260 U.S. 316, 43 S.Ct. 126, 67 L.Ed. 283, 284 (1922).

Id.

Judge Fleming does not make specific findings regarding either, doctrine but it is the heading of section "B" of his opinion. Neither the doctrine of *res judicata* nor the law of the case doctrine apply in this case.

Next, Antonio argues that the trial court never heard evidence on Antonio's equitable claims that the 2002 order reducing his arrearages to a judgment should be vacated or modified. He contends that while the trial court had authority to hear evidence, it denied him the opportunity to present it on his behalf.

Judge Fleming sets forth in his opinion the fact that after each judgment, Antonio had an opportunity to appeal the decision and never did so. This, he states, is the basis of his decision regarding the denial of the CR 60.02 motion.

The purpose of CR 60.02 is to bring before the court errors in judgments. *Davis v. Home Indem. Co.,* 659 S.W.2d 185 (Ky. 1983). In the present action, Antonio obtained custody of two of his children. There is also nothing in the record which indicates Valerie had physical custody of the children for any length of time. We believe the trial court should grant Antonio a hearing pursuant to CR

60.02, to allow him an opportunity to present evidence that he supported his children. Only then can an adequate determination be made regarding any arrearages in child support he may owe.

While the trial court sets forth that Anthony did not follow appropriate procedures regarding his case, Anthony had obtained a custody award from an Indiana court, thus, he should have an opportunity to present evidence of his financial support of his children.

Thus, we reverse the decision of the trial court and remand this case for further proceedings.

WINE, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

DIXON, JUDGE, DISSENTING. While sympathetic to Antonio's position, I must dissent with the majority opinion. I do not believe that Antonio is entitled to a hearing on his present motion. He has repeatedly disregarded court orders relating to child support. Antonio was clearly aware of the child support order entered by the Christian Circuit Court in 1988. Despite his contention now -- decades later -- that the court was without jurisdiction to enter its decree, the facts clearly support the court's authority under K.R.S. 403.140(1). Additionally, Antonio acknowledges his awareness of the court's order on arrearage in 2002, yet he did nothing. It was not until July of 2005 that he filed his first CR 60.02 motion. Antonio then failed to appeal the court's denial of that motion. Not until four years later did Antonio file his successive CR 60.02 motion based on the exact

same contentions as his 2005 motion. Certainly, the purpose of CR 60.02 is to bring errors in judgments before the court. However, this is not a *carte blanche* provision. For example, a motion based upon the first three provisions provided for in this rule must be brought within one year after a judgment is entered. Clearly provisions (d) and (e) do not apply here. Thus, only subsection (f) is available to Antonio as a means to modify the child support order.

Subsection (f) of CR 60.02 is a catchall provision for the rule. It "authorizes the court to grant relief when circumstances of undue hardship, not included in the other five grounds of the rule, would justify relief" and "may be invoked only under the most unusual circumstances." *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (Ky. 1963). While this subsection does not prescribe a time limit on availability, the motion must be made within a "reasonable time." "What constitutes a reasonable time in which to move to vacate a judgment under [this rule] is a matter that addresses itself to the sound discretion of the trial court." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Here, the Christian Family Court found in 2005 that Antonio had waited 17 years to contest the matter and had failed to allege adequate grounds to justify reopening the case. Perhaps Antonio had sufficient reason to dispute whether his grounds were "adequate," but appeal would have been the proper avenue for relief -- not ignoring the order for more than four years and then re-filing the same motion in the same court, but before a different judge. Cases which

have reviewed the sufficiency of extraordinary reasons under subsection (f), have often determined that a movant's lengthy delay constituted a basis for denial of the motion. *See, e.g., Fry v. Kersey*, 833 S.W.2d 392 (Ky. App. 1992) (wife's delay of 5 years to reopen pension plan allocation in divorce decree unreasonable); *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky. App. 2005) (Equitable estoppel required denial of motion to set aside the parentage finding made at the time of divorce, but waited years to seek to vacate.)

Antonio's inexplicable delay of seeking CR 60.02 relief so many years after he has had full knowledge of the reasons he now argues to this court in order to justify his position is unpersuasive. Antonio has been aware of his grounds for his CR 60.02 motion for over 20 years. He has presented these issues to a court of competent jurisdiction several years ago which ruled against him. For these claims to survive it was incumbent upon Antonio to appeal that adverse decision within time frames allowed under the Civil Rules. His failure to do so precludes his subsequent successive CR 60.02 motion. Therefore, I would affirm the Christian Family Court's judgment.

BRIEF FOR APPELLANT:

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