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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000892-MR
AND
NO. 2011-CA-001807-MR

DAVID L. POLSTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 08-CI-503191

FRANCES POLSTON,
NOW MCCORKLE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

KELLER, JUDGE: These consolidated appeals arise from the family court's judgment disposing of the parties' property and its order denying David L. Polston's (Polston) Kentucky Rule(s) of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate and his CR 60.02 motion to set aside that judgment. On

appeal, Polston delineates five issues. However, after reviewing the record and Polston's brief, we believe that those five issues can be distilled to two: (1) whether sufficient evidence supported the court's findings regarding Frances McCorkle's (McCorkle) disposition or concealment of the parties' intangible marital property; and (2) whether the trial court properly disposed of Polston's motion for CR 60.02 relief without a hearing. For the following reasons, we affirm.

FACTS

Polston and McCorkle married on June 11, 1960, separated on August 8, 2008, and the court dissolved their marriage on September 14, 2010. During the course of the marriage, the parties lived primarily in Jefferson County, Kentucky. They have two adult daughters, Jennifer and Julie.

McCorkle testified that, in 2001, the parties and Julie purchased a house in Florida for approximately $275,000. The parties contributed $75,000 toward the purchase price and Julie contributed $200,000. For reasons that are unclear, the house was titled in the parties' names. Between 2001 and 2004, Julie, her two sons, and Polston, at least for a portion of the time, lived in the Florida house.

In December 2004, the parties sold the Florida house for $265,808 and Polston returned to Louisville with Julie and her two sons to live with McCorkle in the parties' marital home. Although it is unclear, it appears the entire $265,808 went into the parties' investment and/or bank accounts. McCorkle testified that, from 2004 until the parties separated in 2008, she paid all of the

living expenses for the family. Additionally, McCorkle testified that she paid off Julie's credit card debt, which was substantial, and Julie's attorneys' fees for litigation related to a custody dispute and criminal charges. McCorkle testified that those fees were also substantial. During this period, the parties' only income was from social security, which amounted to $1,636 per month.

McCorkle testified that, in August 2008, she attempted to commit suicide. After recovering, McCorkle did not return to the marital home, but lived with Jennifer and her family. For reasons that are unclear, McCorkle and Jennifer had a falling out, and McCorkle moved into a "section eight" subsidized apartment.

Polston, who has had significant health problems, including an apparent stroke, did not dispute the above testimony from McCorkle. However, through counsel, Polston asked McCorkle, who had complete control of the parties' finances, to account for $340,000 that she had withdrawn from the parties' investment and/or bank accounts. McCorkle, in testimony that can best be described as less than responsive and rambling, explained the various withdrawals as moving money from one account to another in order to maximize the interest she could earn. She also testified that she spent the money paying for living expenses for the parties, Julie, and Julie's sons. According to McCorkle, by August 2008, all of the money from the sale of the Florida house was gone, as well as any other money the parties might have saved.

In addition to the above dispute regarding the disposition of the money in the parties' various investment and bank accounts, we note that there was

a dispute regarding three life insurance policies. The parties resolved that dispute and there are no issues regarding those policies before us. However, certain facts regarding that dispute are pertinent to Polston's CR 60.02 motion; therefore, we briefly summarize the factual basis for that dispute below.

It appears from the record that McCorkle transferred two policies that she owned and one policy that belonged to Polston to Jennifer. When Polston discovered that this transfer had taken place, he filed a third-party complaint against Jennifer. In that complaint, Polston alleged that Jennifer knew or should have known that McCorkle did not have authorization to make those transfers, and he sought return of the policies. At some point, Polston then transferred the policies to a friend. However, as noted above, the policies were ultimately returned and the cash value was divided between the parties.

Following two hearings that dealt primarily with McCorkle's handling of the parties' investment and bank accounts, Polston argued that McCorkle had hidden or otherwise "sequestered" in excess of $340,000 in marital assets. In support of that argument, Polston noted, as he does here, that McCorkle could not trace with documentary evidence how she disposed of the money she withdrew from the parties' accounts. McCorkle argued that she spent the money paying for the family's living expenses and Julie's substantial credit card debt and attorneys' fees.

The court, noting that Polston did not specifically raise the issue of dissipation of marital property, found that was the only applicable theory.

Therefore, the court undertook a dissipation of marital property analysis and applied the two-prong test set forth in *Brosick v. Brosick*, 974 S.W.2d 498 (Ky. App. 1998). As noted by the court, this Court stated in *Brosick* that dissipation of marital property occurs when "property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property." *Id.* at 500. The court found that any expenditures for which Polston sought reimbursement occurred during the course of the marriage, not "during a period when there was a separation or dissolution pending."

Furthermore, the court concluded that Polston failed to show that McCorkle had:

> [A] clear intent to deprive [Polston] of his proportionate share of the marital property. On the contrary, the evidence seems to support [McCorkle's] assertion that the money was spent over a six-year period to support the parties' lifestyle, including being the primary financial supporters of the parties' grown daughter and her two children. The Court finds it difficult to believe the parties would have been able to maintain a home for three adults and two children on a fixed income of approximately $1,600.00, per month in addition to funding their daughter's six-year court battle.

Therefore, the court concluded that McCorkle had not dissipated marital property.

Polston filed a motion to alter, amend, or vacate, arguing that the court misconstrued his argument. As he does here, Polston argued that McCorkle had not dissipated marital property, but that she had hidden or otherwise failed to

account for it. The court denied Polston's motion and he filed Appeal No. 2011-CA-000892-MR.

One month after filing his appeal, Polston filed a Kentucky Rule of Civil Procedure 60.02 motion to set aside the judgment. In support of that motion, Polston offered affidavits from Jennifer and her husband in which both indicated that, sometime after her release from the hospital in August 2008, McCorkle had asked Jennifer to help McCorkle hide $150,000 in cash. Jennifer stated that she returned the cash to McCorkle shortly before McCorkle moved to her apartment.

McCorkle filed a response in which she stated the affidavits from Jennifer and her husband were false. She also stated that there was no money and attached several checks showing the expenses she had paid.

Without holding a hearing, the court denied Polston's motion. In doing so, the court held as follows:

> This case was filed in 2008. The parties had significant time to prepare for trial and complete any necessary discovery. [Polston] knew throughout the litigation that [Jennifer] potentially had vital information as to [Polston's] claim of hiding or dissipation of assets, as evidenced by the motion to include [Jennifer] as a third party Respondent. Despite this, [Jennifer] was not called as a witness at any of the hearings. Any evidence now presented in [Jennifer's] and her husband's affidavits could have been discovered and presented through testimony during the July 2009 hearing or at the trial. While the allegations in the . . . affidavits imply perjury or fraud on the part of [McCorkle], these allegations are not enough to set aside the judgment under [CR 60.02] subsection (c) and subsection (d). Finally, the Court does not feel the allegations made rise to the level of a reason of extraordinary nature.

Polston appealed from this order, and this Court consolidated that appeal, No. 2011-C-001807-MR, with Polston's first appeal. We set forth additional facts as necessary below.

STANDARD OF REVIEW

Because the issues raised by Polston on appeal have differing standards of review, we set forth the appropriate standard as we address each issue.

ANALYSIS

As previously noted, Polston has raised essentially two issues: (1) whether sufficient evidence supported the court's findings regarding McCorkle's disposition of the parties' intangible marital property; and (2) whether the trial court properly disposed of Polston's motion for CR 60.02 relief without a hearing. We address each issue below.

1. Sufficiency of Evidence Regarding the Disposition of Intangible Marital Property

Whether McCorkle adequately accounted for the disposition of the parties' intangible marital property is a question of fact. A court's findings of fact may 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 witnesses." CR 52.01. "A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, [that] has sufficient probative value to induce conviction in the mind of a

reasonable person." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005) (internal citations omitted).

As noted above, Polston pointed to a number of withdrawals from the parties' investment and bank accounts and asked McCorkle if she had any documentation to show what she did with the money she withdrew. Although McCorkle's testimony was somewhat difficult to follow, she ultimately stated that the withdrawals were used to open accounts and/or to add to existing accounts. Furthermore, she testified that she paid all of the parties' living expenses and the living expenses for Julie and her two sons, as well as Julie's credit card debt and attorneys' fees. McCorkle did not provide any specific documentation to support her testimony; however, she stated that she had not had access to any financial documents since leaving the house in August 2008.

Polston did not offer any testimony to the contrary. In fact, Polston admitted that he left all financial decisions to McCorkle. Furthermore, Polston only offered into evidence the documents showing withdrawals. He did not offer into evidence any documents showing deposits into the various accounts, and he did not offer any documents or testimony that would explain the source of the money in the accounts.

In light of the evidence before it at trial, we cannot say that the court's judgment that McCorkle expended the parties' intangible marital property to support the parties, their daughter, and their grandsons was not supported by evidence of substance. Furthermore, although Polston argues the court erroneously

analyzed his argument under the dissipation of property theory, the theory used by the court is irrelevant, because the conclusion the court reached was not clearly erroneous. Therefore, we discern no error in the court's judgment.

2. Denial of CR 60.02 Motion

> 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: (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.

CR 60.02.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000); *see also Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Polston asserted in his CR 60.02 motion that he was seeking relief under all six provisions of the rule. However, he has not argued that he should be relieved from the judgment under subsection (a) because of mistake, inadvertence, surprise or excusable neglect or under subsection (e) because the judgment is void, or has been satisfied, released, or discharged, etc. Therefore, we need not address those provisions of the rule.

To be successful under subsection (b), Polston was required to show that evidence regarding the $150,000 as set forth in the affidavits from Jennifer and her husband could not have been discovered by due diligence in time to move for a new trial within the ten-day time limit set forth in CR 59.02. The court, noting that Polston made Jennifer a party to the action and alleged that she was wrongfully in possession of several insurance policies, determined that Polstion could have discovered evidence regarding the $150,000 before trial. That is a finding of fact we will not disturb on appeal. Therefore, Polston is not entitled to relief under CR 60.02(b).

Under subsection (c), Polston was required to show that the judgment was obtained by perjury or false testimony.

> If a judgment is obtained by perjury the unsuccessful litigant subsequently to obtain a new trial must offer to show and must clearly and convincingly show (a) that such evidence was false; (b) that the result was produced thereby; (c) that the successful party participated therein; (d) that its nonexposure then was not due to negligence of the unsuccessful party; (e) that ordinary diligence would not have anticipated it; (f) that diligence was exercised to expose it then; (g) that he can expose it now;

> and (h) that the means by which it is proposed to expose it now were not available to him then.

Benberry v. Cole, 246 S.W.2d 1020, 1022 (Ky. 1952).

As to subsection (d), fraud affecting the proceedings, the type of fraud necessary to obtain relief is extrinsic fraud.

> Extrinsic fraud covers "fraudulent conduct outside of the trial which is practiced upon the court, or upon the defeated party, in such a manner that he is prevented from appearing or presenting fully and fairly his side of the case . . . . [P]erjury by a witness or nondisclosure of discovery material is not the type of fraud to outweigh the preference for finality."

McMurry v. McMurry, 957 S.W.2d 731, 733 (Ky. App. 1997) (internal citations omitted).

The fraud Polston alleges, hiding $150,000 in cash, took place outside the tribunal; however, as noted above, the court found that Polston could have uncovered that evidence through discovery prior to trial. Therefore, he is not entitled to relief under CR 60.02(d).

As previously noted, the court found that Polston knew that Jennifer "potentially had vital information as to [his] claim of hiding or dissipation of assets, as evidenced by the motion to include [Jennifer] as a third party Respondent." Despite that knowledge, Polston did not call Jennifer as a witness either through discovery or at trial. Because Polston could have discovered that alleged perjury or falsified evidence with ordinary diligence, he cannot avail himself of CR 60.02(c) as a means to set aside the court's judgment.

Finally, under CR 60.02(f), Polston was required to show a "reason of an extraordinary nature" to justify relief. "[R]elief is not available under CR 60.02(f) unless the asserted grounds for relief are not recognized under subsections (a), (b), (c), (d), or (e) of the rule." *McMurry v. McMurry*, 957 S.W.2d 731, 733 (Ky. App. 1997). Because Polston's grounds for relief - fraud, perjury, and/or falsified evidence - are recognized under other subsections of CR 60.02, he cannot seek relief under subsection (f).

Because Polston could not succeed under any of the subsections in CR 60.02, the court was not required to hold an evidentiary hearing. Furthermore, denial of Polston's CR 60.02 motion was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Therefore, we discern no error.

CONCLUSION

For the foregoing reasons, we affirm the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Robert S. Silverthorn, Jr. Louisville, Kentucky	Melinda Wandzilak Louisville, Kentucky