

RENDERED: AUGUST 10, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001010-MR

TIMOTHY C. FULLER

APPELLANT

v. APPEAL FROM KENTON FAMILY COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 99-CI-02438

RONDA K. FULLER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Tim Fuller appeals from the May 9, 2011, order granting Ronda Fuller's motion to enforce a final judgment entered in March 2003 and awarding attorney's fees to her. After careful review, we affirm.

Tim and Ronda were married on July 17, 1988. Prior to the marriage, Tim had accrued a pension with Ashland Inc. with a present-day-value of

\$23,258.27. During the marriage, Tim earned more toward the defined benefit pension plan, with a present-day-value of \$21,735.83. A decree of dissolution was entered by the Kenton Circuit Court on March 22, 2000, but it reserved all other issues. The matter came before the court for final resolution at a hearing on September 3, 2002, and the final judgment order was entered on October 17, 2002. As stated in the final judgment and order, upon his separation with Ashland, Tim received a severance payout and cashed in some of his retirement. That action resulted in a tax obligation of \$33,412.32. The final judgment and order also awarded Ronda her pension from Ohio and Kentucky Education systems, as well as one-half of the value of Tim's life annuity contract with Ashland as of March 22, 2002.

Subsequently, on March 13, 2003, the court amended the final judgment and order to correct its finding as to the correct name of Tim's life annuity contract holder.¹ Without objection, the trial court entered the order changing the name of the annuity contract holder. Eight years later, Ronda filed a motion to enforce the final judgment following Tim's alleged refusal to sign a tendered Qualified Domestic Relations Order (QDRO) so that she could access the funds awarded to her by the trial court in 2002. Ronda also requested that the trial court award her attorney's fees for having to bring the motion to enforce the order.

On May 9, 2011, the now family court granted the motion and ordered Tim to sign the QDRO and further awarded attorney's fees on behalf of Ronda in

¹ The trial court had referred to it simply as Ashland while the correct name was Ashland Inc. and Affiliates Pension Plan.

the amount of \$500.00. Tim filed a motion to reconsider, which came before the family court on July 7, 2011. The court denied the motion to reconsider, and this appeal now follows.

On appeal, Tim makes several arguments, and we will address them in turn. First, Tim argues that the trial court did not have jurisdiction to amend its October 2002 judgment on May 13, 2003, because if the final judgment and order were indeed final, the trial court would have lost jurisdiction ten days following the date of the order. In response, Ronda argues that the trial court's October 2002 judgment was final, but because Tim erroneously referred to his annuity contract plan holder as Ashland Oil instead of Ashland Inc. and Affiliates Pension Plan, the trial court had to correct the mistake and was permitted to do so by law.

In support of her argument, Ronda cites to *Brosick v. Brosick*, 974 S.W.2d 498 (Ky. App. 1988), where a panel of this Court upheld the trial court's amendment of a QDRO. In that case, the husband argued that the trial court did not follow Kentucky Rules of Civil Procedure (CR) 60.02 in allowing amendment of a prior QDRO. *Id.* at 504. This Court disagreed, finding that the amendment did not alter the substantive rights of any party and merely corrected an oversight. *Id.* Similarly, in the instant case, the order amending the name of Tim's annuity contract plan holder did not alter or change the rights of either Tim or Ronda, but instead simply corrected a clerical error or oversight. We agree that it is within the trial court's right to enforce its own judgments and remove any obstructions to such enforcement. *See Akers v. Stevenson*, 469 S.W.2d 704, 706 (Ky. 1970)

(internal citations omitted). Thus, we hold that the Kenton Circuit Court had jurisdiction to amend the October 2002 order to correctly name the annuity contract plan holder to Ashland Inc. and Affiliates Pension Plan.

Next, Tim argues that the trial court improperly characterized the entire annuity contract as marital property and failed to properly designate a portion of it as non-marital. Tim also argues that the trial court erred when it did not off-set the value of Ronda's pension plans when dividing up the annuity contract. These arguments are the crux of Tim's appeal. However, the opportunity to have the decision reviewed by this Court has long since expired. *See* CR 73.02. The failure to file a timely notice of appeal from the 2002 judgment is fatal.

Tim next urges this Court to review the trial court's division of the parties' pension for palpable error. However, as a failure to file a timely notice of appeal renders this Court without jurisdiction to hear the appeal, a palpable error analysis is not appropriate. Tim relies on *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky. App. 2007), for the proposition that a palpable error could be overturned regardless of whether the time for an appeal had run. In *Hibdon*, the Appellant had not failed to file a timely notice of appeal, but instead had failed to articulate a particular argument to the court below. Again, we reiterate that failure to file a timely notice of appeal is fatal to the appeal, and we will not address Tim's arguments that the trial court improperly divided the non-marital and marital property in this case.

Finally, Tim argues that the family court improperly awarded attorney's fees to Ronda and failed to give proper justification for awarding such fees. The crux of Tim's argument is that because no evidence of the parties' financial positions was put on at the May 2011 hearing, the family court could not have awarded attorney's fees under Kentucky Revised Statutes (KRS) 403.220.

That statute states:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

Tim argues that at the time of the May 9, 2011, hearing, no financial evidence was presented to the court, and because eight years had elapsed, the current judge was not familiar with the financial situations of the parties and therefore did not consider the financial resources of the parties in making this ruling.

However, attorney's fees are also permissible under CR 37.02(3) when a party fails to obey a court order. That rule states that "[i]n lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees." After reviewing the hearing, it is clear that the court was bothered by Tim's failure to sign the QDRO per an order that was

entered eight years prior; in fact the court acknowledged that he could be held in contempt for failing to sign the QDRO. Thus, we cannot say that the family court's award of attorney's fees was in error, and we will not disturb that ruling on appeal.

Based on the foregoing, we affirm the May 9, 2011, order of the Kenton Family Court in its entirety.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael A. O'Hara
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BRIEF FOR APPELLEE:

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