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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000130-MR

DAVID L. POLLARD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 93-FD-001171

MARY JO POLLARD (NOW DOOLEY) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND MAZE, JUDGES.

JONES, JUDGE: This appeal concerns certain post-dissolution decree orders the Jefferson Circuit Court entered. Specifically, the Appellant, David L. Pollard, maintains that the trial court erred by entering a Qualified Domestic Relations Order (QDRO) directing the Kentucky Employees Retirement Systems to pay $1,000 monthly to his former spouse, Mary Jo Pollard (now Dooley). David

argues that the QDRO does not comport with the parties' original property settlement as incorporated into their dissolution decree.

Upon a careful review of the record, it is clear to us that the parties subsequently modified their dissolution decree by agreed order. The QDRO is consistent with the modification. Accordingly, we affirm.

I. Factual and Procedural Background

Ultimately, the legal questions this appeal presents are far less complex than its procedural history. To place those legal issues in the proper context, however, it is necessary to review at some length the various procedural twists and turns this action has taken during its twenty-plus-year history. That history is contentious, complex, and marked, at times, by unexplained delay. While we have reviewed the entire record, in the interests of brevity, we include only the most relevant and pivotal events in our recitation of the facts.

David and Mary Jo were first married in 1980. They divorced in 1983, but married again in 1986. David filed for divorce in 1993. David's state retirement pension was among the property subject to division as part of the dissolution proceedings. At that time, David was not yet eligible to retire, but the parties agreed that he had a vested interest in his pension of approximately $15,000. Ultimately, the parties were able to agree on a division of their property, including David's pension, as reflected in their property settlement agreement dated February 7, 1994. The trial court found the terms of the settlement agreement not to be unconscionable and incorporated the agreement in its final decree of

dissolution of marriage, entered February 8, 1994. Only paragraph 10 of the agreement is at issue as part of this appeal. It provides: "Petitioner [David] agrees to give Respondent [Mary Jo] one-half of his pension acquired during their marriage through a Qualified Domestic Relations Order."

For the next decade, the Pollards' dissolution action was mostly dormant. Then, in 2004, Mary Jo's counsel filed a proposed "agreed order" with the trial court.[1] The proposed "agreed order" states that it was prepared by Mary Jo's counsel, Michael Levy. David's and Mary Jo's signatures appear on the document indicating that they had "seen and agreed to" its terms. The "agreed order" states as follows:

> The Court having considered the agreement of the parties, the payment of $23,000.00 by Respondent [Mary Jo] simultaneous with this agreement, and any other relevant information available;
>
> IT IS HEREBY ORDERED that the parties shall have joint custody of the minor children of this marriage namely, Katheryn Sabel Pollard and Shelby Ann Pollard.
>
> IT IS FURTHER ORDERED that there shall be no child support due by either party, for either party and there is no arrearage due either party.
> IT IS FURTHER ORDERED that a QDRO shall be entered wherein Petitioner [David] shall pay $1,000.00 per month from his retirement beginning October 1, 2004, and continuing until such time as the Petitioner [David] no longer qualifies for retirement, unless the Respondent elects survivorship payment plans and pays for said survivorship payment plan.

[1] It does not appear that a notice and motion accompanied the order.

(R. 92). For reasons that are not entirely clear, the trial court did not take action on the agreed order until 2006 when it signed and entered the order.[2]

In July 2005, prior to the agreed order having been signed by the trial court, David filed a motion asking the trial court to set aside the order, if indeed it had been signed by it, or, alternatively, avoiding and holding any agreement between the parties for naught. In his supporting affidavit, David stated that the agreement was "lop-sided and unfair" to him. He further explained that he was not represented by counsel when he signed the agreement with Mary Jo and believed it was made without consideration from Mary Jo to him.

Mary Jo filed a response to David's motion. Therein, she explained that David had approached her about needing the $23,000 to save his retirement. She stated that David conveyed to her that he had learned in 2004 that he would soon lose his employment with the sewer district. He explained that if his employment terminated, he would lose his entitlement to his Kentucky Retirement Systems Defined Pension Benefit, but that he could save his pension by purchasing sufficient months of service by paying $23,000 to the Kentucky State Treasurer before a certain date. Mary Jo further stated that David explained to her that if he purchased the months in a timely fashion, he would receive monthly pension benefits of approximately $2,600. Mary Jo stated that David asked her to provide him with $23,000 so that he could purchase the extra months before the expiration

[2] The proposed agreed order appears to have been filed as a standalone document. It seems most likely that because a notice-motion did not accompany the agreed order the filing was not brought to the trial court's attention.

date. In exchange, David offered to modify their prior property settlement agreement so that she would receive $1000 per month, a greater amount than she would have been eligible to receive otherwise. Mary Jo made the $23,000 payment to

David by check dated July 14, 2004. The memo line of the check reads: "Ky. Retirement Sys." The very same day, David wrote a $23,000 check to the Kentucky State Treasurer. Mary Jo states that David began paying her the $1000 per month beginning in December of 2004 and continued to do so until he filed his motion in July of 2005.

As directed to by the trial court, David responded to Mary Jo's assertions. David alleged that he could have procured the funds elsewhere, but elected to ask Mary Jo because she owed him back child support of almost $44,000. David maintained that because the payment was merely for money Mary Jo already owed him, there was no consideration supporting the parties' agreement to modify the property settlement agreement.[3]

Ultimately, the trial court signed the agreed order. It was entered on February 17, 2006. David responded by filing a motion to set it aside in March of 2006. He explained that he did not receive notice that the trial court had entered

[3] Nowhere in the record is there any proof of this fact even though the dissolution decree provided that "if the obligated parent fails to make payments for four (4) weeks, either consecutively or cumulatively, upon proper Notice-Motion, an Order of Wage Assignment shall be entered in the amount of the currently ordered support." The only subsequent order of the trial court relating to child support is dated June 25, 1996, wherein Mary Jo's child support obligation was increased when David obtained custody of all three of the parties' children (he previously had custody of only one child).

the order until Mary Jo filed a motion to hold him in contempt for failure to make the March payment. He further requested the trial court to hold a hearing on his original motion to nullify the parties' agreement. The trial court set a hearing for the purpose of receiving evidence and hearing arguments on the pending motions.

Thereafter, on June 27, 2006, the trial court entered the following order:

> There is no dispute that the parties signed an agreement, stylized agreed order, on July 14, 2004. The agreed order provided that the parties have joint custody of their children, that there shall be no child support obligation owed by either party, there is no child support arrearage owed by either party, and that a QDRO shall be entered wherein [David] shall pay $1000 per month from his retirement beginning on October 1, 2004, and continuing so long as [David] qualifies. On that same day, [Mary Jo] gave [David] a check for $23,000 which the parties agree [David] used in full to obtain early retirement. A QDRO was never entered. The agreed order was submitted to the Court on July 28, 2004, but was not signed at that time. [David] paid [Mary Jo] $1000 per month from December 2004 until July 2005. In July 2005, [David] wrote [Mary Jo] [an] $800 check and then stopped payment on the check. [David] has not made any payment to [Mary Jo] since July 2005.
>
> . . . .
>
> David received $23,000 from Mary Jo on the date the parties signed the agreement. There is no dispute he used this money to obtain early retirement. In addition, Mary Jo was still entitled to some portion of David's retirement benefits under the parties' Martial Settlement Agreement. David needed funds to buy early retirement or he feared his retirement benefits would be lost. Mary Jo and her husband provided the needed funds to David. Both parties clearly received some benefit from the agreement. The Court does not find David's claim that the $23,000

> was for child support owed by Mary Jo to be credible. Although, the agreement may be generous on behalf of David, it does not meet the requirements of CR 60.02. The Court does not have jurisdiction to set aside an agreed order simply based on the fact that the agreement is more favorable to one party than the other. Based on the foregoing, the Court denies [David's] motion to set aside the agreed order entered February 17, 2006. The parties are bound by the terms of the agreement. Mary Jo's counsel shall tender a QDRO effectuating the terms of the agreement.

Mary Jo did not submit the QDRO as directed by the trial court. Instead, in July of 2007, Mary Jo filed a motion to modify the prior order to require David to directly pay her $1000 each month. She stated therein that the Kentucky Retirement Systems was no longer accepting QDROs, making it necessary for David to receive his full retirement and then pay her each month. By Order entered January 22, 2007, the trial court granted Mary Jo's motion by ordering David to pay Mary Jo "the sum of $1,000.00 on the first of each month and the sum of $500.00 each month toward the arrearage."[4]

Mary Jo and David were no strangers to the court during the next few years. The record is punctuated with frequent motions concerning David's failure to pay Mary Jo as ordered by the court. At one point, the trial court ordered David to become current on his obligation to Mary Jo or serve thirty days in jail for contempt of court. It appears that David complied with the order by satisfying the arrearage, but soon slipped back into his old ways. The record shows several

[4]Mary Jo had previously filed a motion asking the Court to enter an order so that David would be required to pay her the arrearage that accumulated during the time he was not paying her in accordance with the parties' agreement.

instances of David failing to pay Mary Jo altogether or paying her less than the ordered $1000. In 2008, in an effort to devise a remedy, the trial court ordered David to set up a direct deposit account for Mary Jo's benefit so that he would not have access to Mary Jo's portion of the pension each month.

After the Kentucky Retirement Systems began accepting QDROs again, Mary Jo moved the trial court to enter a QDRO. David responded by again asking the trial court to set aside the agreed order it had entered in 2006. This time, David argued that the trial court lacked jurisdiction to enter the order because his 2004 agreement with Mary Jo was a separate contract, not an amendment of the parties' prior property settlement agreement/dissolution decree. Thus, David maintained that Mary Jo should have been required to commence a separate breach of contract action against him.

By order entered December 23, 2013, the trial court denied Mary Jo's motion for entry of the QDRO. The trial court explained that Mary Jo had not followed the proper procedure in seeking relief because the most recent order required David to direct deposit the funds. The court explained that if Mary Jo now wanted a QDRO, she had to move the court to modify the most recent order, which was entered in June of 2008.

The trial court noted that David had never appealed the court's prior orders rejecting his motions to have the agreed order set aside and was essentially making the same arguments for a third time. Once again, the trial court denied

David's attempt to set aside the agreed order it entered in 2006 as it found no basis to do so under Kentucky Rules of Civil Procedure ("CR") 60.02.

Following the trial court's direction, Mary Jo moved the trial court to modify the payment provision contained in the June 2008 order on the grounds that "the administrator of the Kentucky Retirement System now accepts Qualified Domestic Relation Orders in the division of a former employee's retirement benefits, and may now pay the sums directly to the spouse." By Order entered January 15, 2014, the trial court granted Mary Jo's motion and entered a QDRO that same day.

This appeal by David followed.

II. Analysis

A. 2006 Orders

The primary focus of David's appeal concerns the entry of the agreed order in 2006. He asserts that the order was entered without a motion to amend the original property settlement agreement ever having been filed and without any hearing to test whether the terms of the agreement were equitable and in conformity with the law regarding the division of pension plans.

The agreed order, as signed by the trial court, was entered on February 17, 2006. Pursuant to CR 59.05, David had ten days from the entry of the order, Monday, February 27, 2006, to file a motion to alter, vacate, or amend the trial court's order. In the alternative, David could have appealed the order to our Court by filing a notice of appeal no later than thirty days after entry of the order. CR

73.02(1)(a). David filed neither a CR 59.05 motion nor a notice of appeal. Instead, as the record reflects, David filed a motion to set aside the order in March 2006, well after his time for filing a CR 59.05 motion had expired. The trial court properly treated David's motion as one under CR 60.02. After finding that David failed to meet any of the grounds for relief under CR 60.02, the trial court denied his motion. Once again, David did not appeal to our Court. Because David did not timely appeal from either of the trial court's 2006 orders, we cannot consider his assignments of error as they pertain to those orders. *See Gibson v. Gibson*, 211 S.W.3d 601, 605 (Ky. App. 2006).

In a last-ditch effort to obtain appellate review of the 2006 orders, David relies on palpable error. Palpable error allows us to review unpreserved errors. When an appellate court engages in a palpable error review, its "focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). If the appellate court determines that an unpreserved error results in manifest injustice, it may grant relief, even though the error was not properly called to the trial court's attention.

This is not a case where palpable error review is available. While it may allow a party to obtain appellate review of an unpreserved error, the appeal itself must still be timely. Palpable error does not allow a party to skirt the time limitations for filing a timely notice of appeal.

That being said, we believe that there is no question that the parties' 2004 agreement was properly considered to be a further settlement of their rights as set out in the dissolution decree. The law allows parties to enter into a subsequent agreement to modify a property settlement agreement incorporated into a divorce decree, and, where there are no issues regarding the modification's unconscionability, the trial court is required to uphold the modification. *Brown v. Brown*, 796 S.W.2d 5 (Ky. 1990).

While David believes the modification was unconscionable, the trial court considered the record at length and determined that it was not. The trial court heard testimony and flatly rejected David's contention that the $23,000 was a settlement of Mary Jo's child support arrearage. Rather, the trial court concluded that Mary Jo paid the money to David so that she could receive future pension benefits as provided for in the parties' original property settlement agreement. In exchange for this payment, David agreed to give Mary Jo a greater share of his pension than she would have otherwise been entitled to receive. While this agreement may have ultimately worked to Mary Jo's benefit, it was not made without some risk. As set forth in the agreement, Mary Jo did not have automatic survivorship benefits. Mary Jo took the risk that David might die before she recouped the $23,000 she contributed. Even if we could review the trial court's order, we fail to see any manifest injustice that resulted in this case.

B. Entry of the 2014 QDRO

David's final argument concerns the QDRO the trial court entered on January 15, 2014. David did file a timely appeal from this order; so we may review his assignments of errors with respect to it.

In relevant part, the QDRO provides that the Kentucky Retirement Systems is to pay "$1000.00 directly to [Mary Jo] from [David's] monthly retirement benefit" until David's or Mary Jo's death, whichever occurs first. Citing *Smith v. Rice*, 139 S.W.3d 539, 543 (Ky. 2004), David claims that the QDRO as entered is invalid because it is open-ended in that it does not provide a method to calculate the number of payments or the period to which such order applies. In *Smith*, the Court held that the court's decree could not constitute a valid QDRO because it "insufficiently specifie[d] 'the number of payments or period to which such order applies,' as required by 29 U.S.C. § 1056(d)(3)(C)(iii)." *Id.* at 543. The order at issue in *Smith* simply stated that the wife was to receive "50 percent of any pension plan balance . . . to the extent that it accumulated during the marriage." *Id.* It did not specify a dollar amount for the payments or provide a termination date for the benefits. Accordingly, the trial court held that the decree was not valid as a QDRO because "a fund attempting to implement the . . . decree would not be able to do so, because . . . it does not instruct when or for how long the pension should be distributed." *Id.*

In contrast, the QDRO in this case specifies that the $1000 payment to Mary Jo shall continue until either she or David dies, whichever occurs first. This is not the type of open-ended period the *Smith* court rejected; indeed, the standard

QDRO form itself provides this as a termination option in lieu of setting out a precise number of months for payments. The fund is able to implement the QDRO because it can ascertain both the amount to be paid to Mary Jo, $1000 per month, and the duration, until the death of David or Mary Jo, whichever occurs first.

Finally, we believe the trial court properly granted Mary Jo's motion to amend its prior order to provide for a QDRO instead of direct payments from David. Apparently, the Kentucky Retirement Systems had changed its policy of disallowing QDROs. This represented a substantial change in the circumstances of the case. Additionally, after a decade of contentious litigation due to David's failure to comply with the order to pay Mary Jo, the requested amendment was sorely needed. Even after narrowly escaping jail time for violating the court's order to make monthly payments to Mary Jo, David slipped back into his old ways of skipping or reducing his court-ordered obligation. The amendment did not change the nature of the parties' rights, but simply provided a method of ensuring compliance after David had repeatedly shown himself to be incapable of fulfilling his obligation to Mary Jo. We believe the trial court appropriately granted Mary Jo's motion to amend by entering the QDRO. And, we are most hopeful that it will finally put this two-decade-long saga to rest by providing Mary Jo with direct access to the funds before they ever get into David's hands.

III. Conclusion

For the reasons set forth above, we affirm the Jefferson Circuit Court.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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