RENDERED: OCTOBER 11, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000222-MR

SHEILA REECE — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 08-CI-00820

BENNIS MASON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

COMBS, JUDGE: This case involves a dissolution of marriage. Appellant, Sheila Mason Reece (Sheila), appeals from an order of Whitley Circuit Court denying her motion to set aside the parties' property settlement agreement. She also seeks to set aside the decree of dissolution itself. The Appellee is Bennis Mason (Bennis). After our review, we affirm.

We limit our discussion of the record to the issues before us. We refer to the findings of fact, conclusions of law, and judgment, entered on January 24, 2018, by the Whitley Circuit Court for a summary of the relevant procedural events leading up to this appeal:

> 3. On November 13, 2012, the Petition for Dissolution of Marriage was filed in the McCreary Circuit Court, Civil Action Number 12-CI-00290, and titled Sheila Ann Mason, as the Petitioner, versus Bennis Mason, the Respondent.
> 4. On November 13, 2012, an Entry of Appearance and Waiver was filed, which was signed by [Bennis] on November 12, 2012.
> 5. On November 13, 2012, a waiver was filed, which had been signed by [Sheila] waiving her right to Verified Disclosures and right to final hearing.
> 6. On November 13, 2012, a Property Settlement, Child Support and Child Custody Agreement was filed, signed by the parties on November 12, 2012, which stated that the parties agreed to joint custody of their one minor child Luke Spencer Mason, 12 years old, with no child support paid to either party.
> 7. On November 13, 2012, [Sheila] filed a Motion to Submit by Deposition.
> 8. On November 13, 2012, [Sheila] filed . . . [her] Deposition . . . taken on the prior Friday, November 9, 2012. In the Deposition, [Sheila] stated that the parties had one minor child and she set forth other statistical information.
> 9. On November 14, 2012, a Decree of Dissolution was entered, divorcing the parties, finding that the Property Settlement, Child Support and Child Custody Agreement was conscionable, and ordering them to comply with such.

> 10. On October 15, 2013, [Sheila] filed a motion to set aside the parties' Property Settlement Agreement[1], alleging [that Bennis] did not disclose accurate information and thereby frustrated an equitable division of property and debt and/or prevented a fair result in the disposition of this matter.
> 11. On September 17, 2015, [Sheila] filed a motion to set aside the Settlement Agreement and Divorce[2], alleging that the divorce of the parties was not valid as the parties had not been separated for 60 days as required by Kentucky statute at the time of their divorce. [Sheila] also alleges the Settlement Agreement is unconscionable and she was forced or coerced by [Bennis] to sign the Settlement Agreement.
> 12. On March 24, 2016, the McCreary County Circuit Court case, 12-CI-00290, was transferred and consolidated with the [Whitley County] Civil Action Number 08-CI-00820 . . . .
> 13. According to the record, both [Sheila] and [Bennis] have since remarried.[3]

On August 24, 2016, Whitley Circuit Court conducted a hearing on Sheila's motion. On January 24, 2018, the trial court entered findings of fact, conclusions of law, and judgment denying Sheila's motion to set aside the parties' settlement agreement and the decree of dissolution as follows:

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[1] Appendix "J" to Appellant's Brief. This motion, entitled "Motion to Set Aside Property Settlement Agreement," does not refer to any Civil Rule.

[2] As Sheila notes, this motion is found at pp. 357-59 of the record on appeal (ROA) and states that "pursuant to CR [Kentucky Rules of Civil Procedure] 60.02(d) and (f), [Sheila] hereby moves to Set Aside the Decree . . . to the extent it approved the parties' Property Settlement Agreement and the Property Settlement Agreement filed herein on November 13, 2012 . . . on grounds of fraud, duress, and unconscionability."

[3] According to Sheila's affidavit filed in support of her objection to Bennis's motion for a quitclaim deed, Sheila married William Reece on March 9, 2013 (ROA, p. 378).

> 1. In the case at hand, it is the burden of the party attempting to set aside a Settlement Agreement to show fraud or some other reason such as unconscionability to set it aside. In this case, the burden has not been met by [Sheila]. There is no sufficient evidence presented to make a finding of coercion or that the Separation Agreement is unconscionable or that it was entered under duress.
> 2. Furthermore, [Sheila] does not state any grounds sufficient to warrant a complete setting aside of the parties' Decree despite the fact that the 60-day separation period, required by KRS[4] 403.044, apparently was not met before the parties were divorced.
> 3. As for [Sheila's] allegation that the Court lacked jurisdiction to enter the Decree because the parties had not been separated for 60 days, that argument has long been waived and further evidence of such is that [Sheila] has since remarried.

On February 5, 2018, Sheila filed a notice of appeal to this Court from that order. She first contends that the circuit court erred in denying her CR 60.02 motion to set aside the decree as void *ab initio* because it was entered two days after the petition was filed in violation of the 60-day waiting period in KRS 403.044[5] "even though it was obvious on the face of the record that the parties had a minor child." (Appellant's Brief, p. 16). Sheila contends that the requirement of

[4] Kentucky Revised Statutes.

[5] The statute provides:

> In divorce actions in which there are minor children who are the issue of the marriage no testimony other than on temporary motions shall be taken or heard before sixty (60) days have elapsed from the date of service of summons, the appointment of a warning order attorney or the filing of an entry of appearance or a responsive pleading by the defendant, whichever occurs first.

the statute is mandatory and cannot be waived -- although she acknowledges that a case directly on point could not be found.

Sheila draws our attention to the reasoning in two unpublished decisions as well as to *Mathews v. Mathews*, 731 S.W.2d 832 (Ky. App. 1987), all of which are inapposite. In *Mathews*, the appellees, Margarette and Floyd Hoskins, were married in 1951. In 1974, Margarette filed a petition for dissolution, which was dismissed by agreed order in 1984. In 1985, Margarette and Floyd filed a motion to reinstate the previously dismissed dissolution action. The circuit court granted the motion, entered a decree dissolving appellees' marriage, and then performed a marriage ceremony for Margarette and Payne Mathews on the same day. Payne died intestate four months later and his children (the appellants) moved to set aside the decree. The only issue on appeal was whether appellants had standing. However, this Court observed that the circuit court had lacked jurisdiction to enter the divorce decree *because no petition for dissolution was before it* -- only a motion to revive the previously dismissed case.

More directly on point is the case of *Clements v. Harris*, 89 S.W.3d 403, 404 (Ky. 2002), in which the Supreme Court explained as follows:

> Generally, a decree of dissolution of marriage is not subject to review before an appellate court of the Commonwealth. Section 115 of the Kentucky Constitution provides that "the General Assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage." In 1976, the

> General Assembly enacted KRS 22A.020(3), which provides that "there shall be no review by appeal or by writ of certiorari from that portion of a final judgment, order or decree of a Circuit Court dissolving a marriage." In addition, for well over a century, appellate courts of the Commonwealth have consistently held that a judgment granting a dissolution of marriage is not appealable or subject to appellate jurisdiction.

In *Clements*, this Court determined that a decree of dissolution could **not** be disturbed under KRS 22A.020(3) -- even though the circuit court lacked proper jurisdiction due to the husband's failure to meet the 180-day residency requirement. Our Supreme Court granted discretionary review and affirmed, holding that although the circuit court had acted erroneously in finding the husband to be a resident of Kentucky, the decree of dissolution was not void. The *Clements* Court relied on *Elswick v. Elswick*, 322 S.W.2d 129 (Ky. 1959).

In *Elswick*, the wife moved to set aside a divorce judgment entered by Pike Circuit Court on the ground that she had not been served with notice of filing of the Commissioner's report, an omission which deprived her of an opportunity to file exceptions. The wife sought to dismiss the action because her husband failed to meet the residency requirement. Both parties were residents of West Virginia. Depositions were taken with reference to the question, but the Commissioner found that residence was sufficient to confer jurisdiction and recommended that the husband be granted a divorce. The Court held as follows:

> The difficulty is that there is no right of appeal from that portion of a judgment granting a divorce. Nor can there be an appeal from an order overruling a motion to set aside a judgment of divorce (unless perhaps, the motion is on a ground that would make the judgment void).
>
> . . . .
>
> In effect, Barbara is seeking relief from this Court by reason of the procedural irregularity that occurred when the clerk failed to serve notice of the filing of the commissioner's report. This irregularity could not render the judgment void, but merely erroneous, and this Court does not have the authority to review the question of whether the granting of a divorce is erroneous. . . .

Id. at 130-31 (citations omitted).

In the case before us, Sheila filed a verified petition for dissolution in McCreary Circuit Court on November 13, 2012. On the same day, Bennis filed an entry of appearance and waiver. Without question, the circuit court had jurisdiction over the parties and the subject matter. Consistent with *Elswick*, *supra*, we conclude that the failure to comply with the waiting period in KRS 403.044 was an irregularity which did not render the decree of dissolution void -- but merely erroneous. Accordingly, we find no error in the circuit court's ruling. In reaching this conclusion, we note a case from one of our sister states, the reasoning of which we find both relevant and persuasive.

In *Starr v. Starr*, 26 Ohio App. 3d 134, 498 N.E.2d 1092 (1985), the parties elected to proceed with a hearing on the dissolution of their marriage after

being advised that the thirty-day waiting period in the statute had not been met. The statute, Ohio Rev. Code Ann. § 3105.64 (West 2013), provides in relevant part:

> [N]ot less than thirty nor more than ninety days after the filing of a petition for dissolution of marriage, both spouses shall appear before the court, and each spouse shall acknowledge under oath that that spouse voluntarily entered into the separation agreement appended to the petition, that that spouse is satisfied with its terms, and that that spouse seeks dissolution of marriage.

The decree of dissolution was entered on the same day. Several years later, the appellant filed a declaratory action and argued, *inter alia*, that the waiting period was mandatory and that conducting a hearing on the dissolution prior to the passage of thirty days was jurisdictionally fatal, rendering the judgment of dissolution void. The court disagreed and explained as follows:

> Jurisdiction was acquired by the trial court in the case *sub judice* when both parties (1) petitioned the court for dissolution . . . (2) waived service of summons . . . and (3) met the requirements of showing six months of residency in the properly venued county. . . .
>
> . . . .
>
> If there had been lack of jurisdiction over the parties or subject matter, the action taken by the trial court would have been void, and could be attacked collaterally as well as directly. However, failure to comply with the thirty-day waiting period does not have the effect of ousting jurisdiction, but rather is a mistake or irregularity in the exercise of jurisdiction.

> Although the dissolution decree is not void for lack of jurisdiction over either the parties or the subject matter, failure to follow mandatory provisions of a statute may also render a judgment void and subject to collateral attack. Due to the statutory language . . . and the strong public policy in favor of providing a "cooling-off period" to allow both parties time for reflection, and to possibly effect a reconciliation, we hold the statutory thirty-day waiting requirement is mandatory.
>
> Although the mandatory waiting period was not followed in the case *sub judice*, . . . we find the dissolution judgment in question to be voidable and not void. We make this determination so as to avoid the possibility of rendering numerous other dissolution decrees complete nullities. . . .
>
> When, after a consideration of the entire record, the judgment is found to be plainly correct, it will not be reversed because a bad reason for it was given by the trial court which rendered the decision.

Starr, 498 N.E.2d at 1093-94 (citations omitted).

Sheila also argues that the court erred in failing to find the property settlement agreement unconscionable and that this error also served as a basis for setting aside the decree of dissolution. On September 17, 2015, Sheila filed a motion to set aside pursuant to CR 60.02(d) and (f). That Rule provides:

> 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: . . . (d) fraud affecting the proceedings, other than perjury or falsified evidence; . . . or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the

> judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

In reviewing a circuit court's denial of a CR 60.02 motion, our standard is abuse of discretion. "The test for abuse of discretion is whether the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by legal principles." *Lawson v. Lawson*, 290 S.W.3d 691, 693-94 (Ky. App. 2009) (citations omitted).

The circuit court determined that Sheila had not met her burden of proof, reciting as follows: "[t]here is no sufficient evidence presented to make a finding of coercion or that the Separation Agreement is unconscionable or that it was entered under duress." On appeal, Sheila is essentially re-arguing her case. She fails to persuade us that the circuit court abused its discretion in concluding that she failed to meet her burden of proof. We have no basis to conclude that any abuse of discretion occurred.

We AFFIRM the order of the Whitley Circuit Court denying the motion to set aside both the property settlement agreement and the decree of dissolution of marriage.

MAZE, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN RESULT ONLY: I fully agree with the reasoning and the result of the majority opinion, but I write separately to address the points raised by the dissent. Our inquiry in this matter must begin with the proposition that the validity of a dissolution decree is not subject to appellate review. KY. CONST. § 115. *See also* KRS 22A.020(3). Consequently, Kentucky's appellate courts do not have the authority to set aside a dissolution decree even if the trial court's jurisdictional findings are clearly erroneous. *Clements v. Harris*, 89 S.W.3d 403, 404 (Ky. 2002). *See also Elswick v. Elswick*, 322 S.W.2d 129 (Ky. 1959). Our appellate courts may address the validity of a dissolution decree only where the trial court was acting outside of its subject-matter jurisdiction so as to render the decree itself void. *Self v. Self*, 293 Ky. 255, 168 S.W.2d 743 (1943).

Here, the trial court was acting within its subject-matter jurisdiction, but erroneously due to its failure to comply with the requirements of KRS 403.044. I agree with the dissent that compliance with the 60-day waiting period of KRS 403.044 is mandatory, and I in no way approve of the trial court's failure to observe that requirement. However, this Court is bound by the limitations of § 115, and the legislature cannot grant this Court jurisdiction to act where the Constitution has explicitly spoken. Therefore, I must agree with the majority that the 60-day waiting period provided by KRS 403.044 is a jurisdictional fact, like the required findings of residency at issue in *Clements v. Harris* and *Elswick v.*

Elswick. Consequently, this Court has no jurisdiction to set aside a dissolution decree on this basis.

I would also add that this matter came before the trial court on a CR 60.02 motion to set aside the dissolution decree. The trial court had jurisdiction to consider that motion and could have set aside the dissolution decree on that basis. However, relief under CR 60.02 may be granted only where a clear showing of extraordinary and compelling equities is made. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App. 2002). *See also Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). In this case, Sheila had the opportunity to object to entry of the decree prior to the expiration of the waiting period, but she failed to do so until nearly three years after entry of the decree. As the trial court found, Sheila did not allege that she was prejudiced by the premature entry of the decree. And most notably, both parties have since remarried, so setting aside the dissolution decree would cast doubt on the validity of those marriages. Under the circumstances, I agree with the majority that relief under CR 60.02 was not warranted.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent. The subject matter of this case is a dissolution action involving children for which KRS 403.044 requires establishment of a jurisdictional fact not present here. Consequently, I cannot agree that when the circuit court heard this case, it was properly exercising subject matter jurisdiction.

Our Supreme Court defined subject matter jurisdiction well in another family law case, *Nordike v. Nordike*, when it said, "subject-matter jurisdiction . . . [is] the court's power to hear and rule on a particular type of controversy. Subject matter jurisdiction is not for a court to 'take,' 'assume,' or 'allow.'" 231 S.W.3d 733, 737-38 (Ky. 2007) (citation omitted). Subject matter jurisdiction is invoked by a party or exercised by a court only pursuant to legislative authority. A party can invoke, and a court can exercise, no more subject matter jurisdiction than the legislature grants. *Jefferson County Bd. of Educ. v. Edwards*, 434 S.W.3d 472, 476 (Ky. 2014) ("The legislature has the authority to limit the circuit court's subject matter jurisdiction . . . ."). For this kind of case, the legislature unquestionably did limit the circuit court's subject matter jurisdiction by enacting KRS 403.044.

By enacting KRS 403.044, the legislature said that when minor children of the divorcing parties are involved, except for necessary temporary motions, "no testimony . . . shall be taken or heard before sixty (60) days have elapsed . . . ." KRS 403.044. That statutory limitation does not relate either to *in personam* jurisdiction or particular case jurisdiction. It expressly limits the circuit court's subject matter jurisdiction. *See Mathews v. Mathews*, 731 S.W.2d 832, 834 (Ky. App. 1987) (disallowing use of CR 60.02 to "avoid the jurisdictional" requirement of KRS 403.044). The legislature expressed a strong public policy

purpose behind this jurisdictional limitation, and started by stating a general purpose for the Chapter that might surprise some.

The legislature's first stated purpose for Chapter 403 is not to make obtaining a divorce easier. Rather, the Chapter is intended to "[s]trengthen and preserve the integrity of marriage and safeguard family relationships . . . ." KRS 403.110(1). The legislature paid particular attention to the children when it said another purpose was to "[m]itigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage . . . ." KRS 403.110(3).

This particular attention to children is self-evident in KRS 403.044 – husbands and wives can end their relationship as rashly as they choose when children are not involved; however, because "the Commonwealth has an interest in preserving and promoting the welfare of the children," *Morton v. Tipton*, 569 S.W.3d 388, 397 (Ky. 2019), KRS 403.044 establishes a "cooling-off" period for husbands and wives to consider the impact on their children of dissolving the family's ties.

Although KRS 22A.020(3) generally prohibits appeals of divorce actions, "where a divorce judgment is void . . . an appeal may be prosecuted in this court." *Self v. Self*, 293 Ky. 255, 168 S.W.2d 743, 744 (1943). A judgment, order, or decree entered by a court lacking subject matter jurisdiction is void. *Hisle v.*

Lexington-Fayette Urban County Government, 258 S.W.3d 422, 430 (Ky. App. 2008) (citing *Covington Trust Co. of Covington v. Owens*, 278 Ky. 695, 129 S.W.2d 186, 190 (1939)). This decree was entered when the circuit court lacked subject matter jurisdiction and it is, therefore, void.

Respectfully, I believe the majority reads *Elswick v. Elswick*, 322 S.W.2d 129 (Ky. 1959) too broadly. I agree that the case addresses a question of subject matter jurisdiction, although it does not say so explicitly. *See* RICHARD A. REVELL, DIANA L. SKAGGS, & MICHELLE EISENMENGER MAPES, KENTUCKY DIVORCE § 1:4 JURISDICTION AND VENUE (August 2019) ("The residency contemplated by [KRS 403.140(1)(a)] is actual (as distinguished from legal residence or domicile), the absence of which deprives the court of jurisdiction of the subject matter."). However, *Elswick* stands for the principle that "[w]here . . . there is *any evidence* to show the jurisdictional" fact alleged to be missing and thereby depriving the court of subject matter jurisdiction, then the decree is not void. *Elswick*, 322 S.W.2d at 131 (emphasis added). The Court rephrased the concept to the same effect, saying, when there is "*some evidence* to show the necessary [jurisdictional fact], . . . there is no basis for a claim that the judgment is void." *Id.* (emphasis added). The other case cited by the majority, *Clements v. Harris*, quotes *Elswick* and reaches the same result for the same reason. 89 S.W.3d 403, 405 (Ky. 2002).

The case now under review is distinguishable from *Elswick* and *Clements* because there is absolutely no evidence of the necessary jurisdictional fact of compliance with the 60-day cooling-off period prescribed by KRS 403.044.

The majority's reliance on *Starr v. Starr*, 26 Ohio App. 3d 134, 498 N.E.2d 1092 (1985) is similarly misplaced. The so-called Ohio "cooling-off" period statute interpreted in *Starr* is fundamentally different from KRS 403.044. First, it applies to all cases, not just those involving children. Ohio Rev. Code Ann. § 3105.64(A) (West 2013). Second, it only applies when the parties "voluntarily entered into the separation agreement appended to the petition . . . ." *Id.* Third, it is measured from the unilateral "filing of a petition for dissolution[,]" *id.*, not from service of summons or entry of the other party's appearance as found in KRS 403.044. Fourth, it prescribes a thirty-day, not sixty-day period. *Id.* Fifth, it is not even so much a "cooling-off" provision as a provision defining a window within which "both spouses shall appear before the court" to testify to their execution of the separation agreement. *Id.* ("not less than thirty nor more than ninety days after the filing of a petition for dissolution"). *Id.*

And there is a sixth, and most significant, distinction. Ohio expressly does not treat compliance with this statutory provision as a jurisdictional fact necessary to establish subject matter jurisdiction. For that very point, the Ohio court in *Starr* quoted *In re Murphy*, 10 Ohio App.3d 134, 137 n.4, 461 N.E.2d 910

(1983), which said: "The procedure for dissolution of marriage is one of the few instances in litigation when the jurisdiction and power of the court is invoked by an agreement of the parties, *subject only* to the residential requirement of R.C. 3105.62." *Starr*, 498 N.E.2d at 1093-94 (emphasis added) (quoting *In re Murphy*, 461 N.E.2d at 914, n.4). Consequently, said the court, "the dissolution decree is not void for lack of jurisdiction over either the parties or the subject matter. . . ." *Id.* at 1094.

The majority opinion also notes that both parties have since remarried and that the circuit court considered these remarriages evidence of their mutual waiver of any jurisdiction error. Of course, if the jurisdiction error relates to subject matter jurisdiction, the circuit court is clearly erroneous because "[s]ubject matter jurisdiction cannot be waived or conferred by agreement, and a party may challenge a court's lack of subject matter jurisdiction any time, even for the first time on appeal." *Commonwealth v. B.H.*, 548 S.W.3d 238, 245 (Ky. 2018).

I am convinced that KRS 403.044 is a limitation on the circuit court's subject matter jurisdiction. There is no proof of the jurisdictional fact that the parties complied with KRS 403.044. That prevented the circuit court's exercise of subject matter jurisdiction. The decree is void *ab initio*. If that risks accusations of bigamy, so be it.

Despite recognizing the utility, even practicability, of concurring with the majority, I cannot do so in good conscience. The circuit court lacked subject matter jurisdiction, so this Court has no choice but to void the parties' divorce. For that reason, I respectfully dissent.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Marcia A. Smith Corbin, Kentucky	Mary Ann Smyth Corbin, Kentucky