

RENDERED: JANUARY 28, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

(OPINION RENDERED DECEMBER 23, 2004 WITHDRAWN)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001804-MR

JEAN ALISA ELDER

APPELLANT

V. APPEAL FROM UNION FAMILY COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
CIVIL ACTION NO. OO-CI-00089

THOMAS DAMIEN ELDER, JR.

APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

MINTON, JUDGE: Divorce decrees are given a special deference in Kentucky. Except when there is an utter lack of jurisdiction in the trial court, divorce decrees cannot be reversed by this Court. Nevertheless, Jean Alisa Elder brings this appeal from the July 14, 2003, divorce decree that ended her marriage with Thomas Damien Elder, Jr. Jean claims the decree is void because the family court failed to take proof of residency and because Thomas "worked a fraud" on the court. Because the content of

the record itself belies Jean's claims of voidness and because there is absolutely no evidence of fraud, we are compelled to dismiss the appeal.

Jean and Thomas were married for nearly twenty years when, on March 17, 2000, Jean petitioned for dissolution of their marriage. Since then, the parties have accomplished little more than the accumulation of a voluminous record and withdrawal by three of Jean's attorneys. Although an interlocutory decree of dissolution was recommended by the Domestic Relations Commissioner¹ on April 13, 2001, Jean filed exceptions to the DRC's recommendations. On May 14, 2001, the circuit judge sustained her objection to the dissolution, stating that the court generally "does not favor interlocutory decrees unless it is agreeable to both parties."

Over two years later, on July 14, 2003, the family court entered an interlocutory decree. It is from this decree that Jean appeals.

KRS² 22A.020(3) states that "[n]otwithstanding any other provision in this section, 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

¹ The Honorable William E. Mitchell was the DRC, and he became the regular Family Court Judge for the 5th Judicial Circuit during the pendency of this case.

² Kentucky Revised Statutes.

marriage." The only exception to this rule is if the judgment is proved to be void.

Our Supreme Court recently discussed appellate review of a divorce decree in Clements v. Harris.³ In Clements, a wife appealed from a decree of dissolution, claiming that the judgment was void because her husband had not satisfied the residency requirements. The Court held that although the husband was not a resident of Kentucky, the decree of dissolution was nonetheless valid.⁴ The Court referenced Elswick v. Elswick, stating:

Where the question of jurisdiction in a divorce action has been raised in the lower court, and there is any evidence to show the jurisdictional residence of the parties, the lower court's judgment granting a divorce based upon a determination that it has jurisdiction is not void and cannot be questioned on appeal regardless of the fact that the determination may be against the overwhelming weight of the evidence and be clearly erroneous.

Stated another way, a divorce decree cannot be reversed "without clear and convincing proof of an utter lack of jurisdiction."⁵

We see no basis to support Jean's claim that this decree is void. Jean argues that the family court judge failed to take proof on jurisdictional issues such as the residency of

³ 89 S.W.3d 403 (Ky. 2002).

⁴ *Id.* at 405.

⁵ Kenmont Coal Co. v. Fisher, 259 S.W.2d 480, 482 (Ky. 1953).

the parties. However, as stated by the Court in Clements, this failure alone is insufficient to void the judgment. But the jurisdictional requirements for divorce were never at issue in this case. And the record reflects that the jurisdictional evidence was there. First, residency in Union County, Kentucky, for the requisite pre-petition period was alleged in the petition and admitted in the response. Second, Thomas's sworn deposition testimony states that he has been a resident of Kentucky for 180 days and lists Jean's address as a residence in Morganfield. Likewise, Jean's deposition testimony also reflects her residence to be Morganfield. We believe that this sworn testimony before the court actually satisfies the proof requirements of KRS 403.025. The judgment was not void; therefore, we have no authority to review the merits of Jean's argument.

Jean also argues that Thomas attempted to "work a fraud" on the court by filing a motion to have the family court judge recuse himself. This motion was filed after the decree of dissolution was entered, and it was based on the fact that counsel for Jean had previously represented the family court judge in a separate action. According to Jean, "[Thomas] perpetrated a fraud upon the trial court to get the extraordinary relief of an interlocutory decree."

Frankly, we are puzzled by the argument. How can the filing of a motion asking the family court judge to recuse himself amount to "fraud on the court" when there is evidence in the record that counsel for Jean had indeed represented the presiding judge in another matter? The motion was not frivolous; nor does it appear to have been filed for purposes of delay. Likewise, we do not accept Jean's characterization of an interlocutory decree of dissolution as "extraordinary relief." Because Jean's fraud argument is completely without merit and because it seeks review of the decree itself, we must decline to review it.

For these reasons, we ORDER that this appeal be DISMISSED.

JOHNSON, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN RESULT ONLY.

ENTERED: January 28, 2005

/s/ John D. Minton, Jr.
JUDGE, COURT OF APPEALS

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