

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002491-MR  
AND  
NO. 2007-CA-000030-MR

MARCUS S. MINIX, SR.

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JOHNSON CIRCUIT COURT  
v. HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 86-CI-00010

SHERRY MINIX (NOW WOLF)

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING  
AND REMANDING

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BEFORE: ACREE AND STUMBO JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Marcus Minix, pro se, appeals from an order of the Johnson Circuit Court determining him to be in arrears for past-due child support owed pursuant to an agreement with his ex-wife Sherry Minix (now Wolf), and as owing Wolf, also pursuant to an agreement, his one-half share of medical

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

bills incurred on the parties' youngest child for billings not covered by insurance. Wolf cross-appeals upon the issue of interest upon the judgment.

We affirm upon the substantive issues presented in the appeals. We remand, however, for the trial court's ruling on Minix's still pending motion to hold Wolf in contempt for failure to comply with a prior court order requiring her to produce income tax and business records.

#### FACTUAL AND PROCEDURAL BACKGROUND

Minix and Wolf were married on January 30, 1982. The marriage produced two daughters, Megan, born September 21, 1982, and Melissa, born March 23, 1985. Divorce proceedings were initiated on January 8, 1986. Eventually a decree was entered providing, among other things, that the parties would have joint custody of the children with Wolf being the primary residential custodian.

On February 1, 1988, an order was entered requiring Minix to pay Wolf \$1,100.00 per month in child support. On May 18, 1990, an order was entered setting Minix's child support obligation at \$504.29 bi-weekly. Because it was later determined that the foregoing child-support orders were entered by judges disqualified to sit on the case, the orders were voided (along with other orders entered by the disqualified judges) in 1995.

Following the voiding of the orders, no further actual child support orders were entered; however, the parties entered

into an agreement whereby Minix would continue to pay child support at the pre-existing rate of \$504.29 bi-weekly. The parties also agreed to pay for the children's unreimbursed medical expenses on a fifty-fifty basis.

Minix paid the agreed upon \$504.29 bi-weekly child support payment until approximately September 2000, when the parties' oldest child reached the age of majority. At that time the parties entered into an agreement to modify the amount of child support to 60% of the previous total, resulting in a new bi-weekly payment of \$302.57. Minix timely made those payments until April 2002.

It appears that Minix quit paying child support as a result of a letter sent by Wolf's counsel in January 2002 asking the appellant to sign an agreed order memorializing the parties' child support agreement. The purpose of the request was to facilitate the disbursing of child support funds to Wolf by the local child support office. Minix claims that he interpreted the letter as indicating that his agreement with Wolf was no longer valid, and for that reason he quit making child support payments.

On August 8, 2005, Wolf filed a motion to hold Minix in contempt for failure to pay child support and for failing to pay his share of certain unreimbursed medical bills. As part of the subsequent litigation, Minix filed a cross-motion to hold Wolf in contempt for failure to provide tax returns and business records which Minix had subpoenaed in 1997.

On September 23, 2005, a hearing was held on the pending motions. On October 9, 2006, the trial court entered an order adjudging that Minix was in arrears for \$7,366.82 in unpaid child support, and that he owed \$2,966.72 to Wolf for his share of unreimbursed medical expenses.<sup>2</sup> Judgment was entered accordingly. Minix's post-judgment motions were subsequently denied. These appeals followed.<sup>3</sup>

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Before us, Minix, pro se, makes various arguments in objection to the trial court's judgment. However, we first consider the principal issue in the case - whether the trial court properly determined that Minix is indebted to Wolf - by way of a general discussion.

DISCUSSION

We begin by noting that this case was tried by the circuit court sitting without a jury. It is before this Court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Accordingly, appellate review of the trial court's findings of fact is

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<sup>2</sup> The order did not adjudge Minix to be in contempt of any court order.

<sup>3</sup> Wolf argues that Minix's appeal should be dismissed because his notice of appeal identified only the order denying his post-judgment motions as the order being appealed from. However, the Notice referenced the trial court's October 9, 2006, order, and we conclude that the notice substantially complied with CR 73.03. See *Ready v. Jamison*, 705 S.W.2d 479, 481-482 (Ky. 1986) (Dismissal is not an appropriate remedy for this type of defect so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent).

governed by the rule that such findings shall not be set aside unless clearly erroneous. CR<sup>4</sup> 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Golightly*, 976 S.W.2d at 414; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002); *Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982). The trial court's conclusions of law, however, are subject to independent de novo appellate determination. *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky.App. 1999); *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992).

In its October 9, 2006, order, the trial court made the following findings of fact relevant to our review:

The undisputed evidence is that upon the parties' divorce [Minix] began making child support payments to [Wolf] for the parties' 2 children at the rate of approximately \$1,100.00 per month. Further, upon the oldest child becoming emancipated the undisputed facts are that [Minix] and [Wolf] agreed that child support would be reduced to 60% of the original amount, this being the sum of \$302.57 bi-weekly. The evidence is further undisputed that [Minix] made these payments through April, 2003 with a further \$500.00 payment being made in May, 2003. The undisputed evidence further reveals that the parties were to bear equally the amount of medical bills incurred

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<sup>4</sup> Kentucky Rules of Civil Procedure.

which were not covered by [Minix's] insurance.

[Wolf's] testimony alleges that [Minix] is currently in arrears in child support payments in the amount of \$7,366.82 with the additional sum of \$2,966.72 representing one-half of the medical bills incurred on behalf of the parties' youngest child which were not covered by insurance.

. . . .

Based upon the undisputed testimony it appears that [Minix] is in arrears in the amount of \$7,366.82 representing 60% of the original amount which [Minix] had paid for some 12 or 13 years prior to the emancipation of the party's oldest child. Additionally, the Court finds that [Minix] owes to [Wolf] the sum of \$2,966.72 representing one-half of medical expenses incurred on the party's youngest child not covered by insurance.

The findings of the trial court that the parties' had an agreement concerning the amount of child support Minix would pay is supported by the record. See Transcript of September 23, 2005, hearing, pgs. 54-55. Similarly, the parties' agreement to split unreimbursed child support upon a fifty-fifty basis is supported by the record. See Transcript of March 8, 1996, hearing, pgs. 17-19. Further, the amounts as determined by the trial court are supported by the testimony of Wolf at the September 23, 2005, hearing.

In *Whicker v. Whicker*, 711 S.W.2d 857 (Ky.App. 1986), this Court clarified that agreements concerning child support obligations made between the parties without prior notification or approval of the court are enforceable provided "(1) such

agreements may be proved with reasonable certainty, and (2) the court finds that the agreement is fair and equitable under the circumstances." *Id.* at 859. See also *Arnold v. Arnold*, Ky., 825 S.W.2d 621, 622 (1992). The *Whicker* Court further stated therein that in order to enforce such agreements, "a court must find that modification might reasonably have been granted, had a proper motion to modify been brought before the court pursuant to KRS 403.250 at the time such oral modification was originally agreed to by the parties." *Id.*

The parties' agreement relating to child support (and unreimbursed medical expenses) falls within the *Whicker* rule.<sup>5</sup> Moreover, the requirement that the agreement be proven with reasonable certainty is met in that the agreement was admitted to by the parties upon the record through their respective testimony.

Absent from the trial court's findings, however, are findings concerning whether the parties' agreement is fair and equitable under the circumstances and whether the agreement might reasonably have been granted had a proper motion been brought before the court at the time the agreement was originally agreed to by the parties. However, Minix does not raise the failure of the trial court to make findings in his appellate brief as grounds for error. Because Minix does not challenge the trial court's failure to make findings upon these

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<sup>5</sup> *Whicker* specifically addressed oral modifications of child support; however, we believe the principles set forth in *Whicker* have equal applicability to the extra-judicial agreements at issue in this case.

issues, any error for such failure is deemed waived on appeal. See *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004). We accordingly affirm the trial court's determination of the amounts owed to Wolf upon her claims for child support and unreimbursed medical expenses.

#### OTHER ISSUES

We next discuss the specific issues raised by Minix in his appellate brief.

#### Appointment of Replacement Trial Judge

Previously Judge Charles Lowe, Jr., presided as Special Judge in this case. Judge Lowe, however, retired, and Chief Regional Circuit Judge John David Caudill appointed himself to preside as Special Judge on the case. Minix alleges that Judge Caudill erred by appointing himself as replacement judge in this case and, therefore, lacked jurisdiction to consider the matters at issue.

SCR<sup>6</sup> 1.040(3) identifies the Chief Regional Judge's duties. SCR 1.040(3)(d) provides that the Chief Judge shall "[r]eassign cases from one judge to another as necessary or convenient[.]" In the present case, Judge Lowe retired, thereby requiring the reassignment of the case "from one judge to another as necessary or convenient." Hence, the reassignment was in compliance with SCR 1.040(3)(d). Accordingly, we find Minix's objection to Judge Caudill's assignment of the case to himself to be without merit.

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<sup>6</sup> Kentucky Rules of the Supreme Court.

## Whether Appeal is Interlocutory

Minix argues that his own appeal is interlocutory. As we construe this argument, Minix alleges that because all pre-1995 orders were voided, initial litigation upon various issues (such as property distribution) has not been resolved and those issues must now be relitigated, and new orders issued, to meet the requirement that all issues between the parties be adjudicated for an order to be final and appealable.

CR 54.01 defines a final and appealable order as one which adjudicates all the rights of all of the parties. However, we do not believe the rule is applicable in this case. As we construe the record, all issues have, over the past 22 years, been resolved between the parties except those relating to the latest round of litigation. Hence, we do not believe the voiding of the pre-1995 orders makes the present appeal interlocutory.

By separate argument, Minix argues that the appeal is not final because the trial court did not rule upon his cross-motion for contempt, and thus all the issues between the parties were not adjudicated. Again, we do not believe CR 54.01 applies. As previously noted, all the rights between the parties, save for the present, have been resolved. The present issues relate to compliance with previous orders and agreements and do not implicate new issues between the parties as contemplated under the rule, but, rather, implicate the failure to comply with the previously established orders and agreements.

The trial court's ruling upon Wolf's motion is no less final because Minix has filed a separate and unrelated motion to hold Wolf in contempt. Nevertheless, as further discussed below, we agree that the trial court should have ruled upon his cross-motion. See discussion at pg 12, *infra*.

#### Waiver

As we construe this argument, Minix alleges that Wolf waived her right to child support by failing to obtain a child support order following the voiding of the pre-1995 orders. However, as previously discussed, the parties agreed to a child support arrangement following the voiding of the orders and the arrangement worked successfully until the latest round of litigation. Because Wolf entered into an agreement with Minix for the payment of child support in the absence of a court order, Wolf did not waive her right to child support.\_

#### Estoppel

Minix contends that Wolf is estopped from seeking the present child support arrearage because the January 2002 letter requesting that he enter into an agreed order amounted to an admission that their child support agreement was not enforceable. However, when read as a whole, the letter simply was requesting that Minix enter into an agreed order so that the local child support office could more efficiently administer his child support payment to Wolf. There was no admission by Wolf that she was not entitled to payment of child support pursuant to their agreement.

### Bad Faith

Minix contends that Wolf's motion was filed in bad faith and that she should be sanctioned pursuant to CR 11. However, as discussed herein, Wolf had a legitimate claim that Minix had failed to comply with their agreements relating to child support and unreimbursed medical expenses. As such, Wolf is not subject to CR 11 sanctions.

### Failure to Rule on Cross-motion

Minix argues that the trial court erred by failing to rule upon his cross-motion to hold Wolf in contempt for failing to comply with a September 18, 1997, order to produce certain income tax and business records. We agree.

As previously discussed, as part of the present round of litigation Minix filed a motion to hold Wolf in contempt for failure to comply with a September 1997 order requiring Wolf to furnish certain income tax and business records. The trial court, however, failed to rule upon this motion, and the motion remains pending. While we have grave doubts that such records have any present-day relevance, we believe that it is incumbent upon the trial court to rule upon the motion. We accordingly remand for a ruling upon the outstanding motion.

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In her cross-appeal Wolf argues that the trial court erred by failing to state that its judgment against Minix was subject to interest. Wolf does not cite us to her preservation of this issue, CR 76.12(4)(c). As a general rule, an issue not

raised in the circuit court may not be presented for the first time on appeal. Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky.App. 1998). We note, however, that KRS 360.040 provides that "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." We discern no reason why the statute would not apply in the present case.

CONCLUSION

For the foregoing reasons the judgment of the Johnson Circuit Court is affirmed with the exception that the cause is remanded for a ruling upon the appellant's motion to hold Wolf in contempt.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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