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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000540-MR

DALE RODGER DAUGHERTY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 92-FD-000342

JEAN DAUGHERTY

APPELLEE

OPINION AND ORDER
AFFIRMING
AND DENYING SANCTIONS

** ** * ** * ** *

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Dale Daugherty appeals the judgment of the Jefferson Circuit Court which found that he waived his right to contest a new qualified domestic relations order (hereinafter “QDRO”). After careful review, we affirm.

Dale married Jean Daugherty (now Henderson) in 1975. In 1992, Jean filed a petition for dissolution of her marriage to Dale. In July 1992, Dale and Jean

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

entered into a property settlement agreement that recited that Dale's interest in his pension from Ford Motor Company “shall be divided . . . equally through the date of the Decree entered herein.” In October 1992, the Jefferson Circuit Court entered a decree of dissolution of marriage that incorporated Dale and Jean's property settlement agreement by reference. In November 1992, the Jefferson Circuit Court entered an agreed QDRO. That QDRO ordered, in relevant part, as follows:

1. That the alternate payee, Jean Daugherty, has a right to \$282 .63 per month payable from the pension benefits due the plan participant, Dale Rodger Daugherty, at the time the plan participant begins receiving an unreduced pension benefit, or earlier at a reduced amount, if permitted by the plan. The said \$282.63 is 50% of the calculated monthly benefit of the plan participant at age 65 as of October 6, 1992 [the date the decree of dissolution of marriage was entered].

...

5. The court reserves the right to amend or modify this Order, if necessary, in order to carry out the intent of the Qualified Domestic Relations Order through compliance with the requirements of the Equity Retirement Act of 1984 and/or any other state or federal law dealing with this subject, compliance with which is necessary in order to carry out the parties' intention to permit the alternate payee to share in the participant's qualified pension plan benefits to the precise extent provided herein above. *No amendment or modification of this Order may alter the amount to be transferred as specified herein above.*

(emphasis added).

Nothing germane to this appeal happened between the parties until Dale retired in 2003. It was then discovered that the QDRO had never been submitted to Dale's pension plan administrator. When Dale finally submitted the QDRO to the

pension plan administrator later in 2003, the administrator rejected it for ERISA deficiencies.

As she was not receiving any benefits from Dale's retirement funds, Jean filed a motion to enter a revised QDRO in January 2004. Dale filed no objections, and the court approved Jean's tendered QDRO in March 2004.

Three months after the QDRO was approved, Dale, with a new attorney, filed a motion to set it aside, asking the court to approve his tendered QDRO instead. The family court denied Dale's motion, ruling that Dale had not attached a proposed QDRO and, furthermore, that any future motions to set aside must be accompanied by a "detailed affidavit setting forth specific facts as to why the prior QDRO, which is currently in pay status, is not in conformance with the terms of the Property Settlement Agreement and should be set aside."

In July 2004, Dale filed a motion to set aside the 2004 QDRO. Dale argued that the 2004 QDRO violated the parties' 1992 property settlement agreement because that agreement provided that Jean's interest in Dale's pension had an accrual date of the date of the divorce decree; whereas, the 2004 QDRO used the date of Dale's retirement as Jean's benefit accrual date. In response, Jean filed a motion to quash Dale's motion to set the 2004 QDRO aside. In her motion to quash, Jean argued, among other matters, that Dale, through counsel, had already agreed to the 2004 QDRO.

In late July 2004, the family court denied Dale's motion to set aside the 2004 QDRO. The court noted that Jean was receiving \$774.08 per month from Dale's retirement, an amount well over that agreed to by the parties in 1992, but found that such an amount was proper because the parties had evidenced a desire to split the marital

portion of Dale's retirement equally. Unfortunately, the family court's order did not address Jean's argument that Dale had previously agreed to the terms of the 2004 QDRO.

Still dissatisfied, in August 2004, Dale, represented by a third attorney, filed another motion to set aside the 2004 QDRO. Again, Dale noted the fact that under the terms of the 2004 QDRO, Jean was receiving nearly \$500 per month more than what was specifically agreed to by the parties in 1992 due to the fact that the 2004 QDRO divided Dale's pension through the date of his retirement rather than through the date of the divorce decree. The family court denied Dale's tendered QDRO. Three days later, Dale appealed to this Court.

Jean moved to dismiss Dale's appeal as untimely based on the ground that Dale did not appeal Jean's QDRO within thirty days after its entry on March 4, 2004. Dale, in turn, argued that the 1992 Agreed QDRO was a final judgment with respect to the amount awarded Jean, and the trial court thus lost jurisdiction to alter it in 1992. This Court found that Dale's motions were timely under CR 60.02 for relief from an order which was void. *Daugherty v. Daugherty*, No. 2004-CA-001694-MR, 2005 WL 2323351, slip op. at 6-7 (Ky.App. Sep. 3, 2005). Ultimately, this Court denied Jean's motion to dismiss and determined that,

[b]ecause the parties' property settlement agreement is a valid, enforceable contract, which was incorporated by reference into the decree of dissolution of marriage, its terms must be enforced. Thus, we hold that the trial court abused its discretion by first approving the 2004 QDRO and, then again, by declining Dale's request to set aside the 2004 QDRO, which contains at least one crucial, materially different term than what is called for by the parties' property settlement agreement and the 1992 agreed QDRO.

Id., slip op. at 8-9. This Court remanded, however, the issue of whether Dale's silence regarding the 2004 QDRO constituted waiver, stating that “[i]f the family court finds that Dale voluntarily waived his right to object to the 2004 QDRO, then that document may stand, despite its errors.” *Id.*, slip op. at 10.

Dale moved this Court to reconsider the portion of our opinion remanding the waiver issue, arguing that by denying Jean's motion to dismiss, we had agreed the trial court lost jurisdiction to alter the amount awarded to Jean and jurisdiction could not be created by waiver. We denied the motion without opinion. Dale then filed a motion for discretionary review with the Kentucky Supreme Court, which was also denied without opinion.

On remand, Dale continued to assert lack of jurisdiction to alter the Agreed QDRO. The trial court rejected this argument noting that the jurisdictional issue was finally decided against Dale per his first appeal and that the only issue before it was that of waiver. After careful review, the trial court found that Dale waived any objection to Jean's QDRO due to his attorney's failure to make any objection in the record. Dale moved the trial court to reconsider its decision, which was again denied. This appeal followed.

Dale again raises the argument of jurisdiction in this appeal. We dispense with this effort quickly because it has been addressed by us, the Kentucky Supreme Court, and the trial court *twice*. We clearly recognized jurisdiction by stating, “[i]f the family court finds that Dale voluntarily waived his right . . . then that document may stand, despite its errors.” *Id.* Therefore, we reiterate that the trial court did have jurisdiction to consider this matter, and we find no error. We, however, will not grant the

requested sanctions by Jean regarding the repetition of this argument, as we find it was done in good faith.

We now turn to Dale's contention that he did not waive his right to object to the 2004 QDRO. Dale argues that there is no evidence of waiver except the actions of his first attorney, and he contends that his right to object could not be waived by his attorney. We disagree.

“[W]aiver requires proof of a 'knowing and voluntary surrender or relinquishment of a known right.' Because this is a right with both constitutional and statutory underpinnings, proof of waiver must be clear and convincing.” See *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky. 2004). We review the trial court's findings for clear error, which means we must focus on whether its findings are supported by substantial evidence. *Id.* at 470. In *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003), the Kentucky Supreme Court defined substantial evidence as follows:

'substantial evidence' is '[e]vidence that a reasonable mind would accept as adequate to support a conclusion' and evidence that, when 'taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men.'

The original motion hour for this matter was scheduled for February 2, 2004. Thereafter, the matter was set for motion hour two more times regarding the entry of the QDRO. At no point was an objection stated to the court. In fact, the court entered the QDRO on March 5, 2004, and only when it was approved by the plan administrator, and thereafter reached pay status, did Dale assert an objection. Dale had notice of the proceedings the entire time and still made no objections. Furthermore, it is clear from the

facts that Dale was aware of his attorney's opinion that Jean's QDRO was correct and still failed to voice any objections. The Kentucky Supreme Court has held that "waiver may be implied 'by a party's decisive, unequivocal conduct reasonably inferring the intent to waive,' as long as 'statements and supporting circumstances [are] equivalent to an express waiver.'" *See Moore*, at 360, *citing Greathouse v. Shreve*, 891 S.W.2d 387, 391 (Ky. 1995). The inaction on Dale's part and the failure to enter any objection on record is sufficient evidence to support an implied waiver. We find no clear error.

Accordingly, we affirm the judgment of the Jefferson Circuit Court but deny the requested sanctions, finding that Dale's appeals were raised in good faith.

VANMETER, JUDGE, CONCURS.

KNOPF, SENIOR JUDGE, CONCURS IN RESULT ONLY.

ENTERED: February 15, 2008

/s/ James H. Lambert
JUDGE, COURT OF APPEALS