

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001898-MR

CARL LANORE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT (FAMILY) COURT  
HONORABLE STEPHEN M. GEORGE, JUDGE  
ACTION NO. 09-CI-501401

DEBORAH LANORE (NOW PYNE)

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: CAPERTON, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Carl Lanore appeals from a judgment of the Jefferson Family Court dissolving his marriage to Deborah Pyne. The trial court struck his pleadings and entered a default judgment against Lanore due to his failure to cooperate with discovery. Lanore argues that the trial court failed to make sufficient findings to warrant such an extreme sanction. We disagree, finding no abuse of discretion in the trial court's imposition of sanctions and entry of a default

judgment against Lanore. The remaining issues regarding division of marital property and debts and the award of maintenance to Pyne are not properly preserved for review. Hence, we affirm the judgment in full.

Carl Lanore and Deborah Pyne were married in 1988 and separated in October of 2007. There were three children born of the marriage, but two of those children were emancipated when Pyne filed a petition for dissolution of the marriage on April 23, 2009. Although Lanore filed an initial entry of appearance for himself and later by counsel, he did not file an answer or responsive pleading to the petition.

On August 5, 2009, the trial court entered an order granting Pyne's motion for temporary maintenance and child support. The court awarded Pyne temporary maintenance of \$500 per week and temporary child support of \$423 per month. The trial court also directed that Lanore advance \$1,500 toward Pyne's attorney fees.

In November 2009, Pyne filed a motion to hold Lanore in contempt for failure to pay his temporary maintenance and child support. In an order entered on December 2, 2009, the trial court found Lanore in contempt. The trial court further found that Lanore had a combined arrearage of \$4,424.61 and had failed to advance the \$1,500 in attorney fees as directed in the previous order. The trial court sentenced Lanore to 180 days to serve for the contempt, but withheld imposition of the sentence on the condition that Lanore pay the arrearage within thirty days.

On January 14, 2010, Pyne moved for advancement of funds to prevent foreclosure upon the marital residence, recalculation of Lanore's maintenance and child support arrearage, a contempt finding for Lanore's failure to pay their child's health insurance premiums, and another advance for attorney fees related to the contempt motions. The trial court issued an order on January 20, 2010, stating that Lanore could purge his contempt by paying the sum of \$8,207.60 to Pyne by noon on January 25, 2010. The trial court ordered Lanore to appear on that date for sentencing. Lanore did not pay the required amount, nor did he appear for sentencing as directed.

Consequently, on February 2, 2010, the trial court issued an order of arrest for Lanore. The trial court also scheduled a show-cause hearing with regard to Lanore's failure to pay temporary maintenance, child support and the child's health insurance premiums, and on Pyne's request for attorney fees. She also sought to hold Lanore in contempt for his failure to relinquish a vehicle, as required by a prior order.<sup>1</sup>

Lanore failed to appear for the March 2, 2010, show-cause hearing, but his counsel was present. Counsel presented a personal check from Lanore in the amount of \$8,207 (plus a one-dollar bill) to satisfy Lanore's arrearages. The trial court held that this would purge Lanore's contempt, provided that the check was valid.<sup>2</sup> However, the trial court noted that Lanore still had accrued a

---

<sup>1</sup> Subsequently, Lanore's counsel turned over the keys to the vehicle and informed Pyne where it could be located. However, the vehicle remains located in Arizona.

<sup>2</sup> There is no indication in the record that the check was returned for insufficient funds.

maintenance arrearage in the amount of \$5,000. Consequently, the trial court declined to set aside the arrest warrant and imposed its prior sentence of 180 days for contempt. The trial court also awarded Pyne a common-law judgment of \$2,500 for her attorney fees in connection with the contempt proceedings.

At the hearing, Pyne complained that Lanore was intentionally absenting himself from Kentucky. She noted that Lanore lives and works in Arizona. She played an excerpt from Lanore's internet radio show in which he stated that he did not plan on ever returning to Kentucky. Pyne informed the trial court that Lanore had not fully responded to her discovery requests and was being uncooperative in scheduling a deposition. The trial court orally indicated that if Lanore did not attend his deposition then it would strike his answer and the matter would proceed against him as a default judgment.

After Lanore did not respond to additional attempts to schedule a deposition, Pyne's counsel sent a notice to take Lanore's deposition on April 27, 2010. Two business days before the scheduled deposition, Lanore's counsel filed a request for a continuance, stating that counsel would not be available due to a conflict with another case. Pyne opposed the motion for a continuance. Neither Lanore nor his counsel appeared for the scheduled deposition. On May 5, 2010, Pyne filed a separate motion to compel Lanore to produce documents requested in response to a prior discovery request.

On May 10, 2010, Pyne filed a motion to strike Lanore's pleadings, including his counsel's entry of appearance, in accord with the trial court's comments at the March 2, 2010, hearing. After a hearing, the trial court entered an order on May 17, 2010, granting the motion to strike Lanore's pleadings, including counsel's entry of appearance. Several other pending motions were decided as well.

Subsequently, Lanore's counsel filed a motion seeking to terminate temporary maintenance to Pyne. The trial court denied the request on June 17<sup>th</sup>, 2010, simply writing "Denied" on the motion.

On July 22, 2010, Pyne appeared with her counsel for the bench trial, but Lanore failed to personally appear. The matter proceeded to trial. At the beginning of the hearing, the trial court advised Lanore's counsel that the action would proceed as a default judgment and counsel would not be permitted to participate. The trial court then excused Lanore's counsel from the courtroom. Thereafter, the trial court took proof from Pyne on all contested issues.

On September 14, 2010, the trial court entered its findings of fact, conclusions of law and a decree of dissolution of the marriage. On the issue of maintenance, the trial court found that Lanore is self-employed as an internet radio talk show host. Pyne testified that she believes Lanore earns between \$9,000-\$10,000 per month. Pyne is self-employed as a marketing consultant, but had been unemployed since 2008. The trial court imputed an income to her of \$1,135 per month. Based on her claimed monthly expenses of \$4,000, the trial court awarded

Pyne maintenance of \$2,500 per month for a period of 96 months. The trial court also found that Lanore has accrued a maintenance arrearage of \$12,500. The trial court entered a judgment against him for that amount.

On the issues relating to custody and support of their minor child, the trial court awarded sole custody of the minor child to Pyne and directed that Lanore will be awarded reasonable visitation with the child “at such time he presents himself to this Court and makes that request. Until that time, he shall continue to have access to [the child] via telephone, text message[,] e-mail or similar device.” Based on the parties’ respective incomes, the court ordered Lanore to pay child support in the amount of \$681 per month. The trial court also ordered Lanore to pay sixty-six percent (66%) of the child’s health insurance premiums and unreimbursed medical expenses in excess of \$100 per year. Finally, the trial court found that Lanore had accrued a child support arrearage of \$195.22, which it reduced to a judgment.

The trial court next turned to division of the parties’ property and debts. The trial court noted that the parties have very few assets to divide and there are no claims that the remaining property is non-marital in nature. Consequently, the trial court awarded each party any property currently in his or her possession. The trial court awarded Pyne a judgment in the amount of \$2,400, representing the value of an automobile which it had previously ordered Lanore to turn over to her. The trial court also ordered Lanore to reimburse Pyne \$1,584.65 for marital debts

to T-Mobile and J.R. Vovo,<sup>3</sup> and to be responsible for any tax obligations remaining after the foreclosure sale of the marital residence. To secure payment of these amounts, the trial court awarded Pyne with possession of Lanore's internet domain names www.superhumanradio.com and www.offtopic.com until such time as Lanore had satisfied all judgments against him (totaling \$16,669.87). Finally, the trial court ordered Lanore to pay Pyne \$20,000 for her attorney fees. This amount included previous advances ordered by the trial court.

Following entry of the judgment, Lanore filed a motion to correct certain errors and omissions in the judgment. The trial court granted the motion and entered an amended judgment on October 12, 2010. Lanore now appeals.

Lanore primarily argues that the trial court failed to make sufficient findings to justify striking his pleadings and entering a default judgment against him. The trial court's authority to impose sanctions for failure of a party to comply with discovery is found in Kentucky Rules of Civil Procedure (CR) 37.02(2) and 37.04. CR 37.04 permits the trial court to take any action allowed under CR 37.02(2) when a party fails to appear for a deposition, to serve answers or objections to interrogatories, and to serve a written response to a request for a request for inspection of records. CR 37.02(2) permits the trial court to impose sanctions on any party that fails to obey an order to provide or permit discovery, including the following:

- (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to

---

<sup>3</sup> Spelling to avoid copyright violation.

be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings . . . or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) Where a party has failed to comply with an order under Rule 35.01 requiring him to produce another for examination, such orders as are listed in subparagraphs (a), (b) and (c) of this paragraph (2), unless the party failing to comply shows that he is unable to produce such person for examination.

In this case, the trial court exercised its option under subsection (c), striking all of Lanore's pleadings, including his counsel's entry of appearance.

The matter then proceeded as a default judgment. The trial court also precluded Lanore or his counsel from opposing any of Pyne's claims or even participating in the evidentiary hearing, as provided under subsection (b). Lanore does not directly challenge the trial court's authority to take these actions, but argues that the trial court was required to make detailed findings before taking such drastic action.

When a trial court issues sanctions pursuant to CR 37.02(2), an appellate court reviews the decision for abuse of discretion. *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 360 (Ky. App. 1999). "The test for



abuse of discretion is whether the trial [court's ruling] was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). In *Stapleton v. Shower*, 251 S.W.3d 341 (Ky. App. 2008), this Court held that sanctions imposed under CR 37.02, including dismissal, are functionally the same as a dismissal under CR 41.02. Consequently, the Court held that the factors set out in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), are relevant when a “dismissal [or a default judgment] is imposed as a sanction for failure to comply with discovery requests.” *Stapleton*, 251 S.W.3d at 343-44.

*Ward, supra*, outlined six factors that the trial court must consider when dismissing a case pursuant to CR 41.02: “(1) the extent of the party’s personal responsibility; (2) the history of dilatoriness; (3) whether the attorney’s conduct was willful and in bad faith; (4) meritoriousness of the claim; (5) prejudice to the other party, and (6) alternative sanctions.” *Id.* at 719.

However, in *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654 (Ky. App. 2009), this Court reviewed a trial court’s imposition of sanctions under CR 37.02(2) under the elements set out in *Greathouse v. American National Bank and Trust Co.*, 796 S.W.2d 868 (Ky. App. 1990). *R.T. Vanderbilt*, 290 S.W.3d at 662. *Greathouse* directs a court to consider:

(1) whether [the offending party’s] non-compliance was willful or in bad faith; (2) whether [the adversary] was prejudiced by [the offending party’s] failure to comply with the discovery orders; (3) whether [the offending party] was warned that failure to cooperate could lead to

dismissal; (4) whether less drastic sanctions were imposed or considered before the trial court precluded [the offending party] from presenting its defenses; and (5) whether the sanction imposed bears some reasonable relationship to the seriousness of the non-compliance.

*R.T. Vanderbilt*, 290 S.W.3d at 662, citing *Greathouse*, 796 S.W.2d at 870.

While these tests are not identical, they set out substantially similar factors which a trial court must consider before imposing sanctions on a party for his or her failure to cooperate with discovery. Furthermore, in *Jaroszewski v. Flege*, 297 S.W.3d 24 (Ky. 2009), the Kentucky Supreme Court emphasized that the six *Ward* factors are not exclusive. Rather, the trial court must consider all factors relevant to the particular case. *Id.* at 33. Both tests also recognize that a dismissal or a default judgment under CR 37.02 is a severe sanction which should only be used in exceptional cases. *R.T. Vanderbilt*, 290 S.W.3d at 661, citing *Polk v. Wimsatt*, 689 S.W.2d 363 (Ky. App. 1985). See also *Ward*, 809 S.W.2d at 720. Finally, both tests require the trial court to make findings of fact which are sufficient to allow meaningful appellate review of the imposition of such sanctions. *Greathouse*, 796 S.W.2d 869.

In its May 15, 2009, order, the trial court briefly but clearly set out the basis for its decision.

This matter has been pending since April 23, 2009. For much of the past six months, [Pyne] has attempted to schedule Mr. Lanore's deposition, all without success. Numerous requests have been made to schedule Mr. Lanore's deposition voluntarily, and none received any response. In addition, when [Pyne] set Mr. Lanore's deposition by filing a Notice to Take Deposition, Mr.

Lanore did not respond until two business days prior to the scheduled deposition. The reasons for that request to reschedule the deposition have been inconsistent.

Furthermore, Mr. Lanore has been non-cooperative and non-compliant. He has been held in contempt more than once, and has failed to attend recent Court hearings. In fact, he has stated on his radio show that he would not ever be returning to Kentucky. Whether he was simply boasting, or truthful, is unknown, but his conduct would indicate that he was being truthful.

Lanore complains that the trial court failed to consider his counsel's valid reasons for canceling the April 27, 2010, deposition. He also notes that he was subject to an arrest order if he returned to Kentucky to attend the deposition. In addition, Lanore points out that both parties switched counsel and that there were disputes about timeliness of discovery on both sides. Lanore also states that he or his counsel attended all previous hearings and had participated in the litigation. Lanore maintains that the trial court failed to find whether his conduct was a willful attempt to delay the proceedings, whether Pyne had been prejudiced by his failure to attend the deposition, or whether lesser sanctions were appropriate.

If the trial court had stricken Lanore's pleadings only because he failed to appear for the April 27, 2010, deposition, then we might agree that the sanction was excessive. However, Lanore had demonstrated persistent unwillingness to cooperate with discovery or to timely move the proceedings forward. Although Pyne gave Lanore more than a month's notice of the scheduled deposition, Lanore's counsel did not advise Pyne of his conflict until April 23,

2010. And while Lanore was subject to an arrest order if he returned to Kentucky, he made no effort to arrange an alternate means to taking his deposition or to seek a lifting of the warrant which would have allowed him to attend in person.

Moreover, Lanore was subject to that arrest warrant due to his failure to comply with the trial court's prior orders.

Indeed, the trial court's prior orders holding Lanore in contempt and directing him to cooperate with scheduling the deposition failed to change his behavior. A party who intentionally seeks to delay or thwart the judicial process should not benefit from the defiant conduct. *Baltimore & Ohio Railroad Co. v. Carrier*, 426 S.W.2d 938, 941 (Ky. 1968). The trial court specifically found that Lanore boasted on his internet radio show that he did not intend to ever return to Kentucky. And while Lanore had cooperated with some discovery until the trial court issued the arrest warrant, he persistently refused to respond to Pyne's requests to schedule his deposition after January of 2010. The trial court warned Lanore that his continued defiance would lead to a default judgment. Given this evidence, the trial court reasonably found that Lanore's conduct was willful and that Pyne was prejudiced as a result of his actions. While the remedy in this case was extreme, the trial court implicitly concluded that lesser sanctions would have been futile. Consequently, the trial court did not abuse its discretion by striking Lanore's pleadings and entering a default judgment against him.

The trial court's decision to strike Lanore's counsel's entry of appearance does raise some concern. Although CR 37.02(2)(c) permits the trial

court to strike “pleadings” as a sanction for discovery violations, the rule does not suggest that a counsel’s entry of appearance would be the type of pleading subject to being stricken. Furthermore, the Kentucky Supreme Court has recognized that the disqualification of counsel for a party is a “drastic measure” that may only be employed when “absolutely necessary.” *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 560 (Ky. 2001). When the trial court disqualifies counsel, such “[d]isqualification separates a party from the counsel of its choice with immediate and measurable effect.” *Id.* This case does not involve the disqualification of an attorney, but the practical effect of the trial court’s actions is effectively the same.

We must also note that the trial court’s exclusion of Lanore’s counsel from the proceedings raises serious due process concerns, even though the matter technically proceeded as a default judgment. Fundamental fairness requires that a defaulting party should be given notice of a damage assessment hearing and should be permitted to participate in the damage assessment hearing where he has entered an appearance in the action prior to the hearing. *Howard v. Fountain*, 749 S.W.2d 690, 693 (Ky. App. 1988). The trial court’s striking of counsel’s entry of appearance does not negate these fundamental due process interests.

Even so, given the trial court’s broad powers under CR 37.02(2), we cannot find that Lanore was unfairly prejudiced by the trial court’s decision to strike his counsel’s entry of appearance. Although we question whether it was appropriate to excuse Lanore’s counsel from the courtroom, the trial court was within its discretion to strike Lanore’s pleadings and to prohibit him introducing

evidence in support of his claims or in opposition to Pyne's claims. Lanore's ability to participate in the proceedings would have been extremely limited even if his counsel had been permitted to remain in the courtroom.<sup>4</sup> Thus, even if the trial court had not stricken counsel's entry of appearance, the outcome of the case would have been the same.

Lanore also argues that the trial court erred by inequitably dividing the marital estate and in its award of maintenance to Pyne. But since we have found that the trial court did not abuse its discretion by entering a default judgment against Lanore, "the issue [on] appeal is limited to determining whether the pleadings were sufficient to uphold the judgment[.]" *Jeffrey v. Jeffrey*, 153 S.W.3d 849, 851 (Ky. App. 2004), quoting *Mingey v. Cline Leasing Service, Inc.*, 707 S.W.2d 794, 796 (Ky. App. 1986).

The trial court clearly had the authority to divide the marital property, KRS 403.190(1), and marital debts, *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522 (Ky. 2001). Where the issues are properly preserved, the division of marital property and debt is within the sound discretion of the trial court and will not be disturbed unless we find an abuse of discretion. *Neidlinger*, 52 S.W.3d at 523. Likewise, the trial court had the authority to award maintenance to Pyne under KRS 403.200. An award of maintenance is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Gentry*,

---

<sup>4</sup> We also note that Lanore failed to file an answer or other pleading responsive to Pyne's petition, as required by CR 12.01. In the absence of any showing of good cause, this failure alone would have warranted a default judgment under CR 55.01.

798 S.W.2d at 928; *Perrine v. Christine*, 833 S.W.2d 825 (Ky. 1992). But since his pre-judgment pleadings were stricken and he did not file any post-judgment pleading, Lanore cannot show that he has preserved any factual or legal issues for review. Therefore, we cannot consider the merits of these claims.

Accordingly, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT  
FOR APPELLANT:

J. Clark Baird  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Louis P. Winner  
Stacy Anne Hoehle  
Louisville, Kentucky

ORAL ARGUMENT FOR  
APPELLEE:

Louis P. Winner  
Louisville, Kentucky