

RENDERED: JULY 18, 2014; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000605-MR

GLEN A. MULLINS

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 94-CI-00041

SANDRA MULLINS, (NOW SCAGGS)

APPELLEE

OPINION AND ORDER DISMISSING APPEAL

** ** * * * * *

BEFORE: JONES, STUMBO, AND THOMPSON, JUDGES.

JONES, JUDGE: Appellant, Glen A. Mullins ("Husband"), appeals an order by the Greenup Circuit Court ordering him to produce certain information to the Appellee, Sandra Mullins Scaggs ("Wife") so that she could obtain a Qualified Domestic Relations Order ("QDRO"). For the reasons set forth below, we dismiss this appeal because the circuit court's order is a nonfinal, discovery order.

II. BACKGROUND

The facts are straightforward and undisputed. Husband and Wife were married on April 3, 1976, and separated on July 30, 1993. Wife filed a

petition for dissolution of marriage with the Greenup Circuit Court on February 2, 1994. On July 25, 1995, the circuit court granted Wife's petition and dissolved the parties' marriage as set forth in the court's Order and Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage ("Dissolution Decree"). Paragraph Seven of the Dissolution Decree provides:

The Respondent [Husband] has presently a pension through his employer and when the Respondent is entitled to draw any portion of the pension, either lump sum or periodic, at that time the Petitioner [Wife] shall be entitled to a portion of said payment under the following formula:

Numerator = number of years of marriage.
 $\frac{\text{_____}}{\text{respondent}^1} \times 1/2 \times \text{amount of payment} = \text{amount due}$
Denominator = number of years of service.

On January 31, 2013, Wife filed a motion with the circuit court seeking an order requiring Husband to "provide all necessary information concerning his employment while the parties were married so Qualified Domestic Relations Orders may be entered." Husband responded that Wife's motion was time barred under Kentucky Revised Statutes (KRS) 413.090(1) as she had not moved for entry of a Qualified Domestic Relations Order within fifteen years of the circuit court's entry of the Dissolution Decree. On February 27, 2013, the circuit court conducted a hearing to determine whether KRS 413.090(1) barred further action by Wife to obtain a Qualified Domestic Relations Order with respect

¹ It appears "respondent" was a typographical error as Husband was the respondent in the underlying dissolution proceeding; and, that the amount due should refer to the amount due Wife, the petitioner.

to Husband's pension. Therein, the parties stipulated that Husband, born September 22, 1952, had not reached retirement age and was presently employed.

On February 27, 2013, the circuit court entered an order in favor of Wife as follows:

The issue before the Court is the Petitioner's motion to require the Respondent to require [sic] the necessary information so that a Qualified Domestic Relations Order may be entered. The Respondent Objects stating the parties divorced July 25, 1995 and the Petitioner only pursuant to a [sic] KRS 413.090 only had 15 years to obtain the Qualified Domestic Relations Order. The Petitioner responds and states that the Petitioner's portion of the Respondent's retirement plans were a property right which vested at the time of the decree and therefore does not fall under 413.090. The Respondent states that the request made in the motion and any subsequent Qualified Domestic Relations Order would be an action upon a judgment or decree and therefore would be barred under 413.090.

The Court hereby finds that Petitioner's portion of the retirement account was in fact a property right which vested in the Petitioner at the time of the entry of the decree. The Court specifically finds that because of that, that KRS 413.090 does not apply. Therefore it is the order of this Court that the Respondent supply the information necessary to obtain the QDROs and that said information be provided to the attorney for the Petitioner within ten (10) days of the date of this Order.

This appeal followed.

II. ANALYSIS

"It is fundamental that a court must have jurisdiction before it has authority to decide a case. Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance

examined." *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005). "This [C]ourt must determine for itself whether it has jurisdiction." *Id.* at 914 (quoting *Hubbard v. Hubbard*, 197 S.W.2d 923 (Ky. 1946)).

An absolute prerequisite to appellate jurisdiction is that the order or judgment at issue must be final. KRS 22A.020. We begin with Kentucky Rules of Civil Procedure (CR) 73.02. "The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04." CR 77.04(2) mandates that the clerk of the court immediately serve a notice of entry of a judgment or final order, among other things, upon every party to the proceeding who is not in default for failure to appear. CR 54.01 defines a final or appealable judgment as a final order "adjudicating all the rights of all the parties in an action or proceeding." CR 54.02 does provide a limited exception where there are multiple parties or multiple claims. It allows for an appeal when less than all the rights of all the parties have been adjudicated, but only upon a determination that it is final and that there is no just reason for delay. In the absence of such finality and a recitation thereof, the order is interlocutory and subject to modification and correction before becoming a final and appealable judgment or order. However, where an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable. *Hook v. Hook*, 563 S.W.2d 716 (Ky.1978); *Hale v. Deaton*, 528 S.W.2d 719, 722 (Ky. 1975).

"The test for determining the appealable character of an order of the trial court is whether '... the order grants or denies the ultimate relief sought in the action or requires further steps to be taken in order that parties' rights may be finally determined.'" *The Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 376 (Ky. 1985) (quoting *Evans Elkhorn Coal Co. v. Ousley*, 388 S.W.2d 130, 130–131 (1965)).

In this matter, the circuit court's order was in essence a discovery order compelling Husband to produce to Wife the information she would need to prepare and submit a Qualified Domestic Relations Order for entry by the circuit court. To date, however, no such order has been entered by the circuit court. As the circuit court has not yet granted Wife the ultimate relief she seeks, entry of the Qualified Domestic Relations Order, we do not believe that the order on appeal is final.

"As a general proposition to permit appeals from discovery orders would create intolerable delay and unmitigated chaos in the progress of the litigation." *Lexington Herald-Leader Co. v. Beard*, 690 S.W. at 376. Where irreparable harm is likely to occur, a writ is the appropriate mechanism through which an aggrieved party may seek immediate relief from a trial court's allegedly erroneous discovery order. In the absence of irreparable harm, a party must wait until entry of a final order to pursue a direct appeal of a discovery-related order. Additionally, there is no automatic appeal where the trial court refuses to dismiss

on statute of limitations grounds. *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 416 (Ky. App. 2004).

While this issue is likely to come before this Court again after entry of a Qualified Domestic Relations Order by the circuit court, we cannot ignore the current procedural posture of this case. Moreover, because we do not have jurisdiction, any opinion by us on the substantive issue would be void and unenforceable. *Max Ams, Inc. v. Barker*, 170 S.W.2d 45, 47 (Ky. 1943) ("But any attempt of a court to adjudicate a case when it has no jurisdiction of the subject matter of the action, or of the person of the parties, is void and of no effect.").

Husband is not left without a remedy. In the event the trial court enters a Qualified Domestic Relations Order, he may pursue a direct appeal at that time. *See Goff v. Goff*, No. 2009-CA-000902, 2010 WL 3810735, at *7 n.8 (Ky. App. Oct 1, 2010) ("A party who believes a QDRO fails in its purpose to enforce the judgment consistently with the judgment's terms may appeal that order to this Court.") (citing *Perry v. Perry*, 143 S.W.3d 632, 632-33 (Ky. App. 2004)).

For the foregoing reasons, this appeal is dismissed and the matter remanded to the Greenup Circuit Court for further proceedings.

ALL CONCUR.

ENTERED: July 18, 2014

/s/ Allison E. Jones

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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