Kentucky Law Journal

Volume 46 | Issue 1 Article 10

1957

Civil Procedure--Service of Notice by Mail--Effect of Non-Receipt on a Judgment Increasing Child-Support Payments

Robert E. Adams
University of Kentucky

Recent Cases

CIVIL PROCEDURE—SERVICE OF NOTICE BY MAIL—EFFECT OF NON-RECEIPT ON A JUDGMENT INCREASING CHILD-SUPPORT PAYMENTS—Appellant obtained a divorce from appellee in 1947 and was ordered to pay $25 per month for the support of his two minor children whose custody was awarded to appellee. In 1954, appellee, in the same court, filed a motion to redocket the action and modify the judgment by increasing the support allowance to $50 per month. Notice of date of entry of this motion was mailed to the out-of-state father but was not received by him. Appellee's motion was heard and sustained in February, 1954, and a modified order was entered to this effect. In June, 1954, appellant moved to vacate the modified order on the ground that it was void because no notice of the hearing was ever received by him. From a denial of his motion, he appealed. *Held:* (5-1)[1] affirmed. The serving of the notice, under Kentucky civil rules, was sufficient and complete upon mailing, and validity of the service was not affected by appellant's failure to receive the notice. *Benson* v. *Benson*, 291 S.W. 2d 27 (Ky. 1956).

The three separate opinions in the case suggest comment as to: (1) whether, under Kentucky Rules of Civil Procedure, a modification of a divorce judgment which increases the child-support allowance should be valid when service of notice is made by mail and is not received by the person concerned, and (2) if so, whether the policy behind the rule should be reexamined.

An action for divorce is an equity proceeding, but the court acquires jurisdiction over the parties in the same manner as in proceedings at law. As in actions at law, the validity of the judgment is dependent in part on the validity of service, and the same requirements for service obtain.

It is a well-established principle of equity that when chancery once acquires jurisdiction over a subject-matter, it will continue to exercise that jurisdiction so long and so often as occasion requires, so that its decree may be made effective and full and final relief in the premises may be granted.[2] In a divorce action in which children are involved, full and final relief is never assured until such children attain their

[1] Majority opinion by Stewart, J., separate concurring opinion by Cammack, J.; dissenting opinion by Hogg, J.; Montgomery, J., not sitting.

[2] 30 C.J.S., Equity Sec. 67 (1942).

majority. It follows that in a divorce action involving the custody and support of children, the court retains, during the minority of the children, such jurisdiction over the parties as it acquires in the original action, or in any subsequent ancillary proceeding.[3] Most of the states have enacted statutes incorporating the case law on this point. Kentucky's statute provides:

> Pending an application for divorce, or on final judgment, the court may make orders for the care, custody and maintenance of the minor children of the parties and any of their children of unsound mind. *At any time afterward,* upon the petition of either parent, the court may revise any of its orders as to the children, having principally in view in all such cases the interest and welfare of the children. No such order for maintenance of children shall divest either party of the fee simple title to real estate.[4] (Emphasis added)

Thus any modification of the original judgment is generally regarded as incidental to, and a step in, the original suit.[5] Such modification is effected by petition or motion[6] by either of the parties and a hearing thereon. Service of notice of the entry of such motion, and time of the hearing thereon, must be made on the other party in accordance with the rules of practice in the trial court.[7]

It is patent that an initial judgment awarding support would be void unless the court had such jurisdiction over the person of the party concerned as would authorize a personal judgment against him.[8] If the jurisdiction in the initial action is such that the court can make a valid award of support, the continuing nature of the court's jurisdiction would seem to permit a modification of that judgment by motion and a hearing thereon after notice.

The appropriate Kentucky civil rule is practically a verbatim adoption of the corresponding federal rule[9] and provides, so far as it relates to the facts of the case, that service of such notice upon a party ". . . shall be made by delivering a copy to him or by mailing it to him at his last known address. . . ."[10] This rule concludes with the statement that, "Service by mail is complete upon mailing."

[3] Elkins v. Elkins, 55 App. D.C. 9, 299 F. 690 (1924); Van Divort v. Van Divort, 165 Ohio St. 141, 137 N.E. 2d 684, affirmed 134 N.E. 2d 715 (1956); Harris v. Harris, 71 Wash. 307, 128 P. 673 (1912).

[4] Ky. Rev. Stat. Sec. 403.070 (hereinafter referred to as KRS).

[5] 2 Nelson, Divorce and Annulment 457 and n. 90 (2d ed. 1945).

[6] "Petition", as used in KRS Sec. 403.070, is satisfied by motion to modify the judgment when the action has been retained on the docket, and by a motion to redocket and for a modification if the cause has been stricken from the docket. Hays v. Hays, 219 Ky. 284, 292 S.W. 773 (1927); Franklin v. Franklin, 299 Ky. 426, 185 S.W. 2d 696 (1945).

[7] Restatement, Judgments Sec. 6, comment c (1942); 27 C.J.S. 1247 (1941).

[8] Restatement, Judgments Sec. 74, comment b and illustration 1 (1942).

[9] Federal Rules of Civil Procedure, rule 5(b).

[10] Kentucky Rules of Civil Procedure, rule 5.02.

The principal case presented the Court with its first opportunity to construe this particular rule, and there can be little doubt that it arrived at the only reasonable construction.[11] Within the meaning of the rule, service was valid even though the notice was never received by appellant. This construction is in accord with that given the corresponding federal rule.[12]

The dissenting opinion felt that there had been a denial of due process, and,[13] stressing the in personam nature of the judgment, contended that the court did not have such jurisdiction over the person of the appellant as would authorize a personal judgment against him. Cases cited in the majority opinion as being in point as to construction of statutes requiring notice were distinguished as not involving personal judgments, and authorities were cited in support of this view.[14] The dissent adopted the position that while the court retained jurisdiction of the cause, the statute did not give it continuing jurisdiction over the persons of the parties, and that such jurisdiction could be established only by personal service. This position would seem to be untenable when it is considered that any order concerning the maintenance of the children would be a mere gesture unless the court does, in such actions, retain jurisdiction over the persons of the parties. It seems obvious from the wording of the statute that such orders were within the contemplation of the legislature, and that the legislature intended to provide the means of giving effect to such orders.

The principle of continuing jurisdiction is based on the need for the courts of equity to continue to act in the best interests of the children. The result of the parent's being deprived of what would otherwise be a right to personal service in an original action is an unavoidable factor in securing to the children the continuing protection of the court. To secure such protection to the children, the court's jurisdiction must be a continuing one and must not be subject to termination by the inequitable tendency of state lines to remain where they are drawn while potentially liable fathers exercise their

[11] "The rule is well established that where a statute is free from ambiguity, courts are barred from exploring the realms of construction, and that any construction or interpretation of the statute, save that which is 'the plain, obvious and rational meaning of the statute' (Lynch v. Altworth-Stephens, 267 U.S. 364 at page 370, . . .) is forbidden." State of Minnesota v. Ristine, 36 F. Supp. 3 (D. Minn. 1940).

[12] 2 Moore, Federal Practice 1313-14 and n. 4 (1948, Supp. 1956).

[13] Benson v. Benson, 291 S.W. 2d 27 at 31 (Ky. 1956). Hogg, J., felt that the rule concerned should not be so construed, and that if it were so construed the rule would constitute a denial of due process by not being reasonably calculated to give notice.

[14] Principal reliance was placed on Jasper v. Jasper, 224 Ky. 834, 7 S.W. 2d 236 (1928), in which case there was a complete absence of any pretense of service of legal notice.

migratory inclinations. So long as the minimum requirements of due process are met, the judgments of a court of equity in the interests of children of divorced parents should not be defeated by rules of procedure.[15]

Still, in fairness to either of the parents, it seems that something more should be required than directing notice to the last known address by ordinary mail. Cammack, J., isolated the problem in the principal case when he concurred with the majority because of the clear meaning of the rule but questioned the adequacy of that rule in cases involving a request for substantive relief. He suggested that the rule might be amended to provide that:

> [I]f a motion is for an order or judgment granting a claim for substantive relief in the nature of a judgment in personam, which relief is in addition to that sought in the original complaint in the action or granted by a previous order or judgment in the action, and the opposing party is not represented by an attorney, notice of the motion should be served by *registered* mail.[16]

This recommendation is heartily endorsed with one reservation. It is felt that the words "in the nature of a judgment in personam" should be omitted. Thus broadened, the recommendation would extend the use of registered mail to motions for an order or judgment granting a claim for *any* substantive relief not previously requested in the action. In divorce cases, for example, this would bring motions to modify the child custody provisions of the judgment within the registered mail category. Such a modification of the present rule would not only increase the probability of actual notice, but would also tend to obviate the likelihood of service by gesture.

Robert E. Adams

EVIDENCE—USE OF TRUTH SERUM STATEMENTS IN SUBSTANTIATING THE TESTIMONY OF AN IMPEACHED WITNESS—The defendant was convicted of sodomy and statutory rape committed on a fifteen year old girl. At the trial the girl testified in detail concerning the circumstances of the offenses. Following her testimony the defense then impeached her statements by introducing her letters and affidavit retracting all the allegations of sexual misconduct. In an effort to rebuild their witness's testimony the prosecution called a psychiatrist who testified that in his opinion the girl was telling the truth when making the charges.

[15] There are few if any inflexible rules of procedure in this kind of case. Shallcross v. Shallcross, 135 Ky. 418, 122 S.W. 223 (1909).

[16] Benson v. Benson, supra note 13 (concurring opinion).