RENDERED: JULY 24, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001252-MR

FAYETTA JEAN LYVERS — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 08-CI-00424

CHARLES PHILIP LYVERS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: We must decide if the Marion Circuit Court abused its discretion when it refused to reopen the parties' decree of dissolution under CR[1] 59.05, CR 60.01, and CR 60.02. We find no abuse and affirm.

Appellate Fayetta Jean Lyvers and Appellee Charles Philip Lyvers married on June 13, 1970. After thirty-eight years of marriage, they separated in

[1] Kentucky Rules of Civil Procedure.

August 2008 and Charles filed a petition of dissolution of marriage a few months later. He advised in the petition that he and Fayetta had already entered into a Separation Agreement dividing their marital property and debts. Notably, the Separation Agreement provided that "[a]ll of the real property of the parties currently titled in The Faye Lyvers Living Trust and The Philip Lyvers Living Trust shall remain in said trust and that neither husband nor wife shall be permitted to sale [sic] or transfer any interest in said real property." (R. at 8).

Fayetta filed an entry of appearance, *pro se*, acknowledging "she ha[d] entered into a separation agreement with [Charles] coincident with the execution of this entry of appearance . . . and that in her opinion, same is fair and equitable and just to the parties concerned and that she is satisfied with same." (R. at 4).

The trial court entered a decree of dissolution on November 6, 2008. The decree incorporated the Separation Agreement. No appeal was taken.

Over two years later, on February 25, 2011, Fayetta filed a motion pursuant to CR 59.05, CR 60.01, and CR 60.02 to alter, amend, or vacate, or set aside the decree on three grounds: (a) newly discovered evidence suggesting Charles purposefully withheld or failed to disclose marital assets at the time the parties entered into the Separation Agreement; (b) the Separation Agreement improperly imposed restrictions on the Faye Lyvers Living Trust, a separate legal entity not a party to the divorce action; and (c) the Separation Agreement has kept the parties substantially intertwined and extraordinary relief is needed to unravel

the threads binding the parties together. The trial court denied Fayetta's motion, finding it not timely filed. Fayetta appealed.

II. Standard of Review

All of the civil rules at issue in this case – CR 59.05, CR 60.01, and CR 60.02 – afford the trial court substantial discretion. *Copas v. Copas*, 359 S.W.3d 471, 475 (Ky. App. 2012). Accordingly, we will not disturb the trial court's decision to deny relief under any or all of these civil rules unless the trial court abused its discretion. *Id.* The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

III. Discussion

Fayetta argues the family court abused its discretion when it refused to alter, amend, or vacate, or set aside the parties' decree of dissolution to prevent, in Fayetta's words, a miscarriage of justice. Citing *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002) and *Burke v. Sexton*, 814 S.W.2d 290 (Ky. App. 1991), Fayetta claims the trial court's decision to deny her motion to reopen the decree was unreasonable, unfair, and unsupported by legal principles because, as in *Terwilliger* and *Burke*, Charles concealed or withheld significant marital property, and that allowing the decree to stand would be a travesty of justice. By jumping directly to the substance of her motion, Fayetta consciously disregards or unintentionally misses a crucial gateway issue: timeliness and jurisdiction.

The trial court never reached the merits of Fayetta's motion. Instead, it denied Fayetta's motion on procedural grounds, finding her CR 59.05 and CR 60.02 motions were not timely filed and it lacked jurisdiction under CR 60.01 to alter the judgment except to remedy clerical mistakes. We find no fault with the trial court's decision.

A. CR 59.05

Fayetta first asked the trial court to alter, amend, or vacate the decree under CR 59.05. This rule permits a trial court to "alter or amend a judgment, or to vacate a judgment and enter a new one" if a proper motion is served within ten days of the final judgment's entry. CR 59.05; *Louisville Mall Associates, LP v. Wood Ctr. Properties, LLC*, 361 S.W.3d 323, 336 (Ky. App. 2012). Here, the decree was entered on November 6, 2008. Fayetta's CR 59.05 motion was served 839 days later, on February 25, 2011. We need say no more.

B. CR 60.01

The second rule relied upon, CR 60.01, allows a trial court to correct clerical mistakes lurking in its orders and judgments. The rule states, in pertinent part: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." CR 60.01. As explained by our Supreme Court in *Cardwell v. Commonwealth*, 12 S.W.3d 672 (Ky. 2000):

> We are well aware that CR 60.01 allows a trial court to correct clerical mistakes in its judgments and errors therein arising from an oversight or omission at any time on its own initiative. We do not believe CR 60.01 invests the trial court with either jurisdiction or authority to make substantive changes in a judgment. The effect of the rule is limited to mistakes that are clerical in nature.

Id. at 674 (quoting *Potter v. Eli Lilly and Company*, 926 S.W.2d 449, 452 (Ky. 1996)). A clerical mistake is one "made by a clerk or other judicial or ministerial officer in writing or keeping records." *Id.* Stated another way, "it is an error resulting from a minor mistake or inadvertence, esp. [sic] in writing or copying something on the record, and not from judicial reasoning or determination." *Rogers v. Commonwealth*, 366 S.W.3d 446, 452 (Ky. 2012) (citation and internal quotations omitted).

Here, Fayetta does not seek to correct a clerical mistake made by the trial court in writing or keeping records. Much of her claim turns on an issue of fact – whether Charles deliberately hid or failed to disclose marital assets – and how that fact, if proven true, renders the Separation Agreement unconscionable or unworkable. It is not the function of CR 60.01 to resurrect a final judgment to address this kind of alleged error. The trial court correctly found it was without authority or jurisdiction to reopen the decree under CR 60.01 to make the non-clerical alterations to the separation agreement requested by Fayetta.

C. CR 60.02

The final rule we need to consider is CR 60.02. CR 60.02 is the tried and true vehicle used to afford a party relief from a final judgment. The rule states:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

CR 60.02. Fayetta did not identify in her motion under which subsection of CR 60.02 she was seeking relief. The trial court graciously considered them all and, upon doing so, still found the motion to be untimely. We agree.

A motion for relief under CR 60.02(a), (b), or (c) must be made within one year of the judgment and failure to do so is a bar to relief. Again, in this case the decree of dissolution was entered on November 6, 2008, and Fayetta's CR 60.02 motion was filed over two years later, on February 25, 2011. Accordingly, CR 60.02(a) – (c) cannot serve as a basis to reopen the decree.

That leaves us with CR 60.02(d), (e), and (f). These subsections are not subject to the one-year limitations period. Instead, the statute simply requires that a motion invoking them be filed "within a reasonable time." CR 60.02. There is no "general rule as to what constitutes a reasonable time" which may be uniformly applied in every CR 60.02 case. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). It is a fact-specific inquiry that turns, in large part, on the

specific circumstances of a given case. For that reason, the trial court is given considerable leeway to evaluate whether the passage of time between judgment and motion is justified and reasonable. The question of timeliness "addresses itself to the discretion of the trial court." *Id.*

In this case, it is the timeliness of the motion, not its substance, which is at issue. Yet, as previously indicated, Fayetta failed to challenge in her brief the trial court's decision to deny her CR 60.02 motion as not made within a reasonable time. Two years is not so long a period of time as to automatically render CR 60.02 motions untimely. And, we can infer from Fayetta's motion that she exercised due diligence in pursuing her CR 60.02 claim. Is this enough for us to conclude that the trial court abused its discretion in finding her CR 60.02 motion untimely? We conclude it is not. Ultimately, Fayetta was saddled with the burden of proving she was entitled to the extraordinary relief offered by CR 60.02. *Foley v. Commonwealth*, 425 S.W.3d 880, 885 (Ky. 2014) ("The burden of proof in a CR 60.02 proceeding falls squarely on the movant."). She has pointed to nothing which causes us to believe the trial court exceeded the bounds of its considerable discretion. We simply cannot and do not say the trial court abused its discretion in finding that Fayetta's CR 60.02 motion was not made within a reasonable time.

IV. Result

We affirm the Marion Circuit Court's June 14, 2011 Order.

KRAMER, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I dissent because I believe the circuit court erred by failing to grant an evidentiary hearing on the issue of fraud.

The majority opinion notes that Fayetta Jean Lyvers's motion was not so delayed as to automatically render it untimely under Kentucky Rules of Civil Procedure (CR) Rule 60.02 and it can be inferred that she exercised due diligence in pursuing it, but this was insufficient to establish the trial court abused its discretion in finding her CR 60.02 motion untimely because she did not prove she was entitled to the extraordinary relief offered by CR 60.02. I disagree.

We must first look at the circumstances underlying the original divorce proceeding. Charles and Fayetta went to Charles's attorney's office where a divorce was filed for Charles and an answer was prepared for Fayetta. Fayetta's affidavit states that she was under emotional distress at the time of the agreed divorce and decree. Notably, there is no disclosure of assets listed anywhere in the record of this divorce. These parties had very complex finances including trusts, no debt and substantial assets.

In *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), the Kentucky Supreme Court set out the relevant standard to determine whether an evidentiary hearing is required: "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief."

I believe Fayetta's motion, when combined with her affidavit, satisfied this standard by raising an issue of fraud affecting the proceedings which qualified her

for the extraordinary relief of CR 60.02(d). Fayetta's affidavit presented a factual question of whether her husband had concealed joint assets so that they could not be divided with her, through the following statements:

> 7. That since the entry of the divorce decree, I have learned of that a certain $100,000 payment was made payable to Petitioner and me, however I was never informed of that payment during the divorce.
>
> 8. That I have more recently learned that at the time of the divorce Petitioner may have had in his possession a substantial amount of cash that was not disclosed.

Evidence as to concealment of assets is sufficient to allege fraud affecting the proceedings. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 819-20 (Ky. 2002). Fayetta's allegations presented an appropriate ground for relief from her final divorce decree for fraud affecting the proceedings if she brought her motion within a reasonable time. CR 60.02(d).

Although what constitutes a reasonable time is usually a matter for the trial court's discretion, bringing such a motion two years after the decree for fraud discovered afterwards is not unreasonable. The facts of this case do not show any reason or circumstance why this matter could not or should not receive an evidentiary hearing at this time where the trial court has never considered the matter on the merits.

Charles's response through his own affidavit does not indicate any prejudice due to the elapse of two years and there are no surrounding circumstances from

which to infer any prejudice. The sum of $100,000 is sufficiently large and records should still exist to verify or refute Fayetta's allegations.

Therefore, I believe the circuit court abused its discretion by determining Fayette's motion which encompassed fraud pursuant to CR 60.02(d) was not brought within a reasonable time and summarily dismissing her motion without an evidentiary hearing.

Accordingly, I dissent.

BRIEF FOR APPELLANT:

Elmer J. George
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Philip S. George, Jr.
Lebanon, Kentucky