RENDERED: March 13, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-3059-MR

BARBARA BUCCHOLZ SUTTON — APPELLANT

v. — APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
CIVIL ACTION NO. 94-CI-001908

TERRY LAYNE SUTTON — APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Appellant, Barbara Buccholz Sutton (Barbara), appeals the denial by the Franklin Circuit Court of her motion made pursuant to CR 60.02 to set aside the final judgment entered in her dissolution of marriage action. For the reasons set forth below, we affirm the order entered by the trial court.

The parties to this action married on March 14, 1987. They separated on May 10, 1994, and Barbara filed a petition for dissolution of marriage in Franklin Circuit Court on December 28, 1994. The petition was filed on appellant's behalf by her attorney at that time, Marilyn S. Smith (Smith). There were no children born of the marriage and the only issues to be resolved were the division of marital and non-marital property and the

debts and obligations of the parties. Appellee, Terry Layne Sutton (Terry), filed an answer on January 13, 1995, admitting that the marriage was irretrievably broken and seeking the return of his non-marital property and an equitable distribution of the marital property and obligations. Shortly thereafter, on February 7, 1995, Terry filed a motion to have his non-marital property restored to him and sought an order requiring Barbara to account for all tangible and intangible personal property of the marriage. In an affidavit filed at that same time, Terry expressed concern that if the court did not issue the requested order that marital property in Barbara's control would not be properly accounted for or preserved.

Throughout 1995 there were various evidentiary issues raised by the parties in an attempt to determine the extent and nature of the marital estate. However, by year's end appellant had not fully complied with the requested discovery nor with prior court orders relating thereto. It should also be noted that on August 14, 1996, appellant, a licensed practicing attorney in the Commonwealth, filed a notice of representation in which she entered her appearance as co-counsel in the case and directed that all pleadings and notices be sent to her, as well as, her co-counsel, Smith. Finally, on December 15, 1995, the trial court entered an order directing both parties to comply with previous discovery attempts and to produce within fifteen (15) days all necessary banking, business, farm, martial and property (real and personal) documentation. Appellee complied

with the court order, however, appellant did not. As a result of appellant's failure to comply with the trial court's order, a motion for a rule was filed on February 9, 1996, and set for a hearing on February 22, 1996. Certification of service was sent to both appellant, as co-counsel, and Smith, as attorney of record. Neither appellant nor Smith was present at the scheduled hearing. The court entered an order continuing the motion until March 4, 1996, and distributed the order to all attorneys of record, including appellant. Again, neither Smith nor appellant attended the scheduled hearing. At that time the trial court scheduled the case for final hearing on April 22, 1996, and held that if appellant failed to appear a default judgment would be entered.

At the April 22, 1996, hearing, appellant appeared, pro se, and informed the court that she had not receive notification of the previous hearings because she changed her address, that Smith no longer represented her and was no longer practicing law, and that appellant had been under psychiatric care. Based upon this explanation the court granted appellant ten days to fully comply with the previously ordered discovery and to obtain new counsel. On May 1, 1996, Honorable Catherine C. Staib, filed a motion to substitute herself as counsel of record for Barbara and to permit an extension of time in which to file the requested discovery. Attached to the motion was a letter from Mary Alice Whitehead, LCSW, (Whitehead) indicating that she was treating appellant for major depression. Said motions were scheduled for

a hearing on May 24, 1996. However, on May 24, 1996, Ms. Staib appeared before the DRC and informed the Commissioner that although appellant was aware of the hearing date, she was not present. Ms. Staib also indicated that appellant had not contacted her since their initial conference and, as such, requested to withdraw as attorney of record and to withdraw her motions previously filed. The DRC recommended that said motions be granted and that a default judgment, which had been tendered by appellee, be entered. The trial court accepted the DRC's recommendations and entered judgment on May 24, 1996, dissolving the marriage and dividing the parties' property.

Appellant obtained counsel and filed a CR 60.02 motion on August 30, 1996, seeking to be relieved of the May 24, 1996, judgment. Relying upon CR 60.02(a) excusable neglect and CR 60.02(f) reasons of extraordinary nature justifying relief, appellant alleged that she suffered from a significant and disabling medical condition which caused her to be unable to participate in the court proceedings. The trial court after reviewing the evidence presented by the parties and after a hearing on the motion, denied appellant's CR 60.02 motion. This appeal followed.

Appellant argues that the trial court's denial of the CR 60.02 motion was an abuse of discretion, in that, the court failed to consider all the evidence before it prior to issuing its ruling. Specifically, Barbara contends that the trial court failed to consider the letters from Mary Alice Whitehead

(Whitehead) L.C.S.W., as medical proof that appellant was suffering from major depression and unable to provide assistance to her counsel during the dissolution action. Other evidence before the circuit court included a letter from Dr. Karjcia Van Sickle that appellant had been hospitalized for major depressive disorder, severe, with psychotic features and suicidal ideation between August 1 and August 4, 1996, and that Dr. Van Sickle was now treating appellant on an outpatient basis. This medical treatment occurred, as pointed out by the trial court, some three months after the final decree was entered. Appellant claims that Whitehead's reports should be considered as coming from a medical professional, however, this simply is not true.

KRS 335.100 sets forth the criteria for one to become licensed as a licensed clinical social worker (L.C.S.W.). One must:

> (a) (Have) received a master's degree or doctoral degree in social work from an educational institution approved by the board;
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> (b) (Have) had a minimum of two (2) years of full time post-paster's experience, consisting of at least thirty (30) hours per week, or three (3) years of part time, consisting of at least twenty (20) hours per week, post-master's degree experience acceptable to the board inthe use of specialty methods and measures to be employed in clinical social work practice, the experience having been acquired under appropriate supervision as established by the board by promulgation of an administrative regulation;
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> (c) (Have) paid to the board an examination fee established by the board of promulgation of an administrative regulation;

> (d) (Have) passed an examination prepared by the board for this purpose;
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> (e) (Have) not within the preceding six (6) months failed to pass an examination given by the board;
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> (f) (Have) paid an initial license fee established by the board by promulgation of an administrative regulation; and
>
> (g) (Have) complied with KRS 214.615(1).

KRS 335.100(1).

Under KRS 335.020 subsection 2 defines "the practice of social work to mean the professional activity of helping for remuneration individuals, groups, or communities enhance or restore their capacity for social functioning and create social conditions favorable to this goal. It includes the professional application of social work values, principles, and techniques to one or more of the following ends: counseling and nonmedical psychotherapy... ." (emphasis added). By its statutorily defined principles and techniques, a L.C.S.W. cannot provide medical psychotherapy. As such the trial court was correct when it stated in its opinion and order of October 14, 1996, that appellant had not provided any medical evidence that Barbara was afflicted with a claimed psychiatric disorder. Appellant's argument in this vain is meritless.

Appellant also argues that the trial court abused its discretion by entering a judgment dissolving the marriage and distributing the marital and non-marital assets and liabilities. Citing Bethlehem Minerals Co. v. Church and Mullins Corp., Ky., 887 S.W.327 (1994), appellant contends that the trial court

should have granted her CR 60.02 motion to set aside the judgment because she did not have a fair opportunity to present her claims at trial on the merits and granting said motion would not be inequitable or prejudicial to appellee. Despite appellant's arguments to the contrary, under the facts presented in this case, we believe both considerations weigh in favor of the conclusion that the trial judge acted well within the bounds of his discretion.

Barbara had every opportunity to present her documentation and arguments as to the marital and non-marital assets of the parties. She simply refused to comply with court orders relative to discovery. Appellee complied with the sought-after discovery in a timely fashion and appellant was given numerous continuances and additional opportunities but simply failed to comply with court orders or attend scheduled hearings. Appellant alleges a serious medical condition prevented her from actively and knowingly participating in the process but has failed to provide adequate medical evidence of that fact to the court. Additionally, evidence was presented that she continued to be gainfully employment by the Commonwealth as an attorney during this time period and that she or her attorney had adequate notice of the scheduled hearings. "[T]he determination to grant relief from a judgment or order pursuant to CR 60.02 method is generally left to the sound discretion of the trial court with one of the chief factors guiding it being the moving party's ability to present his claim prior to the

entry of the order sought to be set aside." Schott v. Citizens Fidelity Bank & Trust Co., Ky. App., 692 S.W.2d 810, 814 (1985). Appellant had numerous opportunities to present her claims but failed to do so and both appellant and her attorneys refused to comply with court orders which would have put the necessary evidence before the court. This Court is barred from disturbing rulings under CR 60.02 absent a showing that the trial court abused its discretion in ruling on the motion. Littlefidd v. Commonwealth, Ky. App., 554 S.W.2d 872 (1971).

The argument that appellee would not be prejudiced by additional delays brought on by a reopening is also not true. Appellee did everything required of him to permit the court to make proper findings and resolve any pending issues. The parties were separated in May of 1994, now over three years later there has been no finality in what appeared to be a relatively simple dissolution proceeding. Appellee is not the cause of this long drawn out proceeding and it would be inequitable and prejudicial to him to allow appellant to benefit from her inaction and continual non-compliance.

CR 60.02 actions are left to the sound discretion of the trial court and the exercise of that discretion will not be disturbed on appeal except for abuse. Brown v. Commonwealth, Ky., 932 S.W.2d 359 (1996); Richardson v. Brunnel, Ky., 327 S.W.2d 572 (1959). "Rule 60.02(f) 'may be invoked only under the most unusual circumstances...' Howard v. Commonwealth, Ky., 364 S.W.2d 809, 810 (1963); see also, Cawood v. Cawood, Ky., 329

S.W.2d 569 (1959) and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result. See Wallace v. Commonwealth, Ky., 327 S.W.2d 17 (1959)." Brown, supra. A review of the judgment entered by the Franklin Circuit Court distributing the marital assets and liabilities appears proper, not an abuse of discretion, and in all likelihood not subject to change even had appellant more properly and adequately participated. "The strong and sensible policy of the law in favor of the finality of judgments has historically been overcome only in the presence of the most compelling equities. Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made." Bishir v. Bishir, Ky., 698 S.W.2d 823, 826 (1985). We cannot say that appellant has met her burden in this matter or that the trial court abused its discretion. It is time that this matter be finally put to rest and the parties move on with their lives.

For the foregoing reasons, we affirm the judgment of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Eric Coffman, Esq.
Frankfort, KY

BRIEF FOR APPELLEE:

Steven G. Bolton
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