

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000542-MR

CAROLYN S. NIXON

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE STANLEY BILLINGSLEY, JUDGE  
ACTION NO. 93-CI-00583

CHARLES Y. NIXON

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, GUIDUGLI, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: Carolyn S. Nixon appeals from an order of the Boone Circuit Court directing her to pay \$5,515.87 in interest and \$1,000 in attorney's fees to her ex-husband, Charles Y. Nixon. For the reasons set forth below, we affirm.

Carolyn filed for divorce from Charles in the Boone Circuit Court on July 7, 1993. A decree of dissolution was entered by the trial court on January 29, 1996. Among other things, the decree dissolved the marriage of the parties, divided the property, and ordered Carolyn to pay Charles \$31,519.24 within sixty days to equalize the division of the parties' marital property. Carolyn appealed and Charles cross-appealed,

but this court entered an order on July 22, 1996, dismissing the appeals at the request of both parties.

Carolyn did not make the payment within sixty days of the order. In an order dated December 30, 1996, Charles was ordered to sign quitclaim deeds to Carolyn for the marital residence and Carolyn's farm. Although the order was not entered until December 30, it further ordered the parties to attend a closing to be held at Fifth Third Bank in Hebron no later than December 27, assuming the availability of the bank to close the matter. At the closing, Carolyn was to obtain financing from the bank and was to pay Charles, and Charles was to sign the quitclaim deeds.

The transaction was not closed at that time, and on February 28, 1997, Charles moved the court to issue an order finding Carolyn in contempt for failure to pay him the money to close the transaction and for interest on the sum owed. On March 12, 1997, Charles renewed his motion, and a show cause order directing Carolyn to appear before the court was entered on April 16, 1997. The show cause hearing was eventually held on June 11, 1997, before a domestic relations commissioner.

We have searched the record and are unable to find the commissioner's order which was apparently entered on June 24, 1997. According to subsequent pleadings, however, the commissioner apparently found that Carolyn wilfully failed to comply with the court's previous order by failing to pay Charles and ordered her to pay him interest plus attorney's fees of \$1,000. Carolyn filed exceptions to the commissioner's order,

and the trial judge, Judge Joseph F. Bamberger, entered an order rejecting the commissioner's recommendations and referring the matter to a special commissioner.

On October 27, 1997, Judge Bamberger's wife entered an appearance in the record as counsel for Charles, and Judge Bamberger entered an order of recusal the following day. Judge Stanley Billingsley was appointed as a special judge in the case.

In the meantime, Carolyn had paid Charles the principal amount of \$31,519.24 on July 16, 1997. On November 10, 1997, Charles moved the court to order Carolyn to pay him twelve percent interest from the date of January 29, 1996, to July 16, 1997, which amounted to \$5,515.87. He also requested \$1,000 in attorney's fees as previously awarded by the commissioner plus \$2,000 in additional attorney's fees for bringing this motion. Although a special commissioner had been previously appointed, this motion was noticed to be heard on December 11, 1997, before the special judge. A hearing was held before the special judge on January 9, 1998, and he entered an order on February 3, 1998, directing Carolyn to pay \$5,515.87 in interest and \$1,000 in attorney's fees to Charles within thirty days of the order. This appeal followed.

Charles did not file a brief in this case. CR<sup>1</sup> 76.12(1) requires the parties to file briefs before the appeal is submitted for final disposition on the merits. The penalties for an appellee's failure to file a brief are set forth in CR 76.12(8)(c). This court is not, however, required to consider

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<sup>1</sup> Kentucky Rules of Civil Procedure.

Charles's failure to file a brief as a confession of error and to reverse the trial court for that reason. See Kupper v. Kentucky Board of Pharmacy, Ky., 666 S.W.2d 729, 730 (1983).<sup>2</sup> In reviewing Carolyn's brief and the record herein, we choose to affirm the trial court.

Carolyn asserts in her brief that the reason she did not pay Charles his interest in the marital residence within the time directed by the trial court was that Charles had remarried and the bank would not loan her the money to pay him until the dower interest of his new wife was extinguished. She states that she had attempted on numerous occasions to arrange the closing but that Charles failed to attend. While she claims that she first learned on April 17, 1997, of Charles's remarriage, she does not explain why she apparently made no effort to close the transaction during the fifteen month period from the entry of the decree in January 1996 until she learned of the remarriage in April 1997. Our review of the record from the entry of the decree through the end of 1997 indicates no effort to close the transaction despite the trial court's order that she pay Charles within sixty days of the decree.

Carolyn's defense to not paying Charles for the fifteen month period following the entry of the decree appears to be that she arranged the closing on numerous times but Charles failed to

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<sup>2</sup> In Hoffman v. Hoffman, Ky. App., 553 S.W.2d 474 (1977), this court determined in a divorce case that the appellee's failure to file a brief would be treated as a confession of error meriting reversal without considering the merits of the case. Id. at 475. We decline to follow that case because the facts are sufficiently distinguishable and because we are not required to consider such failure as a confession of error. Kupper, supra.

attend. However, her brief does not cite to any testimony supporting this assertion nor does the trial court's order make any findings in this regard. While we are mindful that Charles did not file a brief, we are also mindful that the burden on appeal is with Carolyn as the appellant and that her brief should have "ample supportive references to the record." See CR 76.12(4)(c)(iv).

We have reviewed the tape of the hearing before the special judge where the issue of interest was addressed. At that time, Carolyn stated that she did not make the payment as ordered because she and Charles were continuing to negotiate and because Charles had failed to make maintenance payments to her in the amount of \$125 per month as ordered.<sup>3</sup> She further acknowledged, however, that Charles eventually made the payments in full with interest. The trial court rejected Carolyn's reasons for not making the payment within sixty days of the decree as ordered, and directed her to pay interest. We find that the court's ruling in this regard was neither clearly erroneous nor an abuse of discretion. See CR 52.01.

As to the award of \$1,000 in attorney's fees to Charles, we conclude that the trial court acted within its discretion in light of the efforts made by Charles's attorneys to force Carolyn to make the payment. An award of attorney's fees is "entirely within the discretion of the court." Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512, 514 (1975).

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<sup>3</sup> We note that at the hearing Carolyn did not cite Charles's failure to attend scheduled closings or his remarriage as reasons for her failure to make the payment.

The order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

Paul J. Dickman  
Covington, Kentucky