

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-001408-MR

RALPH C. CLIFTON, II

APPELLANT

v. APPEAL FROM LEE CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE, JR., JUDGE  
ACTION NO. 99-CI-00126

LINDA CAROL HOLLIN CLIFTON (GIBSON)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, TAYLOR, AND WINE, JUDGES.

CAPERTON, JUDGE: The Appellant, Ralph C. Clifton, II (Ralph), appeals the June 7, 2006, Order of the Lee Circuit Court, ordering a division of funds between himself and Appellee, Linda Carol Hollin Clifton (Linda), six years after the filing of the original divorce decree. Specifically, Clifton asserts that the court erred in

ordering the division of funds without utilizing Kentucky Rules of Civil Procedure (CR) 60.02. We disagree and affirm.

Ralph and Linda were divorced by the Lee Circuit Court on March 22, 2000. In 1999, Ralph entered into a class action lawsuit against a former employer, US Corrections Corporation. Ralph asserts that during the divorce, Linda, as well as her then and current counsel, had full disclosure of the lawsuit. Linda concedes that during the taking of proof there was discussion of an Employee Stock Ownership Plan (ESOP) with Ralph's former employer, US Corrections Corporation. The plan Linda recalled yielded funds, in the amount of \$15,425.95, which were then deposited into a joint checking account and were used for marital expenses.

During the divorce, Ralph was asked to sign a property agreement entitling Linda to one-half of any future settlement that may arise from that lawsuit, which he declined to do. During that same time, the matter was submitted to the court for a decision on the division of marital property. Linda asserts that after the divorce was entered, she learned that an additional ESOP plan distribution was to be made as a result of the lawsuit. No further action was taken regarding the future settlement by either party until July 21, 2005.

On July 21, 2005, Linda filed a motion to increase child support, as well as for a hearing to determine if any funds received by Ralph were marital property, and if so, for same to be divided accordingly. Thereafter, in August of 2005, the class action suit was settled, and a monetary amount was given to all

plaintiffs. Linda's motion was initially set for a hearing on August 24, 2005; however, the notice of this hearing was forwarded to Ralph's address in Beattyville, Kentucky, from which he had moved. Accordingly, on August 24, 2005, the commissioner recommended that the motion be re-noticed.<sup>1</sup>

The motion apparently was re-noticed for a hearing on September 28, 2005, and notice of same was mailed to Ralph on September 12, 2005, at an address in Lebanon, which was being used by the Lee County Child Support Office. Ralph concedes that he received the notice of hearing on September 20, 2005. On September 27, 2005, Ralph filed a motion to continue the hearing for the purposes of retaining counsel. On September 29, 2005, a docket entry order denying Ralph's motion for continuance was entered by the commissioner, and it was recommended that the funds be subject to division and that Ralph not abate the assets.<sup>2</sup>

The commissioner reduced his recommendations to writing on October 17, 2005. Those recommendations were mailed to Ralph at the same

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<sup>1</sup> Importantly, on the docket sheet for that date, the commissioner wrote, "[p]assed to be re-noticed w/60.02." Although the commissioner did not identify a specific subsection of Kentucky Rules of Civil Procedure (CR) 60.02 on the docket, we will assume the court was referencing CR 60.02(f). We make this assumption as the first three subsections - (a), (b), and (c) - can only be argued within one year after the judgment or order, and as provisions (d) and (e) are inapplicable to the facts of the matter *sub judice*.

<sup>2</sup> Linda directs this Court's attention to the fact that although the hearing was on record and was taped, Ralph failed to designate any portion of the record not stenographically recorded pursuant to CR 75.01, and accordingly, there is no transcript of the hearing for this Court's review.

address at which he received the motion noticing the September 28, 2005, hearing. Ten days passed, and the commissioner's report was confirmed by the Lee Circuit Court on December 5, 2005. No exceptions were filed prior to that time.

Linda then apparently filed a motion to determine how the funds were to be divided, and notice was again sent to Ralph at the Lebanon address. The hearing was noticed before the domestic relations commissioner on January 25, 2006, and Ralph did not appear. At that time, the commissioner entered an order recommending that Ralph pay 50 percent of the funds within 20 days.

Ralph then filed a February 6, 2007, motion to hear exceptions to the commissioner's report, asserting several reasons why the motion should be overturned, and particularly referencing CR 60.02. Specifically, Ralph argued that the court was without jurisdiction to reopen the judgment as it never invoked CR 60.02 to do so. Moreover, Ralph argued that the court was without authority to order additional payments to Linda without referencing CR 60.02, as no references or addendums to that effect were noted in the final divorce degree.

On June 5, 2006, the court overruled Ralph's motion and instructed Linda's counsel to prepare an order in conformity with the court's ruling to be presented to the court for entry, which was so entered on June 7, 2006. Thereafter, on July 7, 2007, Ralph filed his notice of appeal to this court.

Having reviewed the record, we note first that we affirm the decision of the circuit court to overrule Ralph's motion for continuance. The law in this Commonwealth is clear insofar as a trial court is granted broad discretion in

granting or overruling such motions. Indeed, this Court will not interfere in the exercise of that discretion absent a clear abuse of that discretion. *See Riordan v. Riordan*, 252 S.W.2d 901 (Ky. 1952), and *Farris v. Evans*, 158 S.W.2d 941 (Ky. App. 1942).

With respect to the issue of reopening pursuant to CR 60.02, Ralph cites this court to *Fry v. Kersey*, 533 S.W.2d 392, 393 (Ky. App. 1992), which provides, in pertinent part, that “a CR 60.02 motion may be a proper vehicle for reopening a decree when a party seeks to recover unassigned property in which he or she had an interest at the time of the decree.” Ralph also cites to Kentucky Revised Statutes (KRS) 403.250(1), which provides in pertinent part:

The provisions of a dissolution decree as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

As Ralph correctly notes, and as this Court set forth in *Fry, supra*, the laws of this state pertaining to reopening are set forth in CR 60.02.

Unfortunately, in his brief to this Court, Ralph fails to cite any portion of the record in support of his position that the trial court did not properly consider CR 60.02 in reopening the divorce decree and awarding Linda half of the settlement funds. Certainly, the record designated in this matter indicates that the commissioner was aware that he was to review these proceedings under CR 60.02, as evidenced by his August 24, 2005, docket notation.

Having no record of the proceedings for review, and absent any citation to the record by Ralph in his brief to this Court, we are required to assume that the omitted record supports the decision of the trial court. *See Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985). We are confined to a determination of whether the pleadings supported the judgment, and in this case, we cannot find that they did not. *See Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972).

Further, as clearly set forth in CR 76.12(4)(c)(iv), at the beginning of each argument, a reference to the record must be made indicating whether the issue was preserved for review and in what manner. Ralph has not done so in this instance, and accordingly, we cannot find that the trial court was in error in ruling as it did.

Accordingly, for the foregoing reasons, we affirm the decision of the Lee Circuit Court, the Honorable William Trude, presiding.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ralph C. Clifton, II, *Pro Se*  
Magnolia, Kentucky

BRIEF FOR APPELLEE:

Thomas K. Hollon  
Beattyville, Kentucky