RENDERED: JANUARY 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000416-MR

V. JANET BOWMAN — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 84-CI-00191

ROBERT EARL CORTELLESSA — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: Janet Bowman, *pro se*, appeals from the family court's denial of her motion to reopen the 1984 order and supplemental order of dissolution. Having reviewed the record, we affirm.

FACTS

Bowman and Robert E. Cortellessa married on September 4, 1971. During the course of the marriage, Cortellessa served in the Ohio National Guard and the United States Army Reserves. In 1984, Bowman filed a petition seeking dissolution of the marriage. During the course of litigation, Bowman's counsel took Cortellessa's deposition. Cortellessa testified that he had a non-vested interest in military retirement plans through the Reserves and the Guard. However, he was not certain if the two plans interacted, if at all, or what value the plans had.

On June 7, 1984, the Fayette Circuit Court entered a decree dissolving the parties' marriage. The parties then agreed to transfer the matter to Woodford Circuit Court for additional proceedings. On October 15, 1984, the Woodford Circuit Court Domestic Relations Commissioner (DRC) conducted a hearing to address issues related to custody, visitation, and the division of property and debt. It appears from the DRC's findings of fact and conclusions of law that Bowman had previously discharged her attorney, had not obtained replacement representation, and failed to appear at the hearing. Following the hearing, the DRC recommended that: Cortellessa be named custodial parent; Bowman have visitation supervised by her parents; Cortellessa and Bowman keep the household goods and furnishings they possessed; Cortellessa keep the marital residence; Bowman keep the automobile; and Cortellessa pay all of the marital and business-related debts. The DRC did not mention Cortellessa's military retirement accounts. Neither party filed objections to the DRC's recommended findings, and

the circuit court adopted them in a supplemental dissolution order entered on November 2, 1984. Neither party filed a motion to alter, amend, or vacate that order, and neither party sought appellate review.

In 1994, Bowman filed a motion asking the Woodford Circuit Court to amend the 1984 findings of fact and conclusions of law. In her motion, Bowman argued that Cortellessa had hidden evidence regarding his military retirement account from her, and she sought an order granting her a share of that account. The circuit court determined the motion was not timely as a matter of law and denied it. Bowman did not appeal that order.

In 1998, Bowman filed a motion asking the Woodford Circuit Court to set aside the 1984 judgment and sought a qualified domestic relations order (QDRO) that would entitle her to a share in Cortellessa's military retirement account. The court denied that motion based on the recommendation of the DRC. In doing so, the court noted that Bowman "had previously sought similar relief in 1994, which was overruled by Order entered August 18, 1994 . . . ." Bowman did not appeal this order.

In 1999, Bowman filed a motion in Fayette Circuit Court asking the court to reopen the 1984 judgment and to award her a share of Cortellessa's military retirement benefits. The court denied that motion because the matter had been transferred to Woodford Circuit Court in 1984. Bowman filed an appeal, which this Court dismissed because it was not filed within thirty days of the circuit

court's order. Bowman filed a motion for discretionary review of this Court's dismissal with the Supreme Court of Kentucky, which the Supreme Court denied.

In 2011, Bowman filed another motion to reopen the 1984 judgment in Woodford Circuit Court. As she has in the past and as she does here, Bowman argued that she is entitled as a matter of law to a share of Cortellessa's military retirement benefits and that Cortellessa and his attorney conspired to hide that marital asset from her. Cortellessa argued, as he has in the past and as he does here, that Bowman's action is barred as untimely, that she was not entitled to any portion of Cortellessa's military retirement in 1984, and that the court could not reopen the judgment to retroactively grant her a share of those benefits. The circuit court denied Bowman's motion, and she appealed.

STANDARD OF REVIEW

Although it is not clear from Bowman's motion, it appears she filed it pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, and we proceed accordingly. "The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000); *see also Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002), and *Brown v. Commonwealth,* 932 S.W.2d 359, 362 (Ky. 1996). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.

1999)). Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

ANALYSIS

Before we address the substance of this appeal, we must address several procedural issues raised by Cortellessa. Cortellessa argues we should dismiss Bowman's appeal because she failed to comply with CR 73.02 and CR 76.12. Specifically, Cortellessa states Bowman violated the requirement in CR 76.12(c)(iv) to provide references to specific pages of the record supporting her statement of the case and the requirement in CR 76.03(4) to set forth with specificity in her prehearing statement the facts and issues raised on appeal.

Bowman's statement of the case does not contain ample citations to the record. However, Bowman did attach to her brief portions of the record that, at least in part, support her statement of the case. The deficiency in Bowman's brief is not so glaring as to mandate dismissal of her appeal or the striking of her brief.[1]

Bowman's prehearing statement contains the following representation, under the section entitled "Facts and Issues": "No state court has decided the value and division of my money property because by law I am entitled to 1/2 of Appellee's military retirement pay that I was accruing during this marriage from 1971-1984 - over 10 years. Appellee Robert E. Cortellessa did not

[1] Despite the mandatory nature of the rule, our appellate courts have tended to excuse the failure when: (1) the record is not voluminous and (2) preservation is clear from the face of the record. *See Baker v. Campbell County Bd. of Educ.*, 180 S.W.3d 479, 481-82 (Ky. App. 2005); *Cornette v. Holiday Inn Express*, 32 S.W.3d 106, 109 (Ky. App. 2000)(cited in *Hudson v. Hudson*, 2011 WL 3805980 (No. 2011-SC-000091) (August 25, 2011)).

answer questions with honesty about his creditable service." Under the section entitled, "Briefly state issues proposed to be raised on appeal," Bowman claims "she was advised to take this back to state court . . . . Because clearly the Federal Government authorized the states to divide military retirement pay during the dissolution of marriage under Public Law 97-252 Sept. of 1982 & Commonwealth of Ky., has done so since that time." These statements, though perhaps not artfully worded, are sufficient to put the Court and Cortellessa on notice of the issue on appeal. We will not dismiss Bowman's appeal for failure to comply with CR 76.03(4).

Finally, Cortellessa argues that Bowman failed to timely file her appeal. On January 17, 2012, the circuit court entered an order denying Bowman's motion to reopen the 1984 judgment. On January 26, 2012, Bowman filed a motion asking the court to reconsider its order. The circuit court overruled Bowman's motion for reconsideration on February 8, 2012, and Bowman filed her notice of appeal on March 1, 2012. With no citation to authority, Cortellessa argues that Bowman improperly filed her appeal from the circuit court's order denying her motion for reconsideration rather than the court's order denying her motion to reopen the 1984 judgment.

Pursuant to CR 54.01, the court's denial of Bowman's motion to reopen the 1984 judgment was "a written order . . . adjudicating a claim or claims in an action or proceeding" and, thus, a judgment. Although she did not designate it as such, Bowman's motion for reconsideration acted as a motion to alter, amend,

or vacate that judgment under CR 59.05. "For purposes of determining the time for filing an appeal, 'finality' runs from the date on which the court denies the motion" to alter, amend, or vacate. *Atkisson v. Atkisson*, 298 S.W.3d 858, 866 (Ky. App. 2009). Because Bowman filed her notice of appeal within thirty days of the court's order denying her motion for reconsideration, her appeal was timely filed.

Next we address the substance of Bowman's appeal, whether the family court erred when it denied her motion to reopen the 1984 judgment. CR 60.02 provides that a court may relieve a party from its final judgment

> 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. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Bowman did not file her motion until twenty-seven years after the court's judgment became final. Therefore, she cannot avail herself of the grounds set forth in (a), (b), or (c) above.

Ground (d) requires some evidence of fraud, other than perjury or falsified evidence. Although Bowman has asserted in numerous pleadings that Cortellessa

and his attorney fraudulently hid his military retirement accounts from her, there is no evidence to support those assertions. In fact, during his deposition in 1984, Cortellessa admitted that he had retirement accounts with the Guard and the Reserves. While he gave few details regarding those accounts, he did not deny their existence. Furthermore, there is nothing in the record to indicate that Cortellessa or his attorney did anything to prevent Bowman or her attorney from contacting personnel in the Guard and/or the Reserves who could have provided those details. Bowman is not entitled to relief under CR 60.02(d).

To be entitled to relief under CR 60.02(e), Bowman is required to show the 1984 judgment is "void . . . 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." Bowman has not alleged that the Woodford Circuit Court lacked subject matter jurisdiction to render the judgment it rendered in 1984. *See Wooten v. Buchanan*, 311 Ky. 310, 312, 223 S.W.2d 976, 977 (1949). The argument that a judgment has been satisfied, released, or discharged is one made by the person responsible for paying the judgment, and prospective application applies to payment for a post-judgment event that cannot occur. *See Alliant Hospitals, Inc. v. Benham,* 105 S.W.3d 473 (Ky. App. 2003) (concluding that a hospital could not be relieved of an award of future medical expenses payable to an injured child when the child died after the judgment was rendered but before it became final). Therefore, Bowman is not entitled to any relief based on ground (e).

Having eliminated grounds (a) through (e), the only ground remaining is subpart (f), "any other reason of an extraordinary nature justifying relief." Bowman is not entitled to relief under this ground for the following reasons.

First, "relief is not available under CR 60.02(f) unless the asserted grounds for relief are not recognized under subsections (a), (b), (c), (d), or (e) of the rule." *McMurry v. McMurry*, 957 S.W.2d 731, 733 (Ky. App. 1997). Bowman is arguing that a mistake occurred in 1984 when the court failed to address any claim she had to Cortellessa's retirement benefits. Thus, she had grounds to bring a CR 60.02 motion pursuant to ground (a). Because that form of relief was available to Bowman and she did not avail herself of it, she is not entitled to seek relief pursuant to ground (f).

Second, any claim for relief pursuant to ground (f) must be filed within a reasonable time and be of an extraordinary nature. In *Fry v. Kersey*, 833 S.W.2d 392 (Ky. App. 1992), the wife, knowing of the existence of her husband's retirement plan, did not raise an issue regarding disposition of the benefits under that plan until five years after the entry of the trial court's final decree. Furthermore, she offered no reason for the five-year delay in raising the issue. The trial court determined there was no reason of an extraordinary nature to justify reopening the judgment, and this Court affirmed. *Id.* at 394.

Bowman argues she did not raise this issue earlier because Cortellessa and his attorney hid the details of Cortellessa's military retirement plans. However, like the wife in *Fry,* Bowman knew of the existence of Cortellessa's military

retirement plans because Cortellessa testified about the plans in his deposition. There is nothing in the record indicating that Cortellessa or his attorney kept Bowman from discovering the details of those plans. Also like the wife in *Fry,* Bowman has not offered any viable explanation for why this issue was not raised before the DRC or the trial court. Faced with the previous denials of Bowman's claim, the twenty-seven-year gap between the judgment and Bowman's motion, and Bowman's failure to offer any viable explanation for the delay, "we cannot say that the trial court erred in failing to find 'a reason of an extraordinary nature' justifying the relief which [Bowman] seeks." *Id.* While Bowman may argue that her attorney in 1984 should have raised this issue prior to when she discharged him, any error by counsel is imputed to the client and is not grounds for relief under CR 60.02(f). *Id.*

Finally, Cortellessa concludes his brief by stating he "respectfully moves that the . . . Court impose appropriate C.R. 11 sanctions on the Appellant for her conduct . . . ." This is not the proper form of a motion before this Court. *See* CR 76.34 (incorporating various other rules). Cortellessa did not file a cross-appeal. Therefore, we cannot afford Cortellessa any relief. We interpret this language as simply being part of his response to Bowman's arguments contained in her brief. We note, however, that when sanctions were sought and denied in the family court, Bowman was advised that the court might not be as understanding regarding any future actions. We believe that to be good advice.

CONCLUSION

For the foregoing reasons, we affirm the order of the family court

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Janet Bowman, *Pro se* Lexington, Kentucky	Robert S. Silverthorn, Jr. Louisville, Kentucky