

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Cynthia Marie Sanders, Appellant,

v.

William S. Smith, Jr., Respondent.

Appellate Case No. 2017-001506

Appeal From Richland County
Dorothy Mobley Jones, Family Court Judge

Opinion No. 5770
Heard December 11, 2019 – Filed August 26, 2020

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Herbert E. Buhl, III, of Columbia, for Appellant.

Bonnie P. Horn, of Horn Law Firm, of Columbia, for
Respondent.

LOCKEMY, C.J.: Cynthia Marie Sanders (Wife) appeals the family court's order denying her motion to set aside or vacate a 2010 divorce decree granting William Smith Jr. (Husband) a default divorce on the ground of one year's continuous separation. Wife argues the family court erred by (1) failing to find Husband's fraud upon the court warranted vacating the divorce decree, (2) finding she failed to file her motion within a reasonable time, and (3) denying the motion to vacate. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Wife and Husband married on March 10, 1979, in Elizabethtown, Kentucky, and lived together as husband and wife until 1994. Husband filed a summons and complaint in South Carolina on February 6, 2009, seeking a divorce on the ground of one year's continuous separation, and he alleged the parties had previously divided all property and debts of the marriage.¹ Husband served in the United States Army until he retired in 1999. During Husband's military career, the parties moved several times and even lived in Germany for a period; however, the parties never resided together in South Carolina. Husband attempted to serve Wife by certified mail, with return receipt and restricted delivery to 810 North Dixie Avenue, Apartment 211, Elizabethtown, Kentucky, 42701, but the mail was returned to sender. The Hardin County Sheriff's Office then attempted to serve Wife at the same address but could not locate her. Husband therefore filed a petition for an order of service of the summons by publication, and the clerk of court issued an order of publication. The summons was published in a newspaper in Elizabethtown, Kentucky for three weeks, but Wife never filed a responsive pleading or appeared in court in South Carolina. Thereafter, the family court issued a divorce decree on February 5, 2010, granting Husband a default divorce based on one year's continuous separation. In addition, the court found all property and debts of the parties had been previously divided. Husband remarried in South Carolina in 2012.

On September 29, 2016, Wife filed a motion to "set aside and/or vacate" the divorce decree. She argued her address was 803—not 810—North Dixie Avenue, Apartment 211, Elizabethtown, Kentucky, 42701. She asserted Husband committed a "fraud upon the Court" in obtaining the default divorce because he knew or should have known the address he provided was incorrect and that she would likely not receive proper notice of the commencement of the divorce proceedings. Wife argued the family court lacked jurisdiction to grant the default divorce and she was entitled to an order granting her a divorce and equitable division of the parties' marital assets and debts, including an order for the division of "Military Retired Pay and Survivor Benefit." Wife alleged Husband married another woman in 1999 while Wife and Husband were still legally married and Husband committed fraud upon the court to conceal his bigamous marriage, obtain

¹ Husband alleged he resided in this state for at least one year prior to commencing the divorce action, a claim Wife does not challenge. *See* S.C. Code Ann. § 20-3-30 (2014) (providing the plaintiff in a divorce action must have resided in South Carolina for at least one year prior to instituting the action).

a default divorce decree, and avoid equitable division of the parties' marital property.

The family court held a hearing on the motion, and Wife and Husband testified during the hearing. In addition, two former employees of the law firm that represented Husband in the divorce testified. The family court denied Wife's motion to vacate or set aside the divorce decree, finding Wife failed to challenge the validity of the divorce decree within a reasonable time when she filed the motion more than six years after the divorce. Additionally, the court rejected Wife's argument that service was defective and found Wife failed to establish Husband intentionally misrepresented Wife's address. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err by finding Wife's delay in moving to vacate the divorce decree was unreasonable?
2. Did the family court err by denying Wife's motion to vacate the divorce decree based on fraud upon the court?
3. Did the family court err by denying Wife's motion to vacate the divorce decree based upon lack of personal jurisdiction?

STANDARD OF REVIEW

"Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019). The family court has discretion in deciding whether to grant or deny a motion made pursuant to Rule 60(b) and we review such decisions using an abuse of discretion standard. *Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013); *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018) (noting our appellate courts review procedural rulings using an abuse of discretion standard). "An abuse of discretion occurs when the order of the court is controlled by an error of law or whe[n] the order is based on factual findings that are without evidentiary support." *Ware*, 404 S.C. at 10, 743 S.E.2d at 822. "In appeals from the family court, the appellate court has the authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence." *Id.*

LAW/ANALYSIS

I. Delay

Wife argues the family court erred by finding she failed to move to vacate the divorce decree within a reasonable time. She contends the defense of laches did not apply due to Husband's inequitable conduct and she acted promptly after she learned he had obtained a default divorce by fraud and deceit. Wife asserts she only became aware of the divorce in the latter part of 2014 and financial and health issues delayed her pursuit of the case at the time. She argues she filed the motion less than two years later and requested equitable division of the parties' marital property, including military retired pay and survivor benefits. Wife contends any delay in filing the motion did not injure, prejudice, or disadvantage Husband. We agree in part and disagree in part.

"On motion and upon such terms as are just, the [family] court may relieve a party . . . from a final judgment, order, or proceeding" for several reasons, including when the judgment is void or for fraud upon the court. Rule 60(b), SCRCF. When the movant alleges the judgment is void or that the nonmoving party engaged in fraud upon the court, the motion must "be made *within a reasonable time* . . . after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCF (emphasis added); *see also Chewing v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 609-10 (2003) (noting "[t]here is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court"); *Mr. T v. Ms. T*, 378 S.C. 127, 134, 662 S.E.2d 413, 417 (Ct. App. 2008) ("The language of Rule 60 specifically excludes motions under Rule 60(b)(4) . . . from the one[-]year limitation . . . and indicates these motions must be brought within a reasonable time."); *cf. Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003) (holding the circuit court did not err by finding a Rule 60(b) motion was untimely when the movant "failed to proffer an argument as to why [the appellate court] should find that a four-year delay [wa]s reasonable").

With respect to Wife's claim that she is entitled to equitable division of the parties' property and military retirement benefits, we find the family court abused its discretion by finding she failed to file the Rule 60(b) motion within a reasonable time. Initially, we note that although Wife refers to the doctrine of laches, the family court's order does not address laches. Rather, the family court referred to Rule 60(b), SCRCF, which itself contains a timeliness requirement. *See* Rule 60(b), SCRCF (providing motions for fraud upon the court must be made within a

"reasonable time"). Apart from the doctrine of laches, Rule 60(b) required Wife to move for relief within a reasonable time because she argued Husband committed fraud upon the court and that the order was void due to the court's lack of personal jurisdiction. The family court entered the divorce decree on February 5, 2010. Wife did not file her motion to vacate until more than six years later on September 29, 2016. Wife became aware of Husband's divorce sometime in 2014, although her testimony was conflicting as to exactly when. Despite this, Wife did not hire an attorney until 2016 or move to vacate the divorce decree until September 29, 2016. To explain this inaction, Wife stated she took time to gather financial resources and was "dealing with illnesses in the family and [her] own illness" at the time. The record is unclear as to when she obtained a copy of the divorce decree.² Further, the record contains no evidence Wife was aware, prior to acquiring the services of an attorney, that the divorce decree contained any finding as to their property or that Husband alleged the parties previously divided all of their property. Because Wife alleges Husband falsely asserted the parties had previously divided their property and requests to set aside the divorce decree so that she can seek equitable division of property and retirement benefits, we conclude the family court erred by finding Wife's delay was unreasonable under the circumstances. Accordingly, we now consider the merits of Wife's arguments that the family court erred by denying her motion to vacate the divorce decree.

II. Fraud Upon the Court

Wife asserts Husband committed fraud upon the court in obtaining the default divorce by falsely claiming he did not know Wife's correct address, suing her using her maiden name, and falsely asserting the parties had previously divided their property. Wife argues the default divorce decree must be vacated on equitable grounds. We agree in part and disagree in part.

The family court may set aside an order due to fraud upon the court. *See* Rule 60(b), SCRCP. "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). A claim of fraud upon the court requires proof by clear and convincing evidence. *See Chewning*, 354 S.C. at 86, 579 S.E.2d at 612. "Fraud upon the court is a narrow and invidious species of fraud that 'subvert[s] the integrity of the [c]ourt itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual

² During oral argument, the parties agreed Wife's attorney provided her a copy of the divorce decree in 2015.

manner its impartial task of adjudging cases that are presented for adjudication." *Perry*, 357 S.C. at 47, 590 S.E.2d at 504 (first alteration in original) (quoting *Chewning*, 354 S.C. at 78, 579 S.E.2d at 608). "Like all other types of fraud, proving fraud upon the court requires showing that the perpetrator acted with the intent to defraud, for there is no such thing as accidental fraud." *Id.* at 47, 590 S.E.2d 504-05.

First, we find the record supports the family court's conclusion Wife failed to show Husband committed fraud upon the court by suing her in her maiden name and misrepresenting her address. Wife denied ever residing at 810 North Dixie Avenue and stated she resided at the 803 North Dixie Avenue address in 2007 and continued living there until about 2011. However, she admitted Husband had never visited her at that address and she did not know how close 803 North Dixie Avenue was to 810 North Dixie Avenue. Although Wife testified she completed a healthcare power of attorney for Husband in 2007 that contained her correct address, she did not recall providing him a copy. Wife stated she used her maiden name, Sanders, on her professional license but "Sanders-Smith" was her actual last name. She testified she began working as a nurse for the United States Army in 2008 and her employer knew her by Sanders-Smith as well as Sanders. Wife stated she was insured through TRICARE,³ which required her to provide her contact information through DEERS.⁴ Wife explained Husband was listed as her sponsor in DEERS and therefore could have accessed her information through the DEERS account to ascertain her address. Husband testified he believed 810 North Dixie Avenue, Number 211 was the address Wife gave him and that at the time he had no doubt it was the correct address, and he therefore had no reason to search for the address in DEERS. Husband stated he had no reason to think the sheriff would be unable to find Wife at that address, and he denied purposefully misrepresenting facts to the court as to his knowledge of Wife's address. He testified he used Wife's maiden name, Sanders, because he believed she went by that name and that people in her community knew her by that name. Husband stated he did not know Wife's name appeared as "Sanders-Smith" in DEERS or on the healthcare power of attorney because he did not consult DEERS and was not aware he could have obtained a copy of the power of attorney document from the

³ TRICARE is the health care program for uniformed service members, retirees, and their families around the world.

⁴ The Defense Enrollment Eligibility Reporting System (DEERS) is a database of information on uniformed service members (sponsors), uniformed services civilians, and their family members, and eligible civilians must register in DEERS to get TRICARE.

hospital. He testified he had not spoken to Wife for two years prior to filing the divorce action but explained he purchased a new phone in 2009 and Wife's number did not transfer to the new phone due to a glitch. Finally, Husband stated he could think of nothing else he could have done to help his attorney find Wife.

We find the foregoing supports the family court's conclusion Wife failed to demonstrate Husband committed fraud upon the court by providing an incorrect address for Wife or using her maiden name. We therefore affirm the family court's denial of Wife's motion to vacate the divorce decree on this basis.

Nevertheless, we conclude the family court erred by failing to find Husband committed fraud upon the court in representing the parties had previously divided all property. The record contains no evidence the parties had in fact divided all of their property. Accordingly, we find the evidence shows Husband intentionally misrepresented the truth when he alleged this in his complaint, and we vacate this provision of the divorce decree and conclude Wife is entitled to bring an action seeking equitable division and military benefits.

III. Personal Jurisdiction

Wife contends she was entitled to relief pursuant to Rule 60(b)(4), SCRPC, based on lack of personal jurisdiction because Husband never personally served her with the pleadings and she was unaware of the divorce proceedings. Wife asserts that pursuant to our decision in *Eckhardt v. Eckhardt*,⁵ she is entitled to bring an action for equitable division and military retired pay ten years after a default divorce. Wife contends the family court erred by relying on our supreme court's decision in *Sijon v. Green*⁶ because its holding supports her position rather than Husband's. Wife argues this court should remand the case for a new trial on the merits. We agree in part and disagree in part.

⁵ 309 S.C. 225, 420 S.E.2d 875 (Ct. App. 1992) (holding wife, who was served by mail in Kentucky where she then resided and did not appear in a North Carolina action, could maintain an action for division of marital property eight years following a divorce when her ex-husband did not request a division of property in his complaint).

⁶ 289 S.C. 126, 128, 345 S.E.2d 246, 248 (1986) (holding when the record contains no evidence that a party-litigant received notice of a hearing and a judgment is rendered, the absent party, upon motion, is entitled to a judicial determination of whether he received proper notice).

Rule 60(b)(4), SCRCP, provides "the court may relieve a party . . . from a final judgment, order, or proceeding" if such judgment, order, or proceeding "is void." "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct. App. 2017) (quoting *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002)). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers*, 304 S.C. at 67, 403 S.E.2d at 129.

Section 15-9-710(8) of the South Carolina Code (2005) provides:

When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the [s]tate and (a) that fact appears by affidavit to the satisfaction of the court or . . . clerk of court . . . of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made . . . the court[or clerk] . . . may grant an order that the service be made by the publication of the summons

. . . .

(8) when the defendant is a party to an annulment proceeding or whe[n] the subject of the matter involves . . . a legal separation.

"Generally, '[w]hen the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion.'" *Belle Hall Plantation*, 419 S.C. at 615-16, 799 S.E.2d at 315 (alteration in original) (quoting *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 429, 535 S.E.2d 128, 130 (2000)).

First, because we vacate the portion of the divorce decree pertaining to the parties' property, we agree Wife may bring an action for equitable division. In *Eckhardt*, the court found the wife was entitled to maintain an action for division of all marital property, including military retirement benefits, following a divorce when

the complaint in the divorce proceeding sought a no-fault divorce but did not request a division of property. 309 S.C. at 226-27, 420 S.E.2d at 876. There, the husband served the wife by mail in Kentucky but she filed no responsive pleadings and did not appear a North Carolina action. *Id.* at 226, 420 S.E.2d at 876. Similarly, here, we found Husband committed fraud upon the court by falsely stating the parties had previously divided their property and therefore vacated the portion of the divorce decree in which the family court found the parties had divided all property. Accordingly, we agree with Wife she is entitled to bring an action seeking military retirement benefits and equitable division of the parties' marital property.

However, we conclude the family court did not err by finding Wife failed to show the divorce decree was void for lack of personal jurisdiction. *See Bowers*, 304 S.C. at 67, 403 S.E.2d at 129 ("The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief."); *Belle Hall Plantation*, 419 S.C. at 617, 799 S.E.2d at 316 ("The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." (quoting *Universal Benefits, Inc.*, 349 S.C. at 183, 561 S.E.2d at 661)). Here, two former employees of Husband's attorney's law firm testified concerning the affidavits of due diligence and petitions for service by publication. Rhonda Sullivan identified a certificate of service that indicated the pleadings were sent by certified mail, return receipt and restricted delivery, to Wife at 810 North Dixie Avenue, Apartment 211, Elizabethtown, Kentucky, 42701. She stated the pleadings were returned to the law firm and the return receipt stated, "Return to sender. No such number. Unable to forward." Another employee, Geraldine Douglas, testified she performed an internet search for Wife by using "People Finder" and "White Pages" and found no listings for a "Cynthia M. Sanders, age 54, in Elizabethtown, Kentucky." The record contains the affidavit of nonservice submitted by the sheriff's deputy who attempted to serve Wife after Husband was unsuccessful serving her by mail. The document stated, "Not a good address need more info to serve." Husband obtained an order of publication and published the summons in *News Enterprise* in Elizabethtown on November 10, 17, and 24, 2009. The record contains the affidavits of due diligence and the petitions for orders of publication filed by Husband, the affidavit of service mailed to 810 North Dixie Avenue notifying Wife of the hearing, the order of publication authorizing service by publication pursuant to section 15-9-710, as well as the publication in *News Enterprise*. Wife does not contend section 15-9-710 precluded service by publication in this case; rather, she argues Husband defrauded the court in obtaining an order of publication. Having determined the family court did not

err by finding Wife failed to show Husband committed fraud upon the court in obtaining service by publication or the divorce, we conclude the foregoing supports the family court's finding the law firm made a diligent effort to locate Wife based on the information Husband supplied. Therefore, the family court did not err by concluding Wife failed to show service was defective, and we affirm the family court's denial of Wife's motion to vacate the divorce decree pursuant to Rule 60(b)(4), SCRCP.⁷

CONCLUSION

Based on the foregoing, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS and HILL, JJ., concur.

⁷ Although we question whether the family court had in personam jurisdiction of Wife such that it was capable of equitably dividing the parties' property, the court made no disposition of the parties' property but merely found the parties had previously divided their assets. Moreover, Wife did not raise this argument to the family court or on appeal.