

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000370-MR

JASON R. BENEDICT

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 10-CI-00124

LORA JANE HYDEN,
F/K/A LORA J. BENEDICT

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: MOORE, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: Jason Benedict appeals from the findings of fact, conclusions of law, and judgment of the Johnson Circuit Court, Family Division.

Because Jason failed to file a timely notice of appeal, this appeal is dismissed.

On January 18, 2011, the trial court entered a final judgment dissolving the marriage between Jason and Lora Jane Hyden, f/k/a Lora J. Benedict, and dividing

the parties' various property interests. The court ordered that the judgment was "final and appealable" with "no just cause for delay of its entry." The same day, the court of its own initiative ordered in an amended judgment that the marriage of the parties was "hereby dissolved and each party is restored to the status of an unmarried person." The amended judgment was dated January 18, 2011, but was not entered until January 31, 2011. On February 25, 2011, Jason filed his notice of appeal from both judgments. Thereafter, Lora filed a motion to dismiss the appeal based on lack of jurisdiction, arguing that Jason's notice of appeal was untimely. Lora asserts that the trial court's initial judgment, rendered January 18, 2011, was final and appealable and that Jason's failure to file a notice of appeal within thirty days from entry of that judgment barred his appeal as untimely per CR¹ 73.02(1). We agree.

CR 73.02(1)(a) provides that "[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." Because compliance with the time requirements of CR 73.02 is mandatory and jurisdictional, failure to comply shall result in dismissal of the appeal. CR 73.02(2); *United Tobacco Warehouse, Inc. v. S. States Frankfort Coop., Inc.*, 737 S.W.2d 708, 710 (Ky.App. 1987). With respect to amended judgments which correct clerical errors in the original judgment, "[t]he time for appeal from the underlying judgment correspondingly dates from the original rendition of judgment . . . ' and not from the entry of an amended judgment."

¹ Kentucky Rules of Civil Procedure.

United Tobacco Warehouse, 737 S.W.2d at 709-10 (citation omitted). However, “when a trial court makes substantive changes – as opposed to merely correcting errors – in entering an amended judgment, the time for filing an appeal starts from the entering of the amended judgment rather than the original judgment.”

Cumberland Valley Contractors, Inc. v. Bell County Coal Corp., 238 S.W.3d 644, 648 (Ky. 2007) (citations omitted).

CR 60.01 defines clerical mistakes in judgments as those arising from oversight or omission, which “may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” CR 60.01. “The Rule not only encompasses mistakes of the clerk but also errors or oversight or omission by the court and others.” 7 Ky. Prac. R. Civ. Proc. Ann. Rule 60.01 (6th ed. 2012) (citation omitted). Intentional omissions by the court are not considered clerical mistakes and are not to be re-litigated under CR 60.01. *Id.* (citation omitted). Rather, CR 60.01 “is primarily for mistakes that do not attack a party’s fundamental right to a judgment at the time it was entered.” *Id.*

In this case, the trial court *sua sponte* ordered in its amended judgment that the marriage of the parties was “hereby dissolved and each party is restored to the status of an unmarried person.” The amended judgment did not alter the substance of the original judgment; the court simply clarified its original judgment. This clarification is analogous to correction of a clerical error. Indeed, the original judgment spoke to the dissolution of the marriage and restored Lora to her maiden name. As a result, the time for perfecting the appeal dates from entry of the

original judgment on January 18, 2011. Jason's notice of appeal, while filed within thirty days from entry of the amended judgment, was not filed within thirty days from entry of the original, final judgment. Since the filing of the notice of appeal was outside the thirty-day time limit set forth in CR 73.02, we lack jurisdiction to consider the appeal and it must be dismissed.

Appeal No. 2011-CA-000370 is hereby dismissed.

ALL CONCUR.

ENTERED: July 27, 2012

/s/ Laurance B. VanMeter
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

No Brief for Appellee

Paul D. Deaton
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