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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000207-MR

STEVEN E. FURLONG — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 00-CI-00961

DONNA H. FURLONG — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Steven E. Furlong ("Steven") appeals from the April 1, 2011, order of the Warren Circuit Court, Family Division, following a hearing on February 24, 2011, and its entry of Findings of Fact, Conclusions of Law and Judgment on January 17, 2012. Specifically, he challenges the trial court's finding that by electing a survivor benefit annuity from his federal retirement plan for his

current wife, he reduced the amount of benefits paid to his former wife, Donna H. Furlong ("Donna"), in contravention of a 2005 Settlement and General Release Agreement ("SGRA") in which he agreed he would:

> not take any steps, sign any documents, or take any actions that would affect [Donna's] interest in his retirement with the United States Office of Personnel Management in Washington, D.C.

He also challenges the trial court's award of relief to Donna under CR[1] 60.02(f) and its award of attorney fees to Donna. Having reviewed the record, the briefs and the law, we affirm.

FACTS AND PROCEDURAL HISTORY

Donna and Steven married on October 8, 1977. Donna, a teacher, participated in the Kentucky Teachers' Retirement System (KTRS). Steven, an employee of the United States Army Corps of Engineers, participated in the Civil Service Retirement System (CSRS) administered by the United States Office of Personnel Management (OPM). Both worked prior to marriage. During the marriage, they enjoyed a debt-free lifestyle, thanks to Donna's parents. The dissolution of Donna and Steven's marriage became final on December 23, 2002.

While this appeal deals primarily with actions taken between 2005 and 2012, and specifically focuses on that portion of Steven's federal retirement benefits awarded to Donna, it is rooted in rulings made by the trial court in 2003 and that is where we begin a detailed recitation of the facts. On February 25, 2003,

[1] Kentucky Rules of Civil Procedure.

the trial court entered amended findings of fact, conclusions of law and decree of dissolution. Regarding Steven's CSRS plan, the trial court wrote:

> [Steven] has a [CSRS] Plan through his employment with the Army Corps of Engineers. As of December 29, 2001[,] the value of the plan was $81.646[.00]. [Steven] started contributing to the plan before the marriage. Thus, a portion of the plan is nonmarital, while the bulk of the asset is martial (sic). The amount of the fund that accumulated before October 8, 1977[,] is awarded to [Steven] as his nonmarital property. As for the amount that accumulated between October 18, 1977[,] until December 23, 2002, the first $12,053[.00] shall be excepted pursuant [to] KRS[2] 403.190(4) and awarded to [Steven] as his nonmarital property. The remaining amount that accrued during the marriage shall be equally divided between the parties. [Steven] shall tender a proposed Qualified Domestic Relations Ordered[3] (sic) forthwith.

Upon learning OPM deems a QDRO an unacceptable vehicle for directing CSRS payments,[4] to comply with the trial court's directive that Donna receive 50% of the value of Steven's CSRS plan after applying an offset for non-marital property, Steven's attorney tendered an order styled "Order Awarding [Donna] Property Division from [Steven's] CSRS Benefit," which the trial court entered, without a hearing, on March 13, 2003. In pertinent part, the order read:

> Inasmuch as [Donna] has been awarded Kentucky Teachers (sic) Retirement Fund contributions in the amount of $12,053[.00] as her sole and separate property,

[2] Kentucky Revised Statutes. (Footnote added).

[3] QDRO. (Footnote added).

[4] Page 5 of the 2002 Handbook for Attorneys on Court-ordered Retirement, Health Benefits and Life Insurance (for members of CSRS, revised July 1997) states, "An order labelled (sic) as a QDRO is not acceptable."

> [Steven's CSRS] contributions and benefits which accumulated from October 8, 1977[,] through December 23, 2002[,] ($81,646[.00]) should be offset in an equal amount pursuant to KRS 403.190(4). Accordingly, the remainder ($69,593[.00]) shall be equally divided between the parties such that [Donna] shall receive $34,796.50. Upon the payment of $34,796.50 to [Donna], **[she] shall have no future rights or entitlements to any other benefits associated with [Steven's CSRS] Plan, including [his] annuity, refund of [his] past or future contributions, and any former spouse annuity.** [Steven] may discharge [Donna's] share of said division by deducting the sum of $34,796.50 from the lump sum judgment due [Steven] from [Donna] pursuant to the previously referenced Judgments and Orders of the Court without further disturbing [Steven's] contributions to the [CSRS].

(Emphasis added). The same day the order was entered, Donna filed a written objection arguing it erroneously: 1) denied her future benefits; 2) awarded Steven a non-marital property offset of $12,053.00, the entire value of her retirement account instead of just $5,889.35, the amount that accrued during the marriage; 3) called for a lump sum payout of one-half of the remainder of Steven's retirement account ($81,646.00 minus an offset of $12,053.00 leaving $69,593.00 to be divided equally), which Donna did not want and believed was disallowed under OPM's model language since the CSRS is a defined benefit plan not based on an employee's actual financial contributions, but rather is an average of the employee's three highest earning years of service, and, therefore, has an unknown dollar value until retirement begins; and finally, 4) denied her access to federal health insurance benefits. Appended to her objection were portions of the 2002 Federal Employees Handbook and the 2002 Handbook for Attorneys on Court-

ordered Retirement, Health Benefits and Life Insurance. Of particular relevance in that attachment was the following language from the attorney handbook:

> ***Benefits payable***
>
> A court order may affect any of three types of retirement benefits paid by OPM. The regulations treat each of the three—employee annuities, refunds of employee contributions, and survivor annuities—independently. In preparing a court order, attorneys should keep in mind that we consider each of the three types of awards as separate and independent of the other two, and should exercise great care in each type of benefit they intend to affect. **Our requirement that the award of each type of benefit be independent does not mean that the court award of one type of benefit cannot affect another. For example, awarding a former spouse survivor annuity requires a reduction in the employee annuity. If the former spouse has also been awarded a portion of the gross or net employee annuity, the former spouse's portion of the employee annuity will be affected.**

(Emphasis added). Six days after filing her objection, Donna moved the trial court to approve a supersedeas bond and alter, amend or vacate the March 13 order or, alternatively, make the order final and appealable. The motion was to be heard March 31, 2003.

On March 20, 2003, Donna filed a notice of appeal to this Court challenging the dissolution decree and the amended dissolution decree.[5] A hearing occurred on March 31, 2003, at which the supersedeas bond was approved; the motion to alter, amend or vacate was noticed for a separate hearing on May 7,

[5] *Furlong v. Furlong,* Case No. 2003-CA-000600.

2003. On April 4, 2003, Steven filed a notice of cross-appeal to this Court challenging the same two rulings identified earlier by Donna.[6]

On May 6, 2003, the day before the scheduled hearing, Donna filed a supplemental objection and motion to vacate the March 13 order, expanding on her original objection and maintaining the wording of the order was contrary to the trial court's previous orders and findings. The hearing was delayed until July 16, 2003.

On October 6, 2003, the trial court entered an order granting Donna's supplemental objection and vacating the entire March 13 order. In particular, the trial court reduced the offset against Donna's KTRS account from $12,053.00 to $5,889.35 and applied the formula discussed in *Armstrong v. Armstrong,* 34 S.W.3d 83, 86 (Ky. App. 2000), specifying:

> [u]nder the formula adopted by Kentucky Courts, the CSRS plan will pay [Donna] a percentage of the pension. This percentage is determined using the following equation: the numerator is the number of months [Steven] was under the CSRS plan during his marriage to [Donna], the denominator is the number of total months [Steven] was under the CSRS plan, this amount is then multiplied by the monthly benefits [Steven] will receive and divided in half (1/2) to determine the percentage [Donna] shall receive. Here [Steven] and [Donna] were married for three hundred and two (302) months and [Steven] was employed and contributing to the CSRS plan during that entire time. Thus, the numerator for this fraction would be three hundred and two (302). The denominator can be easily determined by ascertaining the number of months [Steven] was employed with the Army Corps of Engineers up until the date the divorce decree

[6] *Furlong v. Furlong,* Case No. 2003-CA-000745.

> was entered. This fraction shall then be multiplied by the monthly benefits and divided in half to determine the percentage of the annuity payments that [Donna] is to receive.

Still dissatisfied, Donna moved the trial court to amend the new order to include a former spouse survivor's benefit in her name from Steven's CSRS account. This was important to Donna because without it, if Steven predeceased her, she could still receive federal pension and health benefits under Steven's CSRS plan. Since only one spouse, whether current or former, may participate in the federal employee health benefit plan *after* an employee's death, Donna wrote in a pleading filed June 14, 2004, that OPM had suggested a current spouse could be awarded the entire death benefit upon Steven's death, and Donna, as his former spouse, could receive $1.00 annually as a death benefit *after* his death to allow Donna to purchase health insurance at her own cost through carriers approved by the federal government. Steven objected, arguing a survivor's annuity was not marital property because it accrues only after death, must be purchased by payment of a premium, and should be available to a survivor of his choice.

On September 28, 2004, the trial court entered an "Order Regarding Various Motions," in which it denied Donna's request for a survivor's benefit because such an award would limit Steven's ability to purchase a survivor's annuity for a new spouse upon remarriage; the benefits were not automatically paid upon death; and, the desired benefit had to be purchased as an annuity. On October 28, 2004, Donna filed a notice of appeal to this Court challenging the

order.[7] Steven filed a notice of cross-appeal on December 17, 2004, challenging the same order.[8]

On November 24, 2004, the trial court entered an "Amended Order Awarding [Donna] Percentage of [Steven's] CSRS Annuity." That order repeated the *Anderson* formula (awarding Donna one-half of Steven's CSRS *gross monthly annuity* earned during the marriage which amounted to 39.22% of his benefit plan); specified Donna's monthly share would be based on Steven's three highest earning years as of December 23, 2002, (the date of the dissolution decree) and would not be subject to a cost of living adjustment (COLA); and, awarded Donna a former spouse survivor annuity of $1.00 per month[9] which would not be subject to a COLA before Steven's death.

Thereafter, on January 12, 2005, both parties executed the SGRA[10] which they agreed settled "any and all claims that were raised and/or that could have been raised in the" dissolution action or any of the four appeals filed in this Court. Having stated in the SGRA that both parties would jointly move to dismiss their appeals to this Court, an order was signed to that effect on February 11, 2005. Finality was endorsed on all four appeals on April 4, 2005.

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[7] *Furlong v. Furlong,* Case No. 2004-CA-002258.

[8] *Furlong v. Furlong,* Case No. 2004-CA-002635.

[9] According to Donna's pleading, OPM had suggested an *annual* payment of $1.00.

[10] This document resulted from settlement talks urged by a conference attorney at the Kentucky Court of Appeals.

Upon reaching age 55 on April 4, 2004, Steven became *eligible* to retire. He remarried on March 19, 2005. On October 11, 2005, he applied for retirement and in his application requested a survivor's annuity for his new wife. On January 3, 2006, Steven retired and he and Donna began receiving retirement benefits pursuant to the amended order entered on November 24, 2004, awarding Donna 39.22% of Steven's CSRS annuity.

The case remained stagnant until October 4, 2007, when Donna moved the trial court to amend the SGRA based on her belief that a significant portion of Steven's gross retirement benefit was being reduced to fund the surviving spouse annuity benefit he had elected for his new wife to receive. Donna maintained that had Steven not designated benefits for his new wife, she would have received $1,551.15 each month rather than just $1,404.86 per month. The motion was made pursuant to CR 60.02.[11] Steven argued relief was unavailable under CR 60.02 because there were no "extraordinary" conditions justifying reopening the SGRA; the motion was brought three years later which he claimed was not within a reasonable time; Donna's 2007 motion parroted a 2004 motion for the same relief that had been denied; the SGRA had been satisfied in full; the SGRA included language that it resolved all issues that were or could have been raised; and, because Steven is now retired, allocation of his retirement

[11] Arguably, relief might have been available through the filing of a contempt motion, but that matter is not before us. *See City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Counties,* 459 S.W.2d 85, 87 (Ky. 1970).

benefits cannot be modified. Included in Steven's response was a request for reimbursement of costs and attorneys' fees incurred defending Donna's motion.

On January 26, 2010, the trial court entered an order directing OPM to answer questions pertaining to calculation of Steven's benefits and Donna's share. In a letter dated April 19, 2010, OPM responded as follows:

> 1. If Steve Furlong had not left a death benefit for his current wife, how much would Donna Hines Furlong have received in monthly benefits?
>
>   **Answer**: Donna Hines Furlong would have received $1,551.15 in monthly benefits.
>
> 2. How much of a reduction did Steve Furlong take in his monthly benefits in order to leave the death benefits for his present wife?
>
>   **Answer:** Steve Furlong's current monthly deduction for survivor benefits for his present spouse is $533.00.

Thus, OPM had confirmed Steven's election of a survivor benefit for his new spouse had reduced Donna's share of his CSRS benefits. Long gaps in the progress of this case were attributed to difficulties in requesting and receiving information from the federal government. Additionally, once Steven received responses from OPM, he delayed sharing the desired information with Donna.

On January 7, 2011, Steven was deposed. He admitted changing his pay scale as of January 3, 2006, the date he retired, to give his new wife a survivor's benefit. He testified he knew in January 2006 that leaving a survivor's benefit to his new wife would reduce his benefits. He also knew this would reduce Donna's monthly benefits, but he did not share that fact with Donna. Steven was

adamant that he had followed the trial court's 2002 order verbatim and that all he had done was retire. He further admitted any retiree, including him, would know giving a current spouse survivor benefits would reduce the pay he received.

An evidentiary hearing on Donna's CR 60.02 motion occurred on February 24, 2011. In advance of the hearing, Donna filed a position statement arguing Steven's remarriage in March 2005, and his election in October 2005 to leave a death benefit to his new wife before retiring on January 3, 2006, reduced Donna's monthly benefits from his CSRS plan from $1,551.15 per month to $1,404.86 per month. As a result, Donna requested an award of $9,069.98 (the arrearage since January 3, 2006) plus 12% interest until paid in full, plus an order directing that as of March 2011 she receive $1,551.15 per month. Due to Steven's deliberate delays in providing information to the trial court, Donna asked that he also be ordered to pay her reasonable attorney's fees. On February 23, 2011, Steven responded by repeating much of his original response to the CR 60.02 motion filed on December 4, 2007.

Following the hearing, Donna's attorney drafted an "Amended Order Awarding [Donna] Percentage of [Steven's] Annuity" which he described in a letter to Steven's attorney as follows:

> After much research into the issue of employee annuities under the CSRS, I have discovered that provision can be made for the costs of an awarded survivor annuity to be borne by the former spouse with the former spouse's awarded annuity reduced to cover those costs.

> Accordingly, the enclosed order does just that and awards Donna survivor annuity based upon the marital portion of Steve's participation in the CSRS system. The maximum former spouse survivor annuity is capped at 55% of the employee annuity. The formula I have devised awards Donna a percentage of the 55% cap based on the marital time Steve participated in the CSRS program versus his total time of participation.
>
> Again, Donna will bear the costs of the survivor annuity and there will be no reduction in Steve's benefit. This should address your objection voiced in Court that there would be additional costs to Steve and will accomplish Donna's goal of receiving benefits after Steve's death and ensure her continued eligibility to participate in the Federal Government Health Insurance Plan.

Steven did not object to the proposed order, but, in a letter dated March 9, 2011, suggested only that references to Steven's retirement annuity be modified to read "*monthly* retirement annuity."

On April 1, 2011, the trial court entered an order from the February hearing in which it: 1) found Steven "intentionally violated" the SGRA by choosing a survivor benefit for his current wife that reduced Donna's share of his gross retirement annuity; 2) ordered Steven to obtain five specific pieces of information from OPM within 60 days; 3) awarded Donna $9,069.98 in arrearages plus 12% per annum until paid; and, 4) awarded Donna attorney's fees in an amount to be determined "for having to bring various motions, take depositions, etc., as a result of [Steven's] intentional violation" of the court's prior orders. On April 7, 2011, the court entered an order giving Steven 60 days to pay $5,972.22 in attorney's fees and costs to Donna "through her attorney-at-law[.]"

On May 5, 2011, Steven filed a letter from OPM dated April 26, 2011. That letter showed the calculations for Donna's current monthly benefit of $1,404.86 as well as the benefit she would have received had Steven not elected the survivor spouse benefit for his current wife. The letter confirmed: at no cost to Steven, Donna will receive a monthly survivor annuity of $1.00 upon Steven's death; by ordering Donna's share to be calculated on Steven's GROSS MONTHLY ANNUITY, she is receiving $1,404.86 each month; had the court ordered Donna's share be based upon Steven's NET MONTHLY ANNUITY, she would have received $1,387.30 each month; had the court ordered Donna's share to be based on a SELF-ONLY ANNUITY, Donna's share would be $1,551.15 per month, the same amount as if based on a GROSS MONTHLY ANNUITY without Steven electing a survivor spouse benefit for his current wife.

On December 2, 2011, Steven was deposed again. This time he admitted he had not asked OPM to increase Donna's monthly payment by $146.29. In his view, Donna would have received the full $1,551.15 per month had her attorney drafted the order to calculate her share of benefits based on a "SELF-ONLY ANNUITY" instead of a "GROSS ANNUITY."[12] He also testified that: the federal retirement handbook disallows modification of benefits *after* an employee retires; he knew the calculations made by the trial court and OPM were

[12] Steven testified that under a "self-only" annuity, Donna's share would have been calculated before any deductions were taken. Steven testified he did not believe Donna was entitled to the $1,551.15 because her attorney used the wrong term.

correct since April 26, 2011;[13] he did not have the right to alter Donna's share of his retirement annuity; while he did not *intend* to reduce Donna's share, he now understands his election had that effect; and, he owes Donna $9,069.98 ($146.29 per month x 62 months) in arrearage plus $3,926.26 in interest (rate of 12 % per annum from 1/6/06 – 2/2011).

A hearing was scheduled for December 7, 2011, at which Donna asked the trial court to do three things. First, correct the amount being deducted from her share of Steven's annuity due to an error that began with the amended findings of fact, conclusions of law and decree of dissolution entered on February 23, 2003. Although Donna was employed prior to marriage, and therefore, a portion of her KTRS account was non-marital property, Steven received an offset of the value of her entire KTRS account. Donna initially called this error to the court's attention on March 13, 2003, and it was corrected in the court's order entered on October 6, 2003. However, Donna argued there were lingering effects from the original error and requested an award of more attorney's fees for the period April 2011 through December 2011 for Steven's "willful (sic) failure" to correct this error (presumably with OPM). Second, Donna sought written verification from Steven that the $1.00 former spouse survivor benefit she is to receive after his death will be deducted first from the death benefit. Third, Donna sought all information Steven had provided to OPM and all documents confirming she is eligible to participate in the federal health insurance plan.

[13] A letter from OPM dated April 29, 2010, indicates Steven possessed this information a year earlier.

Steven filed a response reiterating his original argument that CR 60.02 relief was unavailable because no "extraordinary" grounds were alleged; the motion was untimely filed; a prior request for a death benefit had already been denied; Steven did nothing to reduce Donna's benefits, he just retired; and finally, the arrearage and interest amounting to $10,094.01 having already been paid, as well as the attorney's fees in the amount of $5,972.22, there was no basis for reopening the SGRA nor awarding more costs and attorney's fees to Donna. In a final salvo, Steven moved that Donna be required to pay his costs and attorney's fees for defending the motion.

Donna supplemented the motions to be heard on December 7, 2011, and filed an objection to Steven's motion for fees and costs. Donna alleged that Steven had not provided information requested on August 26, 2011. She further alleged that despite continuous demands, Steven had not paid the interest owed on the arrearage and he had failed to pay interest on monthly payments he had untimely paid. As for Steven's motion for his own fees and costs, Donna argued it was untimely and should be summarily denied.

On January 17, 2012, the trial court entered findings of fact, conclusions of law, and judgment on Donna's CR 60.02 motion that had been filed in October 2007. The trial court found relief was unavailable under CR 60.02(a) –

(e), but it was available under CR 60.02 (f)[14] due to Steven's "intentional violation" of the SGRA. The court specifically stated, Steven:

> did not have the right to usurp, alter, reduce, or invade [Donna's] portion of his retirement annuity. [Donna's] portion of the retirement annuity could not be modified by [Steven] in any manner and any options he chose to exercise with the retirement annuity must only reduce his portion of the annuity benefits. The Court further finds that given the circumstances of this case that persuasive equities lie with [Donna] due especially to [Steven's] intent to reduce [Donna's] portion of [Steven's] gross retirement annuity through his action.

The court found the CR 60.02 motion had been filed within a reasonable time because less than two years had elapsed between the intentional violation on January 3, 2006,[15] and the filing of the motion on October 4, 2007. The court reiterated that Steven is responsible for ensuring Donna receives the additional $146.29 per month, and remains "responsible for paying 12% interest per annum on the interest amount of $9,069.98." After reviewing the financial resources of the parties,[16] the court awarded no additional court costs or attorney's fees. The court concluded that: Steven's intentional violation of the SGRA was a condition justifying reopening of the judgment and awarding the relief Donna requested

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[14] CR 60.02(f) allows relief for "any other reason of an extraordinary nature justifying relief" and a motion on this ground "shall be made within a reasonable time[.]"

[15] Steven signed the application for immediate retirement on October 11, 2005, listing his date of final separation from government service as January 3, 2006.

[16] Steven argues the trial court relied on stale data because no update of financial resources was ordered. However, as noted at oral argument, the same attorneys and judge handled this case from its inception in 2000. Additionally, on or before January 12, 2005, Donna paid Steven $685,000.00 plus interest as required by the SGRA. Based upon these facts, we believe the trial court was thoroughly familiar with the financial resources of both parties.

pursuant to CR 60.02; Steven is responsible for ensuring Donna receives 39.22% of his gross annuity; the parties should cooperate to have OPM modify its payment schedule to carry out the court's order; and, until OPM begins paying Donna $1,551.15 per month, Steven remains responsible for paying Donna the additional $146.29 per month plus 12% interest per annum on any arrearage owed. Steven filed a timely notice of appeal to this Court. We affirm.

ANALYSIS

We begin with a word about the record. It is the appellant's responsibility to designate the appellate record. *Commonwealth v. Thompson,* 697 S.W.2d 143, 145 (Ky. 1985); *see also, Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1968); CR 75.01; CR 98(3).[17] If the complete record is not designated for our review, we "assume that the omitted record supports the decision of the trial court." *Thompson.*

Steven, the appellant in this case, did not file a designation of record. Donna, the appellee, filed a designation, but requested only "the entire written record[.]" As a result, we have none of the recorded hearings that occurred in 2003, 2004, 2007 nor 2011. Thus, our resolution of this appeal is based upon the

[17] RCr 98(3) states in relevant part:

> To facilitate the timely preparation and certification of the record as set out in this rule, appellant or counsel for appellant, if any, shall provide the clerk with a list setting out the dates on which video recordings were made for all pre-trial and post-trial proceedings necessary for inclusion in the record on appeal.

limited record provided to us and we assume the missing portions of the record support the trial court's decision.

On appeal, Steven argues that to timely challenge the amount of benefits awarded to Donna, she should have sought modification prior to his retirement in January 2006. He further claims he did nothing to impact Donna's portion of his retirement benefits—he just retired. He also suggests that any error in the division of benefits rests with Donna because her attorney drafted[18] the language for the formula OPM used to compute her share of the benefits and had he specified a "self-only annuity" as opposed to a "gross monthly annuity," Donna would have received the maximum amount of benefits before the taking of any deductions. It occurs to us that the converse of this argument is that had Steven suggested use of the term "self-only annuity" during the drafting process, Donna could have received the maximum benefit, Steven could have elected a survivor benefit for his new wife, and the SGRA would have been left intact. Steven's attorney acknowledged during oral argument that he could have suggested use of the term "self-only annuity." Thus, we reject Steven's attempt to shift the blame from himself to Donna.

Trial courts are vested with broad discretion to determine whether to grant CR 60.02 relief; accordingly, appellate review of a trial court's decision is pursuant to the abuse of discretion standard. *Kurtsinger v. Board of Trustees of*

[18] At oral argument, Donna's attorney stated the document was jointly drafted. Steven's attorney did not challenge this statement.

Kentucky Retirement Systems, 90 S.W.3d 454, 456 (Ky. 2002). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Steven lists several reasons for us to find abuse of discretion and reverse. First, he notes that the trial court did not cite CR 60.02 or KRS 403.250 in its "Order on February 24, 2011 Hearing." Though that may be true, in the findings of fact, conclusions of law and judgment entered on January 17, 2012, the court referenced both CR 60.02 and KRS 403.250. Thus, any error or oversight was cured. We also note that Steven did not move the trial court to alter, amend or vacate either document under CR 59.05. Nor did he seek a new trial under CR 59.01, nor additional findings under CR 52.01.

Second, he alleges no facts or legal grounds supported the award of CR 60.02(f) relief. To succeed on a CR 60.02(f) motion, a movant must demonstrate a "reason of an extraordinary nature justifying relief." *Id*. Further, movant must demonstrate: 1) relief is otherwise unavailable under CR 60.02; 2) the moving party had a fair opportunity to present the claim at a trial on the merits; and 3) granting CR 60.02(f) relief would not be inequitable to other parties. *Id*. As correctly found by the trial court, relief was otherwise unavailable to Donna under CR 60.02(a) – (e). Thus, the first factor was satisfied.

Next, execution of the SGRA, which should have concluded this matter—and Donna may have thought it had—occurred on January 12, 2005.

Steven did not elect the maximum survivor annuity for his new wife—without alerting Donna to this change—until months later when he applied for immediate retirement on October 11, 2005. He did not retire until January 3, 2006. Thus, Donna had no opportunity to present this claim at the multi-day trial that occurred in 2002. Furthermore, the "Order Awarding [Donna] Property Division from [Steven's] CSRS Benefit," was entered by the trial court on March 13, 2003, without a hearing. Hence, the second factor is satisfied.

Finally, the granting of relief was not inequitable to Steven. By signing the SGRA in 2005, he agreed he would do nothing to "affect Donna Hines Furlong's interest in his retirement[.]" He bargained for that language and readily agreed to it. In contravention of that signed agreement, he elected to give his new wife the maximum survivor benefit knowing it would impact the amount of money paid to Donna—a fact he admitted during depositions taken on January 7, 2011, and again on December 2, 2011. Because information about pay and retirement benefits is closely guarded by OPM, as evidenced by delays in getting such information in this case, the details that would have revealed Steven's actions and their impact sooner were not readily available to Donna. Without the relief afforded by CR 60.02(f), Donna would not have recouped the full 39.22% of Steven's annuity the trial court ordered her to receive. She was entitled to the full amount specified by the trial court.

Furthermore, we agree with the trial court's conclusion that Steven's intentional violation of the SGRA was adequate justification for reopening the

property disposition under KRS 403.250(1). Steven made a choice that adversely impacted the amount of money Donna received and did so with full personal knowledge but unbeknownst to her. Without court intervention to rescind Steven's covert actions, the court's words and directives would have no meaning.

Steven argues there is little difference in Donna's 2004 motion for a death benefit and her 2007 CR 60.02 motion. We disagree and see significant difference. The gist of the prior motion for a death benefit was Donna's desire to have access to federal health benefits after Steven's death—a fact that required her to receive at least a nominal survivor benefit from his annuity. In a pleading filed June 14, 2004, while Steven was unmarried, Donna proposed that any future spouse at his death

> be awarded the entire death benefit which would entitled (sic) that spouse to receive a reduced monthly annuity which [Steven] was earning at the time of death and receive the entitlement to the [federal employee health benefit], including the reduced premium subsidized by the government. In such scenario, a former spouse can be awarded one ($1) dollar as a death benefit annually after [Steven's] death. However, the only benefit to a former spouse in this scenario is that the former spouse is entitled to then purchase her own health insurance through the carriers approved by the Federal Government at full cost to the former spouse with no government subsidy for the health insurance premium.

This proposal paved the way for Donna to be awarded under the amended order entered on November 24, 2004, a $1.00 per month former spouse survivor annuity. In 2004, there were also discussions about basing Donna's share on Steven's three highest earning years *during the marriage*. Realistically, none of the arguments

advanced in 2004 was related to Steven's election that a future wife receive a maximum survivor annuity, reducing his annuity to fund it, and thereby adversely impacting Donna's share of his annuity. There could have been no relationship between these arguments because the election had not yet been made and no benefits had been paid.

Steven suggests Donna should have filed her CR 60.02 motion sooner. We disagree. We are not surprised it took time to unravel his chicanery, especially when Steven failed to respond to repeated requests for documentation.[19] The CR 60.02 motion was filed because Steven would not respond to inquiries about the calculation of the amount being paid to Donna. Thus, any delay in Donna's filing of the motion was directly attributable to Steven's obstinance and lack of cooperation. We reject Steven's contention that there was no legal or factual basis for the granting of CR 60.02(f) relief. On the facts presented, we cannot conclude the trial court abused its discretion.

Steven next alleges the trial court erroneously found he had intentionally violated the SGRA. We will not disturb a trial court's findings of fact absent clear error. *Brenzel v. Brenzel*, 244 S.W.3d 121, 124 (Ky. App. 2008). "Findings of fact are only clearly erroneous when they are manifestly against the weight of the evidence." *Burton v. Burton*, 355 S.W.3d 489, 493 (Ky. App. 2011). It is the role of the fact finder to determine the proper weight to give the evidence.

[19] At oral argument, Steven's attorney admitted he could not answer how Donna would have known of Steven's election on his retirement application.

Drummond v. Todd County Bd. of Educ., 349 S.W.3d 316, 322 (Ky. App. 2011) (citation omitted). In performing this function, the trial court "may choose to believe or disbelieve any part of the evidence presented to it." *K.R.L. v. P.A.C*., 210 S.W.3d 183, 187 (Ky. App. 2006) (citing *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977)).

Following a hearing on February 24, 2011, the trial court found Steven had "intentionally violated" the SGRA by taking action that reduced Donna's share of his annuity. Steven having failed to designate that hearing for our review on appeal, we must assume whatever was said during that proceeding supports the trial court's ruling. *Thompson,* 697 S.W.2d at 145. Furthermore, the SGRA, bearing Steven's signature, is part of the record and plainly states Steven "will not take any steps, sign any documents, or take any actions that would affect" Donna's interest in his retirement. Steven did all three. He signed an application for immediate retirement in which he opted for his new wife to receive a survivor benefit with the knowledge that this election would reduce his annuity and also reduce Donna's share of his annuity. His claim that all he did was retire falls upon deaf ears—he knew full well the impact of his action and admitted his knowledge during his depositions. The trial court did not commit clear error in finding Steven intentionally violated the SGRA.

Steven's next complaint is that the trial court erroneously awarded attorney fees to Donna, declined to order Donna to reimburse him for payments he had made to her, and failed to order Donna to pay his attorney fees. The premise

of this argument is the trial court had no grounds upon which to grant CR 60.02 relief, therefore, it erred in ordering him to take corrective action and he should now be reimbursed a total of $21,470.67.[20]

It is well-established that a family court enjoys broad discretion in awarding attorney's fees. *Poe v. Poe*, 711 S.W .2d 849 (Ky. App. 1986). Pursuant to KRS 403.220, the court need only consider the financial resources of the parties in reaching its decision. *Id*. Here, attorney's fees were awarded after the hearing of February 24, 2011, which, as previously noted, is not part of our record. Thus, under *Thompson,* we must assume the missing record supports the trial court's grant of attorney's fees. Furthermore, Steven was assessed attorney fees because Donna had "to bring various motions, take depositions, etc., as a result of [Steven's] intentional violation of this Court's previous orders concerning the retirement annuity." As explained in *Gentry v. Gentry,* 798 S.W.2d 928, 938 (Ky. 1990), "[t]he amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct."

Having previously determined Steven was properly ordered to pay the arrearage with interest, we have no grounds upon which to order reimbursement. Therefore, that request is rejected. Furthermore, finding that Donna's CR 60.02

[20] Calculated as $9,069.98 paid to Donna in arrearages; $2,048.06 paid to Donna for additional benefits for the period of June 2011 through July 2012 ($146.29 per month for 14 months); attorney's fees of $5,972.22 paid to Donna's attorney, David Broderick; plus judgment interest of $4,380.41.

motion was meritorious, we have no grounds upon which to declare the trial court erred in refusing to award Steven attorney's fees for defending the claim.

For the foregoing reasons, we affirm the order entered by the Warren Circuit Court on April 1, 2011, and the judgment entered on January 17, 2012.

ALL CONCUR.

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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