RENDERED: MAY 17, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000784-MR

PATRICIA ANN PATTEN (NOW NAVE) APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 10-CI-04382

WILLIAM EARLY PATTEN APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND JONES, JUDGES; HENRY, SPECIAL JUDGE.[1]

ACREE, JUDGE: Patricia Patten (now Nave) appeals the Fayette Circuit Court's December 22, 2016 order denying her motions to enforce the parties' settlement

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution. Special Judge Henry concurred in this opinion prior to the expiration of his appointment on April 24, 2019. Release of the opinion was delayed by administrative handling.

agreement and to set aside the settlement agreement pursuant to CR[2] 60.02(d) for fraud affecting the proceedings. We reverse and remand for additional proceedings as explained herein.

FACTS AND PROCEDURE

William Patten and Nave married in 1981. At some point they relocated to Kentucky from Oklahoma with their three adopted children. Patten, a tax attorney and CPA licensed in Oklahoma and Missouri, frequently travelled to Oklahoma to meet with his clients. Nave is also an attorney licensed outside Kentucky.

In 2010, Nave petitioned for dissolution of the marriage.[3] The divorce was particularly acrimonious and contentious. Nave claimed from the onset that Patten was hiding assets and concealing income,[4] and much effort was spent by Nave's counsel to uncover all marital and non-martial assets subject to division.

By letter dated November 23, 2010, Nave's attorney requested certain financial documents from Patten, including:

---

[2] Kentucky Rules of Civil Procedure.

[3] Prior to this, Patten filed a dissolution petition in Oklahoma, claiming the parties and their children were residents of Oklahoma. Nave responded with the dissolution petition in Kentucky along with a motion for emergency custody of the children. The Fayette Family Court granted her emergency custody, finding Patten was untruthful and gave a "patently false" statement in his petition in Oklahoma. Eventually, the Kentucky dissolution action moved forward.

[4] Nave asserted in the trial court that Patten had created multiple entities and opened multiple post office boxes and addresses to conceal income and assets for multiple years prior to the filing of the dissolution petition.

> f. Trust documents for The Russell Lee Patten & Kathryn Elva Patten Trust UTD 9-16-99: . . . Bill admitted that he comingled trust and marital funds in the Trust account. As such we need the trust documents to include the AmeriTrade account statements from 2003 to present, any other broker account and the trust bank account statements form the same period, ***including U.S. Bank*** . . . .
>
> k. Bill used to have or currently has a chase Bank account in Ky, ***an ARVEST account in Oklahoma or Kentucky*** . . . We are asking for Bill to provide us with 6 years of bank statements for each bank account he currently has or has had within the last six years.
>
> m. There is also a ***Merrill Lynch*** account, which was a money market as well as a retirement or deferred tax account. We would request all the statements from inception to present for any Merrill Lynch . . . account, including all those currently open as well as any closed since 1988.

(Emphasis added).

A few months later, Patten submitted, under oath, his preliminary verified disclosure statement (PVDS). Patten disclosed a U.S. Bank account as an asset of his parents' trust, and an Arvest Bank account. Notably, Patten refers to the U.S. Bank account as "segregated" from other U.S. Bank accounts. In a follow up letter, Nave asked Patten to disclose the other U.S. Bank accounts; it is unclear if he complied. (R. 1684). Related to his retirement benefits, Patten claimed all his retirement benefits were contained in five Ameritrade accounts totaling $280,000.00. He neither produced nor identified any Merrill Lynch accounts.

In August 2011, Patten, at Nave's request, executed thirty authorizations for the release of tax and financial records. Included were signed releases for: (1) Arvest Bank; (2) U.S. Bank; (3) Bank of America, in which Merrill Lynch was specifically listed as a subsidiary from which records could be obtained; and (4) Ameritrade. The Authorizations were not limited by date or location, and granted access to any and all financial information, including accounts of Patten individually, two trusts, one corporation, and two limited liability companies.

Record retention policies limited Nave's ability to obtain records beyond seven years from Arvest, U.S. Bank, and Ameritrade. Nave was unable to obtain any records from Merrill Lynch.

Nave noticed Patten's deposition in November 2011 along with a subpoena duces tecum requesting, among other things, "copies of all banking records . . . for 2009, 2010, and 2011 . . . . Please include, but do not limit, to the following accounts: Ameritrade, Bank of America, . . . Arvest Bank . . . U.S. Bank and Merrill Lynch (now affiliated with Bank of America)." Nave continued to assert that Patten had a retirement account with Merrill Lynch that he failed to disclose on his PVDS. She claimed Patten showed her a single Merrill Lynch account in 1991 that had, at the time, a balance of $100,000.00; using a reasonable rate of return, Nave insisted that the account would be in the millions as of 2011.

When questioned at his deposition, Patten continued to represent that he had disclosed all his retirement accounts, those being the five Ameritrade accounts previously identified and disclosed totaling $280,000.00.[5] He produced no Merrill Lynch statements in response to the subpoena and prepared three schedules during the divorce proceedings allegedly indicating he had a single Merrill Lynch account containing less than $25,000.00 that was liquidated around 1984. (R. 2066). Patten also testified in his deposition that he lost the parties' tax returns for years 1999-2003, and the electronic data was corrupted.

On December 8, 2011, the parties executed a comprehensive Mediated Separation and Property Settlement Agreement. The Settlement Agreement addressed and resolved all outstanding issues, including child support, health insurance and the division of personal property, real property, retirement accounts, marital debt, and all other assets. The Settlement Agreement awarded Patten his Ameritrade retirement accounts, any Arvest accounts, all trust interests, and all savings bonds in his name or the name of a trust.

To alleviate Nave's fears that Patten was concealing assets, the parties included the following paragraph in the Settlement Agreement:

> 18. DISCLOSURE. The parties hereby agree that this Separation and Property Settlement Agreement has been reached after both parties have made full disclosure of all assets and liabilities and this agreement is predicated

[5] Patten also referenced a retirement account at Security Bank.

> upon each party being fully aware of the financial resources of the other. If either party has failed to disclose any assets of any nature, said asset shall be deemed joint property of the parties subject to division by the Fayette Family Court and this Agreement shall be amended to provide for an equitable division of said asset.

The trial court declared the Settlement Agreement not unconscionable and incorporated it into the decree of dissolution entered December 11, 2011.

Four years later, on December 11, 2015, Nave filed a motion to enforce paragraph 18 of the Settlement Agreement along with a motion to set aside the decree of dissolution and re-open the Settlement Agreement to restore certain assets to Nave pursuant to CR 60.02(d) for fraud affecting the proceedings. Nave filed an amended motion to enforce on January 28, 2016, and re-filed her CR 60.02(d) motion on April 18, 2016. The underlying basis for her motions, however, remained the same.

She asserted that on or about January 2014, Patten produced documents in an Oklahoma probate action that contradicted his sworn testimony during the divorce proceedings. Specifically, Nave claimed that these documents revealed: (1) Patten purchased savings bonds in 2005-2006 using an undisclosed account at Arvest Bank in Joplin, Missouri; (2) Patten purchased bonds using an undisclosed U.S. Bank account in Lexington, Kentucky; and (3) that in 1999 certain funds were transferred into an undisclosed account with National Discount

Broker (NDB). During the divorce, Patten allegedly represented that these same funds were transferred into an Ameritrade account, not an account with NDB. Related to the bonds, Nave appeared to be claiming Patten used marital funds to purchase savings bonds titled in his sister's name as trustee of a trust. He did so to conceal marital assets. Nave asserted Patten did not disclose the Arvest Bank account in Missouri or the U.S. Bank account in Kentucky during the divorce despite repeated requests for him to do so and emphasized that the Arvest and U.S. Bank accounts discovered in 2014 are different than those initially disclosed by Patten. For example, Nave indicated she was aware Patten had an Arvest account in Oklahoma or Kentucky, as referenced in her counsel's November 23, 2010 letter to Patten, but she was unaware Patten had a different Arvest account, with possibly a different account number, in Missouri.

Nave further claimed that on September 15, 2015, she discovered a back-up disc left in the marital residence referencing four Merrill Lynch accounts, including two retirement accounts, that Patten failed to disclose during the divorce. The disc contained a letter dated July 16, 2001, from Patten to Merrill Lynch stating: "Due to the increase in fee structure I am requesting that Merrill Lynch liquidate the above [WCMA] account and send me a check for the account balance. . . . I would appreciate that the address on all of my accounts (CMA, IRA, and SEP) be changed to the address above." (R. 1656). Nave asserted this letter

reveals Patten had several Merrill Lynch accounts as of at least 2001, despite his filings during the divorce that his sole Merrill Lynch account was depleted by 1984. She further argued that that the Merrill Lynch account she had seen 20 years prior containing $100,000.00 would have increased significantly in value. She claimed that Patten committed fraud when he failed to disclose and knowingly undervalued his assets, under oath, four times – in his PVDS, deposition, subpoena response, and when he executed the Settlement Agreement.

Patten responded to Nave's motion, claiming no Merrill Lynch accounts existed when she filed for divorce in 2010. He asserted that, as the 2001 letter indicated, the WCMA account was "closed" in 2001 and its funds distributed to Patten. He attached eight (8) retirement account statements (four (4) Merrill Lynch and four (4) Ameritrade, from a sixty-day period, December 1, 2001 – January 25, 2002), which supposedly revealed that, of the other three accounts (SEP, IRA, and CMA) referenced in the 2001 letter, two were transferred to comparable SEP and IRA accounts opened with Ameritrade in 2001 and 2002. The Ameritrade accounts, Patten asserted, continued to exist at the time of the divorce, were readily disclosed, and were specifically allocated in the Settlement Agreement. The Merrill Lynch CMA account had a balance of about $700 in mid-2003. It was closed, and the money refunded to Patten, in July 2003.

As for Nave's remaining arguments, Patten asserted her claims related to the U.S. Bank and Arvest accounts were untimely, and he did not disclose an NDB account because there was no account to disclose in 2010 or after. Patten asserted he had a NDB account from 1999 until 2001 when Ameritrade bought the company and the NDB account became an Ameritrade account, which was disclosed during the divorce. The "accounts," Patten asserts, were one and the same.

By order entered December 22, 2016, the trial court denied Nave's CR 60.02(d) motion. It did not address any underlying factual discrepancies. Instead, the trial court stated: "On April 18, 2016, [Nave] filed a Motion to Set Aside Settlement Agreement pursuant to CR 60.02(d) for fraud affecting the proceedings. . . . The Motion is **OVERRULED**. CR 60.02 motions must be filed 'within a reasonable time.' Mrs. Nave's motions have not been filed 'within a reasonable time.'" (Underlying emphasis added).

The trial court reasoned that Nave's inability to understand the settlement agreement "is fictitious" and the idea that she or her competent counsel were defrauded "a stretch." It also stated that Nave had every right and opportunity to discover the full extent of Patten's financial accounts during the divorce, and if she mistakenly missed an opportunity, she only had herself to blame. The trial court concluded:

> a five year wait from 2011 to 2016 when the Motion was filed was too long to ignite the relief which is envisioned under CR 60.02. Even if it did, surely the principle of laches is always relevant. At some point, all cases must be final. The possibility of fraud is not sufficient to re-open this case. . . . Therefore, all Motions are **OVERRULED** as untimely, and indeed unsubstantiated by the facts and law related to CR 60.02.

Nave filed a CR 59.05 motion to alter, amend, or vacate the trial court's order. She argued the trial court only considered her CR 60.02(d) motion and wholly failed to address her motion to enforce paragraph 18 of the Settlement Agreement. By order entered April 19, 2017, the trial court denied Nave's motion, stating its December 22, 2016 order overruled all of Nave's motions, including her motion to enforce. Nave appealed.

ANALYSIS

Nave argues the trial court erred when it overruled: (1) her December 11, 2015 motion, as amended on January 28, 2016, to enforce paragraph 18 of the Settlement Agreement; and (2) her motion to re-open the decree and re-allocate assets in the Settlement Agreement based upon fraud affecting the proceedings under CR 60.02(d). She faults the trial court for failing to address her motion to enforce and, instead, focusing exclusively on CR 60.02(d). In response, Patten argues that, pursuant to *Davis v. Davis*, 489 S.W.3d 225 (Ky. 2016), because the Settlement Agreement was incorporated into the decree, Nave is precluded from seeking contractual relief. Her sole route for relief, Patten asserts, is to proceed to

set aside or re-open the decree by way of CR 60.02, and the circuit court properly denied that motion as untimely. We disagree.

A. Distinguishing Between a Motion to Enforce and a Motion to Modify or Set Aside a Settlement Agreement Incorporated into a Decree of Dissolution

Patten and the trial court fail to understand there is a material distinction between a motion to *enforce* the terms of a settlement agreement, and motion to *re-open* a final judgment and *modify* or *set aside* a settlement agreement. We start with *Davis*, a case Patten cites.

The issue in *Davis* was whether a party could file a separate contract action to enforce a valid settlement agreement that was *not* incorporated or referenced in the final decree of dissolution. 489 S.W.3d at 228. Our Supreme Court held a party could file an independent contract action in that limited circumstance. *Id.* at 229 ("[W]e hold that a settlement agreement involving property division that was not incorporated or referenced in the final decree of dissolution may be enforced through an independent contract action.").

The Supreme Court carefully clarified, however, that its holding in *Davis* does *not* apply when, as in the case before us, the agreement is properly incorporated or referenced in the decree. *Id.* In that circumstance, the decree controls. *Id.* Thus, the "[t]erms of the agreement set forth [or incorporated by reference into] the decree are enforceable by all remedies available for

enforcement of a judgment, including contempt, and are enforceable as contract terms." KRS[6] 403.180(5). This is not a new concept.

Kentucky courts have long held that the terms of a settlement agreement set forth in a decree of dissolution of marriage are enforceable as contract terms. *Id.*; *Bailey v. Bailey*, 231 S.W.3d 793, 797 (Ky. App. 2007). This does not require the filing of a separate contract action like that referenced in *Davis*[7] or the invocation of CR 60.02. Instead, a party need only file a motion to enforce the terms of the settlement agreement. This is so because the trial court retains the authority "to enforce its own judgments and remove any obstructions to such enforcement." *Akers v. Stephenson,* 469 S.W.2d 704, 706 (Ky. 1970); *Bailey*, 231 S.W.3d at 797; *Young v. U.S. Bank, Inc.*, 343 S.W.3d 618, 621 (Ky. App. 2011).

In the family law arena, motions to enforce settlement agreements commonly arise related to maintenance, child support, and property-division provisions. *See, e.g.*, *Miranda v. Miranda*, 536 S.W.3d 196, 198 (Ky. App. 2017) (enforcing terms of settlement agreement related to the refinance or sale of the

[6] Kentucky Revised Statutes.

[7] To clarify, a separate contract action is only needed, and authorized, when the underlying agreement is *not* incorporated into the decree of dissolution. This is so because, when not incorporated, the agreement does not become part of the final decree subject to the trial court's inherent authority to enforce its own judgments. Stated another way, the trial court cannot call upon its authority to enforce the settlement agreement when it was not made part of the decree, thereby necessitating the need for an independent contract action. *Davis*, 489 S.W.3d at 228-29.

marital residence); *Cagata v. Cagata*, 475 S.W.3d 49, 50 (Ky. App. 2015) (interpreting and enforcing the terms of a settlement agreement related to the payment of parochial high school tuition and associated costs); *McMullin v. McMullin*, 338 S.W.3d 315, 319 (Ky. App. 2011) (interpreting and enforcing the terms of a settlement agreement related to the division of a party's retirement benefits). In fact, the parties in this case invoked the trial court's inherent authority to enforce its own judgments when Nave asked it to enforce the term of the Settlement Agreement requiring Patten to pay half of his two sons' health insurance and unreimbursed health-related expenses. *Patten v. Patten*, 2015-CA-001812-MR, 2017 WL 729777, at *1 (Ky. App. Feb. 24, 2017). Significantly, orders entered pursuant to such authority merely assure that the judgment is carried out. The trial court is not changing or modifying the underlying decree or incorporated settlement agreement; it is interpreting and enforcing the agreement.

Contrast that fact pattern with one in which the party requests the court to re-open the decree and set aside or modify the terms of the incorporated agreement (other than provisions addressing custody, child support, or maintenance). Now the party is going beyond the mere enforcement of the decree and incorporated agreement and asking the court to change or modify the decree itself and that agreement. In such a scenario, the party may need to rely on other

authority to modify the final judgment, such as CR 60.02.[8] *See, e.g., Terwilliger v. Terwilliger*, 64 S.W.3d 816, 817 (Ky. 2002) (appellant moved to reopen the decree of dissolution and modify the settlement agreement pursuant to CR 60.02); *Bishir v. Bishir*, 698 S.W.2d 823, 825 (Ky. 1985) (indicating a trial court may reopen a divorce decree pursuant to CR 60.02(f)); *Copas v. Copas*, 359 S.W.3d 471, 475 (Ky. App. 2012) ("[I]n order for a court to *modify* a judgment dividing marital property after ten days from the date the final order was entered, a party must allege grounds to reopen the judgment or order under CR 60.02." (emphasis added)); *Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky. App. 2009) (CR 60.02(f) is an appropriate vehicle by which a court may modify a property order which failed to use language sufficient to convey to DFAS the court's intent); *Burke v. Sexton*, 814 S.W.2d 290, 291 (Ky. App. 1991) (party moved to re-open the decree and set aside the incorporated property settlement agreement as unconscionable under CR 60.02); *Fry v. Kersey*, 833 S.W.2d 392 (Ky. App. 1992) (noting CR 60.02(f) may be a proper vehicle for reopening a divorce decree).

Turning back to the case before us, Nave brought two motions: the first to *enforce* paragraph 18 of the Settlement Agreement, and the second to *re-open the decree and set aside* the Settlement Agreement pursuant to CR 60.02(d).

[8] Nothing in this Opinion should be construed as indicating CR 60.02 is the *only* vehicle to re-open a divorce decree and modify or set aside an incorporated settlement agreement. It is simply one vehicle by which to do so.

Though initially combined in one document,[9] these were two different motions asking for two different types of relief under separate and distinct criteria. The trial court addressed the latter, but not the former. This was error.

B. Motion to Enforce Paragraph 18 of the Settlement Agreement

We agree with Nave that the trial court erred when it denied her motion to enforce the Settlement Agreement without adequately considering that motion. Again, the terms of a settlement agreement set forth in a decree of dissolution of marriage are enforceable as contract terms. KRS 403.180(5); *Money v. Money*, 297 S.W.3d 69, 71 (Ky. App. 2009). The construction and interpretation of a contract is a matter of law reviewed under the *de novo* standard. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

In this case, the trial court's order speaks only as to the timeliness of her CR 60.02 motion and her alleged failure to prove the possibility of fraud. Yet, it denied *all* her motions. Unlike Nave's motion for CR 60.02(d) relief, her motion to enforce paragraph 18 of the Settlement Agreement did not require her to prove fraud. As previously referenced, paragraph 18 contemplates that "both parties have made full disclose of all assets and liabilities, and this agreement is predicated upon each party being fully aware of the financial resources of the other." To

[9] Nave's original December 2015 motion combined her motion to enforce and her motion for CR 60.02 relief in one document. She later amended and refiled her motion to enforce in January 2016 and re-filed her CR 60.02 motion in March 2016.

ensure full disclosure by both parties, paragraph 18 further provides: "If either party has failed to disclose any assets of any nature, said asset shall be deemed joint property of the parties subject to division by the Fayette Family Court and this Agreement shall be amended to provide for an equitable division of said asset."

Paragraph 18 only requires that one party establish that the other failed to disclose an asset. That failure, while possibly evidence of fraud or intentional deception, could also have occurred due to simple mistake or inadvertence. Paragraph 18 does not make a distinction. The court's requirement to entertain Nave's motion is triggered by her allegations of the nondisclosure of an asset "of any nature" without any additional requirement of impropriety, fraud, or wrongdoing.

Furthermore, unlike CR 60.02(d), paragraph 18 contains no limitations period. It is not limited by time except for that contained in statute. *See* KRS 413.090(1) ("An action upon a judgment or decree of any court of this state . . . , the period to be computed from the date of the last execution thereon[,]" shall be commenced within fifteen (15) years after the cause of action accrued). Nothing indicates Nave failed to timely file her motion.

Once a party has established the other party failed to disclose an asset, enforcement of paragraph 18 requires the trial court to declare that asset "joint

property of the parties" and to equitably divide the asset. While paragraph 18 does state that the Settlement Agreement "shall be amended" to effectuate the division, we do not think amending the Settlement Agreement is required. Instead, the trial court need only consider and apply the terms of the Settlement Agreement when dividing the new, undisclosed asset. Stated another way, the division of assets as set forth in the Settlement Agreement remains unaffected and unchanged. The trial court is not, in practical effect, "amending" the Settlement Agreement but is, instead, simply dividing the new asset equitably between the parties.

In sum, we find the trial court erred when it summarily denied Nave's motion to enforce paragraph 18 of the Settlement Agreement. On this issue, we reverse and remand for additional proceedings. On remand, the trial court must find as fact under the agreement: (1) whether an asset not disclosed at the time the parties executed the Settlement Agreement existed; and (2) if it finds a non-disclosed asset, it must then equitably divide the asset between the parties, taking into consideration the Settlement Agreement and in accordance with KRS 403.190.

We are not unmindful of Patten's arguments that none of the assets identified by Nave were "undisclosed" during the dissolution process. He claims he sufficiently proved as much before the trial court. Nave naturally disagrees, pointing to inconsistencies in Patten's evidence and holes in his arguments. As explained, the trial court did not adopt Patten's factual position or resolve any of

these factual disputes on any basis correlative to Patten's arguments. Resolution of these issues involves fact finding, a task left to the trial court.

C. Motion to Set Aside the Settlement Agreement Pursuant to CR 60.02(d) for Fraud Affecting the Proceedings

Nave also argues the trial court abused its discretion when it denied her motion for relief under CR 60.02(d). To the extent her motion does, in fact, assert grounds set out in CR 60.02(d), we agree. However, as explained below, if her claim is actually based on falsified evidence as contemplated by CR 60.02(c), her motion was not timely.

The denial of a CR 60.02 motion is reviewed by this Court under an abuse of discretion standard. *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted).

The trial court found Nave's CR 60.02 motion both untimely and factually insufficient to warrant relief. We question the trial court's timeliness analysis, and find its substantive analysis lacking and, therefore, suspect.

CR 60.02 authorizes a circuit court to relieve a defendant from a final judgment on grounds of:

> (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.

CR 60.02.

CR 60.02 is a unique rule designed to be utilized only in remarkable situations to grant exceptional relief "under the most unusual and compelling circumstances." *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011). Kentucky courts have long urged its cautious application. *Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008); *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959).

A motion for relief under CR 60.02(a), (b), or (c) must be made within one year of the judgment and failure to do so is a bar to relief. The remaining subsections, CR 60.02(d), (e), and (f) are not subject to the one-year limitations period. Instead, the statute simply requires that a motion invoking them be filed "within a reasonable time." CR 60.02.

Kentucky's version of CR 60.02 differs from its federal counterpart, Fed. R. Civ. P. 60(b).[10] Unlike its federal counterpart that limits to one year all motions for relief from a final judgment based on any brand of fraud, the Kentucky version of the rule applies the one-year limitation only to perjury and falsified evidence. *Compare* Fed. R. Civ. P. 60(b)-(c) *and* CR 60.02. Allegations of other kinds of fraud must be brought within a reasonable time.

It is unclear if Nave is basing her allegation of fraud on perjury or falsified evidence, or some other form of fraud. She repeatedly states in her brief to this Court that her allegations are based upon an extensive record of fraud, including Patten's repeated failure, *under oath*, to disclose certain accounts and assets, including his March 2011 PVDS; in response to the October 2011 subpoena, in his November 2011 deposition, and when he executed the Settlement Agreement in December 2011. (Appellant's Brief, pp. 14, 16, 21-22). She also references "Patten's perjury during his deposition and subpoena response and multiple inconsistent versions of documents" as part of the basis for her fraud claim. (*Id.* at 22). To the extent Nave is claiming Patten lied under oath, or that he submitted falsified evidence by way of a deceitful PVDS or other documents, this amounts to perjury or falsified evidence, and the one-year limitation for motions

[10] Motions under Fed. R. Civ. P. 60(b)(3), encompassing *every* kind of fraud, must be filed within one year of judgment. Fed. R. Civ. P. 60(c).

under CR 60.02(c) applies. Here, the decree was entered on December 12, 2011. Nave filed her CR 60.02 motion on December 11, 2015, four years after entry of the decree. If Nave's claim falls solely under CR 60.02(c), it was not timely filed.

However, Nave also claims Patten committed fraud when he entered into the Settlement Agreement with knowingly undervalued assets and that Patten intentionally concealed assets. This is more likely an assertion under CR 60.02(d), not CR 60.02(c), and the reasonable time limitation would be applicable. *See Terwilliger*, 64 S.W.3d at 818 (husband's intentional undervaluation of marital assets during divorce negotiations constituted fraud "affecting the proceedings" that justified reopening the property division). Nave also asserts that Patten executed the Settlement Agreement with knowingly undervalued marital assets, particularly the value of his retirement accounts, thereby committing fraud upon Nave. *Id.* ("It is the finding of this Court that fraud on a party is, in fact, 'fraud affecting the proceedings.'").

Nevertheless, the trial court found Nave's CR 60.02 motion untimely under the "reasonable time" standard as brought and as Nave indicated, pursuant to CR 60.02(d). The trial court measured the reasonableness of this time starting from the judgment date until Nave filed her motion four years later in December 2015. However, it is undisputed Nave did not discover the disc referencing Patten's Merrill Lynch accounts until September 2015. She filed her CR 60.02(d)

motion less than four months later. The trial court failed to factor that circumstance in its "reasonable time" determination.

It is also undisputed that Nave discovered the other alleged hidden accounts by January 2014, yet she waited almost two years from then to file her CR 60.02 motion. In that regard, we agree it is possible her motion with respect to these assets was not filed within a reasonable time.

Accordingly, this Court concludes this issue must be remanded to the trial court for additional fact finding and consideration of these factors.

We also disagree with the trial court's determination that Nave established nothing more than a mere possibility of fraud. While the trial court refers to Nave's failure to adequately prove fraud, it does so merely in passing and without resolving any of the underlying factual discrepancies, such as whether the U.S. Bank and Arvest accounts Nave discovered were indeed different than those disclosed by Patten during the dissolution proceedings and whether the funds contained in the Merrill Lynch accounts were indeed transferred into the Ameritrade accounts disclosed by Patten and divided in the Settlement Agreement. It is clear from the record that Nave repeatedly requested certain documents, including those regarding any Merrill Lynch accounts. Patten repeatedly stated he either disclosed all such documents or did not have access to them, and that his only Merrill Lynch account had been depleted by 1984. Yet, in response to Nave's

post-decree motions, Patten submitted Merrill Lynch statements referencing accounts in existence as of 1993. This alone lends credence to Nave's fraud claim because it indicates Patten, in fact, did have access to account documents and did have such accounts during the marriage, but chose not to disclose those documents and/or accounts despite repeated and specific requests that he do so. Ultimately, whether Nave established fraud is a factual issue which must be decided by the trial court, not this Court.

Accordingly, we also reverse and remand the trial court's denial of Nave's CR 60.02(d) motion. On remand, the trial court must first determine whether Nave's motion properly falls under CR 60.02(c), perjury or falsified evidence, or CR 60.02(d), fraud affecting the proceedings. It must then determine, based on that initial finding, whether the motion was timely filed. If Nave clears those hurdles, the trial court must determine whether she adequately established fraud affecting the proceedings to justify re-opening the decree and modifying or setting aside the Settlement Agreement. We pause to clarify that the trial court may not need to address Nave's CR 60.02 motion at all if adequate relief is granted regarding her motion to enforce paragraph 18 of the Settlement Agreement. Nothing in this Opinion should be construed as dictating the outcome of either motion. We leave it fully and squarely to the trial court's sound discretion.

CONCLUSION

We reverse and remand the Fayette Family Court's December 22, 2016 order denying Nave's motions to enforce paragraph 18 of the Settlement Agreement and to re-open the decree of dissolution and set aside or modify the Settlement Agreement under CR 60.02(d) for fraud affecting the proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Patricia A. Nave, *Pro Se* Lexington, Kentucky	Elizabeth Hughes Lexington, Kentucky