

RENDERED: AUGUST 9, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001282-MR

DEBRA LEE KELLY

APPELLANT

v. APPEAL FROM BOONE FAMILY COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 03-CI-01280

MARK D. KELLY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

SPALDING, JUDGE: Appellant Debra Kelly challenges an order of the Boone Family Court reopening the decree dissolving the parties' marriage and awarding one-half of her retirement pension to appellee, Mark Kelly. Finding no abuse of discretion in the decision of the family court, we affirm.

On January 21, 2005, Debra (wife) and Mark (husband) entered into a property settlement agreement. A decree of dissolution incorporating the terms of that agreement was entered on the same date. Pertinent to this appeal, the property settlement agreement set out the following terms:

Article 1
WAIVER OF RIGHTS

Each party hereby waives, relinquishes and forever releases the other party from any and all claims he or she may have against the other for dower, curtesy, alimony, maintenance, property settlement, and all other claims of any kind and nature, both known and unknown, except the rights saved or created by the terms of this Agreement, it being understood and mutually agreed between the parties that this Settlement Agreement represents a full, final and complete settlement of any and all claims of every kind, character and description, both known and unknown, which either party has, may have, or perceives as having against the other.

.....

ARTICLE 6
MARITAL PROPERTY (PERSONALTY)

.....

The Husband is a retired person. He receives a monthly retirement check from the Kentucky Retirement System in the net amount of \$5,093.37. . . . Since the Husband is already retired and drawing the retirement proceeds, a QDRO cannot be utilized to divide the monthly proceeds. The parties agree to equally divide the Husband's monthly retirement check and to be equally responsible for any tax liability for such retirement funds.

....

The Wife has a 401-K plan through Bank One. The Husband waives any interest in this plan.

....

ARTICLE 9 FULL DISCLOSURE OF PROPERTY INTERESTS

Each party represents and warrants that he or she has made a full disclosure of all his or her property and that neither has knowledge of any other property of any kind in which the party so representing has any beneficial interest.

In late 2017, husband became aware that wife had retired and was receiving retirement pension benefits from the Kentucky Retirement System. Shortly thereafter, he filed a motion to reopen the decree seeking an equitable share of that pension on the grounds the pension plan was not addressed in the parties' agreement. On August 8, 2018, the family court entered detailed findings of fact and conclusions of law supporting its decision to award husband a share of wife's pension based on Civil Rule (CR) 60.02(f) principles. This appeal followed.

The primary focus of wife's challenge is the authority of the family court to reopen the 2005 decree. Specifically, wife argues that husband did not cite CR 60.02 in his motion. However, that is not truly an issue as husband is allowed to reopen the decree pursuant to statute. Kentucky Revised Statutes (KRS) 403.250(1) states "[t]he provisions as to property disposition may not be revoked

or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.” In *Fry v. Kersey*, 833 S.W.2d 392 (Ky. App. 1992), this Court interpreted this language to mean that “[t]he law of this state relating to the reopening of decrees is found in CR 60.02. Under the residual clause of that rule, a judgment may be set aside for ‘reason[s] of an extraordinary nature justifying relief.’” *Id.* at 394. *Fry* directs the circuit court to analyze the motion under the principles of CR 60.02 and that is how the Boone Family Court proceeded.

We begin our analysis by reiterating that the standard of our review of a trial court’s decision concerning CR 60.02 is confined to determining whether the trial court abused its discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). The test for abuse of discretion is whether the decision of the trial court is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). “Absent some flagrant miscarriage of justice an appella[te] court should respect the trial court’s exercise of discretion” concerning applications of CR 60.02. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). Applying these factors to the family court’s decision in this case, we perceive nothing which could be construed to be an abuse of its wide discretion concerning relief from a prior judgment.

In reaching this conclusion, we are guided by our Supreme Court's interpretation of the purpose of CR 60.02:

The rule upon which the trial court acted, CR 60.02, is a safety valve, error correcting device for trial courts. It applies in six enumerated situations: "(a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence . . . ; (c) perjury or falsified evidence; (d) fraud affecting the proceedings . . . ; (e) the judgment is void . . . ; or (f) any other reason of an extraordinary nature justifying relief." The rule is designed to allow trial courts a measure of flexibility to achieve just results and thereby "provides the trial court with extensive power to correct a judgment."

Kurtsinger v. Board of Trustees of Kentucky Retirement Systems, 90 S.W.3d 454, 456 (Ky. 2002) (footnotes omitted). Like the family court, we are convinced that the facts of this case permitted application of CR 60.02 in order to achieve a just result by correcting a judgment entered on the basis of a faulty settlement agreement.

Further, we find no merit in wife's contention that it is not clear how the family court concluded that the decree should be reopened. Wife argues that the circuit court cited both CR 60.02(d) (fraud affecting the proceedings) and (f) (any other reason extraordinary in nature justifying relief) but failed to identify any fraudulent conduct on her part. We are convinced that wife's arguments concerning fraud are a red herring as it is clear from a reading of the family court's opinion that its decision was based upon CR 60.02(f). We thus turn to a

consideration of whether that section is applicable to the circumstances of this case.

The criteria for the proper application of subsection (f) were thoroughly examined and explained by this Court in *Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky. App. 2009):

A successful movant must present to the court a “reason of an extraordinary nature justifying relief.” CR 60.02(f). “What constitutes a reason of extraordinary nature is left to judicial construction.” *Commonwealth v. Spaulding*, 991 S.W.2d 651, 655 (Ky. 1999). Judicial construction must incorporate consideration of three specific factors. The first is that relief under subsection (f) of CR 60.02 will not be available unless “none of that rule's [other] specific provisions applies.” *Alliant Hospitals, Inc. v. Benham*, 105 S.W.3d 473, 478 (Ky. App. 2003), citing *Spaulding* at 655 (“CR 60.02(f) is a catch-all provision that encompasses those grounds, which would justify relief pursuant to writ of coram nobis, that are not otherwise set forth in the rule.”). After determining that CR 60.02(a)-(e) do not apply, courts must consider two more factors: “(1) whether the moving party had a fair opportunity to present his claim at the trial on the merits, and (2) whether the granting of CR 60.02(f) relief would be inequitable to other parties.” *Bethlehem, supra; Fortney v. Mahan*, 302 S.W.2d 842 (Ky. 1957).

Id. at 884. Applying these factors to the instant case, the family court did not abuse its discretion in reopening the decree under CR 60.02(f).

First, the parties appear to concede that none of the subsections of CR 60.02 except (d) and (f) are applicable to the facts of this case. Because the family court failed to make a specific finding as to fraud, the only remedy available under

CR 60.02 is subsection (f). Relying upon *Fortney v. Mahan, supra*, the family court directed its analysis to whether husband had a fair opportunity to present his claim concerning wife's pension and whether the granting of relief at this juncture would be inequitable to wife. In answering those questions, the family court specifically found that wife was aware of her pension and failed to disclose it pursuant to the agreement. It found husband was unaware of the existence of wife's pension. Therefore, the family court found husband did not have a fair opportunity to present this issue in the original litigation surrounding the divorce. The family court also found that it was not inequitable for husband to share in wife's pension as she has benefited from her equal share in husband's pension for many years. Finally, the family court found that because wife failed to disclose her pension and husband was not aware of it, it had not been awarded to either party under the agreement.

In our view, nothing in the family court's findings and conclusions are "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."

English, 993 S.W.2d at 945. There was evidence to support the finding that wife was aware of the pension and failed to disclose it as required under the parties' agreement. There was evidence to support the finding that husband was unaware of an actual pension until shortly before he filed the motion even though he admitted he was generally aware wife had the right to contribute to a pension.

Importantly, there is no indication that husband got any benefit for waiving his potential claims as to the marital share of the pension.

On this state of the record, we cannot say the family court abused its discretion. Certainly, the family court could have found the other way, but it did not. Based upon its findings, the family court acted within its discretion in reopening the decree under CR 60.02(f). This Court will not disturb its decision to award appellee one-half of the marital portion of appellant's pension.

Accordingly, the decision of the Boone Family Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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