

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 1999-CA-003143-MR

PAUL DAVID GEE

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 92-CI-00102

JOYCE DARLENE GEE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: Paul David Gee appeals from a post-decree order of the Carter Circuit Court denying his motion pursuant to CR 60.02(d) to set aside a dissolution decree and incorporated property settlement agreement. He argues that the decree is void as a matter of law and that the appellee's failure to file a brief in this appeal should be deemed a confession of error. Based upon the trial court's findings of fact and the applicable

law, we find that this result is not appropriate under the circumstances. Hence, we affirm.

On May 1, 1992, Joyce Darlene Gee filed a petition for dissolution of her marriage to Paul Gee. The trial court entered a decree dissolving the parties' marriage on October 19, 1992. That decree also incorporated a property settlement agreement which the parties had executed. Thereafter, on August 5, 1996, the court entered an order adopting an agreement for modification of property division and maintenance. This agreement was signed by the parties and notarized. It also appears that the modification agreement was the same agreement that was incorporated in the court's original decree. Subsequently, on September 16, 1996, the trial court entered an order directing the master commissioner to execute a deed to Joyce based upon the provisions of the settlement agreement. None of these orders were appealed.

On November 23, 1998, Paul filed a motion to set aside the dissolution decree and judgment incorporating the settlement agreement, alleging that they were procured by fraud. The matter was referred to a domestic relations commissioner. Following a hearing, the commissioner issued findings recommending that the motion be denied. The trial court

overruled Paul's objections and adopted the commissioner's findings and recommended order. This appeal followed.<sup>1</sup>

As an initial matter, Paul notes that Joyce has failed to file a responsive brief in this appeal. Under CR 76.12(8), we may accept Paul's statement of the facts and issues as correct, reverse the judgment if we believe his brief supports such a result, or treat Joyce's failure to file a brief as a confession of error and reverse the judgment without reaching the merits of the case.<sup>2</sup> Paul moves that we adopt the latter course, reversing the trial court's judgment and remanding with instructions to the trial court to proceed accordingly. However, this Court is not required automatically to reverse the trial court's judgment simply because an appellee has failed to

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<sup>1</sup> This case has languished on appeal for an unusually long period of time. The record reveals the delay was due to the inaction of the parties. Paul filed a timely notice of appeal on December 29, 1999. However, on September 10, 2001, this Court granted a joint motion to place the appeal in abeyance to allow resolution of proceedings which were still pending in circuit court. This case was returned to the active docket on March 10, 2004. But following the filing of the appellant's brief, Joyce's counsel moved to withdraw and to hold the appeal in abeyance. This Court granted the motions and the appeal was not returned to the active docket until October 18, 2005. The appeal and Paul's pending motion were not assigned to this panel for disposition until December of 2005.

<sup>2</sup> Scott v. Scott, 80 S.W.3d 447, 451 (Ky.App. 2002).

file a brief.<sup>3</sup> Furthermore, the circumstances of this case render that result inappropriate.

First, Paul asserts that the dissolution judgment is void because the parties continued to live together as husband and wife even after the filing of the petition. Nevertheless, a judgment granting dissolution of marriage is not appealable.<sup>4</sup> Even when jurisdictional matters are concerned, a judgment granting a dissolution decree will be upheld even if it is erroneous.<sup>5</sup> The trial court's findings concerning the jurisdictional prerequisites are not subject to appellate review.

Of course, the trial court's rulings regarding division of property, maintenance, and child support are appealable. But as the commissioner noted, Paul never sought to directly appeal those judgments. Rather, he moved to set aside those orders by alleging fraud under CR 60.02(d). CR 60.02(d) generally relates to extrinsic fraud, which covers "fraudulent conduct outside of the trial which is practiced upon the court, or upon the defeated party, in such a manner that he is

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<sup>3</sup> See Kupper v. Kentucky Board of Pharmacy, 666 S.W.2d 729, 730 (Ky. 1983).

<sup>4</sup> KRS 22A.020(3).

<sup>5</sup> Clements v. Harris, 89 S.W.3d 403, 404 (Ky. 2002).

prevented from appearing or presenting fully and fairly his side of the case."<sup>6</sup>

Although Paul asserts that Joyce fraudulently procured the decree of dissolution, he does not assert that the settlement agreement adopted by the court in 1992 or ratified in 1996 was procured by fraud. Indeed, Paul conceded at the commissioner's hearing that he knowingly and voluntarily signed the 1996 modification agreement. Furthermore, the commissioner found that Paul had a full and fair opportunity to appear and raise these issues both in 1992 and in 1996. The trial court adopted the commissioner's finding that Paul's actions in 1996 ratified the 1992 decree and agreement and waived any claim of error or fraud. As these findings are supported by substantial evidence, they may not be disturbed in this appeal.<sup>7</sup> Since Paul failed to prove extrinsic fraud related to entry of the settlement agreement, the trial court did not err by denying his motion to set aside the judgment.

Accordingly, the order of the Carter Circuit Court is affirmed.

ALL CONCUR.

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<sup>6</sup> McMurry v. McMurry, 957 S.W.2d 731, 733 (Ky.App. 1997), quoting W. Bertelsman and K. Philipps, Kentucky Practice CR 60.02, cmt. 6, at 425 (4th ed.1984).

<sup>7</sup> CR 52.01. See also Whicker v. Whicker, 711 S.W.2d 857, 858-59 (Ky.App. 1986).

BRIEF FOR APPELLANT:

No brief for appellee.

Robert W. Miller  
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