

RENDERED: MARCH 4, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001427-MR

DONALD G. FORD

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE KEVIN L. GARVEY, JUDGE  
ACTION NO. 95-FC-01242

MARGARET G. FORD

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR  
JUDGE.<sup>1</sup>

COMBS, CHIEF JUDGE: Donald G. Ford has appealed from an order of the Jefferson Family Court entered on March 19, 2003, which granted the CR<sup>2</sup> 60.02 motion of the appellee, Margaret Ford, to re-open the parties' decree of dissolution and to modify their

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<sup>1</sup> Senior Judge John D. Miller, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rule of Civil Procedure.

property settlement agreement based upon a claim of fraud. After our review of the facts and the law, we vacate and remand.

Donald and Margaret Ford married in 1949. They accumulated business interests in several commercial ventures, in gaming enterprises, and in numerous tracts of income-producing real property. By the early 1990's, the marital estate appeared to run into the millions of dollars. Beginning in 1992, however, the couple's lucrative business ventures had become the focus of a federal criminal investigation.<sup>3</sup>

In August 1992, Internal Revenue Service agents raided Arcade Plaza Bingo in Louisville, a gaming establishment owned by the Fords, and seized \$53,000.00 in cash. A few days later, agents confiscated more than \$750,000.00 from bank accounts held by Donald Ford and others. By the following summer, Donald had been indicted by a federal grand jury on charges of illegal gambling, money laundering, and income tax fraud.<sup>4</sup> Federal authorities sought forfeiture of business assets (allegedly financed with illegal gambling proceeds) valued at more than two million dollars.

In March 1995, Margaret filed a Petition for Dissolution of Marriage seeking to end her forty-two year

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<sup>3</sup> Margaret Ford was never implicated in any criminal wrong-doing.

<sup>4</sup> Media reports (filed in April 1993 and made part of the record by Margaret) indicate that Donald was alleged to have skimmed large amounts of cash from the gaming operations each day. He allegedly hid the cash in brief cases and deposited the money in safety deposit boxes throughout the country.

marriage to Donald. With criminal proceedings against Donald pending, the parties exchanged informal offers of settlement in September 1995. On October 4, 1995, Margaret rejected Donald's offer of 1.5 million dollars to settle the property division portion of the proceedings. While she originally intended to propose a counter-offer of 2 million dollars, her final written offer of settlement demanded "50% of the marital estate after disclosure of all financial documents." Presumably because of the ongoing criminal investigation of his financial dealings, Donald resisted a full disclosure of the assets under his control.

On October 5, 1995, the parties executed a Memorandum of Agreement in which they divided the marital estate to their mutual satisfaction. Under the terms of the agreement, Margaret was to receive immediately the marital residence; all household goods, furniture, and jewelry in her possession; an unencumbered vehicle; \$350,000.00 in cash; and a certified check in the amount of \$650,000.00. Additionally, Margaret was to receive \$500,000.00, payable in yearly installments of \$100,000.00, beginning on March 1, 1996.

Margaret agreed to continue as a defendant in a forfeiture action instituted by federal authorities. She also agreed that if she were to prevail as an innocent spouse in the proceedings, she would convey to Donald her interest in the cash

and real and personal property that were the subject of the forfeiture action. Finally, Margaret agreed to disclaim any interest "to any other real or personal property located or situated in any place or state . . . ." Donald was to take the remainder of the marital estate, including specifically enumerated parcels of real property. He agreed to accept full responsibility for the payment of all known and unknown state and federal tax liabilities. A final decree of dissolution was entered on October 6, 1995, incorporating by reference the property settlement agreement executed by the Fords.

The Fords' settlement negotiations had clearly taken place in an atmosphere permeated with distrust, suspicion, and tension. Various disputes soon arose concerning the construction and implementation of the agreement. In July 1997, Donald filed a CR 60.02 motion to modify the agreement based on Margaret's failure to convey certain real property to him. In September 1997, an agreed order was entered in which Margaret released Donald from his obligation to pay to her the four remaining annual payments of \$100,000.00 in exchange for three parcels of the couple's real estate.

In March 2001, Margaret filed a motion to re-open the decree of dissolution and to modify the parties' property settlement agreement. Margaret contended that newly discovered evidence indicated that Donald had concealed and failed to

disclose to her the existence of more than 1.8 million dollars in marital funds.

Donald, now imprisoned at a federal facility, responded to the motion for relief in April 2001. Through counsel, Donald explained that the funds at issue were being held by Orson Oliver, President of the Bank of Louisville, as his power of attorney and that they were the subject of a federal forfeiture action. In addition, he denied that the funds were marital property. He stated that they were the proceeds of various loans and property sales. Donald contended that Margaret "plainly had actual knowledge of the existence of such sources of funds" and alleged that Margaret, too, had failed to disclose that she was holding large sums of cash when she filed her sworn disclosure form with the court.

In defending the claim against him, Donald separately contended that the property settlement agreement should be set aside. In his own motion for relief, Donald referred to an outstanding federal tax bill of 2.6 million dollars and requested a hearing in which the entirety of the marital estate, including its liabilities, could be finally and equitably distributed to the parties.

On August 14, 2001, following a period of active discovery, Margaret filed a motion for partial summary judgment. In her motion, Margaret contended that she was entitled as a

matter of law to recover from Donald one-half of the secreted cash plus interest from October 5, 1995; the sum of \$6,328.10, representing an overpayment of Social Security benefits made to Donald and withheld from Margaret by federal authorities; and her attorney's fees.

In a *pro se* response, Donald claimed that the disputed 2.5 million dollars belonged to investors, who had requested that it be placed "in bank shares at the Bank of Louisville." Donald claimed that the bank suggested that he use the cash to purchase money orders instead of bank shares.

In a supplemental motion for relief, Margaret urged that the decree should be re-opened and that the agreement be modified pursuant to CR 60.02(f), which provides for "any other reason of an extraordinary nature justifying relief." She contended that Donald's failure to disclose the true nature of the marital estate amounted to fraud and perjury and that he should not be permitted to profit from his nefarious behavior. She argued that it would be manifestly unfair to allow the judgment to stand.

In an order entered March 19, 2003, the Jefferson Family Court granted Margaret's motion for summary judgment. The court determined that Donald had committed fraud by concealing from Margaret more than 1.8 million dollars in money orders; that he had also purchased and wrongfully concealed

other money orders totalling \$720,000.00; and that Margaret was entitled to recover the sum of \$6,328.10 that had been paid in error to Donald by the Social Security Administration and withheld by that agency from Margaret.<sup>5</sup> The court awarded Margaret a judgment for \$3,169,991.54. Ford's motion to vacate pursuant to CR 59.05 was denied, and this appeal followed.

Donald argues on appeal that the family court erred by re-opening the judgment since Margaret's request for relief was untimely. We disagree.

CR 60.02 provides as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (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

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<sup>5</sup> At the direction of the United States District Court, the Jefferson Family Court also determined that Margaret was entitled to one-half of more than \$600,000.00 (seized by federal authorities from Donald before the dissolution of the parties' marriage) as part of the equitable division of the couple's property. This award has not been appealed.

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.

Margaret based her motion on various claims of newly discovered evidence, fraud, perjury, and "a reason of an extraordinary nature." By relying on a "claim of fraud affecting the proceedings" as contemplated by CR 60.02(d), we agree that Margaret alleged sufficient grounds to justify her motion for relief and that the motion is not otherwise procedurally barred.

In Terwilliger v. Terwilliger, 64 S.W.3d 816, 818 (Ky. 2002), the Supreme Court of Kentucky held that "fraud on a party is, in fact, 'fraud affecting the proceedings.'" The dispute in Terwilliger also concerned a settlement agreement dividing a couple's marital property and debts at the time of their divorce. The Terwilligers' marital property included several closely-held corporations. Thomas Terwilliger represented to his wife, Judith, that the corporations, including TransAmerica Cable, were in grave financial straits and that TransAmerica was nearly bankrupt. Based upon Thomas's representations, Judith entered into a property settlement agreement accepting unencumbered stock approximating 10% of the value of the couple's businesses. Thomas assessed Judith's interest at \$11,000.00. Pursuant to the agreement, Thomas was to receive

the remaining stock that he valued at \$100,000.00 -- along with the corporate debt. The final decree of dissolution incorporated the property settlement agreement by reference and was duly entered.

Less than one month after the divorce decree was entered, Thomas entered into an agreement to sell TransAmerica for approximately \$1,600,000.00. Judith filed a motion to re-open the decree of dissolution pursuant to CR 60.02(d). She alleged that the settlement agreement had been procured through "fraud, misrepresentation, lack of full disclosure, and [Thomas's] overreaching." Id. at 817.

The family court granted Judith's CR 60.02 motion to re-open, and following a hearing, it modified the original property division to award Judith an additional \$384,166.50. Thomas appealed the modification to this court, arguing that his actions did not amount to "fraud affecting the proceedings" as contemplated by CR 60.02(d). Relying upon the analysis in Rasnick v. Rasnick, 982 S.W.2d 218 (Ky.App. 1998), we reversed the decision of the family court. Rasnick held that the provisions of CR 60.02(d) applied only to extrinsic fraud -- fraud committed outside the court proceedings.

According to the leading authority on the Kentucky Rules of Civil Procedure, fraud affecting the proceedings relates to what is denominated "extrinsic fraud." 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 60.02

cmt 6 (5th ed. 1995). "This 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 prevented from appearing or presenting fully and fairly his side of the case." Id. "Normally, perjury by a witness or nondisclosure of discovery material is not the type of fraud to outweigh the preference for finality." Id.

Id. at 219. Accordingly, we applied the Rasnick reasoning to Terwilliger and determined that Thomas's conduct did not constitute "fraud affecting the proceedings."

The Kentucky Supreme Court reversed, holding that "the definition of 'fraud affecting the proceedings' utilized by the Court in Rasnick is an overly restrictive conception of CR 60.02(d)." Id. The Court concluded that Thomas Terwilliger had used the proceedings themselves as a tool to defraud his wife when he intentionally undervalued the marital estate. Id. In a discussion relevant to this case, the Court observed as follows:

[CR 60.02] does distinguish between fraud affecting the proceedings . . . and the presentation of perjury or falsified evidence, which is clearly a fraud upon the court. This distinction is important because the latter can be raised only "not more than one year after the [judgment]," while the former must be "made within a reasonable time." Thus, it appears that fraud perpetrated in the courtroom or through testimony under oath is subject to a one-year limitation while fraud occurring outside the courtroom that interferes with

presentation of the losing party's evidence to the extent that he or she is "prevented from appearing or presenting fully and fairly his side of the case" is not subject to that limitation. (Emphasis added).

Id. at 818-819.

In Terwilliger, the Supreme Court of Kentucky expanded the grounds for relief contained in CR 60.02(d). By construing the phrase "fraud affecting the proceedings" to include "fraud on a party," the court expanded the scope and applicability of CR 60.02(d). Margaret's allegations concern fraud that occurred in the conduct of the divorce proceedings outside the courtroom rather than allegations of "fraud perpetrated in the courtroom or through testimony under oath..." Consequently, Terwilliger dictates that her motion to re-open is not subject to the one-year time limitation applicable to motions brought pursuant to CR 60.02(a), (b), and (c). Her motion to re-open was brought within a reasonable time. See Cain v. Cain, 777 S.W.2d 238 (Ky.App. 1989).

Donald next contends that the family court erred by re-opening the judgment and modifying its terms summarily. Donald argues that the trial court erred by ignoring his request for a full evidentiary hearing. We agree.

The determination to grant or to deny a motion under CR 60.02 is within the sound discretion of the trial court. Schott v. Citizens Fidelity Bank & Trust Co., 692 S.W.2d 810

(Ky.App. 1985). The rule requires a substantial showing to merit relief from a final judgment. Ringo v. Commonwealth, 455 S.W.2d 49 (Ky. 1970).

As we have discussed, a final divorce decree incorporating a property settlement agreement may be re-opened if the final judgment was obtained by fraud. However, it is well-settled that fraud is not to be presumed and must be established by clear and convincing evidence. United Parcel Service Co. v. Rickert, 996 S.W.2d 464 (Ky. 1999). Fraud consists of: 1) a material misrepresentation, 2) which is false, 3) which is known to be false or made recklessly, 4) which was made with inducement to be acted upon, 5) which resulted in action in reliance thereon and 6) which resulted in injury. Id. In this case, the court concluded summarily that Donald had committed fraud by failing to disclose assets worth 2.5 million dollars.

It is noteworthy that the parties' negotiations were undertaken in the shadow of Donald's impending criminal prosecution. The evidence of record indicates that as early as 1992, it was well publicized throughout the community that Donald was suspected of possessing and secreting large sums of cash. Substantial evidence also indicates that during the years between the parties' separation and the execution of their property settlement agreement, Margaret was aware that Donald

had access to large sums of money. In 1995, Margaret represented to the court that the couple's marital estate exceeded 4 million dollars.

Donald notes that Margaret, too, omitted relevant information from her sworn financial disclosure statement -- namely, \$350,000.00 in cash that she recovered from a box mailed to their home.<sup>6</sup> Donald contends that Margaret was fully aware of the nature and extent of their marital estate. However, presumably because she comprehended the precarious nature of the legal troubles in which Donald was embroiled, she elected to accept a generous settlement in lieu of forcing his full disclosure of their assets. Donald denies that Margaret was induced by any misrepresentation to accept the terms of the property settlement agreement.

In a marital dissolution action, a full and frank disclosure of assets is fundamental. Courts are entitled to rely upon the truth and accuracy of sworn financial disclosure statements. A material misrepresentation of assets is a grave matter, and a participant's intentional misrepresentations to the court cannot be tolerated or rewarded. Moreover, the law treats the special relationship between spouses as privileged

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<sup>6</sup> While omitted from Margaret's financial disclosure statement, the funds were ultimately accounted for under the terms of the property settlement agreement.

and fiduciary in nature. This special relationship compels full financial disclosure during dissolution proceedings.

Nevertheless, despite Donald's failure to make a full disclosure of the parties' assets, a summary determination that he committed fraud is insufficient as a matter of law. There is "some evidence" -- albeit tainted in its premises -- to support Donald's position that Margaret knew of the character and extent of their estate or that she waived her right to compel a complete disclosure by accepting a very favorable settlement. The property settlement agreement made no pretense or direct representation that it constituted a full disclosure of the assets of either party, and no financial statements were attached to it. The court could not rely on the parties' sworn financial statements to assess the terms of their property settlement agreement. We must conclude that based on these insufficient facts, summary disposition of the motion was improper.

Therefore, the judgment is vacated, and this matter is remanded for an evidentiary hearing. On remand, the family court shall re-examine whether to grant the motion to re-open based on the allegation of fraud. If it determines that a re-opening is warranted, it should then conduct a hearing with respect to the request for a modification of the property

division. If necessary, it should then enter new orders concerning disposition of the couple's marital estate.

As the remaining issues advanced by Donald on appeal are rendered moot by this decision, we shall refrain from addressing them.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

J. Fox DeMoisey  
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

Brett Butler  
Louisville, Kentucky