

RENDERED: AUGUST 14, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001996-MR

DEBBIE BURGESS

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT  
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE  
ACTION NO. 17-CI-00055

DAVID DEWEESE

APPELLEE

OPINION  
REVERSING

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BEFORE: ACREE, CALDWELL, AND KRAMER, JUDGES.

ACREE, JUDGE: Appellant, Debbie Burgess, appeals the Marshall Family Court's order denying her petition for annulment of marriage. We reverse.

Burgess married David Deweese on July 4, 2016. The marriage was never consummated. Burgess filed a petition for annulment of marriage alleging

Deweese lacked the capacity to consummate the marriage.<sup>1</sup> She further asserted that, at the time of marriage, she was unaware of both his incapacity and his mental health issues. Deweese did not contest the petition and signed an agreed order to have the marriage annulled.

The family court refused to enter the agreed order and scheduled an evidentiary hearing. Deweese had entered his appearance; however, Burgess was the only party present at the hearing. After taking testimony, the family court denied the petition for annulment. It concluded, “[t]he parties meet the criteria under KRS<sup>[2]</sup> 403.120(1)(b) for an annulment, however, they fail to meet the requirements for the court to grant annulment under KRS 403.120(2)(b).” Burgess moved to alter, amend, or vacate the judgment; the family court denied the motion. This appeal followed.

KRS 403.120(1)(b) allows for an annulment when “[a] party lacks the physical capacity to consummate the marriage by sexual intercourse, and the other party did not at the time the marriage was solemnized know of the incapacity[.]” The family court concluded this requirement was met but found the petition did not comply with KRS 403.120(2)(b). This holding is erroneous on its face.

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<sup>1</sup> The petition was signed and sworn before a notary on September 28, 2016.

<sup>2</sup> Kentucky Revised Statute.

KRS 403.120(2)(b)'s limiting the filing of petitions to one year from the date of marriage applies only when the basis of the annulment is that the marriage is prohibited by law. Burgess's petition for annulment is not based on a prohibited marriage. Instead, it is premised on Deweese's incapacity to "consummate the marriage by sexual intercourse[.]" KRS 403.120(1)(b).

The applicable time limitation for commencing an action for an annulment based on the inability to consummate the marriage is found in KRS 403.120(2)(a). It says such an action must be commenced no later than 90 days after the offended party obtained knowledge of the condition. Although there was a delay in filing the petition, it was signed and notarized within the ninety-day limitations period.

We believe the family court meant to rely on KRS 403.120(2)(a) and citation to KRS 403.120(2)(b) was merely a clerical error. If KRS 403.120(2)(b) applied, Burgess's petition was certainly timely.

However, we need not have considered the merits of the appeal even to this limited extent. Because Deweese filed no brief, we conclude this case is appropriate for application of CR<sup>3</sup> 76.12(8)(c). This important rule of appellate procedure states:

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's

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<sup>3</sup> Kentucky Rule of Civil Procedure.

statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

CR 76.12(8)(c). We not only conclude that Burgess's brief reasonably appears to sustain her claim for relief, we also regard Dewese's failure to file a brief as a confession of error. Therefore, having considered the record before this Court in its entirety, we reverse the judgment in reliance on CR 76.12(8)(c)(iii), making the substantive analysis conducted here superfluous.

For the foregoing reasons, the Marshall Family Court's order denying annulment is reversed and the judgment of annulment shall be entered.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

Heather L. Jones  
Paducah, Kentucky