CIVIL RULE 60.02

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CIVIL RULE 60.02

This packet is intended to assist a defendant in filing a CR 60.02 motion. A copy of CR 60.02 and related case law are attached. Because the laws may have changed since the publication of this document, one should read over the Rules of Civil Procedure and the case law relating to the rule before filing the CR 60.02 motion.

GROUNDS FOR FILING CR 60.02 MOTIONS

- CR 60.02 motions are filed by defendants in the county of his conviction to attack his/her conviction and sentence.
- Grounds that can be raised in a CR 60.02 motion are:
    (a) Mistake, inadvertence, surprise or excusable neglect;
    (b) Newly discovered evidence by which 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. (*See* attached CR 60.02 Rule).
- **NOTE:** CR 60.02 is not a substitute for RCr 11.42 motions alleging claims of ineffective assistance of counsel or for direct appeal of the judgment. Grounds or issues that could have been raised or were raised in an RCr 11.42 proceeding or on direct appeal cannot be raised in a CR 60.02 motion. *See Gross v. Commonwealth*, 648 S.W.2d 853 (1983).

CR 60.02 TIME LIMITS

- If relief is sought pursuant to CR 60.02 (a), (b) or (c), the motion must be filed within **one year** of the judgment or order, or within one year from the date the sentencing order was entered.
- If relief is sought pursuant to CR 60.02 (e) or (f), the motion must be filed within a **reasonable** time of the entry of the order. What constitutes a "reasonable time" is left to the discretion of the trial judge and depends on the grounds raised, when that information became known to the defendant, and the reason behind any delay in discovering the grounds for the motion and the filing of the motion. *See Graves v. Commonwealth*, 283 S.W.3d 252 (Ky. App. 2009), holding that 7-year delay between sentence and motion for relief pursuant to CR 60.02 was unreasonable as defendant did not explain delay in filing motion.
- There is no set time limit for the Commonwealth to respond to the CR 60.02 motion and there is no time limit for the Court to rule on the motion.
- If the defendant has a direct appeal pending and plans to file a CR 60.02 (e) or (f), it is highly recommended that he/she wait until after the direct appeal is concluded to file the CR 60.02. If the defendant files a CR 60.02 motion while a direct appeal is pending and before the appellate court has entered its opinion, the defendant must file a motion and ask the appellate court to hold the direct appeal in abeyance pending the decision in the trial court on the CR 60.02.
- Note that the filing of an RCr 11.42 motion, or any other post-conviction motion, does not toll the filing deadline for a CR 60.02 motion. Therefore, although typically the progression of filing is: direct appeal, RCr 11.42, CR 60.02, the defendant must still file within one year if filing under CR 60.02 (a) – (d) or within a reasonable time if filing under CR 60.02 (e) or (f). That the defendant had an RCr 11.42 pending is not an excuse recognized by the Courts for waiting to file a CR 60.02.

FILING OF THE MOTION

- The original CR 60.02 motion should be sent to the Circuit Court Clerk in the county where the defendant was convicted. A copy should be sent to the Commonwealth Attorney in the county of conviction. The names and addresses of each Circuit Court Clerk and Commonwealth Attorney can be found in the KENTUCKY LEGAL DIRECTORY available in most institutional Legal Aide Offices.
- A Motion to Proceed *In Forma Pauperis* and an Affidavit of Indigency should be filed with the CR 60.02 motion, if the defendant is indigent. (Sample motions are attached to this packet). If the *In Forma Pauperis* motion is denied, the defendant may appeal that decision by filing an appeal within 30 days to the Kentucky Court of Appeals. *See* RCr 12.04(3). An appellate package is available in the law library.
- Although the defendant does not have a right to counsel when filing a CR 60.02 motion, a motion for the appointment of counsel can still be filed.

STANDARD OF REVIEW

- The decision as to whether to deny or grant a CR 60.02 motion is left to the sound discretion of the trial court. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). Abuse of discretion occurs when a trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

EVIDENTIARY HEARING

- If the defendant would like an evidentiary hearing on the CR 60.02 motion, he/she must request it and the motion must allege facts, that if true, would justify relief.

APPEALING THE DENIAL OF THE CR 60.02

- If the CR 60.02 motion is denied, the defendant has the right to appeal to the Kentucky Court of Appeals. This is done by filing a Notice of Appeal and filing fee, or Motion and Affidavit to Proceed *In Forma Pauperis*, if the defendant is indigent. The Notice of Appeal must be filed within **30 days** of the entry of the Order denying the CR 60.02 motion. It is filed with the Clerk of the Circuit Court denying your motion. The Notice is considered timely filed if the envelope is officially

marked as having been deposited in the institution's internal mail system on or before the last day of filing with sufficient First-Class postage prepaid. *See* RCr 12.04(5). An appellate packet is available to assist in this process.

CHECKLIST FOR CR 60.02

After completing the CR 60.02 motion and accompanying documents, please use the following checklist to make sure you have followed all of the steps:

- You have told the Court the name and address of the institution where the defendant is housed.
- You have told the Court the number of years the defendant is serving and for what conviction(s).
- You have explained to the Court the reason(s) (who, what, when, where & why) the judge should set aside the defendant's conviction or reduce the defendant's sentence.
- You have cited to the appropriate legal authority to support the defendant's motion.
- The defendant has signed the Motions and Affidavit on the appropriate lines.
- You mailed the original documents to the Circuit Court Clerk in the county in which the defendant was convicted and a copy of each document to the Commonwealth Attorney.
- You kept a copy of the documents for the defendant's records.

Disclaimer: Be sure to read this again and familiarize yourself with the contents before filing a CR 60.02 motion. Realize that case law that may pertain to this subject may change over time. This handout is not a substitute for individual legal advice from a licensed attorney. It is intended as a starting point in assisting one in preparing a CR 60.02 motion.

CR 60.02

Constitutional issues

Death penalty inmate's petition for declaratory judgment, seeking to have self-defense statutes, as they existed at the time of his trial, declared unconstitutional, failed to plead an existing actual controversy, and thus was subject to dismissal for failure to state a claim upon which relief could be granted; constitutionality of self-protection statutes could have no foreseeable application to defendant, defendant was not seeking relief from his conviction and sentence through the action, and there was no deficiency of criminal law structure that would prevent defendant from raising the constitutional claim within its framework. *Foley v. Commonwealth*, 306 S.W.3d 28 (Ky. 2010).

The Kentucky Court of Appeals' practice of rendering unpublished opinions, combined with the rule barring citation to unpublished opinions, does not deprive a defendant of due process or equal protection under the state or federal constitutions by not allowing him to refer to an unpublished decision which he claims would give him a cognizable claim for relief; even if the decision had been published, it would have no legal effect on a decision of the Kentucky Supreme Court since nothing the appellate courts do is binding on the court of last resort and such a decision would not support a collateral attack on a final ruling of that body. *Goodlet v. Commonwealth*, 825 S.W.2d 290 (Ky. App. 1992).

A defendant who wishes to raise a question as to the constitutional validity of a previous conviction must do so by pretrial motion and, if he fails to do so, a trial court does not err in refusing to permit the defendant to introduce evidence raising the question during a persistent felony offender proceeding. *Commonwealth v. Gadd*, 665 S.W.2d 915 (Ky. 1984).

An accused is not entitled to appointed counsel for a CR 60.02 proceeding. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

The failure to perfect an appeal is not grounds for relief under CR 60.02. *United Bonding Ins. Co., Don Rigazio, Agent v. Commonwealth*, 461 S.W.2d 535 (Ky. 1970).

An alleged error which could have been corrected on an appeal cannot be raised by a motion under CR 60.02. *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908 (Ky. 1967).

Where record showed no proof to sustain a finding that defendant, who had been assigned counsel during trial, was denied the right of counsel to assist him in prosecuting an appeal from the judgment, defendant was not entitled to relief in proceeding to set aside judgment. *McIntosh v. Commonwealth*, 368 S.W.2d 331 (Ky. 1963).

A motion to set aside a judgment does not put into issue the constitutionality of the statute under which it was taken. *Richardson v. Brunner*, 356 S.W.2d 252 (Ky. 1962), *certiorari denied* 83 S.Ct. 27, 371 U.S. 815, 9 L.Ed.2d 56, *rehearing denied* 83 S.Ct. 204, 371 U.S. 906, 9 L.Ed.2d 167.

Trial court admission of testimony from Federal Bureau of Investigation (FBI) employee, who compared the chemical composition of bullets found at all three gas stations with bullets found at defendant's residence, a process known as comparative bullet lead analysis (CBLA), did not violate due process, even though the FBI had ceased conducting CBLA testing since defendant's trial due to its unreliability; the verdict would have been the same if the CBLA testimony had not been admitted at trial, as the evidence linking defendant to the weapon and the weapon to the murders was compelling. *Bowling v.*

Commonwealth, 2008 WL 4291670, (Ky. 2008) Unreported, *rehearing denied*, *certiorari denied* 130 S.Ct. 1053, 558 U.S. 1117, 175 L.Ed.2d 893, *rehearing denied* 130 S.Ct. 1943, 559 U.S. 1032, 176 L.Ed.2d 406.

A default judgment entered without notice or service of a complaint is constitutionally infirm, and a court's refusal to set aside the judgment on a bill of review if a meritorious defense is not asserted is reversible error; the argument that the same judgment will follow a trial because no meritorious defense exists is incorrect since the defendant may have settled the suit or else sold property himself to pay the judgment rather than suffer its sale below true value. (Ed. note: Texas procedure construed in light of federal constitution.) *Peralta v. Heights Medical Center, Inc.*, 108 S.Ct. 896, 485 U.S. 80, 99 L.Ed.2d 75, (U.S. Tex 1988), on remand, writ denied.

Habeas corpus petitioner fairly presented state courts with opportunity to pass on his constitutional claim that he had been denied equal protection when trial court denied him leave to appeal in forma pauperis, and thus, petitioner exhausted his claim in state court, where, although petitioner did not specifically request his belated appeal in his first attempt to get postconviction relief, trial court nevertheless denied such relief, and where petitioner's appellate counsel made statement of argument on appeal that petitioner had been denied equal protection and due process of law under both State and Federal Constitutions because lower court denied his motion for appointment of counsel, copy of his records, and belated appeal. *Harris v. Rees*, 794 F.2d 1168 (6th Cir. 1986).

Where petitioner, who contended that conduct of clerk of state court had denied him rights under equal protection and due process clauses, was provided by Kentucky rules with adequate post-conviction procedure to seek determination of such question, but he had not attempted to obtain relief thereunder, he was not entitled to federal habeas corpus. *Jones v. Davis*, 336 F.2d 594 (6th Cir. 1964).

In general

Adoption of child conceived by artificial insemination of biological mother by biological mother's former same-sex domestic partner was not a fraud upon the court, and thus biological mother's motion to set aside adoption judgment was barred by statute prohibiting attacks on adoption judgments more than one year after their entry; though the adoption violated statute requiring the termination of a biological parent's parental rights in adoptions not involving stepparents and the Cabinet for Families and Children did not consent to the adoption, neither the family court nor the biological mother were deceived regarding the facts and the law when the adoption judgment was entered. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. App. 2008).

The doctrine of collateral estoppel did not bar former client's claims against attorney and adoption agency, who had assisted client in placing her baby for adoption, even though client had previously filed a motion to set aside order terminating her parental rights to child, in action against attorney and adoption agency that sought damages for legal malpractice, fraud, negligent misrepresentation, loss of consortium, and intentional infliction of emotional distress; several issues, such as whether attorney acted negligently with respect to her representation of client, where defendants made fraudulent representations to client, and whether defendants made negligent misrepresentations, were not litigated in client's action to set aside order terminating her parental rights. *Goebel v. Arnett*, 259 S.W.3d 489 (Ky. App. 2007), review denied.

Questions about status of judgment lienor as party to foreclosure action did not render trial court's consideration of lienor's arguments reversible error, when considering mortgagee's motion for relief from default judgment of foreclosure, where mortgagee named lienor as party to appeal from the denial, lienor

participated extensively in trial court proceedings, the order denying motion for relief named lienor as a party, and relief sought by mortgagee was to extinguish the judgment lien. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007).

Rule 60.02 motion to vacate or set aside prior final judgment of conviction is the codification of the common law writ of coram nobis, which allows a judgment to be corrected or vacated based upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief. *Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998).

Trial court has authority and duty to determine that its judgments are correct and accurately reflect the truth in all respects, and in order to so determine, has sufficient inherent authority to conduct investigation and hearing to determine whether its judgments accurately reflected the truth; right of investigation is conditioned to such circumstances where there is reasonable basis to believe that there is possible lack of accuracy or truth in judgment, and goes beyond actual fraud to encompass bad faith, abuse of judicial process, deception of court, and lack of candor to court. *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449 (Ky. 1996).

Even palpable error can be waived. *Sherley v. Commonwealth*, 889 S.W.2d 794 (Ky. 1994), *denial of habeas corpus affirmed*, 229 F.3d 1153.

Determination to grant relief from judgment or order pursuant to Rules Civ.Proc., Rule 60.02 is generally left to the sound discretion of the trial court, and one of the chief factors guiding the trial court is the moving party's ability to present his claim prior to the entry of the order sought to be set aside. *Schott v. Citizens Fidelity Bank and Trust Co.*, 692 S.W.2d 810 (Ky. App. 1985).

A judgment should be reopened, on the ground of change in the law, only in aggravated cases where there are strong equities. *Reed v. Reed*, 484 S.W.2d 844 (Ky. 1972).

When empowered to act the trial court has a discretion as to whether it will set aside the judgment. *City-County Planning Commission, Lexington v. Fayette County Fiscal Court*, 449 S.W.2d 766 (Ky. 1970).

The writ of coram nobis is available where the application properly raises the issue. *Balsley v. Commonwealth*, 428 S.W.2d 614 (Ky. 1967).

On timely motion under court rules, trial court had authority to reverse its earlier findings and conclusions and enter new findings, conclusions and judgment. *Carpenter v. Evans*, 363 S.W.2d 108 (Ky. 1962).

In suit by mortgagors to set aside order of court confirming report of sale, and to cancel certain deeds, although petition asked for incidental relief of cancellation after judgment confirming sale was set aside, suit was not a collateral attack but was a direct attack on judgment as allowed by statute. *Buskirk v. Joseph*, 233 S.W.2d 524 (Ky. 1950).

A purchaser at a judicial sale under a valid judgment is bound by a valid order of court confirming the sale and can only be relieved in the manner pointed out by this section. *Bowles' Guardian v. Johnson*, 291 S.W. 29 (Ky. 1927).

One seeking to have a judgment set aside must allege and prove diligence. *Elkhorn Coal Corporation v. Cuzzort*, 284 S.W. 1005 (Ky. 1926).

In a suit seeking to vacate a judgment and obtain a new trial, the court may set aside the judgment in the original action, and also determine finally the rights of the parties, or the court may set aside the judgment and leave the rights of the parties to be finally determined on the hearing of the original action. *Gaar, Scott & Co. v. Vanhook*, 172 S.W. 680 (Ky. 1915).

The fact that there is neither allegation, exhibits, nor proof to sustain the judgment does not authorize its vacation by the circuit court. *Anderson v. Anderson*, 57 Ky. 95 (Ky. 1857).

When ruling upon motion for new trial based on claim that verdict is against weight of evidence, district court must compare opposing proofs, weigh evidence, and set aside verdict only if it determines that verdict is against clear weight of evidence; motion should be denied if verdict is one which could reasonably have been reached, and verdict is not unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable. *U.S. v. L.E. Cooke Co., Inc.*, 991 F.2d 336 (6th Cir. 1993).

Denial of motion for relief from judgment on grounds other than clerical mistake was within district court's discretion, in movant's defamation and civil rights action against prosecutor, television station, and newspaper after his conviction of unlawful transactions with a child, where movant failed to satisfy any standard for relief from judgment on grounds other than clerical mistake and where the motion was an attempt to relitigate the case. *Walker v. WBKO Television*, 46 Fed.Appx. 317, 2002 WL 31055982 (6th Cir. 2002), Unreported.

Construction and application

A motion for relief from judgment where the reasons for the relief are of an extraordinary nature is a "catch-all" provision and allows a party to request relief from a judgment based on "any other reason of an extraordinary nature justifying relief." Rules Civ.Proc., Rule 60.02(f). Young v. Richardson (Ky.App. 2012) 2012 WL 3136770.

Statute authorizing courts to relieve parties from final judgments for any reason of an extraordinary nature that justifies such relief did not afford trial court the authority to expunge record of movant's drug possession conviction; to allow trial courts to use statute as a vehicle to expunge the records of criminals, where the statute did not allow expungement and the Commonwealth objected, would indubitably run afoul of the separation of powers doctrine. *Commonwealth v. Jones*, 406 S.W.3d 857 (Ky. 2013).

Rules of civil procedure governing the reopening of cases to correct mistakes did not apply to workers' compensation proceedings, and therefore provided no basis for claimant's motion to reopen; rule of civil procedure applied to proceedings before an administrative agency only to the extent provided by statute or regulation, and, although the regulations that governed workers' compensation proceedings had adopted several of the rules of civil procedure, they had not adopted the rules at issue. *Burroughs v. Martco*, 339 S.W.3d 461 (Ky. 2011).

Legislative intent/Also listed as Purpose

Rule providing for relief from judgment under certain circumstances, including mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud, is not intended as merely an additional opportunity to raise claims which could and should have been raised in prior proceedings, but, rather, is

for relief that is not available by direct appeal and not available under rule governing motions to vacate, set aside, or correct sentence. *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011).

Scope and applicability of rule

A trial court need not hold a hearing or appoint counsel on a motion for relief from judgment when the record in the case refutes the movant's allegations. *Goins v. Commonwealth*, 2012 WL 5038488 (Ky. App. 2012), Unreported, opinion not to be published, review denied.

Relief pursuant to a motion for relief from judgment for reasons of an extraordinary nature is only available if the asserted grounds for relief are not recognized under other subsections of the rule governing motions for relief from judgment. *Young v. Richardson*, 2012 WL 3136770 (Ky. App. 2012).

Although trial court had authority to grant relief from judgment of foreclosure sale and judgment confirming sale, it lacked authority to grant such relief on its own motion or order mortgagee to show cause as to why judgments should not be set aside. *Young v. U.S. Bank, Inc*., 343 S.W.3d 618 (Ky. App. 2011).

Retroactive application of the new rule of *Peyton v. Commonwealth* that sentences for multiple felonies committed while on parole serve consecutively to sentence for which paroled, but may serve concurrently to one another, is proscribed. *Campbell v. Commonwealth*, 316 S.W.3d 315 (Ky. App. 2009).

Rule providing relief from judgment for any reason of an extraordinary nature did not apply to allow retroactive application, to defendant's sentence, of the new rule of *Peyton v. Commonwealth* that sentences for multiple felonies committed while on parole would be served consecutive to sentence for which he was paroled but concurrently to each other; original sentence was correct under the case law in existence at the time, and the general rule against retroactive application of a decision would not be departed from in the absence of an aggravated case with strong equities. *Campbell v. Commonwealth*, 316 S.W.3d 315 (Ky. App. 2009)

While the remedies formerly available in criminal cases by common law writ of coram nobis have been preserved by the civil procedure rule regarding relief from judgment, the remedies have not been extended, but have been limited by the language of that rule. *Baze v. Commonwealth*, 276 S.W.3d 761 (Ky. 2008).

Family court had authority to consider former boyfriend's motion to vacate a domestic violence order (DVO) entered against him; DVO at issue was a “final judgment” or “final order” since court's issuance of DVO adjudicated all of the rights of both parties in proceedings with nothing left for its consideration, and thus, relief afforded by rule governing relief from judgment as to “final judgments, orders, or proceedings” was available as to DVOs if former boyfriend set forth any of the criteria covered by rule. *Roberts v. Bucci*, 218 S.W.3d 395 (Ky. App. 2007).

Defendant alleging that he was incorrectly classified as violent offender for purposes of parole eligibility was required to proceed by means of original action against Department of Corrections before circuit court in circuit in which he was incarcerated, rather than by means of post-conviction motion for correction of sentence. *Hoskins v. Commonwealth*, 158 S.W.3d 214 (Ky. App. 2005).

CR 59, rather than CR 60, is the appropriate vehicle for alerting the lower court to procedural defects that may be corrected by a new trial, such as an allegation that a new trial should have been granted under CR

63 because of the death of the original trial judge. *Hamlin Const. Co., Inc. v. Wilson*, 688 S.W.2d 341 (Ky. App. 1985).

Where fire policyholder made no positive steps to relieve herself from agreed order directing her to reconvey property to her mother and in fact policyholder initiated such order, policyholder could not later claim such order was not binding upon her. *Bryant v. Transamerica Ins. Co.*, 572 S.W.2d 614 (Ky. App. 1978).

Trial court did not err in refusing to dismiss without prejudice defendant's motion to set aside judgment on theory that, when he failed to appear for scheduled hearing on his motion, he was nevertheless entitled to have his motion dismissed without prejudice pursuant to civil rule providing procedure for dismissing without prejudice an action or any claim therein, inasmuch as defendant's motion to set aside judgment was not "an action or any claim therein" within meaning of the rule. *Littlefield v. Commonwealth*, 554 S.W.2d 872 (Ky. App. 1977).

Where decree in child custody case was not void on its face, prohibition did not lie against a contempt proceeding based on decree, even if decree were erroneous, in absence of a showing of irreparable injury and in view of other remedies available to petitioner. *Luster v. Auxier*, 285 S.W.2d 900 (Ky. 1955).

In proceeding under Code provision for modification or vacation of judgment in case of death of one of the parties before judgment in the action, trial court has discretion to grant or withhold a new trial as the facts may warrant. *Peoples State Bank & Trust Co. v. Snowden*, 249 S.W.2d 736 (Ky. 1952).

In proceeding to settle decedent's estate, an order directing distribution among all creditors and confirming an allowance of uncontested claims which had been reported by master commissioner several years before was a final judgment which could not be vacated or modified at a later term except in a proceeding instituted pursuant to code provision giving court power to modify or vacate a judgment in case of death of one of the parties before the judgment in the action. *Peoples State Bank & Trust Co. v. Hardy*, 243 S.W.2d 480 (Ky. 1951).

Complainant was not within scope of this section when he had ample opportunity to file exceptions to the commissioner's report. Cleek v. Ryan's Ex'x (Ky. 1943) 296 Ky. 187, 176 S.W.2d 405.
Plaintiff had a remedy to correct by motion, an alleged clerical misprision. She was not entitled to resort to an action under this section. Campbell v. First Nat. Bank (Ky. 1932) 244 Ky. 110, 50 S.W.2d 17.

Under this section a judgment of adoption may be set aside. Greene v. Fitzpatrick (Ky. 1927) 220 Ky. 590, 295 S.W. 896.
For any of the causes authorized by this section appellant who was prevented from filing exceptions to the commissioner's report before it was confirmed may have that matter reopened. Collins v. Conley (Ky. 1926) 216 Ky. 582, 288 S.W. 316.

A suit for the recovery of money paid under a valid judgment of a competent court is a prohibited collateral attack on the judgment; such money, even though unjustly collected, may not be recovered in equity without a new trial. *Woollums v. Fowler*, 207 Ky. 532, 269 S.W. 721 (Ky. 1925).

A commissioner's report disallowed a claim. An order confirming this report was a final judgment. The circuit court after the term had no power to vacate or modify same in the absence of some of the grounds in this rule. *Culver v. Lutz*, 171 Ky. 690, 189 S.W. 240 (Ky. 1916).

This section has no application to orders of the fiscal court. *Kenton County v. Jameson*, 150 S.W. 528 (Ky. 1912).

If the plaintiff or his attorney, before judgment, either directly or indirectly puts a party who is not liable for the debt sued on off his guard, or prevents him from defending the action, such conduct will entitle the party to relief. *Johnson v Gernert Bros Lumber Co*, 75 S.W.2d 357 (Ky. 1934).

Plaintiffs' motion to amend judgment, which was filed for purpose of having trial court reinstate original judgment, which had been amended when defendant tendered another judgment to trial court, was not based on mistake, newly discovered evidence, fraud, or other reason of an extraordinary nature that would justify relief, and therefor was not subject to rule governing relief from judgment on such grounds. *Gay v. Oldham*, 2010 WL 391846 (Ky. App. 2010).

Mistake, inadvertence, surprise, or excusable neglect

The failure of employee's attorney to respond to notice that employee's action against railroad would be dismissed for want of prosecution except for good cause shown, was not the result of mistake, inadvertence, surprise or neglect, or fall into the category of an "extraordinary reason," as required to set aside judgment dismissing employee's claim, where, if there was inadvertence, it was at the hands of employee's attorney in failing to notify the court of his address change, and not at the hands of the court in mailing notice to attorney at his prior address. *Honeycutt v. Norfolk Southern Ry. Co*, 336 S.W.3d 133 (Ky. App. 2011).

One of the chief factors guiding the granting of relief from a judgment or order on the basis of mistake, surprise, or excusable neglect is the moving party's ability to present his claim prior to the entry of the order sought to be set aside. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007).

Relief from default judgment of foreclosure was not warranted, on the basis of mortgagee's mistake in failing to name judgment lienor as a party to the action, where mortgagee could have, with minimal effort, discovered the judgment lien prior to entry of final judgment in the foreclosure action and litigated the judgment lien therein. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007).

The determination to grant relief from a judgment or order on the basis of mistake, surprise, or excusable neglect is one that is generally left to the sound discretion of the trial court. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007).

Trial court's order granting mortgagee's motion for relief from default judgment of foreclosure on basis of mistake in failing to name judgment lienor as a party, was an interlocutory, nonfinal order, and it was within the circuit court's discretion to reexamine the ruling. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007).

Under proper circumstances, relief from a court's final decree of divorce, including an award of child custody, is available by means of a motion to set aside a judgment based on mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud. *Robinson v. Robinson*, 211 S.W.3d 63 (Ky. App. 2006)

Motion to vacate a judgment in a child custody case may be proper under rule governing relief from judgment on ground of mistake or inadvertence, even where it would not be proper to modify it. *Dull v. George*, 982 S.W.2d 227 (Ky. App. 1998).

No basis existed for disturbing judgment of trial court that no oral agreement existed between mother and father that father's child support payments would cease for three months during which son resided with father in Pennsylvania, where narrative statement approved by trial court had no recitation of testimony concerning any such oral agreement. *Abbott v. Abbott*, 673 S.W.2d 723 (Ky. App. 1983).

Unsupported claims in motion to set aside summary judgment that corporation's president, who had discharged corporation's attorney of record, did not have sufficient time to employ services of attorney because he was under great stress, tension and nervous strain did not entitle corporation to vacation of judgment against it. Horn Transfer Lines, Inc. v. Kroehler Mfg. Co. (Ky. 1969) 444 S.W.2d 117.

When parties to lawsuit agree in good faith that mistake has been made and that judgment should be vacated, there is no justifiable basis for overruling motion to set it aside. *Robertson v. City of Hazard*, 401 S.W.2d 223 (Ky. 1966).

Facts held not to show excusable neglect; and a default judgment will not be set aside where it is supported by the allegations in the complaint and the exhibits. *Crowder v. American Mut. Liability Ins. Co.*, 379 S.W.2d 236 (Ky. 1964).

Unappealed order approving payments made by purchaser at execution sale and directing that sale bond be cancelled as satisfied was final order and widow of owner, who was personally present in court when motion for discharge bond was heard, was not entitled to assert two years later claim against purchaser for alleged deficiency of $800 in payment of purchase price, in absence of allegations to warrant relief under rule relating to mistake and excusable neglect. *Walters v. Anderson*, 361 S.W.2d 31 (Ky. 1962).

Where clerk of court allegedly promised to notify plaintiff or plaintiff's attorney of date case was set for trial, failure of clerk to fulfill such alleged promise was not ground for granting plaintiff a new trial under statute authorizing a new trial for unavoidable casualty or misfortune. *Summers v. Nipper*, 240 S.W.2d 74 (Ky. 1951).

Failure to place stakes or iron pins at points designated in judgment, whether intentional or unintentional, is not a ground for vacation of judgment. *Watlington v. Kasey*, 300 Ky. 240, 188 S.W.2d 425 (KY. 1945).

Land erroneously included by mistake in and sold under judgment may be recovered under this section. *Winkler v. Peters*, 142 Ky. 83, 133 S.W. 1144 (Ky. 1911).

Defendant's claim that his son, who was served with plaintiff's summons and complaint, failed to tell him about the service for a long time, preventing him from responding on time, met culpability prong of test for setting aside default judgment on ground of excusable neglect. *River Trading Co., Ltd. v. High Ridge Min.*, Inc. 179 F.R.D. 214 (E.D.Ky. 1998).

A party seeking to modify under Fed Civ R 60(b) a consent decree concerning reform of a penal institution has the burden of establishing that a significant change in facts or the law warrants revision of the decree and that the modification being proposed is suitably tailored to the changed circumstances; modification may be in order where changes in factual circumstances render compliance substantially more onerous,

unforeseen circumstances make the decree unworkable, or enforcement would be a detriment to the public interest. *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 502 U.S. 367 (U.S. Mass. 1992).

Perjury or falsified evidence

An action seeking relief from a judgment on the ground of perjury must be filed within one year from date of entry of the judgment in issue. *Copley v. Whitaker*, 609 S.W.2d 940 (Ky. App. 1980).

The judgment should be set aside where the successful party hired a witness to testify falsely. *Duncil v. Greene*, 424 S.W.2d 587 (Ky. 1968).

False testimony does not constitute fraud. *Tartar v. Medley*, 371 S.W.2d 480 (Ky. 1963).

Change of one witness' testimony from that given at murder trial assertedly because of coercion by decedent's family was insufficient to warrant vacation of conviction on coram nobis, in view of other evidence. *McIntosh v. Commonwealth*, 343 S.W.2d 574 (Ky. 1961).

Petition for new trial, on ground that judgment in previous action was obtained by perjury, must show that evidence was false, that result was produced thereby, that successful party participated in perjury, that its nonexposure then was not due to negligence of petitioner, that ordinary diligence would not have anticipated it, that diligence was exercised to expose it then, that petitioner can expose it now, and that means by which it is proposed to expose it now were not available to petitioner then. *Benberry v. Cole*, 246 S.W.2d 1020 (Ky. 1952).

Evidence warranted setting aside of judgment as procured by fraud since procured by admittedly perjured testimony. *Webb v. Niceley*, 286 Ky. 632, 151 S.W.2d 768 (Ky. 1941).

An attorney's petition to obtain new trial of disbarment proceedings showing that witnesses who testified against him were unworthy of belief by evidence which was cumulative of that given on former trial and which would have been inadmissible as impeaching witness by particular wrongful acts and which was not decisive was properly dismissed. *Sessmer v. Commonwealth*, 273 Ky. 40, 115 S.W.2d 337 (Ky. 1938).

Newly discovered evidence

Ballistics expert's reexamination of ballistics evidence and his report did not constitute newly-discovered evidence warranting new trial under criminal rule permitting a trial court to grant a new trial for any cause which prevented the defendant from having a fair trial or if required in the interest of justice, in murder prosecution; the expert's report did not cast doubt on defendant's conviction. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

Ballistics expert's reexamination of ballistics evidence and his report did not constitute newly-discovered evidence warranting postconviction relief from murder conviction and death sentence, some two decades after the trial; upon the exercise of reasonable diligence, anything in the expert's report could have been previously presented, and a fair examination of the report disclosed an abundance of speculation, inference, and surmise. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

An expert's opinion consisting simply of a reexamination and reinterpretation of previously known facts cannot be regarded as newly-discovered evidence; there would be no finality to a verdict if the facts upon which it was based were perpetually subject to whatever reanalysis might be conceived in the mind of a qualified expert witness. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

An expert's opinion cannot fit the definition of newly discovered evidence of the sort that warrants postconviction relief unless it is based upon underlying facts that were not previously known and could not with reasonable diligence have been discovered. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

Newly-discovered evidence warranting postconviction relief is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

In order for newly-discovered evidence to support a motion for new trial, it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

Trial court acted within its discretion in determining that city residents failed to exercise due diligence to discover newly-submitted evidence suggesting that city did not own property at issue, and thus evidence did not necessitate new trial in residents' action against city alleging arbitrary ordinance-making and enforcement; evidence consisted of deeds, and order from the Transportation Cabinet and a survey, all of which were in the public record. *Leeds v. City of Muldraugh*, 329 S.W.3d 341 (Ky. App. 2010).

Any alleged error in admission of witness testimony not disclosed to defense prior to trial did not entitle defendant to new trial on murder charge, even though court decision subsequent to defendant's direct appeal changed law by requiring mistrial after introduction of testimony not disclosed to the defendant prior to trial; there was enough convincing evidence aside from the testimony objected to to allow the jury to return a guilty verdict, and permitting a retroactive application of new precedent would vitiate finality of judgments. *Berry v. Commonwealth*, 322 S.W.3d 508 (Ky. App. 2010).

Postconviction motion in which movant asserted existence of newly discovered evidence warranting relief from judgment was properly analyzed, by trial court, as arising under rule explicitly permitting relief from judgment on that basis, rather than rule referenced by movant, which permitted relief for reason of extraordinary nature. *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009).

Postconviction petitioner was not entitled to relief where he failed to allege with specificity how Commonwealth wrongfully obtained his rape conviction through use of satanic ritual abuse sham. There had been no reference to any ritual activity, and allegation that Commonwealth's expert was trained by expert involved in satanic ritual abuse sham was more akin to conspiracy theory and was not sufficient to justify relief. *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009).

Victim's affidavit to effect that defendant was welcome to enter her home, even though she was not present, did not constitute newly discovered evidence warranting new trial for burglary; victim was witness at defendant's trial and therefore, was available for cross-examination regarding defendant's permission to enter home, and defendant presented no explanation for why such evidence was unavailable at trial. *Commonwealth v. Harris*, 250 S.W.3d 637 (Ky. 2008).

Defendants in action challenging authenticity of testator's signature on will codicil were not entitled, based on newly discovered evidence, to a new trial on issue of whether testator signed codicil; the “new” evidence consisted of some pictures, a videotape depicting testator, and medical records, the pictures and videotape were in the possession of two defendants before trial, the medical records were disclosed to defendants one year before trial, and the main purpose of the evidence was to impeach occupational

therapist's testimony that testator could not grip a pen in order to write on the date the codicil was allegedly signed. *Richardson v. Head*, 236 S.W.3d 17 (Ky. App. 2007).

Defendant's "newly discovered evidence," which included affidavits of one of defendant's former criminal associates and defendant's "step-cousin," and which was only impeaching in nature, did not warrant new trial, in light of strong evidence of defendant's guilt and weakness of evidentiary support for defendant's alternative theory. *Foley v. Commonwealth*, 55 S.W.3d 809 (Ky. 2000).

Trial judge did not abuse his discretion in denying evidentiary hearing on capital defendant's motions for new trial on basis of newly discovered evidence and for funds to perform ballistics tests on two apparently burned car doors allegedly found by defendant's "step-cousin" at defendant's direction, where defendant filed numerous affidavits in support of motion for new trial, including two of his own, Commonwealth countered with witness's sworn statement denying allegations of one of defendant's former criminal associates and reaffirming his trial testimony, defendant responded with more affidavits impeaching portions of witness's sworn statement, and defendant did not suggest what additional evidence he might have presented at an evidentiary hearing or how such evidence could overcome fact that his "newly discovered evidence" was merely collateral and impeaching, and thus insufficient to mandate a new trial. *Foley v. Commonwealth*, 55 S.W.3d 809 (Ky. 2000).

Fact that individual, who was injured while assisting his first cousin in constructing new roof on mobile, had been offered compensation for his work by cousin was known by individual throughout proceedings, and did not constitute newly discovered evidence which could warrant relief from judgment in cousin's favor in action by individual. *Hopkins v. Ratliff*, 957 S.W.2d 300 (Ky. App. 1997).

Trial court did not abuse its discretion in denying mining company's motion to vacate judgment for owner of surface rights based on interest asserted by stranger to original litigation in surface of tract as well as minerals. *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327 (Ky. 1994).

Unsworn affidavits concerning date that defendant allegedly slapped complainant's back could not be considered as newly discovered evidence such as would warrant new trial of defendant convicted of terroristic threatening. *Thomas v. Commonwealth*, 574 S.W.2d 903 (Ky. App. 1978).

Statute providing, on appeal of rate order provided by Public Service Commission, for remand because of "newly-discovered evidence" did not authorize trial court to remand for "new evidence" consisting of evidence of actual operating experience under new rates, though such evidence could not have been obtained for use at hearing and, according to trial court, would materially affect merits of the case. *Stephens v. Kentucky Utilities Co.*, 569 S.W.2d 155 (Ky. 1978).

Where life insurer paid parents proceeds on life policy covering daughter who had disappeared, but daughter later was found alive, insurer was entitled to restitution of all moneys paid to parents, with interest from date on which parents discovered that daughter was still alive. *Alexander Hamilton Life Ins. Co. of America v. Lewis*, 550 S.W.2d 558 (Ky. 1977).

Relief is limited to matters discovered after the judgment without fault of the party seeking relief. *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183 (Ky. 1974).

CR 60.02(6) applies where the insurance company has paid the death benefits pursuant to a court declaration that the insured was presumed dead and the insured in fact was alive. *Alexander Hamilton Life Ins. Co. of America v. Lewis*, 500 S.W.2d 420 (Ky. 1973).

Motion by defendant for new trial upon ground of newly discovered evidence of witnesses, who were allegedly present when illegal act was alleged to have taken place and whom defendant's attorneys allegedly refused to produce at trial, was fatally deficient where motion did not present any information that was not known to defendant at time of trial and where motion was not supported by affidavits by the proposed witnesses. *Hampton v. Commonwealth*, 454 S.W.2d 672 (Ky. 1970).

Where county court's condemnation judgment erroneously embraced a 37-acre parcel in addition to the strip actually desired for highway right of way, as result of using surveyor's description in body of complaint, though plans and map attached to complaint as exhibits showed clearly that only right of way was sought to be taken, circuit court on appeal could amend the county court judgment so as to eliminate reference to the 37-acre parcel, though error was not discovered until more than a year after entry of judgment. *Com., Dept. of Highways v. Reynolds*, 398 S.W.2d 703 (Ky. 1966).

"Coram nobis" is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record and not available by appeal or otherwise, and not discovered until after rendition of the judgment, without fault of the party seeking relief. *Hamm v. Mansfield*, 317 S.W.2d 172 (Ky. 1958).

"Coram nobis" is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds not appearing on the face of the record and not available by appeal or otherwise, which were discovered after rendition of judgment without fault of the party seeking relief. Harris v. Commonwealth, 296 S.W.2d 700 (Ky. 1956).

Proffered testimony of plaintiff's son and daughter with reference to circumstances surrounding execution of note by husband and wife and that wife had never denied that she owed the money did not constitute such new and material evidence as would justify setting judgment aside insofar as it held that wife was not personally liable on note, in absence of evidence as to whether wife had anything to do with borrowing the money, or how it was spent or whether she signed note as principal or surety, particularly where plaintiff's son and daughter lived in county within fifteen miles of courthouse where trial had been held, so that with due diligence their testimony could have been presented at trial. *Swafford v. Manning*, 295 S.W.2d 802 (Ky. 1956).

Where evidence justified finding that an irrevocable trust for benefit of grantor's two daughters had been created by conveyance of realty to son three years prior to death of grantor upon written agreement by son to make a settlement with his sisters upon death of grantor, evidence as to attempted revocation of agreement by grantor one year later without consent of beneficiaries under trust thereby created and that grantor was mentally competent when he executed deed and agreement was not of such character as would make reasonably certain a different judgment and hence did not entitle grantee to a new trial on ground of newly discovered evidence, particularly in absence of showing of exercise of due diligence to discover such evidence. *Carter v. Spurlock*, 282 S.W.2d 838 (Ky. 1955).

Cumulative or impeaching evidence, which was not decisive, did not justify setting aside judgment and granting a new trial on ground of newly discovered evidence. Mason v. Hooker's Adm'r, 275 S.W.2d 596 (Ky. 1955).

Where judgment dismissing petition to set aside judgment adverse to petitioner on ground of newly discovered evidence after affirmance of such judgment by Court of Appeals was affirmed by that court, petitioner had exhausted her remedy and was not thereafter entitled to writ of coram nobis recalling original mandate and judgment of Court of Appeals and granting a new trial on grounds of error in facts and newly discovered evidence. *Morris v. Thomas*, 275 S.W.2d 423 (Ky. 1954).

On appeal from judgment in suit to settle estates of decedents, newly discovered deeds, which had not been introduced or referred to on trial in trial court, could not be added to record. *Fortney v. Elliott's Adm'r*, 273 S.W.2d 51 (Ky. 1954).

Under the statute providing for new trial after expiration of term and the statute authorizing independent suit for new trial on ground of newly discovered evidence which is material and which party could not with reasonable diligence have produced at trial, burden is upon party to show that by exercise of due diligence he could not have discovered proffered evidence in time to have introduced it on original trial. *Gray v. Sawyer*, 247 S.W.2d 496 (Ky. 1952).

Where petition for new trial contained averments that petitioner had, before trial, sought out all witnesses, pursued records, and interrogated people in vicinity of property involved and that she had produced every witness she knew or could by reasonable diligence have discovered, and in supporting affidavits it was set forth in detail how petitioner had discovered new witnesses and facts as to which each would testify, averments in petition and supporting affidavits showed due diligence and met requirements of law. *Morris v. Thomas*, 240 S.W.2d 99 (Ky. 1951).

Where new trial is sought on ground of newly discovered evidence or misfortune preventing introduction of evidence, evidence relied on must not be merely cumulative, but must preponderate greatly or have decisive influence upon verdict or judgment sought to be overturned. *Pearce v. Coogle*, 178 S.W.2d 938 (Ky. 1944).

Newly discovered evidence cannot be introduced in court of appeals to affect a judgment in question on appeal. But proceeding to affect such judgment because of said ground must be instituted in circuit court. *Fordson Coal Co. v. Vanover*, 164 S.W.2d 966 (Ky. 1942).

New trial will be granted on ground of newly discovered evidence only where such evidence is so material or convincing as to be likely to produce a different result, has been discovered since trial, could not have been discovered before trial by exercise of due diligence, is material to the issue, and is not merely cumulative or impeaching. *Stephens v. Epperson*, 283 Ky. 31, 140 S.W.2d 656 (Ky. 1940).

The remedy of person whose petition in independent action for new trial has been dismissed and who has been refused new trial is to appeal to Court of Appeals and not to file motion for new trial for newly discovered evidence. *Wilhoit v. Nicely*, 134 S.W.2d 615 (Ky. 1939).

Where those in charge of defendant's local office relied on a check apparently bearing plaintiff's indorsement as evidence of payment, not knowing that former employees had indorsed plaintiff's name and issued a new check as directed in garnishment proceedings and did not discover the new check in defendant's foreign office until after trial and adjournment of court, there was a sufficient excuse for its nonproduction to authorize a new trial in an action brought for that purpose. *Parsons v. Black Mountain Corp.*, 107 S.W.2d 310 (Ky. 1937).

Where defendant in action on notes and purchase-money mortgage on automobile denied execution of instruments and recovered judgment on counterclaim for malicious prosecution, plaintiff's petition for new trial on ground of newly discovered evidence, supported by affidavit of person who would testify that he saw defendant sign and deliver instruments to seller's agent, held to state cause of action, and court erred in sustaining demurrer to petition. *Central Acceptance Corp. v. Rachal*, 95 S.W.2d 777 (Ky. 1936).

Where newly discovered patent upon which defendants' motion for new trial of quiet title suit was based allegedly covered land in controversy, and hence must have been part of chain of title, and was of record in public office and could have been discovered before trial if reasonable search had been made, new trial would not be granted. *Holliday v. Tennis Coal Co.*, 264 Ky. 371, 94 S.W.2d 657 (Ky. 1936).

Process in an action for sale of land in which an infant under fourteen years of age had an interest was served on her grandmother; the record did not show that her father was living. The judgment directing sale and the sale were set aside in an action under Civil Code 518 (now CR 60.02), in which it was shown that the father was living when process was served. *Humphrey v. Holland*, 192 Ky. 168, 232 S.W. 642 (Ky. 1921).

Employee was not entitled to relief from summary judgment entered in favor of university medical school in sexual harassment and sexual discrimination case; employee offered no new evidence or grounds to support a finding that summary judgment was improper. *Gozal v. University of Lousiville School of Medicine*, 2014 WL 689040 (Ky. App. 2014).

Trial court denial of defendant's motion for a new trial based on newly discovered evidence, which argued that the recent discrediting of comparative bullet lead analysis (CBLA) testing constituted newly discovered evidence, was not an abuse of discretion; the verdict in the case would not have been different if the jury was informed of the limitations of CBLA testing, given the extensive evidence linking defendant to the murders and other crimes. *Bowling v. Commonwealth*, 2008 WL 4291670 (Ky. 2008).

Admission of testimony from Federal Bureau of Investigation (FBI) employee, who compared the chemical composition of bullets found at all three gas stations with bullets found at defendant's residence, a process known as comparative bullet lead analysis (CBLA), did not prejudice defendant or warrant a new trial, even though the FBI had ceased conducting CBLA testing since defendant's trial due to its unreliability; the testimony was cumulative of other evidence admitted at trial, which established that the bullets that killed victims were fired from the gun defendant threw from his vehicle during police chase, third victim identified defendant as the individual who shot at him and he also identified the handgun as the one used during the attack, and defendant's ex-wife identified the handgun as one defendant had earlier purchased from his uncle. *Bowling v. Commonwealth*, 2008 WL 4291670 (Ky. 2008).

Victim's alleged statement that defendant was welcome in her home did not constitute newly discovered evidence warranting new trial for burglary and theft under rule providing for relief from judgment based on newly discovered evidence; alleged statement could have been discovered before trial, and defendant had opportunity to ask victim about statement when she testified at trial. *Harris v. Commonwealth*, 250 S.W.3d 637 (Ky. 2008).

Post-judgment facts or occurrences

Statutory amendment reducing the sentence for a second or subsequent conviction for possession of a controlled substance in the first degree would not apply retroactively, upon motion for relief from

judgment, to defendant convicted and sentenced nearly three years before the amendment became effective. *Goins v. Commonwealth*, 2012 WL 5038488 (Ky. App. 2012), Unreported.

Homeowners' association's grant of retroactive setback variance to one of its residents, after trial court issued an injunction against plaintiff resident prohibiting him from violating the association's setback variance, did not present a factual scenario that was so extraordinary as to justify the trial court's relief of revisiting its own final judgment. *West Vale Homeowners' Ass'n, Inc. v. Small*, 367 S.W.3d 623 (Ky. App. 2012).

The court rule governing relief from final judgment affords the trial court the discretion to reopen a judgment or order for the consideration of newly discovered evidence, which was unavailable to the court at the time of judgment; however, it does not allow for a judgment to be reopened and altered on the basis of facts which occurred after the judgment was entered. *West Vale Homeowners' Ass'n, Inc. v. Small*, 367 S.W.3d 623 (Ky. App. 2012).

The court rule governing relief from a final judgment does not vest the trial court with the authority to amend a permanent injunction on the basis of actions taken by one of the parties after that injunction was entered; were the trial court to have such authority, no judgment would have the finality intended by the rules, and all would be subject to amendment and reversal at any time on the basis of actions taken after the fact. *West Vale Homeowners' Ass'n, Inc. v. Small*, 367 S.W.3d 623 (Ky. App. 2012).

Fraud

Medical licensing board's misrepresentation, that it could reinstate doctor's medical license with restrictions if doctor dismissed his petition for judicial review of board's order suspending doctor's medical license, did not constitute fraud sufficient to set aside doctor's dismissal of the suspension petition; although board could not reinstate a license, once revoked; board could issue a new license, doctor participated in any fraud that took place when he agreed to an order that reinstated his license with restrictions, and doctor was not harmed, but benefited, by agreement because he was able to earn more money, completed otherwise unavailable training, and proved that he could successfully practice medicine. *Doyle v. Kentucky Bd. of Medical Licensure*, 2013 WL 1352046 (Ky. App. 2013).

Medical licensing board's conditioning of full reinstatement of doctor's medical license on dismissal of his petitions for judicial review of board's order suspending doctor's medical license was neither illegal nor fraudulent, as required to set aside dismissal order; although board could not reinstate license, but could issue a new one, nothing in licensing statute prohibited board from placing conditions on granting of a new license, and when doctor was offered choice of either full reinstatement of his license conditioned on his dismissal of review petitions, or continuing to litigate correctness of the suspension, he chose full reinstatement, knowing the conditions and the ramification of accepting the conditions. *Doyle v. Kentucky Bd. of Medical Licensure*, 2013 WL 1352046 (Ky. App. 2013).

Medical licensing board's alleged failure to include doctor's attorney in negotiations concerning return of an unrestricted license to practice of medicine was not sufficient to grant doctor's motion to set aside, as fraudulently obtained, order dismissing doctor's petition for judicial review of board's order that had suspended his license; doctor negotiated with the board either directly or through physician who assisted him, and doctor's attorney was aware that doctor and/or physician began negotiating directly with board's attorney about a year and a half before doctor's medical license was fully reinstated. *Doyle v. Kentucky Bd. of Medical Licensure*, 2013 WL 1352046 (Ky. App. 2013).

Plaintiff's alleged concealment of fact that name it used in caption of complaint was simply trade name did not rise to level of extrinsic fraud warranting relief from summary judgment granted plaintiff. *Edwards v. Headcount Management*, 421 S.W.3d 403 (Ky. App. 2014).

Mother's participation in obtaining fraudulent agreed judgment of child custody with same-sex partner did not preclude mother, under unclean hands doctrine, from seeking to set aside judgment; although mother had signed the agreement voluntarily and clearly intended to confer custody rights on partner, it had been partner's idea to have the agreed judgment drawn up by her attorney, mother had signed it without the benefit of her own counsel, and equity of the parties was subordinate to the welfare of the child. *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010).

Assertion in agreed judgment of child custody between mother and same-sex partner, that partner was child's primary caregiver and primary financial provider, was falsified evidence and fraud warranting relief from judgment. *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010).

Any fraudulent statement made by mortgagee during the court proceedings in a foreclosure action against a mortgagor, even if knowingly false, would not have constituted the "extrinsic fraud" which would have provided a basis under the rules of civil procedure for relief from judgment. *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898 (Ky. App. 2009).

"Extrinsic fraud" as a basis for relief from judgment does not include fraudulent representations or concealments made during court proceedings. *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898 (Ky. App. 2009).

Generally, fraud between the parties, without more, does not rise to the level of "fraud upon the court" as a basis for relief from judgment. *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898 (Ky. App. 2009).

"Fraud upon the court" as a basis for relief from judgment is that species of fraud which does or attempts to subvert the integrity of the court itself; such fraud has been construed to include only the most egregious conduct, such as bribery of a judge or a member of the jury, evidence fabrication, and improper attempts to influence the court by counsel. *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898 (Ky. App. 2009).

Trial court denial of mother's motion to set aside judgment granting paternal grandparents permanent custody of child was not an abuse of discretion, even though mother submitted affidavits alleging grandparents and mother's husband committed fraud by working together to prevent mother from filing an answer or defense in custody proceeding; mother never appealed the custody determination, and mother failed to establish that she had a defense in the custody proceeding that would have defeated grandparents' petition for child custody. *Mauldin v. Bearden*, 293 S.W.3d 392 (Ky. 2009)

Evidentiary hearing was required on issue of whether mother was guilty of fraud or misrepresentation in conveying to alleged father that he was child's biological father, for purposes of determining whether alleged father, whom DNA testing had excluded as child's biological father, was entitled to relief from order requiring him to pay child support arrearages; results of DNA test, by themselves, offered some indication that mother did not tell the whole truth, and alleged father's affidavit further supported this proposition, but trial court did not hear evidence on issue because it believed it did not have any authority to set aside past child support obligations. *Wheat v. Com. Cabinet for Health and Family Services, ex rel. C.P.*, 217 S.W.3d 266 (Ky. App. 2007).

Husband's knowing undervaluation of marital assets during divorce negotiations, when neither party was represented by counsel, was a fraud "affecting the proceedings" that justified reopening the property division; to allow the original decree to stand would be a miscarriage of justice. *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002).

Extrinsic fraud which warrants relief from a final judgment covers fraudulent conduct outside of trial which is practiced upon court, or upon defeated party, in such a manner that he is prevented from appearing or presenting fully and fairly his side of case. *McMurry v. McMurry*, 957 S.W.2d 731 (Ky. App. 1997).

Perjury by witness or nondisclosure of discovery material is not type of fraud which would entitle party to relief from final judgment. *McMurry v. McMurry*, 957 S.W.2d 731 (Ky. App. 1997).

Inherent authority of court to conduct hearing where reasonable basis exists to believe that there is possible lack of accuracy or truth in original judgment goes beyond actual fraud and encompasses bad faith conduct, abuse of judicial process, any deception of court, and lack of candor to court, as system depends on adversarial presentation of evidence, and even slightest accommodation of deceit or lack of candor in any material respect quickly erodes validity of process. *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449 (Ky. 1996).

Reasonable basis existed to believe that possible lack of accuracy existed in judgment which had been entered in action against pharmaceutical manufacturer following jury verdict, and trial court was justified in conducting hearing to determine validity of judgment, where plaintiff after obtaining favorable ruling on admissibility of evidence of prior wrongdoing by manufacturer had chosen not to admit evidence, record indicated that some sort of settlement had been reached before case was submitted to jury, and there had been great lack of candor to trial court with regard to agreement. *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449 (Ky. 1996).

Warning order procedure requires only that plaintiff state last known address of defendant and, thus, wife did not commit fraud entitling husband to post judgment relief by not giving warning order attorney address of husband's lawyer, restaurant operated by husband, or husband's brother. *Karahalios v. Karahalios*, 848 S.W.2d 457 (Ky. App. 1993).

A decree of dissolution does not preclude a party from taking action to recover unassigned property in which he or she had an interest at the time of the decree, and CR 60.02 may be a proper vehicle for reopening the decree. *Fry v. Kersey*, 833 S.W.2d 392 (Ky. App. 1992).

A CR 60.02 proceeding to set aside a judgment procured by fraud is available to amend a judgment to increase the sentence imposed when more than ten days have elapsed since the original judgment was entered; however, a motion must be filed by the Commonwealth, and a letter from the probation officer who investigated the accused informing the judge of the fraud is not a sufficient basis for the entry of an amended judgment. *McMurray v. Commonwealth*, 682 S.W.2d 794 (Ky. App. 1985).

Where a divorce judgment incorrectly states that payments are for a wife alone instead of for the wife and a child and that judicial error is not corrected on the ground of mistake within one year after its entry, the order stands; it cannot be corrected by a nunc pro tunc order since the purpose of that order is to place in the record all evidence of judicial action that has actually been taken, not to correct error or

supply omissions of judicial action; thus, the husband must pay any accrued payments to the wife. *Carroll v. Carroll*, 338 S.W.2d 694 (Ky. 1960).

Where due legal procedure was followed, at least technically, in obtaining judgment that plaintiff was sole owner of land, though his wife, since deceased, was also named as grantee in deed under which he claimed, and that 17-year-old daughter had no interest in land as sole heir of her deceased mother, evidence was not sufficiently clear and convincing to require vacation of judgment on ground of fraud in procurement thereof, and not because of infancy of defendant, or reversal of judgment dismissing complaint in action to set aside such judgment. *Rice v. Dowell*, 322 S.W.2d 468 (Ky. 1959).

Generally, a divorce decree brings an end to litigation, and an allowance of alimony cannot be had after a decree of divorce has been granted, particularly where the court had jurisdiction to award alimony, but failed to do so, but such rule will not be adhered to in unusual circumstances where adherence to it would cause a miscarriage of justice. *Reynierson v. Reynierson*, 303 S.W.2d 252 (Ky. 1957).

Where one is summoned and appears in court and does not participate in the trial he is not entitled to have a judgment set aside on the ground of either fraud or casualty or misfortune. *Noel v. City of Madisonville Municipal Housing Com'n*, 279 S.W.2d 790 (Ky. 1955).

Concealment by counsel of a settlement with a co-defendant is a fraud. *Hamilton v. Hayes Freight Lines, Inc.*, 251 S.W.2d 277 (Ky. 1952).

In action to set aside judgment after term on ground that it was obtained by fraud, petition alleging that one of the defendants in original action was related to the circuit court and that records were changed in the original action while in custody of the circuit clerk, was insufficient in absence of any charge that any of the defendants altered the records, or that they were changed with their knowledge or at their direction. *Gilliam v. Gilliam*, 240 S.W.2d 626 (Ky. 1951).

In action to set aside judgment on promissory note upon which petitioners were jointly and severally liable with two other persons, allegations that judgment was procured by fraud of other persons liable on note and that such persons were not made parties to action do not state a cause of action, since the allegations of fraud are mere conclusions, and joint makers are severally liable for the whole amount of the note. *Hibbard v. Clay County*, 186 S.W.2d 423 (Ky. 1945).

While a mortgage foreclosure sale, confirmed without exceptions thereto, will seldom be set aside after expiration of term, court has power to do so under statute and will exercise such power in case of fraud resulting in injury to complainant, though fraud be constructive rather than actual. *Hunter v. Hunt*, 178 S.W.2d 609 (Ky. 1944).

A complaint, in action to enjoin collection of money, which contained no allegation of fraud in obtaining judgment under which collection was sought and which failed to allege the defense that would have been interposed if judgment had not been rendered, was insufficient to justify the setting aside judgment. *McKim v. Smith*, 172 S.W.2d 634 (Ky. 1943).

Where a judgment setting aside the probate of a will is fraudulently procured, the judgment is voidable and not void, and the only remedy against the judgment is by filing a petition in equity within three years after the Circuit Court's final decision vacating the will. *Miller v. Hill*, 168 S.W.2d 769 (Ky. 1943).

Evidence held to warrant setting aside of decretal sale due to constructive fraud. *Maynard v. Maynard*, 167 S.W.2d 853 (Ky. 1943).

Action to set aside judgment on ground that it had been procured by fraud is allowable despite fact that court had theretofore overruled an unsigned motion to vacate the judgment which motion set out no grounds upon which it was based. *Fillhardt v. Schmidt*, 165 S.W.2d 155 (Ky. 1942).

Allegations of petition for new trial and motion to set aside default judgment as to fraud in procuring judgment and discovery of fraud over five years after its perpetration held sufficient to substantiate plea of fraud and avoid limitation statute. *Sutton v. Davis*, 283 Ky. 146, 140 S.W.2d 1020 (Ky. 1940).

In order to reopen a case after final judgment on ground of "fraud" practiced by successful party, fraud must be upon adversary's right which resulted in having thrown him off guard or otherwise prevented him from defending, and losing party must show that he himself was not negligent and that he had a prima facie valid defense. *Overstreet v. Grinstead's Adm'r*, 140 S.W.2d 836 (Ky. 1940).

Plaintiff delayed in the taking of proof on promises of defendant to postpone the taking of latter's depositions. Despite these promises, defendant took proof and submitted the case for judgment and obtained the same. These facts justify the setting aside of the judgment as obtained by fraud. *Jarvis v. Baughman*, 137 S.W.2d 1076 (Ky. 1940).

Evidence that judgment in adoption suit was procured through fraud sustained judgment setting aside the adoption suit judgment. *Barber v. Barber*, 134 S.W.2d 933 (Ky. 1939).

This section does not afford any means of relief from a judgment which has become final, except for discoveries made since rendition, or for facts happening thereafter, or for fraud committed by opposing litigant. *Swartz v. Caudill*, 130 S.W.2d 80 (Ky. 1939).

The four classifications of fraud which will warrant the setting aside of a judgment are set out in this case. Beneficiary of insurance policy secured a judgment holding the insured presumptively dead when such beneficiary knew he was alive. On this showing the judgment was set aside because procurred by fraud. *Metropolitan Life Ins. Co. of New York v. Myers*, 109 S.W.2d 1194 (Ky. 1937).

Under statute, party who by fraud, casualty, or misfortune is prevented from having a hearing in any action or proceeding can obtain relief. *Buttermore v. Hensley*, 267 Ky. 669, 103 S.W.2d 68 (Ky. 1937).

The word "fraud" embraces merely leading astray, throwing off guard or lulling to security and inaction, regardless of the intention or motive. *Johnson v. Gernert Bros. Lumber Co.*, 75 S.W.2d 357 (Ky. 1934).

A defendant who seeks to set aside a judgment on the ground of fraud must plead and prove sufficient grounds to authorize the vacation and the defense which he would have interposed except for the fraud, and should point out specifically and fully the fraud relied on. *Hargis Commercial Bank & Trust Co.'s Liquidating Agent v. Eversole*, 74 S.W.2d 193 (Ky. 1934).

Any taxpayer may bring suit to set aside for fraud a judgment procured in a suit brought by another taxpayer to test the validity of a tax. *Parsons v. Arnold*, 235 Ky. 600, 31 S.W.2d 928 (Ky. 1930).

Where one joint owner in a suit to sell jointly-owned property and divide the proceeds joined as party plaintiffs other joint owners without their consent, such nonconsenting joint owners on learning of this after judgment had the right to have the judgment set aside for fraud. *Phillips v. Martin*, 25 S.W.2d 1034 (Ky. 1930).

The purchaser of land at a decretal sale becomes a party to the proceedings from the time the report of sale is made, and relief may be had against the judgment for fraud on his part in procuring the judgment. *Caulder v. Elmore*, 188 S.W. 666 (Ky. 1916).

A consent or agreed judgment procured by fraud may be vacated. *Commonwealth v. Helm*, 173 S.W. 389 (Ky. 1915).

Though a judgment contained a recital which is false and obtained by fraud, the judgment will not be vacated therefor if it would have been valid without the recital. *Anderson v. City Nat. Bank of Cairo*, 155 S.W. 385 (Ky. 1913).

Money collected under a judgment at law fraudulently obtained may be recovered without awarding a new trial or setting aside the judgment. *Ellis v. Kelly*, 71 Ky. 621 (Ky. 1872).

In an action by creditor against bankrupt after adjudication based on alleged new promise to pay an existing debt, if bankrupt was properly served and was unavoidably prevented from defending the action by reason of casualty or misfortune, or if judgment was obtained by reason of fraud practiced by the successful party, the bankrupt has the right to have judgment vacated. *In re Cox*, 33 F.Supp. 796. (Ky. 1957).

Divorce actions

Defense Finance and Accounting Service's (DFAS) misinterpretation of provision in divorce decree dividing equally the amount of husband's military pension pay attributable to the marriage was a sufficient basis for granting extraordinary relief to allow the family court to adjust the order's language to meet DFAS's specific requirements; information provided to DFAS was not complete and did not conform to the template for court orders later developed by DFAS and, as a consequence, DFAS paid wife a greater proportion of husband's military retired pay than that to which she was entitled. *Copas v. Copas*, 359 S.W.3d 471 (Ky. App 2012).

Granting wife relief from property division judgment was not an abuse of discretion, when husband received a federal “economic stimulus” check payable to both parties after the final decree of divorce had been entered, which was based on the prior year's income tax return, which the husband and wife had filed jointly, and which court ordered husband to share with wife; wife was unable to present her claim prior to entry of final divorce decree because stimulus payment had yet to be distributed, and it was safe to say the making of such a payment by U.S. government was not a routine or customary practice that ought to have been anticipated by either party. *Wilder v. Wilder*, 294 S.W.3d 449 (Ky. App. 2009).

The trial court's determination that former wife's fraud, intimidation, and mental incompetence claims were unsubstantiated was not an abuse of discretion, on motion for relief from divorce judgment; the record indicated that former wife and former husband bargained and exchanged for the terms of their property settlement and separation agreement, former wife testified to the court that the agreement was fair and asked that it be incorporated into the divorce decree, and former wife's attorneys fully explained

in writing to her the risks she was taking in accepting the property settlement agreement in lieu of conducting discovery into former husband's assets. *Lawson v. Lawson*, 290 S.W.3d 691 (Ky. App. 2009).

Husband was not entitled to relief from dissolution judgment, where husband failed to establish mistake or inadvertence, there was no newly discovered evidence that could not have been discovered in time to move for a new trial, and there was no evidence that wife fraudulently concealed marital assets. *Brenzel v. Brenzel*, 244 S.W.3d 121 (Ky. App. 2008).

Former husband failed to establish fraud affecting divorce judgment, or a reason of "extraordinary nature" that would have justified setting aside order of support for child born during the marriage who was not his biological child; former husband himself alleged in petition for divorce that child was born of the marriage, despite fact that former wife had notified him that child might not have been his, and he continued to portray himself as her father until six years after he learned that his parentage of child was questionable. *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky. App. 2005).

Client's motion for relief from judgment in legal malpractice case arising from representation during divorce did not toll one-year statute of limitations. *Faris v. Stone*, 103 S.W.3d (Ky. 2003).

Net worth of divorced husband and wife was not "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial," where prior to signing dissolution agreement, parties had reviewed joint financial statement with estate planning attorney, met with accountant to review approximate net worth, and wife had signed joint tax returns for prior three years. *Rasnick v. Rasnick*, 982 S.W.2d 218 (Ky. App. 1998).

Nondisclosure of assets in a dissolution action does not constitute "fraud affecting the proceedings" allowing for relief from final judgment. *Rasnick v. Rasnick*, 982 S.W.2d 218 (Ky. App. 1998).

Disparity between father's income in excess of $400,000 and ordered child support of $18,000 per year presented prima facie case for setting aside portion of dissolution decree fixing child support, and absent findings on this issue, Court of Appeals could not review order for abuse of discretion. *Rasnick v. Rasnick*, 982 S.W.2d 218 (Ky. App. 1998).

Ex-wife failed to establish fraud affecting divorce proceedings which would have warranted relief from final property settlement agreement; record did not support her contention that ex-husband attempted to or concealed and misrepresented any information relating to his medical practice or couple's finances, and although this information was discoverable and could have been obtained through formal discovery, ex-wife instead elected to enter into property settlement agreement without conducting independent inquiry of her own. *McMurry v. McMurry*, 957 S.W.2d 731 (Ky. App. 1997).

Property settlement agreement was not manifestly unjust and inequitable and did not warrant setting aside of agreement for any other reason of extraordinary nature justifying relief; at time of dissolution, parties had acquired massive debts which exceeded their income, ex-husband assumed all debts and agreed to pay maintenance to ex-wife, and settlement agreement provided that maintenance to ex-wife would be reviewed and increased if marital debts had been satisfied and if ex-husband's income was in excess of $275,000.00. *McMurry v. McMurry*, 957 S.W.2d 731 (Ky. App. 1997).

Property settlement agreement was not manifestly unjust and inequitable and did not warrant setting aside of agreement for any other reason of extraordinary nature justifying relief; fact that ex-husband was

subsequently able to obtain financing, to complete unfinished home, and to manage to reduce some of debt did not render agreement unconscionable. *McMurry v. McMurry*, 957 S.W.2d 731 (Ky. App. 1997).

Trial court's determination on question of jurisdictional residence in divorce case and past jurisdiction cannot be questioned on appeal if evidence shows necessary residence and question of jurisdictional residence was raised in lower court. *Karahalios v. Karahalios*, 848 S.W.2d 457 (Ky. App. 1993).

A former husband's behavior amounts to fraud affecting the proceedings under CR 60.02(d) warranting reopening the dissolution action where not only is the separation agreement very lopsided in the former husband's favor, awarding all the real estate, two trucks, and all household furnishings to him and one car, custody of the parties' fifteen-year-old son and an $800 debt to the former wife, and in addition providing that the wife waive all claims to alimony and child support, but the wife is also prevented from participating in the divorce action by a waiver of all further notice and service of process including the judgment, while in the meantime the husband told the wife he had dropped the divorce after she signed the agreement, the couple continued to live together as husband and wife until shortly before the judgment was entered and tried to reconcile, which prevented the wife from timely disputing the terms of the agreement. *Burke v. Sexton*, 814 S.W.2d 290 (Ky. App. 1991).

In an appeal of a former husband from a judgment overruling his CR 60.02 motion to reopen his dissolution action in order to determine the paternity of a minor child of his former wife, applying res judicata to bar his motion would be highly unfair and unjust to the former husband and potentially to the child where (1) the former husband never held out the child as his, (2) no demand was ever made of him to provide any support for the child until after the dissolution action was instituted, and (3) the blood test shows that the former husband is not the child's father. *Spears v. Spears*, 784 S.W.2d 605 (Ky. App. 1990).

When a husband (1) files an action for divorce against his wife; (2) reconciles with her during the time in which she could file a timely answer to the action; (3) represents to her that the lawsuit will be dropped, and (4) without further notice to his wife, he prosecutes the action to a conclusion, which results in an entry of a divorce judgment, the trial court properly set aside that judgment on the wife's motion alleging mistake, excusable neglect, and fraud under CR 60.02. *Cottrell v. Cottrell*, 502 S.W.2d 80 (Ky. 1973).

Resumption of marital relations between parties to a pending divorce action will not terminate action or affect jurisdiction of court to continue with the proceeding, although it will constitute grounds upon which action may and should be dismissed upon proper showing at any time before judgment, and regardless of whether party has appeared or is in default for failure to appear, he or she is entitled to notice of any further action proposed to be taken that will have the effect of resuming the proceeding; modifying *Barrett v. Barrett*, 474 S.W.2d 74 (Ky. 1971).

A denial of wife's motion to set aside judgment of divorce under CR 60.02(1), (2) and (3) is not improper where wife and her attorney were apprised of the chancellor's intent to enter judgment of divorce for the wife before its entry, and there was no formal motion on her behalf to withdraw her counterclaim for divorce nor any objection made to entry of judgment. *Greenwell v. Greenwell*, 449 S.W.2d 21 (Ky. 1969).

Service on attorney of husband 10 years after divorce in case for delinquent child support payments and house repair cost required under divorce judgment was not valid and motion to set aside purported default judgment in the suit was adequate by simply alleging invalidity of service. *Guthrie v. Guthrie*, 429 S.W.2d 32 (Ky. 1968).

Appeal from judgment awarding alimony to divorced wife, taken more than one year after entry of judgment, must be dismissed, but reviewing court could consider timely appeal from supplemental order overruling motion to relieve divorced husband of further alimony payments on ground of change in conditions. *Gann v. Gann*, 347 S.W.2d 540 (Ky. 1961).

The portion of divorce judgment relating to alimony or property restoration may be set aside on the ground of newly discovered evidence. *Kivett v. Kivett*, 312 S.W.2d 884 (Ky. 1958).

Though husband, who had not actually received mailed notice of wife's motion to redocket divorce action to increase children's maintenance allowance, could not attack validity of service on such ground, he would have remedy, under rules, if he could establish grounds enumerated in rules for voiding order which had been entered increasing maintenance allowance. *Benson v. Benson*, 291 S.W.2d 27 (Ky. 1956).

Where wife purportedly instructed her attorney to dismiss her divorce suit and assumed that instruction was followed and wife had no notice that her suit had not been dismissed and that husband had filed counterclaim and that depositions had been taken, and husband dealt with wife's attorney without knowledge of such instructions, there was no such fraud practiced by husband in obtaining divorce judgment as would justify setting aside such judgment. *McKay v. McKay*, 260 S.W.2d 945 (Ky. 1953).

Where husband was not a resident of Martin County when he filed his action for divorce against his wife and knew he was not a resident and the sole witness who testified in his behalf did so by prearrangement under an assumed name and the evidence established that husband was a resident of West Virginia an action by the wife would lie in Martin Circuit Court under the statute to set the divorce judgment aside on the ground of fraud practiced by the husband. *Kirk v. Kirk*, 240 S.W.2d 598 (Ky. 1951).

A judgment, regular on its face, dismissing husband's divorce action for want of jurisdiction because parties were nonresidents of commonwealth and stating that previous judgment in same action granting husband divorce was never in force because it was never signed by judge, was not void, hence later judgment, after term had expired, setting aside judgment of dismissal and reinstating original judgment granting husband divorce, was erroneous. *Hodge v. Hodge*, 194 S.W.2d 362 (Ky. 1946).

Where wife, after judgment in divorce action awarding her $600 for alimony and support, sought new trial on ground that husband testified that property in which she was awarded a half interest was worth $1,000, that husband, a year later, contracted to sell the land for $3,500, and that husband had concealed from court true value of the land, there was no charge of fraud warranting grant of new trial. *Hill v. Hill*, 188 S.W.2d 448 (Ky. 1945).

Where wife's attorney, contrary to stipulation and without submitting judgment to defendant, prepared divorce judgment to direct husband to execute a mortgage to secure weekly payments of alimony to wife for life and a lump sum to become due one year after rendition of judgment and husband's mortgage securing the payments contained undirected precipitation clauses, and judgment foreclosing mortgage for sum stipulated to become due upon precipitation had become final, evidence established that, in reliance upon representations made to husband by wife's attorney, husband did not employ an attorney and did not defend foreclosure action and that foreclosure judgment was entered without husband's knowledge, entitling husband to new trial because of wife's failure to comply with “clean hands” maxim. *Yung v. Yung*, 171 S.W.2d 1017 (Ky. 1943).

In wife's divorce suit, where husband was summoned and appeared with his attorney at preliminary hearing on question of allowance to wife pendente lite, but never raised question of court's jurisdiction by demurrer or pleading, judgment granting wife divorce was not void as obtained by her fraud, though she was not actually resident of county of venue when action was instituted, as court had jurisdiction of subject-matter and husband "waived" jurisdiction as to person. *Gorin v. Gorin*, 167 S.W.2d 52 (Ky. 1942).

Court of Appeals is powerless to set aside judgment of divorce unless said judgment was void. *Winfrey v. Winfrey,* 150 S.W.2d 689 (Ky. 1941).

A judgment for divorce may be set aside for fraud in its obtention under this section even though spouse has remarried. *Logsdon v. Logsdon*, 263 S.W. 728 (Ky. 1924).

Criminal cases

Court of Appeals was unable to review merits of defendant's claims that his sentence for conviction by guilty plea to various sex offenses demonstrated failure on part of Commonwealth and trial court to honor oral plea agreements concerning sexual offender sentencing and concurrent sentencing, where, in neither his petition for post-conviction relief nor in his brief, did defendant specify details of alleged agreements or explain how parties failed to comply with them. *Stacey v. Commonwealth*, 177 S.W.3d 813 (Ky. 2005).

Defendant was barred from collaterally attacking his conviction by guilty plea to various sex offenses by means of civil procedural rule governing allegations of mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud, as issues could have been raised on direct appeal or in a timely petition for post-conviction relief. *Stacey v. Commonwealth*, 177 S.W.3d 813 (Ky. 2005).

An evidentiary hearing is required on petition for post-conviction relief if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record, and the trial court may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Stacey v. Commonwealth*, 177 S.W.3d 813 (Ky. 2005).

The existence of a mental disability that serves to toll the limitations period for filing a petition for post-conviction relief is a question of fact. *Stacey v. Commonwealth*, 177 S.W.3d 813 (Ky. 2005).

Defendant's untimely petition for post-conviction relief from conviction by guilty plea to various sex offenses, along with evidentiary material documenting defendant's "vast array of neuropsychological deficits," was facially sufficient to warrant evidentiary hearing on issue concerning whether defendant suffered from an ongoing mental incapacity following his guilty plea such that three-year limitations period for filing petition should have been tolled; letters from psychiatric experts supported defendant's allegation that facts upon which his claim was predicated, i.e., that he was incompetent to enter a guilty plea due to mental incapacity, were unknown to him and could not have been ascertained by exercise of due diligence. *Stacey v. Commonwealth*, 177 S.W.3d 813 (Ky. 2005).

Motion for relief from judgment was permissible remedy for defendant to obtain relief from order revoking probation if trial court lacked jurisdiction to revoke probation due to expiration of probation period. *Commonwealth v. Dulin*, 427 S.W.3d 170 (Ky. 2014).

Capital murder defendant's motion for relief from judgment was, in practical effect, an impermissible successive motion to vacate, set aside, or correct sentence, as claims set forth in the motion for relief

from judgment were of the type ordinarily raised in a motion to vacate, set aside, or correct sentence. *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011).

Defendant was not entitled to relief from judgment of conviction based on the improper admission of evidence at trial. *Parrish v. Commonwealth*, 283 S.W.3d 675 (Ky. 2009).

Accomplice's testimony at cocaine dealer's trial that he lied in statement to police about his and defendant's activities on night of burglary in order to get plea bargain in his own case, that sheriff had promised him plea bargain if accomplice would "tell on others" involved in burglary, and that he and defendant had not taken guns and cash stolen during burglary to dealer's home to trade for drugs but that he had traded guns for drugs in neighboring county, did not warrant new trial; outcome of trial would not have been different even if it were revealed that accomplice had lied, as accomplice gave no direct testimony at defendant's trial that implicated defendant, but instead had testified that he did not remember making statement because he was so high, and at trial against dealer, accomplice testified that he remembered evening more clearly, and that defendant and other party were with accomplice at victim's house and that they left with cash and guns. *Commonwealth v. Harris*, 250 S.W.3d 637 (Ky. 2008).

Rules of civil procedure governing motions to alter, amend or vacate a judgment and governing relief from judgment under certain extraordinary circumstances do not give a trial court any authority to reconsider a prior order allowing a guilty plea to be withdrawn and to reinstate the previously vacated order accepting the guilty plea. *Turner v. Commonwealth*, 10 S.W.3d 136 (Ky. App. 1999).

Whether defendant who was convicted of first-degree manslaughter was entitled to relief from judgment based on witness's perjury at second trial could be determined by consideration of whether evidence, excluding witness's testimony, was sufficient to support conviction, despite witness's testimony at first trial in support of claim of self-defense, where there was no evidence that witness testified truthfully at first trial, which ended in mistrial. *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999).

There was sufficient evidence to support conviction for manslaughter even without considering any testimony of witness who was convicted for committing perjury at defendant's second trial, thus foreclosing relief from judgment of conviction, though witness' testimony at first trial supported defendant's self-defense theory, where other witnesses testified that defendant was aggressor in fight that ended in victim's death. *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999).

That criminal conviction was based on perjured testimony, introduced without prosecutor's knowledge or acquiescence, could be "reason of an extraordinary nature justifying relief" from judgment, subject to reasonable time limitation, though generally motion for relief based on allegations of perjury must be brought within one year of entry of judgment. *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999).

To justify relief from judgment of conviction based on introduction at trial of perjured testimony unknown to prosecutor, defendant has burden to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known. *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999).

Defendant who was convicted of first-degree manslaughter was not collaterally estopped, by rulings denying original motion for relief from judgment, from bringing another motion based on introduction of perjured testimony without knowledge of prosecutor; original motion was based on prosecutorial misconduct for failure to correct perjured testimony, and trial court did not necessarily determine issues

of falsity and materiality of allegedly perjured testimony in its blanket denial of original motion. *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999).

Defendant's Rule 60.02 claim for relief based on fiduciary relationship between victim and county attorney participating in prosecution for complicity to commit robbery and burglary was not barred based solely on fact that fiduciary relationship was matter of public record, in absence of reason for defendant to suspect that such a relationship existed between victim and county attorney. *Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998).

Motion under civil rules for relief from judgment is not separate avenue of appeal to be pursued in addition to other remedies in criminal cases, but is available only to raise issues which cannot be raised in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997).

Evidence that defendant's attitude and character changed during his 16 years of confinement on capital murder conviction did not permit court to grant relief from death penalty; even if defendant has been model prisoner and religious convert during his myriad appeals, defendant's evidence would afford no basis for relieving him from punishment legally imposed for crimes he committed. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997).

Counsel's discovery that there was entry in police file indicating that defendant claimed several days after robbery and murder that it was his half-brother who killed victim, was not type of newly discovered evidence that could have warranted extraordinary post-conviction relief or relief from judgment and death sentence; statement was made by defendant and was known to him, so that there was nothing to discover, prosecutor had “open file” discovery policy, and defendant made conscious decision not to use statement against half-brother at trial. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997).

Trial court's failure to consider suspended sentence did not merit modification of defendant's sentence to allow probation; neither defendant nor trial court relied on or mentioned statutory provision requiring consideration of suspended sentence as basis for modification of sentence, motion to modify was not made within one year of original sentencing, defendant did not preserve issue of whether he was entitled to probation by failing to challenge it at sentencing hearing and this type of error of law was not sufficient to permit reopening of judgment. *Commonwealth v. Gross*, 936 S.W.2d 85 (Ky. 1996).

Rule providing for post-conviction relief for “any other reason of an extraordinary nature justifying relief” may be invoked only under most unusual circumstances, and relief should not be granted pursuant to that provision unless new evidence, if presented originally, would have, with reasonable certainty, changed result. *Brown v. Commonwealth*, 932 S.W.2d 359 (Ky. 1996).

Indication by Commonwealth's medical expert in homicide prosecution that portions of his testimony in defendant's trial could have been erroneous did not warrant post-conviction relief under rule providing for relief for “any other reason of an extraordinary nature justifying relief,” as inclusion of expert's misgivings in evidence, or exclusion of his testimony from original trial altogether, would not, with reasonably certainty, have altered outcome; on cross-examination, expert admitted that his particular blood analysis was novel, and that he did not know whether blood found on defendant's boots belonged to victim or to third party, and neither defense counsel nor prosecutor even referred to expert or his testimony in closing argument. *Brown v. Commonwealth*, 932 S.W.2d 359 (Ky. 1996).

While there is danger that expert witness' testimony can be given undue weight by jury, and court determining whether to grant post-conviction relief under rule providing for relief for "any other reason of extraordinary nature justifying relief" must be sensitive to possible injustice of convicting and incarcerating, on basis of discredited expert testimony, man who might be innocent, court nevertheless must not underestimate jury's ability to discern between multitude of evidence and testimony presented to it and to evaluate such accordingly. *Brown v. Commonwealth*, 932 S.W.2d 359 (Ky. 1996).

There was no reason to conduct palpable error review of unobjected-to introduction of alleged hearsay evidence at retrial of case that was reversed by federal court on petition for habeas corpus; test for review that federal court applied had been replaced by test requiring that error have substantial and injurious effect or influence in determining jury's verdict, and there was sufficient evidence in instant case even without alleged hearsay to allow jury to reach verdict of guilty. *Sherley v. Commonwealth*, 889 S.W.2d 794 (Ky. 1994).

Proper way to challenge prior convictions for driving on suspended license arising from driving under the influence (DUI), on which charge of driving on suspended sentence was based, was motion to vacate judgment or motion for relief from judgment made in court in which previous convictions were obtained rather than by asserting ineffective assistance of counsel claim made in court in which charges against defendant were pending. *Lovett v. Commonwealth*, 858 S.W.2d 205 (Ky. App. 1993).

The circumstances of allegedly irregular post-sentencing incarceration procedures cannot be considered on direct appeal, which is limited to trial and sentencing errors in the record; therefore, the court of appeals should not have granted the defendant relief based on such procedures. *Commonwealth v. Hayes*, 734 S.W.2d 467 (Ky. 1987).

Family hardships occasioned by an accused's incarceration are not sufficient grounds for the grant of a motion for relief from judgment under CR 60.02. *Wine v. Commonwealth*, 699 S.W.2d 752 (Ky. App. 1985).

Findings of a trial court on post-conviction motion as to whether counsel retained by a defendant has fulfilled the effective assistance test will not be set aside on appeal unless they are clearly erroneous. *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky. App. 1983).

Where petitioner did not raise any issue about the validity of guilty pleas for prior felonies at the time petitioner entered guilty plea to persistent felony offender charge based on the earlier conviction, petitioner waived his right to contest the guilty pleas in any subsequent post-conviction proceeding. *Alvey v. Commonwealth*, 648 S.W.2d 858 (Ky. 1983).

Where an accused was convicted of being a persistent felony offender, then waited twelve years to seek post-conviction relief yet failed to give reasons of an extraordinary nature justifying relief, the court properly denied his motion on the merits. *Ray v. Commonwealth*, 633 S.W.2d 71 (Ky. App. 1982).

Where accused has waited a year and a half from the entry of the trial court's judgment to request CR 60.02 relief on the ground of mistake, his right to proceed on this ground has elapsed and he is barred from raising the issue. *Duncan v. Commonwealth*, 614 S.W.2d 701 (Ky. App. 1980).

Defendant was not entitled to relief under rule governing relief from judgment on ground of mistake, newly discovered evidence, or fraud, on ground that unidentified witnesses were not subpoenaed in

prosecution for wrongful detaining of woman against her will where he did not state to what the witnesses would testify. *Clements v. Commonwealth*, 441 S.W.2d 158 (Ky. 1969).

In a criminal case, the appellant must have the clerk prepare the trial record up to and including the judgment. *Fanelli v. Commonwealth*, 423 S.W.2d 255 (Ky. 1968).

Where prisoner moving for post-conviction relief is proceeding *pro se*, standards applied to legal counsel with respect to sufficiency of motion as a pleading will not be imposed. *Commonwealth v. Miller*, 416 S.W.2d 358 (Ky. 1967).

Claimed invalidity of 1927 and 1938 convictions should have been raised in 1946 habitual criminal prosecution, and convictions were not subject to attack by motion to set them aside. *Copeland v. Commonwealth*, 415 S.W.2d 842 (Ky. 1967).

Where prisoner's motion to vacate judgment of conviction was denied after full hearing with competent counsel, such denial was affirmed, certiorari was denied by United States Supreme Court, and prisoner brought a second motion for same relief on identical grounds and did not appeal from denial thereof, third motion for same relief on identical grounds was mere trifling with court and prisoner was not entitled to mandamus to require judge to order record prepared for appeal. *Burton v. Tartar*, 385 S.W.2d 168 (Ky. 1964).

Defendant was not entitled to a new trial on ground of newly discovered evidence consisting of statements of witnesses as to location of blood stains, tending to corroborate defendant's trial testimony as to where a shooting occurred, where such witnesses lived in defendant's apartment building and were available at the time of trial. *Bradley v. Commonwealth*, 347 S.W.2d 532 (Ky. 1961).

A motion of an accused to vacate judgment of conviction is treated as a motion for relief under rule authorizing a court to relieve a party from a final judgment under certain circumstances. *Jackson v. Commonwealth*, 344 S.W.2d 381 (Ky. 1961)

On motion to delete words “without parole” from jury verdict and judgment entered thereon in rape case, affidavits of jurors were not competent to explain how members of jury had arrived at their verdict. *Ruggles v. Commonwealth*, 335 S.W.2d 344 (Ky. 1960).

Voluntary affidavit of rape victim stating that at trial she testified that defendant was guilty of rape but that she now realizes that there was no actual penetration and that charge should have been attempted rape was not of such conclusive character as to indicate that verdict most probably would not have been rendered and that there was a strong probability of a miscarriage of justice and defendant was not entitled to extraordinary relief in nature of coram nobis. *Meland v. Commonwealth*, 328 S.W.2d 161 (Ky. 1959).

Generally, a writ of coram nobis can be issued for vacating of a criminal judgment only upon facts discovered by petitioner after he exhausted all other judicial processes, where such facts could not have been previously discovered by his exercise of due diligence, and where it was definitely certain that such facts, if they had been previously discovered and presented, would have produced or resulted in a different judgment. *Wallace v. Commonwealth*, 327 S.W.2d 17 (Ky. 1959).

Evidence, consisting of depositions of nine persons who were a part of grand jury which rendered indictment in controversy against a coram nobis petitioner, that they had no recollection of his indictment,

did not establish that petitioner was not indicted by the grand jury, and in view of proof by the state that a valid indictment was returned against him by the grand jury, petitioner was not entitled to relief on ground that he was not indicted for the crime of which he was convicted. Sherrill v. Commonwealth, 323 S.W.2d 586 (Ky. 1959).

A proceeding to vacate judgment of conviction on ground that new evidence had been discovered which by due diligence could not have been discovered in time to move for a new trial as provided by Criminal Code of Practice, which proceeding was not begun until one year and eight months after date when judgment of conviction was entered, was too late under statute providing that remedy sought thereunder must be sought within the year even though an appeal is being prosecuted. *Meredith v. Commonwealth*, 312 S.W.2d 460 (Ky. 1958).

Coram nobis was available to obtain a new trial in criminal case upon a showing of conditions which established that original trial was tantamount to none at all because a miscarriage of justice had effectually deprived defendant of life, liberty or property without due process of law. *Green v. Commonwealth*, 309 S.W.2d 178 (Ky. 1958).

Petition for writ of error coram nobis was equivalent of a civil motion to set aside the criminal judgment. *Underhill v. Thomas*, 299 S.W.2d 633 (Ky. 1957).

Presence of a deputy sheriff of county on grand jury which returned indictment and improper remarks allegedly made by trial judge in presence of jury during absence of defendant and his counsel, tending to discredit his defense and prejudice his substantial rights, could have been discovered by exercise of due diligence in time to include such alleged errors in motion and grounds for new trial and appeal from any adverse rulings thereon, and hence writ of coram nobis would not lie to set aside conviction on ground of such errors, since remedy by appeal was adequate. *Collins v. Commonwealth*, 297 S.W.2d 54 (Ky. 1956).

Review of criminal case by Court of Appeals may be obtained by statutory or direct appeal or by motion under civil rule to set aside judgment on ground of newly discovered evidence, fraud, or other unusual situations which may arise after expiration of normal period of appeal. *Meredith v. Commonwealth*, 296 S.W.2d 705 (Ky. 1956).

Defendant was procedurally barred from challenging jury instructions that allegedly failed to factually differentiate the multiple charges against him, in proceedings on motion for relief from judgment, where defendant failed to raise issue on direct appeal or in his petition for postconviction relief. *Juarez v. Commonwealth*, 2011 WL 3524418 (Ky. App. 2011).

Trial court denial of defendant's motion for a new trial, which was based on the alleged recantation of the testimony of three witnesses, was not an abuse of discretion; trial judge determined that the witnesses did not recant their testimony, that their affidavits were consistent with their trial testimony, and the alleged new evidence in the affidavits was merely cumulative of trial testimony. *Stopher v. Commonwealth*, 2006 WL 3386641 (Ky. 2006).

Trial court determination that defendant was not entitled to a new murder trial after three witnesses recanted their trial testimony and submitted affidavits stating that defendant was extremely intoxicated at the time the crime was committed was not an abuse of discretion. *Stopher v. Commonwealth*, 2006 WL 3386641 (Ky. 2006).

Defendant's motion for relief from judgment entered in capital murder case was procedurally barred because issue of alleged juror misconduct, set forth in motion for relief from judgment, should have been raised in defendant's motion to vacate sentence. *Woodall v. Commonwealth*, 2005 WL 2674989 (Ky. 2005).

Sentence of death for capital murder conviction under Kentucky law did not violate the Eighth and Fourteenth Amendments based on claim that intense pain was caused by a prolonged confinement expected to end in execution; the delay in defendant's execution was attributable solely to his own conduct in filing discretionary appeals and writs. *Matthews v. Simpson*, 603 F.Supp.2d 960 (W.D.Ky. 2009), affirmed in part, reversed in part 651 F.3d 489, rehearing and rehearing en banc denied, certiorari granted, reversed 132 S.Ct. 2148, 183 L.Ed.2d 32.

Under Kentucky law, in order to attack sentence or conviction used as basis for persistent felony offender sentence, defendant must raise any objections concerning infirmities of underlying conviction during PFO hearing; otherwise, defendant is thereafter barred from raising these claims. *Logsdon v. Scroggy*, 595 F.Supp. 626 (W.D.Ky. 1984).

Attorney or judicial error

Husband was entitled to review of his claim of palpable error in trial court's adoption of settlement agreement which husband allegedly did not sign, even though husband failed to object to Domestic Relations Commissioner's report which recommended that motion to set aside judgment be denied. *Herndon v. Herndon*, 139 S.W.3d 822 (Ky. 2004).

On motion to dismiss appeal for lack of jurisdiction, appellate court did not lack jurisdiction to review merits of order granting relief from summary judgment due to mistake of trial court in failing to send copy of judgment to plaintiff's substitute counsel. *Younger v. Evergreen Group, Inc.*, 363 S.W.3d 337 (Ky. 2012).

Patient and spouse were not entitled to relief from judgment dismissing their malpractice complaint with prejudice due to attorney's failure to attach proposed order to motion for pro hac vice admission and failure to attend hearing on the matter, even if motion was in substantial compliance with rules governing pro hac vice admission; relevant rules used the mandatory directive “shall,” intending absolute compliance. *Brozowski v. Johnson*, 179 S.W.3d 261 (Ky. App. 2005).

District judge who imposed original sentence on defendant was without jurisdiction to reconsider order modifying original sentence, which was entered by other district judge, even though entry of order modifying original sentence may have violated supreme court rule providing that, in the absence of good cause, all matters connected with a pending or supplemental proceeding shall be heard by the judge to whom the proceeding was originally assigned, where district judge who imposed original sentence did not attempt to reconsider order modifying original sentence until more than ten days after its entry, and neither the Commonwealth nor defendant appealed or brought a motion to set aside the order modifying original sentence. *Mullins v. Hess*, 131 S.W.3d 769 (Ky. App. 2004).

CR 60.02 does not give authority to amend a defendant's conditional discharge order on the grounds of mistake, since the rule providing relief from final judgment is not available for judicial errors or mistakes. *McMillen v. Commonwealth*, 717 S.W.2d 508 (Ky. App. 1986).

Negligence of an attorney is imputable to the client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f). *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797 (Ky. App. 1984).

Failure to file motion requesting that trial judge disqualify himself from hearing motion to withdraw guilty pleas because at time of pleas he was county attorney did not constitute a waiver of rights under the disqualification statute. *Carter v. Commonwealth*, 641 S.W.2d 758 (Ky.App. 1982).

That judgment was based on error of law was not sufficient to permit a reopening of the judgment. *City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Counties*, 459 S.W.2d 85 (Ky. 1970).

An asserted error of a circuit court judge in signing an order dismissing a divorce action on July 1, was a judicial error, and not a clerical one, and the judge had no jurisdiction on September 9 to correct the error, the rule pertaining to relief of a party from a final judgment or order on the ground of mistake, inadvertence, excusable neglect, and other reasons, not being applicable. *Roberts v. Osborne*, 339 S.W.2d 442 (Ky. 1960).

Where a divorce judgment incorrectly states that payments are for a wife alone instead of for the wife and a child and that judicial error is not corrected on the ground of mistake within one year after its entry, the order stands; it cannot be corrected by a nunc pro tunc order since the purpose of that order is to place in the record all evidence of judicial action that has actually been taken, not to correct error or supply omissions of judicial action; thus, the husband must pay any accrued payments to the wife. Carroll v. Carroll, 338 S.W.2d 694 (Ky. 1960).

Where a default judgment is taken because of failure of the local attorney to get an extension of time, and he did not know that such was expected of him, the judgment should be set aside. *Bargo v. Lewis*, 305 S.W.2d 757 (Ky. 1957).

Default judgment may be set aside because of unfair practices of the attorney subject to the entry of the judgment. *Waxler v. Bryant*, 255 S.W.2d 625 (Ky. 1953).

Defendant's argument, in her motion for relief of judgment, that illicit sexual relationship between her and former circuit judge who was not trial judge during her trial for capital kidnapping and facilitation of murder destroyed her attorney/client relationship with trial counsel, rendering her convictions unreliable, could have been previously raised during her hearing on her prior motion to vacate her convictions and, therefore, was procedurally barred, where defendant was not prevented from bringing the claims earlier because of duress, fear or any other cause since judge had been dead for many years. *Humphrey v. Commonwealth*, 2005 WL 924188 (Ky. 2005).

A federal judge's duty to disqualify himself in any proceeding in which his impartiality might be questioned, under 28 USC 455, is violated when a reasonable individual knowing the facts would expect that a judge knew of circumstances creating an appearance of impropriety, despite a finding the judge was not actually conscious of the circumstances; where a judge who should have disqualified himself did not do so, vacatur under Fed Civ R 60 is a proper remedy. *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194 (U.S.La. 1988).

Judgments

Judgments - Void

Despite a court's discretion to determine a reasonable time period to file motion for relief from void judgment, void judgment is a legal nullity, and a court has no discretion in determining whether it should be set aside. *Soileau v. Bowman*, 382 S.W.3d 888 (Ky. App. 2012).

While trial courts are afforded discretion to address what constitutes a reasonable time within which to bring motion for relief from void judgment, void judgments are not entitled to any respect or deference by the courts. *Soileau v. Bowman*, 382 S.W.3d 888 (Ky. App. 2012).

Motion for relief from judgment on the grounds of voidness only needs to be filed within a reasonable time, and even that proposition is debatable since a void judgment does not acquire validity with the passage of time. *Rogers Group, Inc. v. Masterson*, 175 S.W.3d 630 (Ky. App. 2005).

Where trial court had no jurisdiction over foreign insurer due to insufficiency of service of process at time default judgment was entered, judgment was void ab initio. *Foremost Ins. Co. v. Whitaker*, 892 S.W.2d 607 (Ky. App. 1995).

Void judgment is not entitled to any respect or deference by courts. *Foremost Ins. Co. v. Whitaker*, 892 S.W.2d 607 (Ky. App. 1995).

Void judgment is legal nullity, and court has no discretion in determining whether it should be set aside. *Foremost Ins. Co. v. Whitaker*, 892 S.W.2d 607 (Ky. App. 1995).

In the absence of a motion to dismiss an appeal from a void judgment, the Court of Appeals will entertain an appeal and declare such judgment void. *Epling v. Ratliff*, 364 S.W.2d 327 (Ky. 1963).

The circuit court has the power to set aside a void portion of a judgment on motion without limitation of time. *Engle v. City of Louisville*, 262 S.W.2d 371 (Ky. 1953).

Distinction made between erroneous and void judgments by decreeing that the former may be attacked only directly, and the latter collaterally. *Com. ex rel. Dummit v. Jefferson County*, 300 Ky. 514, 189 S.W.2d 604 (Ky. 1954).

Since court in rendering judgment attacked had jurisdiction of the subject matter and the persons, judgment held not void and hence not subject to collateral attack. *Commonwealth v. Miniard*, 266 Ky. 405, 99 S.W.2d 166 (Ky. 1936).

Judgment entered without consent or agreement of adverse party and without notice as required by statute after expiration of statutory term as extended by proper order held void. *Green v. Blankenship*, 263 Ky. 29, 91 S.W.2d 996 (Ky. 1936).

A judgment quieting title to land of two plaintiffs, one of whom died after submission, was not void. A petition to vacate same should show, beside other things, what interest is claimed by petitioner and what estates in the land were claimed by plaintiffs. *Mosely v. Morgan*, 199 Ky. 845, 252 S.W. 117 (Ky. 1923).

Judgment, unless void, cannot be attacked or vacated in a collateral proceeding, except in the manner pointed out in the Code. *Commonwealth v. Harkness' Adm'r*, 181 Ky. 709, 205 S.W. 787 (Ky. 1918).

The provisions authorizing the modification and vacation of judgments apply where a judgment is erroneous, but need not be resorted to when judgment is void. *Stevens v. Deering*, 10 Ky. L. Rptr. 393, 9 S.W. 292. (Ky. 1888).

Judgments - Affected by other judicial action

Denying employer's motion for writ of prohibition to block relief from judgment that trial court lacked jurisdiction over wage and hour dispute would not result in irreparable injury to employer or the justice system, and, thus, employer was not entitled to writ; employer was already defending wage and hour dispute in administrative proceeding, possibility of recovering attorney fees and liquidated damages in judicial proceeding was not an egregious, irreparable harm, and system of justice could benefit from permitting employee's claims to be heard on the merits after dismissal based upon erroneous and abandoned misreading of the law. *Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010).

Where a party raises on appeal an issue of juror misconduct arising out of a juror's discussion with the trial judge concerning information about the case which had been imparted to her by her husband, CR 60.02, which provides that the party may make a motion to introduce the issue in the trial court, does not afford the party an adequate opportunity for relief where the trial court has already ruled on the issue by telling the juror that "that type of discussion is okay," and the opportunity for a timely and meaningful inquiry into the details of the juror's extrinsic fact-gathering has vanished long ago; not only would the trial court be reviewing its own error, but the product of any evidentiary hearing would be less reliable than the contents of the present record. *Deemer v. Finger*, 817 S.W.2d 435 (Ky. 1990).

A trial court properly exercises its discretion in ordering blood tests of a mother, child, and putative father where the defendant putative father discovers that the mother told her ex-husband that defendant was not the father of her child and that she brought paternity proceedings in an effort to regain defendant's affection; however, it is an abuse of discretion for the court not to set aside the default judgment declaring the defendant to be the child's natural father after the blood test results unequivocally exclude defendant as the child's father. *Crowder v. Com. ex rel. Gregory*, 745 S.W.2d 149 (Ky. App. 1988).

Where a judgment has been entered and a subsequent opinion of the United States Supreme Court reflects that the ground upon which the judgment was entered was erroneous, the judgment should be set aside. *National Elec. Service Corp. v. District 50, United Mine Workers of America*, 279 S.W.2d 808 (Ky. 1955).

Suit brought to set aside a judgment of court ordering a conveyance of land and to recover same from grantee on ground that interest of plaintiff was conveyed when plaintiff was an infant, without the necessary procedural steps being taken, was a direct attack on that judgment, since the theory of the suit was that neither the infancy of the plaintiff nor the errors in the proceedings appeared in the record of the suit wherein the judgment of conveyance was entered. *May v. Pratt*, 35 S.W.2d 542 (Ky. 1931).

Change in decisional law did not afford a basis for relief from judgment to reopen wage and hour case that had been final for years and was relied upon by the parties, particularly in light of the fact that plaintiffs still had an alternative avenue for relief with the Kentucky Labor Cabinet. *Toyota Motor Mfg., Kentucky, Inc. v. Kelley*, 2013 WL 6046079 (Ky. App. 2013).

Defendant was barred under law of the case doctrine from raising in motion for relief from judgment claim that he was entitled to expert witness funding to retain a ballistics expert and a social worker expert, where claim was raised in prior post-conviction petition and denied; although there had been intervening developments in the standard for the granting of funding for expert witnesses in post-conviction proceedings, change in the standard was de minimis and would not affect the prior conclusion, change

was not an aggravated case involving strong equities in favor of defendant, and change in expert funding rules was not retroactive. *Fole v. Commonwealth*, 2010 WL 1005873 (Ky. 2010).

Where it is clear that the county court has made an error in the judgment which has been appealed to the circuit court, the error may be corrected by the circuit court. *Kentucky Dept. of Highways v Reynolds*, 398 S.W.2d 703 (Ky. 1966).

Judgments - Prospective application no longer equitable

Kentucky Retirement Systems (KERS) was not entitled to relief from judgment specifically holding that former state university professor was entitled to 23 months of service credit representing her tenure as a professor under rule governing motions for relief from judgment, based on KERS' assertion that it had already partially satisfied judgment and that number of service credit months trial court ordered it to sell professor should be reduced from 23 to 22 because it had already sold professor service credit for period during which professor's university and Internal Revenue Service (IRS) employment overlapped, as information leading to KERS' discovery of this overlap was in its possession four years prior to trial court's order, such that KERS could not contend that it was without fault for discovering overlap after rendition of judgment. *Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788 (Ky. App. 2010)

Trial court's authority to relieve a party from a final judgment for which prospective application is no longer equitable did not entitle hospital that was found liable for causing brain damage to infant child while mother was in labor to relief, upon child's death after judgment was entered, from award of nearly $2 million in damages for future medical expenses; judgment for money damages, even if not yet enforced, did not have prospective application, but “closed the book” on a past wrong and left court with no further involvement. *Alliant Hospitals, Inc. v. Benham*, 105 S.W.3d 473 (Ky. App. 2003).

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Trial court's authority to relieve a party from a final judgment on grounds of “newly discovered evidence” did not entitle hospital that was found liable for causing brain damage to infant child while mother was in labor to relief, upon child's death after judgment was entered, from award of nearly $2 million in damages for future medical expenses; it was in society's interest that the final judgment emerging from fair truth-finding process that was calculated to reach as accurate a result as possible bring the litigation to an end. *Alliant Hospitals, Inc. v. Benham*, 105 S.W.3d 473 (Ky. App. 2003).

Order relieving father of his child support obligation could be vacated prospectively on motion for relief from judgment on ground that it was no longer equitable for order to have prospective application, where mother's new husband did not adopt child as anticipated when order was entered. *Berry v. Cabinet for Families & Children ex rel. Howard*, 998 S.W.2d 464 (Ky. 1999).

An agreed judgment may be set aside upon a showing that at time of settlement there was no dispute or question concerning the illegality of the contract involved. *Cumberland Falls Chair Lift, Inc. v. Commonwealth*, 536 S.W.2d 316 (Ky. 1976).

A court on a motion under rule allowing relief by motion on grounds of, inter alia, mistake, fraud, and any other reason of extraordinary nature justifying relief may relieve a party from that court's final judgment if that judgment is no longer equitable. *Urban Renewal and Community Development Agency of Louisville v. Goodwin*, 514 S.W.2d 190 (Ky. 1974).

Where the proceedings were against "unknown owners" one of the unknown owners can challenge the judgment. *City of St. Matthews v. Roberts*, 490 S.W.2d 750 (Ky. 1973).

Where a judgment is set aside on the ground that the action has been abandoned at the time of its entry, there is not an action pending in the court. *Dahlem v. Holbert*, 461 S.W.2d 539 (Ky. 1970).

The provision authorizing the setting aside of the judgment if it is no longer equitable that the judgment should have prospective application does not apply to a judgment that has been satisfied. *Cawood v. Cawood*, 329 S.W.2d 569 (Ky. 1959).

Extraordinary reason

Failure of all parties to present documents they possessed purporting to show trustee's legal authority to transfer assets from two inter vivos trusts warranted vacation of summary judgment ruling pursuant to a motion for relief from judgment for reasons of an extraordinary nature in dispute between beneficiaries concerning propriety of transfers; it was extraordinarily unusual that none of the parties or their attorneys produced these documents for the court's consideration at the time competing summary judgment motions were filed, and previous summary judgment ruling that trustee lacked authority did not result in a just outcome. Young v. Richardson (Ky.App. 2012) 2012 WL 3136770.

Courts should invoke relief pursuant to a motion for relief from judgment for reasons of an extraordinary nature only with extreme caution, and only under most unusual circumstances. Young v. Richardson (Ky.App. 2012) 2012 WL 3136770.

Claims raised by capital murder defendant in his motion for relief from judgment were not of an extraordinary nature justifying relief under rule permitting relief from judgment for any other reason of an extraordinary nature justifying relief, as each of the claims, with the exercise of reasonable diligence could have been brought in defendant's direct appeal or in his motion to vacate, set aside, or correct sentence, and claims were of the usual procedural, evidentiary, and ineffective assistance of counsel variety, and, thus, did not implicate the extraordinary sort of claim contemplated by the rule. *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011).

Trial court's ruling on motion for relief from judgment under catch-all provision based on any other reason of an extraordinary nature is reviewed for an abuse of discretion. *Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010).

Employee's motion under catch-all provision for relief from judgment dismissing wage and hour dispute was not premised on mistake or subject to one-year time limitation for motions for relief based on mistake, and, thus, trial court had jurisdiction to rule on motion more than one year after dismissal; the initial ruling comported with the prevailing construction of the law that wage and hour claims had to be brought first in administrative *Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010).

In support of his motion for relief from final judgment in divorce action, husband established that granting relief from judgment, to extent it awarded wife a portion of husband's military retirement pay, would not

be inequitable to wife; in its order denying relief from judgment, family court, effectively held that wife was only entitled to share of marital portion of husband's right to retired pay, and husband did not seek more than that. *Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky. App. 2009).

Reasons stated by trial court for its order granting relief from its earlier judgment and entering agreed order, that it was appropriate for court to exercise its equitable powers to fulfill intent of trustee in transferring trust assets to limited liability company (LLC) and to effectuate parties' settlement agreement, were neither extraordinary, as required by "catch-all" provision of rule governing relief from judgment, nor appropriate equitable grounds, within meaning of rule governing independent actions to relieve person from judgment. *Young v. Richardson*, 67 S.W.3d 690 (Ky. App. 2008).

A party who failed to take timely action, within one year, to seek relief from judgment based on excusable neglect, may not seek relief more than a year after the judgment by resorting to the subsection of the civil procedure on relief from judgment, permitting relief from judgment, within a reasonable time, for any reason of an extraordinary nature. *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007).

Immediate appeal is permitted, from a nonfinal order setting aside a judgment and reopening the case for trial, where the disrupted judgment is more than a year old, and where the reason offered for setting it aside is an extraordinary circumstance. *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007).

Defendant's participation in drug court as condition of probation for drug offenses was not reason of extraordinary nature for amending original judgment of sentence at subsequent probation revocation hearing. *Commonwealth v. Gaddie*, 239 S.W.3d 59 (Ky. 2007).

The rule providing for relief from a judgment or order on the basis of mistake, surprise, or excusable neglect is designed to provide relief where the reasons for the relief are of an extraordinary nature; a very substantial showing is required to merit relief under its provisions. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007).

Failure to advise defendant, who was citizen of another country, of potential deportation consequences of his guilty plea to first degree assault did not constitute level of extraordinary circumstances that would justify granting defendant relief from that judgment; failure to inform defendant of deportation consequences had no constitutional implications and was collateral to guilty plea proceeding, and there was no requirement that counsel or court inform defendant of those consequences at time guilty plea was entered. *Reyna v. Commonwealth*, 217 S.W.3d 274 (Ky. App. 2007).

Relief from provision of judgment of dissolution granting former husband attorney fees, rather than ordering former wife to pay the fees directly to former husband's former attorneys, was not available to former husband's former attorneys under court rule allowing relief from judgment for reason of an "extraordinary nature"; former husband and attorneys had opportunities during original proceedings and post-judgment proceedings to present a motion requesting that award of fees be ordered payable directly to the law firm, and firm did not have standing to pursue its motion for relief in family court because it was not a party to appeal. *Hinshaw v. Hinshaw*, 216 S.W.3d 653 (Ky. App. 2006).

Agreed judgment entered between testator's son and housekeeper splitting estate between son and housekeeper, in action contesting validity of testator's second will which provided that assets of the estate were to go testator's housekeeper, would not be vacated on ground that it was no longer equitable that the judgment should have prospective application or on ground that another reason of an extraordinary

nature justified relief, and thus agreed judgment was enforceable to the extent that housekeeper would receive half of the one-third share of the estate that testator's son received pursuant to testator's prior will which was ultimately probated; agreed judgment was a simple judgment for money damages that did not have prospective application though it was never enforced, and catch-all "reason of extraordinary nature" ground for vacating judgments did not apply as such provision only applied if no other reason for vacating a judgment was applicable. *Raisor v. Burkett*, 214 S.W.3d 895 (Ky. App. 2006).

A defendant's claim that twelve month sentences for theft would have negative immigration consequences did not constitute that level of extraordinary circumstances that would justify granting defendant relief from that judgment. *Commonwealth v. Bustamonte*, 140 S.W.3d 581 (Ky. App. 2004).

The doctrine of stare decisis did not require trial court deciding a boundary dispute between adjoining landowners to perpetuate error or illogic by forcing adherence to the same interpretation of deed descriptions that formed basis of prior boundary line judgment that was set aside by clear showing of extraordinary and compelling equities. *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002).

Failure of mother's new husband to adopt child as planned was sufficiently extraordinary reason to warrant grant of motion for relief from judgment relieving father of his child support obligation. *Berry v. Cabinet for Families & Children ex rel. Howard*, 998 S.W.2d 464 (Ky. 1999).

Trial court did not abuse its discretion when it granted unwed mother's motion for relief from judgment awarding custody of child to father and reopened case, despite fact that mother had moved to Virginia without notifying father or the court and her conduct was responsible for any lack of notice of earlier custody proceedings; granting relief from judgment was not inequitable to father, and by reopening the case, the court considered all available evidence, and father was allowed to present his case and counter mother's arguments. *Dull v. George*, 982 S.W.2d 227 (Ky. App. 1998).

Relief from judgment for "any other reason justifying relief" is not available unless asserted grounds for relief are not encompassed within any of the first five clauses of rule governing relief from judgment. *McMurry v. McMurry*, 957 S.W.2d 731 (Ky. App. 1997).

A wife fails to show extraordinary circumstances justifying the reopening of her marriage dissolution decree to have the court allocate her husband's pension plan between the parties where nearly five years have elapsed between the entry of the decree and the filing of her CR 60.02 motion to reopen, and despite the fact that during that time she had several occasions to discuss the marital assets with the domestic relations commissioner, she never (1) mentioned the pension plan, (2) moved the court to alter or amend its decree to deal with pension benefits, or (3) challenge it on appeal. *Fry v. Kersey*, 833 S.W.2d 392 (Ky. App. 1992).

A trial court commits palpable error where it condones a juror's extra-court conversation with her husband about an ongoing case and fails to notify counsel of her remarks; the juror's comments fairly command the inference that she allowed her husband to address her concerning the substance of the case being tried, in transgression of her oath and the court's admonitions; therefore, since it cannot be presumed that the juror's independent knowledge had no effect on her decision in the case, it cannot be said that the cause was tried by a fair and impartial jury or that the plaintiff did not suffer manifest injustice, and thus a new trial is warranted. *Deemer v. Finger*, 817 S.W.2d 435 (Ky. 1990).

Despite fact that claimant, after having filed a notice of appeal from first judgment of circuit court, failed to notify Court of Appeals of his motion before circuit court to set aside the judgment under rule providing that the court may relieve a party from its final judgment for "any other reason of an extraordinary nature justifying relief," it was not mandatory in the instant case for claimant to have moved the Court of Appeals to abate the appeal until a final order was entered in the circuit court, where there had been nothing more than the filing of the notice of appeal by claimant, where the Court of Appeals thus had not been called on to act, and where the aforementioned motion would not upset the procedure in the Court of Appeals to any extent. *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 481 S.W.2d 36 (Ky. 1972).

Subsequent change of physical condition is not justification for relief from the operation of the lump sum judgment. *Cawood v. Cawood*, 329 S.W.2d 569 (Ky. 1959).

The omission from the judgment of the amount in controversy is not of an extraordinary nature justifying relief. *Maslow Cooperage Corp. v. Jones*, 316 S.W.2d 860 (Ky. 1958).

"Unavoidable casualty or misfortune" within meaning of statute providing that court in which a judgment has been rendered shall have power, after expiration of term, to vacate or modify it for "unavoidable casualty or misfortune," preventing the parties from appearing or defending, must be such as could not have been avoided by the exercise of reasonable skill and diligence. *Kinnaird v. Harvey*, 291 S.W.2d 11 (Ky. 1956).

For one who was an infant at a time when judgment was rendered to set it aside, it is sufficient for him to show his infancy at the time of the rendition of the judgment, that the judgment is unjust according to the facts presented by him and that he applied to have it set aside within one year after coming of age. *Wilson's Adm'r v. Wilson*, 288 Ky. 522, 156 S.W.2d 832 (Ky. 1941).

Under statute providing for setting aside a judgment where unavoidable casualty or misfortune prevented the party from appearing or defending, the casualty or misfortune must be such as could not, by exercise of reasonable skill and diligence, have been avoided. *Mason v. Lacy*, 117 S.W.2d 1026 (Ky. 1938).

That the defendant was of unsound mind (although not judicially found to be), and in consequence thereof incompetent to make an intelligent defense to the action, is such a misfortune as will authorize the court to vacate or modify a judgment against him. (See also Bean v Campbell, 237 Ky 498, 35 SW(2d) 862 (1931).) Bean v Haffendorfer Bros (1887) 84 Ky 685, 2 SW 556, 3 SW 138.

Irregularity in advertisement and appraisement of a judicial sale was not ground for setting aside the confirmation thereof after the term. Caudle v. Luttrell (Ky. 1919) 183 Ky. 551, 209 S.W. 497.

Defendant, who learned twenty-eight years after his initial murder conviction that Commonwealth witness was given a plea agreement for his testimony, failed to establish extraordinary and compelling equities entitling him to relief from judgment, where defendant failed to demonstrate that any perjury was actually committed at his trial, and witness's testimony at trial was corroborated by ample and compelling physical evidence and independent testimony. Thompson v. Com. (Ky. 2006) 2006 WL 2986494,

Evidence that witness was not truthful at trial for burglary and theft had such decisive value or force that it would probably change result if new trial should be granted, as required for new trial for perjury

unknown to prosecutor under rule providing for relief from judgment for a reason of an extraordinary nature justifying relief; witness's credibility was important issue since evidence from witness was only evidence implicating defendant in burglary, and knowledge of witness's deceptions would have affected jury's determinations of guilt and sentencing. *Harris v. Commonwealth*, (Ky.App. 2005) 2005 WL 2238213, rehearing denied, review granted, not to be published pursuant to operation of cr 76.28(4), affirmed in part, reversed in part 250 S.W.3d 637.

Defendant established within a reasonable certainty that witness did not testify truthfully at trial for burglary and theft, as required for new trial for perjury unknown to prosecutor under rule providing for relief from judgment for a reason of an extraordinary nature justifying relief; witness claimed sweeping failure of memory during trial but, at subsequent trial of another person on related matters, was able to recall events and admitted that he had been untruthful, and such evidence was material since witness was eyewitness to and participant in offenses for which defendant was charged. *Harris v. Commonwealth*, (Ky.App. 2005) 2005 WL 2238213, rehearing denied, review granted, not to be published pursuant to operation of cr 76.28(4), affirmed in part, reversed in part 250 S.W.3d 637.

To be entitled to a new trial due to perjury unknown to the prosecutor under rule providing for relief from judgment for a reason of an extraordinary nature justifying relief, a defendant has the burden of showing within a reasonable certainty that perjured testimony was in fact introduced against him at trial. *Harris v. Commonwealth*, (Ky.App. 2005) 2005 WL 2238213, rehearing denied, review granted, not to be published pursuant to operation of cr 76.28(4), affirmed in part, reversed in part 250 S.W.3d 637.

Defendant was entitled to new trial for burglary and theft due to witness's perjury, under rule providing for relief from judgment for a reason of an extraordinary nature justifying relief; witness's untruthfulness at defendant's trial was established within reasonable certainty, knowledge of witness's deceptions would have affected jury's determinations of guilt and sentencing in defendant's case, in that evidence from witness was only evidence implicating defendant in burglary, and defendant was effectively precluded from adequately cross-examining witness, given that witness consistently disclaimed any memory of events on which he could have been cross-examined. *Harris v. Commonwealth*, (Ky.App. 2005) 2005 WL 2238213, rehearing denied, review granted, not to be published pursuant to operation of cr 76.28(4), affirmed in part, reversed in part 250 S.W.3d 637.

Reasonable time

Trial court's finding that father's motion to modify child support order was not filed within a reasonable time did not constitute an abuse of discretion or a flagrant miscarriage of justice, even though father's three biological children were emancipated and the fourth child born during the marriage was not father's biological child; father had known for ten years that the fourth child was not his biological child, yet had continued to pay child support without complaint, and only sought to modify his child support obligation after the Cabinet for Health and Family Services had intervened on behalf of mother and filed a motion to increase child support. Hughes v. Hughes (Ky.App. 2013) 2013 WL 45671

Request for relief pursuant to a motion for relief from judgment for reasons of an extraordinary nature must be made within a reasonable time, rather than within one year from the date of the judgment. Young v. Richardson (Ky.App. 2012) 2012 WL 3136770.

Subsection of criminal rule permitting otherwise untimely postconviction claims based on special circumstances, may be invoked only under the most unusual circumstances. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

Motion for postconviction relief from murder conviction based on alleged newly-discovered evidence that included ballistics testing and conclusions of ballistics expert was not brought within a reasonable time, and thus, trial court acted within its discretion in summarily denying motion without evidentiary hearing; two decades had passed between the conclusion of the trial and defendant's filing of his motion. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

Regardless of the amount of time that had passed from the date of defendant's probation revocation order to the date that his motion to vacate was filed, it was clearly a miscarriage of justice for defendant to be required to serve time under the probation revocation order, where the trial court lacked jurisdiction to revoke his probation and where the order revoking probation was a nullity and otherwise of no force or effect as a matter of law. *Grundy v. Commonwealth*, 400 S.W.3d 752 (Ky. App. 2013).

Kentucky Retirement Systems (KERS) was not entitled to relief from trial court's judgment specifically holding that former state university professor was entitled to 23 months of service credit representing her tenure as a professor based on its alleged discovery of newly discovered evidence through mistake, inadvertence, surprise, or excusable neglect, as KERS failed to move for relief from judgment within one year of its entry, which KERS was required to do by rule governing motions for relief from judgment even though it was prosecuting an appeal. *Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788 (Ky. App. 2010).

Four-month delay from the time mother signed custody agreement to the time she filed a motion for relief from judgment was not an unreasonable time, and thus the trial court was required to consider mother's motion on its merits; mother realized she was dependent upon alcohol and needed residential treatment, she signed a document prepared by father's sister, whom she considered to be a close friend, that she believed would provide for the care of her out-of-wedlock child while she received treatment, and she later learned the document relinquished her custody of child. *Kerr v. Osborne*, 305 S.W.3d 455 (Ky. App. 2010).

Motion of mortgagor, to set aside a judgment of foreclosure on the grounds that he was in the county jail at the time of judgment and was thus entitled to have a guardian ad litem appointed, was untimely and was not excused by the rule of civil procedure on relief from judgment for extraordinary circumstances of excusable neglect; mortgagor waited more than a year to seek relief from a judgment of which he must have certainly known or should have known much sooner through due diligence, and it appeared he invoked the rule to evade the expired one-year limitations period on his direct appeal. *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898 (Ky. App. 2009).

Sixteen years was not a “reasonable time” for waiting to file motion for relief from prior judgment that corrected clerical mistake of designating the crime as capital offense. *Oller v. Commonwealth*, 292 S.W.3d 332 (Ky. App. 2009).

Trial court determination that former wife failed to file her motion for relief from divorce judgment within a reasonable time was not an abuse of discretion, in support of denial of former wife's motion; the parties were involved in an expedited divorce case, former wife immediately began spending the money and using the assets conferred to her during the divorce, and former wife waited almost one year before filing for relief from judgment. *Lawson v. Lawson*, 290 S.W.3d 691 (Ky. App. 2009).

Trial court properly determined that defendant had newly discovered evidence in his possession for 10 years which was well outside one year time limit, thus there was no abuse of discretion by trial court to deny claim. *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009).

To extent that movant sought relief from judgment based on reason of extraordinary nature justifying relief, motion, which was filed 18 years after his conviction and 10 years after his first motion for postconviction relief, was not raised in a reasonable time. *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009).

Seven-year delay between sentence and motion for relief from judgment of conviction and sentence for wanton murder, and to set aside twenty-year sentence was unreasonable; defendant did not explain delay. *Graves v. Commonwealth*, 283 S.W.3d 252 (Ky. App. 2009).

Defendant's motion to vacate judgment of conviction on grounds of extraordinary circumstances that he was not informed of deportation consequences of his guilty plea, not filed until after defendant had served his sentence and four years after he entered his guilty plea, was untimely. *Reyna v. Commonwealth*, 217 S.W.3d 274 (Ky. App. 2007).

Pendency of defendant's appeal from trial court's refusal to set aside no-contact order precluding parties from contacting jurors did not toll one-year time limit for motion for new trial based on newly discovered evidence, relating to defendant's capital murder conviction and death sentence. *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004).

Former wife, in her independent action seeking relief from previously entered divorce decree on the ground of mistake, was not entitled to relief, since her motion was filed approximately 15 years after the decree was entered, beyond the one year statute of limitation for filing motion for relief from judgment or order, and she had previously been denied relief in an earlier motion for relief from decree based on the same grounds. *O'Neal v. O'Neal*, 122 S.W.3d 588 (Ky. App. 2002).

Counsel's discovery that there was entry in police investigative file indicating that defendant claimed several days after robbery and murder that it was not he, but his half-brother, who actually killed victim, occurred more than one year after conviction and more than one year before defendant sought extraordinary postconviction relief or relief from judgment and death sentence and, thus, motion for relief from judgment was untimely. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997).

Defendant who is in custody under sentence or on probation, parole, or conditional discharge must avail himself of motion for postconviction relief as to any ground of which he is aware, or should be aware, during the period when that remedy is available to him, and may not use civil motion for relief from judgment as additional opportunity to relitigate issues that could "reasonably have been presented" by direct appeal or in postconviction proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997).

Despite statute granting court limited jurisdiction to consider shock probation when defendant has moved for shock probation not earlier than 30 days and not more than 180 days after incarceration, trial court lost jurisdiction to amend judgment of conviction to enter probated sentence after expiration of ten days of its entry where defendant did not move for shock probation within applicable time period. *Commonwealth v. Gross*, 936 S.W.2d 85 (Ky. 1996).

Trial court's refusal to grant father's motion to set aside a nearly ten-year-old order terminating his parental rights was not an abuse of discretion; child was now more than 13 years of age and had been with adoptive parents virtually all of her life, and to interfere with that relationship now could have an adverse emotional impact not only on child but also adoptive parents. *Whittington v. Cunnagin on Behalf of Englert*, 925 S.W.2d 455 (Ky. 1996).

Foreign insurer satisfied requirement for setting aside void judgment that motion be made within "reasonable time" by tendering its motion within a few weeks after receiving notification of year-old default judgment. *Foremost Ins. Co. v. Whitaker*, 892 S.W.2d 607 (Ky. App. 1995).

Motion to vacate judgment based upon alleged attorney negligence stated insufficient grounds to warrant vacation of judgment, where motion was filed more than 10 days after entry of judgment. *Natural Resources and Environmental Protection Cabinet v. Adams*, 873 S.W.2d 834 (Ky. App. 1993).

The statutory redemption period does not expire during the pendency of an appeal from an order of the court setting the redemption price on property sold pursuant to a judicial order where the former owner complies with KRS 426.530 and CR 60.02 by filing a motion asking the court to rule that the redemption period be stayed during the pendency of the appeal; the former owner is not required to file a supersedeas bond under CR 73.04 since there has been no monetary relief from which the appeal was taken. *Karam v. Greentree Corp.*, 783 S.W.2d 78 (Ky. App. 1990).

A lapse of two years between an ex-husband's learning of his ex-wife's statement to their son that the ex-husband is not his father, and his filing of a CR 60.02 motion and a request to compel blood tests to determine if he is the natural father of the child born during the marriage is not an unreasonable length of time, even though the parties were divorced twelve years earlier; therefore, since KRS 406.081, the Uniform Act on Paternity, gives the court not only the authority but the duty to order the appropriate blood tests to determine paternity, the divorce judgment must be reversed and remanded for entry of an order granting the motion for blood tests. *Cain v. Cain*, 777 S.W.2d 238 (Ky. App. 1989).

Where the Court of Appeals upheld the trial court's denial, without a hearing, of the accused's motion made five years after the date of the judgment questioned by the motion, the Court of Appeals did not establish an arbitrary general rule as to what constitutes a reasonable time within which to bring the motion, but only decided that in the particular facts of this case the trial court did not abuse its discretion in denying the motion. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

An action seeking relief from a judgment on the ground of perjury must be filed within one year from date of entry of the judgment in issue. *Copley v. Whitaker*, 609 S.W.2d 940 (Ky. App. 1980).

Judgment that has not been attacked within ten days after its entry, even though it is entirely valid and enforceable, is not "final" in truly jurisdictional context, and thus prior judgment for respondent was not still in effect, despite respondent's successful motion to set aside such judgment, on theory that there was no motion to amend or vacate it within ten days following its entry and that therefore trial court had no jurisdiction to enter any of the subsequent judgments, since if it was final in such a sense, reopening provision of rule could not have any validity. *Arnett v. Kennard*, 580 S.W.2d 495 (Ky. 1979).

Appellant should have filed a notice of appeal from judgment within 20 days of date circuit court clerk's office noted on docket that counsel for appellant had received an attested copy of judgment, but where it chose instead to move to set aside judgment, appellant allowed its time to file a notice of appeal to

expire and, thus, lost its right to appeal judgment. *Electric Plant Bd. of City of Hickman v. Hickman-Fulton Counties Rural Elec. Co-op. Corp*., 564 S.W.2d 845 (Ky. App. 1978).

Appeal styled by appellant to be from order overruling her motion to set aside judgment would be treated by appellate court as an appeal from finalized original judgment as well as from order overruling motion to set aside judgment, and appellee's motion to dismiss such appeal, on ground that appellant's brief was not timely filed, would not be sustained since time for filing brief was suspended during pendency of motions to dismiss. *Fruchtenicht v. U. S. Fidelity & Guaranty Co.*, 451 S.W.2d 835 (Ky. 1969).

Where co-grantee did not commence action to vacate part of judgment reforming deed until almost ten years after entry of original judgment and seven years after its final determination in court of appeals and claims of co-grantee raised in action to vacate could have been raised in earlier litigation, action was not timely. *Huffaker v. Twyford*, 445 S.W.2d 124 (Ky. 1969).

Facts that plaintiff sustained bodily injury and property damage in automobile accident and that his first attorney failed to obtain successful settlement and filed suit to protect his client from statute of limitations and then withdrew from case did not relieve plaintiff from use of diligence in pursuing his cause. *Averitte v. Hutchinson*, 420 S.W.2d 581 (Ky. 1967).

Motion to amend judgment to allow prior interest could not be granted where it was served more than 10 days after entry of final judgment and there was no attempt by movant to show the existence of mistake, inadvertence, surprise or excusable neglect. *Whittenberg Engineering & Const. Co. v. Liberty Mut. Ins. Co.*, 390 S.W.2d 877 (Ky. 1965).

Condemnor was not entitled to have dismissal of its condemnation action set aside more than two years after order of dismissal was entered, although condemnor received no notice of entry thereof. *Com., Dept. of Highways v. Hatcher*, 386 S.W.2d 262 (Ky. 1965).

Motion for reconsideration of prior order overruling motion for new trial does not terminate running of time for appeal at least where such second motion is filed more than ten days after judgment. *Rodgers v. Berry*, 346 S.W.2d 43 (Ky. 1961).

A motion for relief on the ground of mistake must be made within one year after judgment or be of an extraordinary nature justifying relief; a mistake cannot be corrected by a nunc pro tunc order. *Carroll v. Carroll*, 338 S.W.2d 694 (Ky. 1960).

Discretion exists in trial court to set aside a default judgment for good cause and to allow an answer to be filed in relation to property rights which have been adjudicated by default in a divorce proceeding, and a liberal attitude should be observed toward timely application to set aside a default judgment, although delay in pleading without reasonable excuse cannot always be overlooked. *Childress v. Childress*, 335 S.W.2d 351 (Ky. 1960).

Where a judgment to enforce a parol trust in realty and for specific performance of promise to convey realty had been affirmed over ten years before, and judgment debtor had attempted by various motions and proceedings to have original judgment set aside, and latest proceeding on motion which could have been summarily denied had again terminated unfavorably to judgment debtor, the controversy was terminated finally and irretrievably, and hence order denying the motion to vacate would be affirmed notwithstanding contention that injustice had been done. *Morris v. Thomas*, 330 S.W.2d 591 (Ky. 1959).

The remedies provided in this rule cannot be invoked to avoid the time limitation of Rule 4.10. *Dean v. Gregory*, 318 S.W.2d 549 (Ky. 1958).

Where the defendant has not been summoned, and moves within one year after he received notice of the default judgment against him, his motion is timely. *Hertz' You Drive It Yourself System, Inc. v.* Castle, 317 S.W.2d 177 (Ky. 1958).

Where collision between automobile and truck occurred on December 9, 1955, complaint was filed April 18, 1956 and case did not come to trial until February 28, 1957, and truck owner tried on various occasions to subpoena witnesses for purpose of taking depositions but subpoenas could not be executed or served because sheriff could not locate witnesses, trial court acted correctly in both overruling truck owner's motion for continuance and in sustaining objection to evidence pertaining to truck owner's diligence in attempting to locate witnesses. *Clement Bros. Const. Co. v. Moore*, 314 S.W.2d 526 (Ky. 1958).

The circuit court has the power to set aside a void portion of a judgment on motion without limitation of time. *Engle v. City of Louisville*, 262 S.W.2d 371 (Ky. 1953).

Counsel for P withdrew from case and P knowing of such withdrawal took no steps to secure new counsel or to protect his interests in the case for over two terms of court after such withdrawal; during said second term, judgment was rendered against P. P was not entitled to have the judgment set aside on the ground of unavoidable casualty or misfortune. *Fuson v. Fuson*, 280 Ky. 91, 132 S.W.2d 508 (Ky. 1939).

The failure of a petition for the sale of a ward's real estate for his education to state that the sale was necessary for the maintenance and education of the ward, and the failure of the judgment order of sale to so state, renders the judgment voidable only, and is binding until remedied by appeal by the ward within one year under this section after removal of disability, or by proceeding under Civil Code 391 and 518 (now KRS 454.110 and CR 60.02), within such time to vacate or modify the judgment. Harris v. Hopkins (Ky. 1915) 166 Ky. 147, 179 S.W. 14.

The Circuit Court acted within its discretion in finding that defendants' motions for relief from judgment imposing death penalty on murder convictions were not brought in a reasonable time and in denying them as untimely; motions were based on alleged juror misconduct that could have been discovered and asserted earlier, and could have been asserted in prior motions for postconviction relief, but which were not asserted until over 20 years after trial. *Willoughby v. Commonwealth*, 2007 WL 2404461 (Ky. 2007).

Defendant was not entitled to relief from judgment of conviction based on newly discovered evidence of Brady violation that came to light twenty-eight years after his initial conviction, where motion was made more than one year after judgment. *Thompson v. Commonwealth*, 2006 WL 2986494 (Ky. 2006).

A conviction that was based on perjury unknown to the prosecutor may be a violation of due process, and as such it is subject to the “reasonable time” limitation of rule providing for relief from judgment for a reason of an extraordinary nature justifying relief. *Harris v. Commonewalth*, 2005 WL 2238213, rehearing denied, review granted, not to be published pursuant to operation of cr 76.28(4), affirmed in part, reversed in part 250 S.W.3d 637 (Ky. App. 2005).

Motions to alter or amend judgment are time-tolling motions insofar as time for filing appeal is concerned, and must be filed within ten days, while motions filed pursuant to rule governing relief from judgment or

order are not time-tolling motions, and need not be filed within ten days. *Hood v. Hood*, 59 F.3d 40 (6th Cir. 1995).

A prisoner who withdraws his appeal from the denial of his CR 60.02 motion for post-conviction relief is not entitled to relitigate issues raised and decided in that proceeding; such withdrawal constitutes a procedural default barring federal habeas corpus review of the prisoner's constitutional challenge to his conviction. *Wesselman v. Seabold*, 834 F.2d 99 (6th Cir. 1987).

Limitations period

Motion for relief from judgment denying third motion to vacate judgment denying state habeas corpus relief on basis of mistake, inadvertence, neglect, or newly discovered evidence was governed by one-year limitations period, absent showing that any exceptions to one-year period applied. *Walker v. Brown*, 416 S.W.3d 316 (Ky. App. 2013).

Applicability of order

The timely filing of plaintiffs' postjudgment motion to alter, amend, or vacate a summary judgment in favor of defendants postponed finality of the summary judgment, and a ruling on the postjudgment motion was necessary to achieve finality, and thus, rule permitting relief from a "final judgment, order, or proceeding" for certain enumerated errors applied to order denying the postjudgment motion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002).

Since a judgment is not final so long as postjudgment motions are available and time for making such a motion remains, the language of rule permitting relief from a "final judgment, order, or proceeding" for certain enumerated errors contemplates not only final judgments, but necessarily as well orders that have the effect of making prior judgments final. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002).

Arguments made previously to the Court of Appeals on motion for reconsideration of dismissal of appeal could not be renewed on appeal from subsequent order. *Young v. Edward Technology Group, Inc.*, 918 S.W.2d 229 (Ky. App. 1995).

Dismissal of action was not open to review of Court of Appeals where another panel of that Court had already determined in an opinion which was final that dismissal did not constitute an abuse of discretion. *Polk v. Wimsatt*, 689 S.W.2d 363 (Ky. App. 1985).

Where accused successfully asserted in federal habeas corpus case that he had been unconstitutionally deprived of appeal through lack of counsel, and federal court directed his discharge from custody unless commonwealth saw to it that his appeal was perfected to Court of Appeals, Court of Appeals had jurisdiction to entertain appeal, notwithstanding expiration of time regularly provided for appeal from 1956 judgment of conviction. *Tipton v. Commonwealth*, 456 S.W.2d 681 (Ky. 1970).

Where lower court treated a motion by corporation to set aside original order allowing 40% attorney fee in derivative action as motion to set aside order under rule and entered order calling for taking of evidence, Court of Appeals would not grant corporation's petition for mandamus for release of funds on claim that it would be deprived of use of money or interest while litigating matter of fee and thus had no adequate remedy at law, and it would not anticipate that lower court would not make fair and reasonable disposition of matter. *Black Motor Co. v. Hill*, 372 S.W.2d 801 (Ky. 1963).

Order denying motion to set aside judgment is appealable. *Com., Dept. of Highways v. Stahr*, 351 S.W.2d 67 (Ky. 1961).

An order setting aside a judgment is not an appealable order. *Brumley v. Lewis*, 340 S.W.2d 599 (Ky. 1960).

Where a judgment is set aside and the case is reopened for further trial due to mistake, inadvertence, or other named reasons in Civ R 60.02, it is not a final appealable order since it does not finally determine any claim. *Hackney v. Hackney*, 327 S.W.2d 570 (Ky. 1959).

An order of judgment setting aside a former judgment and directing further proceedings is not appealable. *Hackney v. Hackney*, 327 S.W.2d 570 (Ky. 1959).

Where principal basis of second suit to adjudicate proper location of common boundary line was that circuit judge originally deciding controversy committed error in finding for certain parties, accepted procedural device for correcting such error was to appeal to Court of Appeals, and it was not proper to take such an appeal to different branch of the same court with a different judge and thereby have the matter re-determined in a trial de novo. *Cline v. Smith*, 316 S.W.2d 68 (Ky. 1958).

An order denying a motion for new trial under the rule is appealable since the motion under that rule in effect initiates a new proceeding. *White v. Hardin County Bd. of Ed*., 307 S.W.2d 754 (Ky. 1957).

Where defendant against whom judgment was entered filed a notice of appeal and trial court thereafter overruled defendant's motion to set aside judgment on ground that it was entered at trial held without notice to defendant, notice of appeal from the judgment did not extend to and embrace the later court order overruling defendant's motion and defendant who failed to file notice of appeal from the order could not appeal from such order. *Carolina Cas. Ins. Co. v. Gross*, 305 S.W.2d 925 (Ky. 1957).

The trial court has the power to pass upon a motion to vacate the judgment while an appeal is pending in the Court of Appeals. *Wolfe v. Combs' Adm'r*, 273 S.W.2d 33 (Ky. 1954).

Where order of Circuit Court confirmed judicial sale of mortgaged land, directed execution of deed to purchaser, indicated that deed was examined and approved by judge and was certified to county clerk's office for record, and then ordered case stricken from docket, order was a final one and could not be set aside after term at which it was entered, except in manner and upon grounds set forth in code in absence of showing that judgment was void. *Cornett v. Combs*, 265 S.W.2d 482 (Ky. 1954).

Order sustaining motion for a new trial made by defendant against whom rendered at same term of court and not granted in independent action filed therefor under statute was not a “final order,” hence not appealable. *Rose v. Edmonds*, 111 S.W.2d 427 (Ky. 1937).

Right of obtaining new trial after term at which trial is concluded is limited by statute to grounds prescribed, and proper remedy to correct error arising from misinterpretation of law by party, counsel, or court is by appeal. *Hurd v. Laurel County Bd. of Educ*., 103 S.W.2d 277 (Ky. 1937).

In proceeding under statute authorizing modification or vacation of judgment after term, order vacating judgment and granting new trial held an appealable “final order”. *Crowe v. Crowe*, 95 S.W.2d 251 (Ky. 1936).

If a circuit court misunderstands the mandate of the Court of Appeals and enters an erroneous judgment the remedy for the error is by appeal. *Jellico Hardware Co. v. Pine Mountain R. Co.*, 201 S.W. 450 (Ky. 1918).

Appellate issues regarding order denying motion for relief from judgment would be presumed waived in wrongful-death action that was brought against state employees and that arose from fatal accident in which road construction firm's employee was struck by tractor trailer while working on highway construction project; issues concerning order were not briefed. *Hensley v. Davis*, 2006 WL 2847243, not to be published pursuant to operation of cr 76.28(4), review granted, affirmed 256 S.W.3d 16 (Ky. App. 2006).

District court lacked ancillary jurisdiction to enforce in their entirety terms of settlement agreement entered by parties in administratrix's suit against corporation, where district court failed to expressly retain jurisdiction over agreement and incorporated only one of settlement terms in its dismissal order; rule permitting relief from judgment did not give court such authority, as contempt order was more than just a continuation or renewal of the dismissed suit, and parties did not seek relief under that rule. *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000).

Court of Appeals had jurisdiction to review administratrix's appeal from district court order holding her in contempt for noncompliance with settlement agreement in her action against corporation, as order was entered after final judgment in the case, and order was more than a mere reentry or immaterial revision of one of the court's earlier orders. *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000).

District court appropriately denied plaintiff's motion for reconsideration of grant of summary judgment for defendant in malicious prosecution action, as affidavits filed by defendant in support of summary judgment gave court appropriate basis for concluding that, to degree defendant was responsible for bringing criminal complaint against plaintiff, he did so upon advice of counsel, and plaintiff failed to offer contrary evidence on advice of counsel claim or seek to depose defendants' counsel when defendant could not be deposed because of health problems. *Hood v. Hood*, 59 F.3d 40 (6th Cir. 1995).

Procedural issues

A signed order granting summary judgment, which was sent by facsimile to the court clerk and entered in the docket, was a final judgment for purposes of calculating the timeliness of a subsequent motion to alter, amend, or vacate; clerk's notation of order in the docket was an entry of the document, and the order was regular on its face and not challenged as not intended to be entered or not the signature of the judge. *McPherson v. Felker*, 393 S.W.3d 40 (Ky. App. 2013).

Procedural issues - In general

Trial court's alternative relief on trust beneficiary's motion to extend time in which to appeal, which relief ordered the filing date changed on notice of appeal, was inconsistent with the primary relief granting the extension in that it changed the date from which the appeal time would be calculated, and thus, the alternative relief was invalid. *James v. James*, 313 S.W.3d 17 (Ky. 2010).

Judge was authorized to hear and decide defendant's motion for relief from judgment, although statutory procedures that required court clerk to notify Chief Justice regarding previous judge who could not preside in the action were not followed when previous judge recused himself; judge who heard petition

succeeded judge who previously recused himself, and defendant did not object to judge who issued decision on petition before, during, or after hearing. *Oller v. Commonwealth*, 292 S.W.3d 332 (Ky. App. 2009).

Defendant's appeal from denial of motion for relief from judgment was not rendered moot by completion of his sentence pending appeal. *Parrish v. Commonwealth*, 283 S.W.3d 675 (Ky. 2009).

Court of Appeals would ignore general contractor's arguments, in appeal of summary judgment order for subcontractor in mechanic's lien action, that an issue of fact existed regarding the nature of earth removed by subcontractor and that trial court should have held a hearing on damages and the amount of interest to be awarded, where general contractor, after filing appeal of summary judgment order based on admissions served by subcontractor that were deemed admitted, made motion in trial court setting forth such arguments for the first time, trial court denied the motion, and general contractor did not file a notice of appeal from the denial of such motion. *Manus, Inc. v. Terry Maxedon Hauling, Inc*., 191 S.W.3d 4 (Ky. App. 2006).

A judgment debtor must file a motion under CR 60.02 in the action in which he acquired such status if he desires to assert an exemption to execution and levy. *Howard v. Miller*, 685 S.W.2d 548 (Ky. 1985).

A CR 60.02 proceeding to set aside a judgment procured by fraud is available to amend a judgment to increase the sentence imposed when more than ten days have elapsed since the original judgment was entered; however, a motion must be filed by the Commonwealth, and a letter from the probation officer who investigated the accused informing the judge of the fraud is not a sufficient basis for the entry of an amended judgment. *McMurray v. Commonwealth*, 682 S.W.2d 794 (Ky. App. 1985).

Case had to be remanded to trial court to enter an order requiring insurer of driver of vehicle involved in collision with tractor trailer, which crossed to wrong side of highway, to pay balance of its coverage, with interest from date of judgment in tort action, on uncollected amount of judgment in tort action, in order to conform to conclusions of law stated in opinion of the Court of Appeals. *Davis v. Home Indem. Co*., 659 S.W.2d 185 (Ky. 1983).

Although, as regarded void circuit court orders approving lump-sum settlement agreements and dismissing appeals of workmen's compensation cases, without Board approval, the appellant in neither case moved the circuit court to set aside its order, the Court of Appeals would nevertheless hear both cases and dispose of them on their merits in the interests of judicial economy. *Kentucky Workmen's Compensation Bd. v. Alexander*, 562 S.W.2d 670 (Ky. App. 1978).

Though defendants were in default, amended complaints filed without leave of court technically were unauthorized when filed, but judgment subsequently entered pursuant to the amendment amounted to "leave of court," under principle that that which could have been authorized in advance can be ratified afterwards. *Roadrunner Min., Engineering & Development Co., Inc. v. Bank Josephine*, 558 S.W.2d 597 (Ky. 1977).

Dismissal of complaint in civil action, although harsh result, was justified in view of plaintiffs' utter neglect to make any sort of response to trial court's order requiring filing of more definite statement. *Reisert v. Apple Valley Resort, Inc*., 551 S.W.2d 256 (Ky. App. 1977).

Where judgment was entered by default because it took nearly six days for postal service to deliver defendant's file to its attorney and where postmaster filed affidavit to the effect that the usual time for such a mail trip was two days, the delay was not the fault of defendant and it was an abuse of discretion to deny defendant's motion to set aside the default judgment. *Educator & Executive Insurers, Inc. v. Moore*, 505 S.W.2d 176 (Ky. 1974).

Rule authorizing trial court to set aside judgment by default for good cause shown is not ordinarily operative to set aside judgment for mere procedural irregularities. *Ryan v. Collins*, 481 S.W.2d 85 (Ky. 1972).

Attorney who was neither a party to action by city nor attorney for city, special or otherwise, had no standing, either as special attorney for city or as citizen, taxpayer and resident, to file motion to set aside judgment denying all but small portion of city's claim against police judge for fines and forfeitures collected in his court and motion was properly overruled. *City of Manchester v. Keith*, 396 S.W.2d 44 (Ky. 1965).

Having once abandoned eminent domain proceedings, condemnor's right to proceed anew against same property for same purpose depends on whether abandonment was in good faith and condemnor cannot resort to experimental suits and assessments and in effect grant itself new trial in order to have reassessment without taking appeal. *Com., Dept. of Highways v. Fultz*, 360 S.W.2d 216 (Ky. 1962).

One whose right to relief from judgment by motion was barred by one-year limitation could not escape the bar simply by bringing independent action rather than filing motion. *Cline v. Cline*, 324 S.W.2d 390 (Ky. 1959).

The execution of a judgment cannot be stayed pending an appeal from an order refusing to set the judgment aside. *Harris v. Stephenson*, 321 S.W.2d 399 (Ky. 1959).

A motion under this rule must be made in the lower court. *Taylor v. Mills*, 320 S.W.2d 111 (Ky. 1958).

Action to set aside as void a judgment of circuit court which had adjudicated that an alleged will of plaintiff's husband was a forgery was the equivalent of a collateral attack upon the judgment, and judgment could not be set aside for mere procedural irregularities such as premature entry of judgment, allowance of unauthorized amendments to pleadings, absence of necessary parties, improper substitution of parties, etc. *Skinner v. Morrow*, 318 S.W.2d 419 (Ky. 1958).

A motion to vacate a judgment must be accompanied by a supporting statement. *Ellis v. Bradshaw*, 302 S.W.2d 95 (Ky. 1957).

Ground 6 must be clearly stated in a written motion or petition attempting to invoke it. *Hartford Acc. & Indem. Co. v. Lewis*, 296 S.W.2d 228 (Ky. 1956).

There is a full compliance with requirements necessary for the vacation of a judgment when the entire record of proceedings, judgment of which is sought to be vacated, is made a part of petition in vacation action. *Triplett v. Stanley*, 279 Ky. 148, 130 S.W.2d 45 (Ky. 1939).

Objections to judgment and report of commissioner, by widow who had been a party in the action to obtain sale of property, should not be treated as a petition to vacate or modify a judgment. *Pugh v. Pugh*, 279 Ky. 170, 130 S.W.2d 40 (Ky. 1939).

Defendant's motion for relief from judgment entered in capital murder case was procedurally barred because issue of alleged juror misconduct, set forth in motion for relief from judgment, should have been raised in defendant's motion to vacate sentence. Woodall v. Com. (Ky. 2005) 2005 WL 2674989,

District court properly denied habeas petitioner's motions for relief from judgment as successive petition that was abuse of the writ, where petitioner could not show cause and prejudice. *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

State prisoner was not entitled to relief from judgment dismissing as untimely his complaint against private counseling center and its employees and against state psychiatric facility and its employees for alleged conspiracy to deprive him of various constitutional rights, where his motion did not claim that any error of law was made in the initial decision granting summary judgment, he did not present any new evidence to justify the granting of relief based on newly discovered evidence which by due diligence could not have been timely discovered, and there were no exceptional circumstances to justify relief on grounds not otherwise addressed in rule governing relief from judgment. Walker v. Lifeskills, Inc. (C.A.6 (Ky.) 2002) 31 Fed.Appx. 186, 2002 WL 449845,

Procedural issues - Evidentiary hearing

Motion for postconviction relief from murder conviction based on alleged newly-discovered evidence that included ballistics testing and conclusions of ballistics expert was an impermissible successive motion, and thus, trial court acted within its discretion in summarily denying motion without evidentiary hearing; in addition to his direct appeal and federal habeas proceeding, defendant had filed five prior postconviction motions. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

Defendant was not entitled to additional findings of fact and conclusions of law on his motion to correct his sentence in light of the recent Supreme Court opinion of Peyton v. Commonwealth, regarding sentencing for crimes committed while on parole, inasmuch as defendant presented a legal argument, and there were no facts to be found. *Campbell v. Commonwealth*, 16 S.W.3d 315 (Ky. App. 2009).

Defendant was not entitled to an evidentiary hearing on his motion to correct his sentence in light of the recent Supreme Court opinion of Peyton v. Commonwealth, regarding sentencing for crimes committed while on parole; the issue of whether Peyton was retroactive was a legal conclusion and what few facts, if any, that would be necessary to determine if it should be applied retroactively in defendant's case were easily discernable from the record. *Campbell v. Commonwealth*, 16 S.W.3d 315 (Ky. App. 2009).

The family court was not required to conduct a full evidentiary hearing after mother alleged in her motion to set aside permanent custody order that her husband engaged in acts of domestic violence and conspired with paternal grandparents to prevent mother from filing an answer or raising a defense in paternal grandparents' action for permanent custody of child; the court had addressed the issues and the parties in two prior custody hearings and in dependency, neglect and abuse (DNA) proceedings, and the affidavits attached to mother's motion were clear as to the acts of fraud alleged by mother. *Mauldin v. Bearden*, 293 S.W.3d 392 (Ky. 2009).

Defendant was not entitled to postconviction evidentiary hearing, where defendant failed to affirmatively allege facts which if true would have justified relief from judgment or order. *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009).

Trial court was not required to hold an evidentiary hearing on motion to amend judgment denying postconviction relief in absence of specific request by movant. *Land v. Commonwealth*, 986 S.W.2d 440 (Ky. 1999).

Trial court did not abuse its discretion in declining to hold evidentiary hearing on motion for postconviction relief, as court accepted as true all of factual allegations made by movant regarding prosecution's medical expert's misgivings about his trial testimony. *Brown v. Commonwealth*, 932 S.W.2d 359 (Ky. 1996).

Provision of Rules of Civil Procedure allowing relief from judgment based on mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud did not authorize trial judge to conduct hearing to determine whether judgment which had been entered was correct and reflected the truth; rule is only available to party or his legal representative, and judge is certainly not party to litigation originally. *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449 (Ky. 1996).

On motion for relief from judgments of conviction, rendered more than 20 years previously, mere allegation of lack of counsel, accompanied by affidavits not purporting to be based on positive representations that records reciting representation by counsel were inaccurate or false, was insufficient to warrant evidentiary hearing. *Ringo v. Commonwealth*, 455 S.W.2d 49 (Ky. 1970).

In every action or proceeding by whatever name it may be called, a party who by fraud, casualty, or misfortune, is prevented from having a hearing may obtain relief under this section. *Commonwealth v. Weissinger*, 136 S.W. 875 (Ky. 1911).

Mother was entitled to evidentiary hearing on her motion to set aside prior judgment awarding permanent custody of child to child's paternal grandparents; affidavits that accompanied mother's motion constituted clear examples of mother's allegations of fraud on the custody proceedings and collusion on part of father and the grandparents, and the allegations composed of fact, which if were true, would have justified vacating the judgment. Bearden v. Mauldin (Ky.App. 2008) 2008 WL 2152351, rehearing denied, review granted, not to be published pursuant to operation of cr 76.28(4), reversed 293 S.W.3d 392.

Procedural issues - Notice and service of process

Assignee of first mortgage was entitled to appeal trial court's grant of summary judgment in favor of assignee of third mortgage, even though appeal was brought more than 30 days after trial courts entry of judgment, pursuant to mistake correcting rule, where trial court failed to mail assignee of first mortgage notice of its order of judgment. *Cadleway Properties, Inc. v. Bayview Loan Servicing, LLC*, 338 S.W.3d 280 (Ky. App. 2010).

In support of his motion for relief from final judgment in divorce action that awarded wife portion of husband's military retired pay, husband established he lacked fair opportunity to present his claim that wife was not entitled to portion of such pay; notice of wife's motion to set hearing for trial on merits was not mailed to husband at address he had on record with court clerk and, even if husband had received wife's motion, he was never notified that final hearing itself would actually take place on date scheduled for trial court to set hearing. *Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky. App. 2009).

Administrative Law Judge (ALJ) could set aside and reissue order, denying employer's motion for reconsideration of benefits award to workers' compensation claimant, on basis that employer's counsel was not notified of order, for purposes of permitting a timely appeal, where notice to employer had been problematic throughout administrative proceedings. *Fluor Const. Intern., Inc. v. Kirtley*, 103 S.W.3d 88 (Ky. 2003).

Trial court acted within its broad discretion in vacating its order denying plaintiffs' postjudgment motion to alter, amend, or vacate a summary judgment in favor of defendants and in entering a new order, even if ruling had effect of extending time for taking an appeal, in light of trial court's findings that its office was at fault for mistake in failing to send notice of original order to plaintiffs and that plaintiffs acted with due diligence in requesting relief upon learning of the original order. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002).

Secretary of State's failure to mail copy of summons and complaint to foreign insurer's designated agent rendered service insufficient; requirement was not satisfied when process was generally addressed by registered mail to foreign insurer at its mailing address, without mention of name of designated agent. *Foremost Ins. Co. v. Whitaker*, 892 S.W.2d 607 (Ky. App. 1995).

Where service upon foreign insurer by Secretary of State was insufficient because process was not addressed to designated agent, but only generally to company's mailing address, default judgment entered by trial court against foreign insurer was void. *Foremost Ins. Co. v. Whitaker*, 892 S.W.2d 607 (Ky. App. 1995).

It is the duty of a husband to revive his CR 60.02 motion to vacate a decree of legal separation entered before his wife died, and where the husband does not formally revive his action against his wife's administrator after filing a motion to vacate the decree in spite of his knowledge of his wife's death, his mailing of notice to the administrator, a nonparty to the action, is insufficient to bring the administrator before the court as a party and the husband is barred from moving to vacate the decree. *Snyder v. Snyder*, 769 S.W.2d 70 (Ky. App. 1989).

Regardless of putative father's claim on appeal of defect in constructive service on him in termination of parental rights proceeding, judgment terminating mother's parental rights was not subject to modification on appeal, since mother was before trial court as defendant and did not appeal from judgment terminating her rights. *Unknown Person on Behalf of Englert v. Whittington*, 737 S.W.2d 676 (Ky. 1987).

Equitable estoppel prevented debtor from denying validity of service of process that was served on debtor's son, as son's conduct in dealing with creditor indicated that he in fact was his father, creditor relied on these representations and believed that son was the proper person to serve with process, creditor did not know it was dealing with anyone other than debtor, and creditor would suffer detriment if suit was dismissed due to insufficiency of service. *Gray v. Jackson Purchase Production Credit Ass'n*, 691 S.W.2d 904 (Ky. App. 1985).

Misinterpretation of law of service of process, in assuming that the presence of a registered agent of service precluded use of service by Secretary of State, did not amount to excusable neglect to allow setting aside of default judgment. *Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc.*, 690 S.W.2d 393 (Ky. 1985).

Where ownership of land was at issue, constructive service through warning order procedure was proper for nonresident claimant. *Field v. Evans*, 675 S.W.2d 3 (Ky. App. 1983).

Since actual notice is not required to effect personal jurisdiction under the Kentucky long-arm statute, showing lack of actual notice will not automatically result in setting aside a default judgment, but the facts and circumstances of each individual case should be weighed. *Cox v. Rueff Lighting Co*., 589 S.W.2d 606 (Ky. App. 1979).

Where original summons, which was attempted to be served on defendant in regard to action arising out of automobile collision, was returned with notation "Moved Out-Address Unknown," plaintiff, in furnishing Secretary of State with address at which such service had been attempted when plaintiff subsequently alleged that defendant was nonresident and requested that summons be issued by Secretary, had not furnished "correct address;" thus, default judgment against defendant was void, though insurer may have known of motion for default judgment but did not raise objection to insufficiency of service at hearing. *Priddy v. Swimme*, 555 S.W.2d 279 (Ky. App. 1977).

Where service had not been personally made on judgment debtor but was left with his wife, failure of judgment debtor to establish that process did not reach him did not preclude him from moving to set aside judgment*. R. F. Burton & Burton Tower Co. v. Dowell Division of Dow Chemical Co*., 471 S.W.2d 708 (Ky. 1971).

Where county court held full hearing on merits of motion to set aside order of appointment of committee for incompetent and all persons who had any legal interest in the matter were before the court and had full opportunity to present all legal objections to the order's validity, order appointing the committee was not void because of failure to comply with statutory provisions with respect to notice and hearing. *Settle v. Triplett*, 426 S.W.2d 423 (Ky. 1968).

Where nonexistent society was named in residuary clause of will, executor, in proceeding to construe will, sent warning order notice to society named in will at address of existing society of similar name, and existing society was not in fact named as defendant, existing society's receipt of notice was case of mistaken identity, process was ineffectual, and existing society was not party to action and could not obtain judgment or relief from judgment in absence of proper intervention. *Mulligan v. First Nat. Bank & Trust Co. of Lexington*, 351 S.W.2d 59 (Ky. 1961).

A statutory suit to set aside a judgment on ground that defendants had not been summoned was proper, where it was alleged that the defendants knew nothing of the suit until after sale of realty which was mortgaged to secure note sued upon. *Miller v. National Bank of London*, 273 Ky. 243, 116 S.W.2d 320 (Ky. 1938).

Defendant in breach of contract action suffered no prejudice so as to require reversal of summary judgment entered against him based on alleged failure to receive a copy of amended summary judgment order, which added award of damages against him, until after the ten-day period for challenging a final judgment pursuant to rule of procedure governing motions to alter or amend judgments; defendant failed to state what new facts he would have provided to create a triable issue on the question of damages, defendant could have moved for relief from the judgment, and the certificate of service on the amended judgment and order indicated that it was mailed to an address used by defendant's attorneys of record during the course of the litigation. Morgan v. Appalachian Regional Healthcare, Inc. (Ky.App. 2011) 2011 WL 4861859

Defendant “appeared” in plaintiff's fraud action and was thus entitled to notice of plaintiff's application for default judgment such that plaintiff's failure to comply with the notice requirement was a fatal defect rendering default judgment void; defendant had filed an answer and several substantive motions in the action, and had appeared personally or by counsel at several motion hours and preliminary conferences. *Crawford v. Pittman*, 2007 WL 2812179 (Ky.App. 2007).

Jurisdiction
Also listed as Procedural issues - Jurisdiction
Change in law providing that circuit court had parallel jurisdiction with Kentucky Department of Labor over wage and hour disputes was not such extraordinary circumstance justifying relief from summary judgment dismissing employees' suit for lack of jurisdiction; employees were not denied due process following prior dismissal, in that they had available forum to present their case, employees had opportunity to present claim under law available at time of dismissal, and granting relief would work great inequity against employer, who had relied on finality of prior dismissal for at least three years. Toyota Motor Mfg. Kentucky, Inc. v. Johnson (Ky. 2009) 2009 WL 735835,

Relief from trial court's orders granting petitions for emergency protection order (EPO) and domestic violence order (DVO) was by way of appeal, and not collaterally by way of motion to set aside judgment for lack of jurisdiction. *Sitar v. Commonwealth*, 407 S.W.3d 538 (Ky. 2013).

Judgment issued by a court acting outside its jurisdiction may be void and subject to collateral attack by way of a motion for relief from judgment; however, an erroneous judgment issued by a court acting within its jurisdiction is not subject to collateral attack. *Sitar v. Commonwealth*, 407 S.W.3d 538 (Ky. 2013).

Law of the case doctrine did not prevent trial court from exercising jurisdiction over employee's motion under catch-all provision for relief from judgment dismissing wage and hour dispute for lack of jurisdiction; law that trial court lacked jurisdiction over wage and hour disputes had changed; overruling 2004 WL 1093039. *Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010).

Law of the case doctrine does not deprive a trial court of jurisdiction to reconsider, when ruling on motion for relief from judgment based on any other reason of an extraordinary nature, an issue already decided, if the law upon which the original decision was based, including a controlling appellate opinion, has materially changed. *Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010).

Trial court's jurisdiction to determine whether extraordinary circumstances merit relief from a judgment includes jurisdiction to determine whether extraordinary circumstances also merit application of one of the exceptions to the law of the case doctrine. *Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010).

Circuit Court had jurisdiction to stay enforcement of its own judgment, even though court's order affected judgment creditor's assignee's attempts to enforce judgment against real property owned by judgment debtor in another county, where judgment debtor requested relief from judgment pursuant to rule that gave court power to relieve judgment debtor from judgment on appropriate equitable grounds, and which also could be construed as a request for relief pursuant to rule giving court power to relieve a party from its final judgment for any other reason of an extraordinary nature justifying relief. *Fox Trot Properties, LLC v. Wright*, 314 S.W.3d 286 (Ky. 2010).

Defendant's claim, that venue for his capital murder trial was improper, could have been raised on direct appeal or in defendant's prior motions for postconviction relief, and thus, defendant was not entitled to raise such claim in a motion, under the Civil Rules, to vacate judgment. *Baze v. Commonwealth*, 276 S.W.3d 761 (Ky. 2008).

Res judicata did not apply to bar trial court from redetermining boundary lines between adjoining landowners following prior judgment determining the same, where court set aside prior judgment. *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002).

Because jurisdiction over a thing is truly jurisdiction over interests of persons in a thing, in order to justify exercise of jurisdiction in rem, basis for jurisdiction must be sufficient to justify exercising jurisdiction over interests of persons in a thing. *Citizens Bank and Trust Co. of Paducah v. Collins*, 762 S.W.2d 411 (Ky. 1988).

CR 60.02 is not intended as a vehicle to avoid the jurisdictional and/or procedural prerequisites established by the legislature; thus, a motion to revive a dissolution action which the parties had previously dismissed does not confer jurisdiction on the court to entertain dissolution matters where no verified petition for dissolution is filed. *Mathews v. Mathews*, 731 S.W.2d 832 (Ky. App. 1987).

Defendant who did not challenge trial court's jurisdiction due to failure of indictment to set out overt act prior to appeal could not raise it for first time on appeal. *Corbett v. Commonwealth*, 717 S.W.2d 831 (Ky. 1986).

A court's ruling on a CR 55.02/CR 60.02 motion to set aside a default judgment is a “final judgment,” and where a motion to reconsider is filed within ten days of such order, the trial court retains its jurisdiction to entertain the motion and may set aside the default judgment where the defendants filed an answer late but prior to the hearing on the motion. *Mingey v. Cline Leasing Service, Inc*., 707 S.W.2d 794 (Ky. App. 1986).

After judgment was entered determining that husband had removed himself from jurisdiction of court to avoid support and maintenance and directing him to pay for child support and wife's maintenance and for services rendered by her attorney, husband, who filed motion to quash service of summons, was entitled to hearing on whether his leaving Kentucky was motivated in substantial degree by intent to avoid authority of Kentucky courts to act against him in matter of support and, unless it were so determined, he would not be bound by its findings of fact or its judgment. *Tally v. Tally*, 603 S.W.2d 486 (Ky. 1980).

Where plaintiffs moved for permission to file amended complaints more than 10 days after complaints were dismissed with prejudice, and also requested order amending prior judgment of dismissal nunc pro tunc so as to strike words “with prejudice” therefrom, court had no jurisdiction to reopen or amend judgment or to permit filing of amended complaints on ground that it was “no longer equitable” for the judgment to stand, and accordingly subsequent judgment dismissing such amended complaints was void and appeal taken from such judgment would be dismissed. *James v. Hillerich & Bradsby Co*., 299 S.W.2d 92 (Ky. 1956).

Motion to reconsider petition for writ of error coram nobis to review judgment of conviction was in effect a motion under civil rule to alter or amend order dismissing such petition, and where such motion was filed after the expiration of ten days from entry of such order dismissing the petition, court had no power to entertain and act upon such motion, and hence court acted without jurisdiction in granting the writ of error coram nobis. *Commonwealth v. Newsome*, 296 S.W.2d 703 (Ky. 1956).

Trial court having had jurisdiction of parties and subject matter at time judgment was entered and having been in error in granting motion at a subsequent term to set aside judgment, the second trial was held unauthorized and the first judgment sustained. *House v. Rawlings*, 177 S.W.2d 562 (Ky. 1943).

Fraud on the court which justifies the setting aside of a judgment of adoption must relate to jurisdictional matters and not to those matters available as a defense. *Greene v. Fitzpatrick*, 295 S.W. 896 (Ky. 1927).

Executor of mortgagor's estate was not entitled to writ of prohibition that would require trial court to vacate order that vacated dismissal order and reinstated foreclosure action that was being pursued by mortgagee's successor in interest, although earlier foreclosure action had been dismissed; res judicata was affirmative defense and had no jurisdiction dimension, trial court's order allowed litigation to go forward, and any incorrect adverse judgment would be subject to appellate correction. Hamlin v. Peckler (Ky. 2005) 2005 WL 3500784,

Federal court was without jurisdiction to decide on state convict's habeas corpus application claim of mental retardation where he did not show that question had ever been raised in any state court proceedings or that he had exhausted state remedies on question. *Jones v. Davis*, 233 F.Supp. 949, affirmed 336 F.2d 594 (W.D.Ky. 1964).

Procedural issues - Jurisdiction
See Jurisdiction
Default judgment
Trial court did not abuse its discretion in determining that carelessness, rather than good cause, existed, for purposes of setting aside default judgment entered when parties failed to answer complaint; one counsel misunderstood the date of service and miscalculated answer's due date, and the other claimed improper service but admitted to having at least 22 days' notice of action prior to default. *First Horizon Home Loan Corp. v. Barbanel*, 290 S.W.3d 686 (Ky. App. 2009).

Trial court could not rely on subsequent service of court orders on defendant, made after default judgments had been issued against him, to deny his motion to alter, amend, or vacate the default judgments since the threshold notice requirement of the rule governing default judgments had not been met. *Leedy v. Thacker*, 245 S.W.3d 792 (Ky. App. 2008).

Trial court did not abuse its discretion in refusing to set aside default judgment, as defendants had not satisfactorily explained their failure to respond to complaint within 20-day period and nondefaulting party would be prejudiced if judgment were set aside. *S.R. Blanton Development, Inc. v. Investors Realty and Management Co., Inc.*, 819 S.W.2d 727 (Ky. App. 1991).

Under CR 60.02, factors to consider in deciding whether to set aside a judgment are: (1) valid excuse for a default, (2) meritorious defense, and (3) absence of prejudice to the other party; therefore, a borrower and guarantor are not entitled to have a default judgment entered against them set aside where their excuses for failing to answer summonses and proffered defenses are weak. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166 (Ky. App. 1991).

A trial court's entry of a default judgment which was obtained without notice of the motion for default judgment to the defendant is void as a matter of law and the court has no discretion in ruling on a motion to set the judgment aside, where the pro se defendant had filed a letter with the clerk claiming that he

was not responsible for the payment sought by the plaintiff; since that answer meets the test for making an appearance, the defendant was not in default. *Kearns v. Ayer*, 746 S.W.2d 94 (Ky. App. 1988).

Where trial court mistakenly entered default judgment in favor of creditor against guarantors for double amount to which creditor was entitled according to pleadings, denial of motion by guarantors to set aside or amend judgment was abuse of discretion. *Granville & Nutter Shoe Co. Inc. v. Florsheim Shoe Co*., 569 S.W.2d 721 (Ky. App. 1978).

Trial court did not abuse discretion in refusing to set aside default judgment where defendant had waited from July 26, when summons was served, until October 7 to employ attorney. *Terrafirma, Inc. v. Krogdah*, 380 S.W.2d 86 (Ky. 1964).

Where on appeal from an order overruling motions to vacate a default judgment entered in favor of plaintiff vesting plaintiff with fee simple title to certain realty claimed by defendant, such order was affirmed, default judgment was thereby held valid, and such judgment was res judicata, and barred any further litigation of issue as to ownership of the property between the parties. *Richardson v. Brunner*, 328 S.W.2d 530 (Ky. 1959).

Where plaintiff, in action to set aside default judgment, averred that defendant knowingly made false allegation that plaintiff supervised efforts, which led to defendant's injuries, to dislodge enmired van and had lulled plaintiff into false security by stating that his injuries were fully compensated for and that he wanted plaintiff as witness in action against owner and operator of van, and his defense to such charges, his petition stated a cause of action. *Dawson v. Clelland*, 252 S.W.2d 694 (Ky. 1952).

Motion to set aside a default judgment and affidavit in support thereof even if treated as a petition under this section held insufficient. *Guyan Machinery Co. v. Premier Coal Co*., 163 S.W.2d 284 (Ky. 1942).

Where default judgment was rendered for less than amount allegedly due, because of mistake in drafting original petition, plaintiff's remedy was to have the judgment vacated or set aside and to be granted a new trial pursuant to statutory procedure. *Johnson v. Dry Creek Oil & Gas Co*., 141 S.W.2d 263 (Ky. 1940).

The power of the trial court to set aside a default judgment at the term at which it was rendered is inherent and not dependent upon statutory provisions regulating the granting of new trials, and is exercised as a judicial discretion, dependent on whether the ends of justice will be furthered and in a measure whether the party complaining has been guilty of laches. *Carr Creek Community Center v. Home Lumber Co*., 125 S.W.2d 777 (Ky. 1939).

That a co-defendant represented to a defendant that plaintiff had agreed to dismiss as to him is not ground for setting aside a judgment by default. Holzknecht v. Louisville Deutsche Scheutzen Gesselschoft, 241 S.W. 804 (Ky. 1922).

Nonresident buyer's lack of diligence in obtaining local counsel to file timely motions to quash service and dismiss for lack of personal jurisdiction and claim that goods received were inferior were not “good cause” required for relief from default judgment on manufacturer's claim for unpaid invoices, given that buyer offered no explanation why it could not obtain local counsel, and buyer voiced no objection to the quality of the goods received and not paid for until after institution of the action. High Desert Livestock Supply v. Walters Gate Co., Inc. (Ky.App. 2006) 2006 WL 2328557,

District court did not abuse its discretion in setting aside default judgment against insurance company under relief from judgment rule where insurer fairly established surprise, as its agent attested that insurer was unaware that lawsuit had been filed until after default judgment had been entered; moreover, insurer demonstrated no intent to thwart judicial proceedings or disregard for effect of its conduct on such proceedings, there was no indication of prejudice, and insurer had meritorious defense. *Thompson v. American Home Assur. Co.*, 95 F.3d 429 (6th Cir. 1996).

Default judgment would not be set aside, where defendant merely made general assertion that he had meritorious defenses, without coming forward with specific defenses or disputing some of the material facts in the case, and defendant failed to address whether plaintiff would be prejudiced by setting aside the default judgment. *River Trading Co., Ltd. v. High Ridge Min., Inc.*, 179 F.R.D. 214 (E.D.Ky. 1998).

Burden of proof
Also listed as Presumptions and burden of proof
The burden of proof in a proceeding on a motion for postconviction relief based on newly-discovered evidence falls squarely on the movant to affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify relief. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

Presumptions and burden of proof
See Burden of proof
Preservation of issues for review
Subject of emergency protection order and domestic violence order (DVO) failed to preserve for appellate review any substantive claim regarding applicability of domestic violence statutes, where subject failed to timely appeal from family court's DVO. *Sitar v. Commonwealth*, 407 S.W.3d 538 (Ky. 2013).

Postconviction rule governing relief from judgment based on reasons of an extraordinary nature could not be used to challenge or overturn trial court's decision to deny defendant's request for public funds to cover costs of DNA testing of physical evidence, especially when the issue of whether trial court erred or abused its discretion in denying public funds to defendant could have been raised on direct appeal. Com. v. Bonner (Ky. 2013) 2013 WL 6729917,

Review
Estate of deceased 50% owner of automobile dealership failed to preserve for appeal its argument that because discrepancies existed between affidavits submitted in support of dealership's motion for summary judgment and documents underlying the claimed debts that resulted in the grant of summary judgment in favor of dealership, and against estate, the trial court abused its discretion in denying estate's motion for relief from judgment on the basis of fraud or any other reason of an extraordinary nature justifying relief, absent anything in the record demonstrating any such discrepancies. Roberts v. Roberts (Ky.App. 2012) 2012 WL 3764719.

Trial court did not abuse its discretion in denying relief from summary judgment that was entered against patient in medical malpractice action for a failure of proof that physician deviated from standard of care during or after performance of thyroidectomy; unsworn letter from otolaryngologist, submitted by patient apparently to support relief from judgment, opined that defendant physician deviated from standard of care prior to performing surgery, but did not state that physician did so in his subsequent actions. *Love v. Walker*, 423 S.W.3d 751 (Ky. 2014).

Defendant's appeal from denial of his fourth pro se motion for postconviction relief on plea-based convictions was frivolous and warranted a sanction barring prospective pro se filings collaterally attacking convictions in question; defendant's one-page response to show-cause order to avoid dismissal and sanctions briefly recounted details of guilty plea, claimed a lack of legal knowledge, and asked Court of Appeals to tell him "if my case has merit," and that court had advised defendant over a decade earlier in on a prior postconviction appeals that rule governing motions to vacate, set aside, or correct a sentence prohibited successive motions for postconviction relief. *Cardwell v. Commonwealth*, 354 S.W.3d 582 (Ky. App. 2011).

Lack of notice to capital murder defendant of appointment of senior status judge to preside over his post-conviction motion for relief from judgment until after issuance of order denying the motion did not require reversal of the denial of the motion, as defendant made no argument that the senior status judge did not provide him a fair and impartial review, his grounds for raising notice issue were solely directed toward his argument that senior status judge's appointment violated State Constitution, and Supreme Court reviewed this constitutional issue, and resolved it adversely to defendant. *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011).

Damages

Plaintiffs in a medical malpractice action brought against a doctor for damage to nerves in the patient's leg are not entitled to a new trial where the jury awards $400 for lost wages, but $0 damages for the permanent impairment of the patient's power to labor and earn money and for mental pain and suffering and $0 damage for her husband's loss of consortium since evidence existed that nerve injuries usually heal in time, the patient was capable of getting about, and her leg had gotten better, and the jury was not required to believe that the patient was not capable of rendering services and companionship to her husband in a normal manner even though they believed she endured some pain and suffering. *McVey v. Berman*, 836 S.W.2d 445 (Ky. App. 1992).

A court reviewing, pursuant to a motion for a new trial, damages awarded in a medical malpractice action, cannot consider the amount awarded for current medical expenses and physical pain and suffering where the motion only alleges excessiveness as to the awards for future medical expenses and lost earnings. *Morrow v. Stivers*, 836 S.W.2d 424 (Ky. App. 1992).

Substantial evidence supported award of $85,000 for interference with right to nominate mare to breed with syndicated Thoroughbred. *North Ridge Farms, Inc. v. Stathatos*, 760 S.W.2d 89 (Ky. App. 1988).

Holding that former wife was entitled to have husband pay attorney's fees for postjudgment proceedings, under KRS 403.220, was proper. *Bishir v. Bishir*, 698 S.W.2d 823 (Ky. 1985).

In action for damage to automobile resulting from collision, allowing proof as to market value of automobile before collision and the cost of repairs, without requiring proof as to market value of automobile immediately after collision, was error but not prejudicial where the nature and extent of damages were such as to warrant conclusion that automobile had only junk value in damaged condition. *Mt. Vernon Tel. Co. v. Patrick*, 293 S.W.2d 731 (Ky. 1956).

Standard of review

The Court of Appeals reviews a trial court's ruling on a motion for relief from judgment for abuse of discretion. Doyle v. Kentucky Bd. of Medical Licensure (Ky.App. 2013) 2013 WL 1352046

Given the high standard for granting a motion for relief from judgment or order on the basis of mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud, a trial court's ruling on the motion receives great deference on appeal; therefore, on the appeal of a denial of such a motion, the trial court's ruling will not be overturned except for abuse of discretion. Roberts v. Roberts (Ky.App. 2012) 2012 WL 3764719.

Under the abuse of discretion standard, the appellate court will affirm the lower court's ruling on a motion for postconviction relief unless there is a showing of some flagrant miscarriage of justice. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

The denial of a motion for postconviction relief is reviewed under an abuse of discretion standard. *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014).

The standard of review of an appeal involving a motion for relief from judgment is whether the trial court abused its discretion; for a trial court to have abused its discretion, its decision must have been arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Grundy v. Commonwealth*, 400 S.W.3d 752 (Ky. App. 2013).

Trial court's denial of a motion for relief from void judgment is reviewed for an abuse of discretion. *Soileau v. Bowman*, 382 S.W.3d 888 (Ky. App. 2012).

The law favors the finality of judgments, and thus, motions for relief from judgment may be granted only with extreme caution and only under the most unusual and compelling circumstances. *Age v. Age*, 340 S.W.3d 88 (Ky. App. 2011).

The decision as to whether to grant or to deny a motion for relief from judgment lies within the sound discretion of the trial court. *Age v. Age*, 340 S.W.3d 88 (Ky. App. 2011).