NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-1183

HENRY CHARLES HOLLINS, APPELLANT	**Opinion Delivered** 22 APRIL 2009
V.	APPEAL FROM THE MILLER COUNTY CIRCUIT COURT, [NO. DR-04-242-2-1]
	THE HONORABLE JAMES SCOTT HUDSON JR., JUDGE
CHINNIE LEE HOLLINS, APPELLEE	REVERSED

D.P. MARSHALL JR., Judge

Did the circuit court have jurisdiction, about two years after divorcing Henry and Chinnie Hollins, to amend the decree and divide an investment account solely because the court concluded that the Hollinses forgot about this marital asset at the time of the divorce?

This appeal involves a twice-amended divorce decree. The original decree divorced the Hollinses in July 2006 (after more than thirty years of marriage) and divided their property. Ms. Hollins received, among other things, half of Mr. Hollins's retirement benefits from the Federal Employees Credit Union. In April 2007, the circuit court entered an amended decree by agreement because there was a clerical error in the original decree: it misnamed the source of Mr. Hollins's retirement

benefits. The amended decree directed the U.S. Office of Personnel Management to pay Ms. Hollins half of Mr. Hollins's Civil Service Retirement System benefits computed as of the date of the divorce. The next month, Ms. Hollins died after a battle with cancer. The timing of her death, and the fact that Mr. Hollins had not yet retired, meant that Ms. Hollins's share of the Civil Service Retirement System benefits reverted to Mr. Hollins.

In November 2007, David Hollins—the Hollinses' son and the administrator of his mother's estate—filed a "Motion To Correct And/Or Clarify Judgment." He sought half of Mr. Hollins's Thrift Savings Plan—a different asset—for the estate. David argued that neither the original nor the amended divorce decree was clear about the division of Mr. Hollins's retirement benefits. He further alleged that the parties intended for Ms. Hollins to have half of *all* Mr. Hollins's retirement benefits, which David said included the Thrift Savings Plan. After a hearing, the circuit court ruled in favor of the estate and amended the decree again. The court granted Ms. Hollins's estate half of Mr. Hollins's Thrift Savings Plan—about $9,000.00. Mr. Hollins appeals, arguing that the circuit court lacked jurisdiction to enter the second amended decree. The estate filed no brief.

A circuit court may modify or vacate a decree to correct errors or to prevent the miscarriage of justice within ninety days of filing the decree with the clerk. Ark. R. Civ. P. 60(a). And the court may correct clerical mistakes in a decree at any

time—even beyond ninety days of its entry. Ark. R. Civ. P. 60(b). This is what occurred in the amended decree: nine months after entering the original decree, the court corrected the misnaming of the Civil Service Retirement System benefits. Absent a clerical error (or a similar Rule 60(b) animal, an oversight or omission), the circuit court may not modify or amend a decree more than ninety days after entry unless one of the exceptions in Rule 60(c) applies. Two of those exceptions were asserted here: the discovery of a misrepresentation or fraud by an adverse party; and the revelation that erroneous proceedings were had against a person of unsound mind, without that condition having been revealed or addressed. Ark. R. Civ. P. 60(c)(4) & (5).

More than ninety days had passed since entry of the amended decree when David moved to amend on the estate's behalf. And the circuit court did not enter its second amended decree until more than a year after it entered the amended decree. Rule 60(a), therefore, did not provide jurisdiction for the circuit court's entry of the second amended decree. For the circuit court's action to have been proper, either Rule 60(b) or Rule 60(c) must have applied. Neither did.

Unlike with the amended decree, the circuit court did not enter the second amended decree to correct a clerical error. When confronted with a clerical error, the circuit court may only "correct[ ] the order to reflect the action the court actually took as demonstrated by the record rather than the action the court should have taken."

Abbott v. Abbott, 79 Ark. App. 413, 421, 90 S.W.3d 10, 15 (2002). The court may also "make changes that clarify what the court originally intended." *Ibid.*

In its bench ruling, the circuit court specifically avoided deciding whether Mr. Hollins's Thrift Savings Plan fell under the category of "retirement benefits" as contemplated in the original and amended decrees. If the circuit court had reached this question, then its action might have been a clarification of the court's original intention. Instead, the circuit court likened the omission of the Thrift Savings Plan to "forgetting about a piece of property over in Louisiana or something," which suggests that the circuit court had not considered the Plan at all when entering either of the previous decrees. The Thrift Savings Plan was not mentioned in either decree. There was testimony at the modification hearing, moreover, that Mr. and Ms. Hollins were both well aware of the Plan's existence. Therefore the circuit court was not correcting a clerical error. *Jones v. Jones*, 26 Ark. App. 1, 6–7, 759 S.W.2d 42, 45–46 (1988).

Rule 60(b) also allows the circuit court to correct errors in a judgment "arising from oversight or omission." Did this provision create jurisdiction to enter the second amended decree? No. An oversight or omission has occurred when "the trial court inadvertently failed to set out a matter it originally intended to include." *Linn v. Miller*, 99 Ark. App. 407, 412, 261 S.W.3d 471, 475 (2007). This record did not present those circumstances. In the divorce context, moreover, this part of Rule 60(b)

must give way to the settled law about dividing property. All marital property must be divided at the time the divorce is granted. Ark. Code Ann. § 9-12-315 (Repl. 2008); *Jones*, 26 Ark. App. at 6, 759 S.W.2d at 45. The circuit court "lacks jurisdiction to distribute property not mentioned in the original decree if grounds for modifying a judgment after 90 days are absent." *Ibid.* The court's jurisdiction here "does not permit the change of a record to provide something that in retrospect should have been done but was not done." *Harrison v. Bradford*, 9 Ark. App. 156, 158, 655 S.W.2d 466, 468 (1983).

None of the Rule 60(c) exceptions applied either. At the hearing, David invoked the fraud and the unsound-mind exceptions and provided supporting testimony for both. Mr. Hollins presented contrary testimony. But the circuit court made no finding on either exception. Indeed, the circuit court did not mention the exceptions in its bench ruling or the second amended decree. The court must make the applicable findings to establish its jurisdiction under Rule 60(c). *Jones*, 26 Ark. App. at 6–7, 759 S.W.2d at 45–46. So this subdivision of the Rule did not provide jurisdiction either.

In summary, the circuit court lacked jurisdiction under any part of Rule 60 to enter the second amended decree. We need not decide whether the right to seek modification of the decree survived Ms. Hollins's death or whether David (as administrator of her estate) was properly substituted as a party. Any right that the

estate had to seek a second change must have derived from Ms. Hollins's right, had she been alive, to seek the same change. And regardless of who sought the second modification, in the circumstances presented, the circuit court did not have jurisdiction under Rule 60 to act on it.

Reversed.

GRUBER and GLOVER, JJ., agree.