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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002394-MR

VIOLET A. HAZLETT (NOW ALBERS) APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 00-CI-01415

ALBERT HAZLETT APPELLEE

OPINION

AFFIRMING IN PART, REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: DYCHE, AND McANULTY, JUDGES; AND JOHN WOODS POTTER, SENIOR JUDGE.[1]

McANULTY, JUDGE: Violet Albers appeals the circuit court's order denying her motion to amend, alter or vacate the court's findings of fact and conclusions of law on matters pertaining to its interpretation of an agreed property settlement in an uncontested divorce from Albert Hazlett. Violet Albers argues

[1] Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the trial court effectively set aside portions of the agreed property settlement without first making a finding that the agreement was unconscionable, as is required under KRS 403.180(2). After considering the terms of the couple's agreed property settlement, we affirm in part and reverse and remand in part.

Violet Albers, formerly Violet Hazlett (Violet), and Albert Hazlett (Albert) married on September 21, 1999. The marriage was Violet's eighth marriage and Albert's third marriage. On December 5, 2000, the couple decided to get a divorce and agreed to settle their property.

The couple had an attorney draft an Agreed Property Settlement (Agreement) disposing of their property. Violet signed the Agreement on December 7, 2000, and Albert on December 8, 2000. Later that day on December 8, 2000, the trial court approved the Agreement and incorporated it by reference in the court's final decree entered December 8, 2000.

The property disposition from the Agreement is as follows:

> 3. Real estate is divided as follows: Husband is to keep his cottage at Lake Cumberland. Wife is to keep her home located at 116 Schenkelwood Drive, Frankfort, Ky. The residence and business, with all contents, located at 551 South Main St., Lawrenceburg is to be to [sic] sole property of the wife and husband agrees to execute deed to said property to wife. In

> addition, Husband is to have his fishing boat, his Ford Explorer, his bank account at Farmers Bank, and all funds in a joint account the parties maintained at Edward Jones, at market value after December 14, 2000. Husband is restored to all personal property he owned before the marriage and all property he has removed from the residence at 551 South Main St. at the time of the signing of this agreement. Husband and Wife promise to pay any outstanding debts that are in their respective names, and hold the other harmless from payment of the same. The wife is to retain all funds in bank accounts in her name as Violet Hazlett and as Violet Albers. All other property not listed herein is to be the property of Violet Hazlett.

(Paragraph 3 of the Agreement).

At the time of the divorce, Albert was 74 years old and was a retired contractor. Violet was 55 years old and owned and operated a wedding rental and florist business called "Hazlett's Wedding Center & Flowers by Violet."

Subsequent to the final decree of dissolution and after Violet received a credit card statement addressed to her for charges in excess of $10,000, Violet filed a motion with the trial court on April 19, 2001, to enforce certain provisions of the Agreement. Specifically, in pertinent part, she represented to the court that Albert had a First USA Bank Visa account in his name, and he transferred the balance to Violet's name. Violet believed Albert should pay the debt because it was originally in his name. In response to Violet's motion, Albert

filed a counter-motion for the court to order Violet to pay Albert all the funds she received in a joint investment account the couple started in November of 1999 with Albert's initial funds of $11,000.00.

The court heard testimony on the issues of the credit card debt and the joint investment account on June 5, 2001, and July 7, 2001. At the hearings, Violet and Albert testified on these issues, as did Danny L. Lamb, an investment broker with Edward Jones, through whom the couple opened the investment account.

Violet testified that in November of 1999, Albert and Violet opened a joint investment account with Edward Jones Co. The couple opened the account with a check for $11,000 drawn on Albert's checking account with Farmers Bank. Albert had deposited the funds the day prior after closing his savings account with another bank. Edward Jones Co. structured the account as follows pursuant to the couple's instructions: $5,000 in an account with Investment Company of America; $5,000 in an account with New Economy; and the remaining $1,000 in a money market account.

According to Violet, the Investment Company of America account was her account, and she deposited $5,000 in Albert's Farmers Bank account to cover this amount as the initial deposit in the investment account consisted of Albert's non-marital

savings. In addition, Violet testified that she added a total of $1,500 to the money market account during the marriage. Moreover, as part of the opening of the Edward Jones Co. investment accounts, the couple opened an Edward Jones Co. First USA Visa (Visa) account in Albert's name. In order to prove that the account was in Albert's name only, Violet introduced a Visa credit card with Albert's name on it, which card was not signed by Albert and which Violet had in her possession.

As evidenced by documents Violet introduced through Danny Lamb, on the same day that Violet signed the Agreement, December 7, 2000, she contacted Lamb and asked him to transfer funds from the money market account totaling $1,500 to her and a co-transferee named Shelia Hatfield. In addition, Violet instructed Lamb to transfer the assets in the Investment Company of America account to Violet and Ms. Hatfield. Later, on December 11, 2000, Lamb transferred the remainder of the funds in the money market account totaling $1,088.35 to Albert as well as the assets in the New Economy Fund. Both Violet and Albert signed the letters of authorization which Edward Jones required to complete the respective transfers.

On cross-examination, Violet admitted that she used the Visa card to finance the expansion of her business. Specifically, she purchased a computer for the business and additional inventory on the Visa card. However, Violet would

not agree that the majority of the purchases were business related; she said she also used the card to purchase groceries and clothing for both Albert and Violet. The debt on the credit card was in excess of $10,000.

Finally, Violet further testified that she was unaware that Albert could not read. Accordingly, she did not know that he had not read the Agreement prior to signing it.

Albert testified that he could not read. Moreover, he did not know about the Visa account and the debt in excess of $10,000 that was allegedly in his name only. Finally, Violet did not deposit funds in his account with Farmers Bank to cover the Edward Jones investment in the Investment Company of America account. The way he understood the couple's Agreement, he was to receive all of the funds in all of the accounts with Edward Jones.

On the issue of the Visa account, after hearing the testimony, the trial court found that Albert did not know of the credit card debt in excess of $10,000 when he signed the Agreement, nor did Violet tell him of the debt. Moreover, the court found that Violet incurred all of the debt, and she incurred the vast majority of the debt in her florist/wedding business. Based on these findings, the court concluded that Violet shall pay the Visa credit card debt.

On the issue of the Edward Jones investment account, the court found that Albert opened the account with money he withdrew from his non-marital savings account the day prior. Despite the fact that Albert signed documents around December 11, 2000, allowing Violet to receive $1,500 from the money market account and all the assets in the Investment Company of America account, the trial court concluded that the language of the Agreement should prevail and Albert shall receive all of the funds in the accounts which were purchased with his non-marital property.

Violet filed a motion to amend, alter or vacate the findings of fact and conclusions of law of the trial court as to the Visa account and the investment account. The trial court denied her motion, precipitating this appeal.

On appeal, Violet argues that the parties' Agreement should be enforced as written as to the joint investment account and the Visa debt. Thus, the issue is whether the trial court properly interpreted the parties' Agreement. Specifically, the two questions we must answer are, under the language of the Agreement, (1) was the trial court correct in deciding that Violet should be obligated to pay the Visa account, and (2) was the trial court correct in deciding that Albert shall receive all of the funds in the Edward Jones investment accounts which were purchased with his non-marital property. As the issues

here involve matters of contract interpretation, our review is *de novo.* See First Commonwealth Bank of Prestonsburg v. West, Ky. App., 55 S.W.3d 829, 835 (2000).

In a petition for dissolution of marriage, "the parties may enter into a written separation agreement containing provisions for . . . disposition of any property owned by either of them[.]" KRS 403.180(1). Moreover, the terms of the agreement regarding any division of property are binding on the court unless it finds that the terms are unconscionable. See KRS 403.180(2). Finally, "[t]erms of the agreement set forth in the decree . . . are enforceable as contract terms." KRS 403.180(5).

Accordingly, under principles of contract law, we need to determine if the terms of the Agreement are ambiguous. See Central Bank & Trust Co. v. Kincaid, Ky., 617 S.W.2d 32, 33 (1981). If we hold that they are ambiguous

> then extrinsic evidence may be resorted to in an effort to determine the intention of the parties; if not, then extrinsic evidence may not be resorted to. The criterion in determining the intention of the parties is not what did the parties mean to say, but rather the criterion is what did the parties mean by what they said. An ambiguous contract is one capable of more than one different, reasonable interpretation.

Id. Moreover, in determining what the parties meant by what they said,

> it is admissible in the construction of many contracts that are on their face free from ambiguity to consider their situation and the circumstances and conditions surrounding them at the time the contract was entered into, -- not for the purpose of modifying or enlarging or curtailing its terms, but to shed light upon the intention of the parties. And the intention of the parties thus gathered will prevail unless it does violence to the meaning of the contract as written. In other words, if a written contract, when viewed from the standpoint of the parties at the time it was executed can be made to carry out their intention as expressed in the writing, the court will adopt the construction that will accomplish this end.

Lexington & Big Sandy Ry. Co. v. Moore, 140 Ky. 514, 131 S.W. 257, 258 (1910) (internal citations omitted).

Guided by the above principles, we begin our review with the clause of the Agreement pertaining to the allocation of debt, which reads "Husband and Wife promise to pay any outstanding debts that are in their respective names, and hold the other harmless from payment of the same." We do not believe that this clause is ambiguous. Albert is responsible for payment of those debts for which he alone is legally responsible; Violet is responsible for payment of those debts for which she alone is legally responsible.

While this clause pertaining to individual debt allocation is not ambiguous, the Agreement does not provide for payment of joint debts for which both parties had legal

responsibility, or debts which were in the name of both parties. As is apparent from the trial court's findings of fact and conclusions of law, it chose not to believe Violet's assertion that the Visa debt was in Albert's name only. The trial court treated the Visa debt as a marital debt and decided the issue because the parties did not address the responsibility for joint debts.

We review issues pertaining to the assignment of debts incurred during the marriage under an abuse of discretion standard. See Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 523 (2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000).

Debts incurred during the marriage are assigned on the basis of such factors as (1) receipt of benefits; (2) extent of participation in incurring the debt; (3) whether a party incurred the debt to purchase assets later designated as marital property; (4) whether a party incurred the debt to provide for the family; and (5) the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. Neidlinger, 52 S.W.3d at 523.

In this case, the trial court considered the factors listed above, specifically finding that Ms. Albers incurred all

the debt. Moreover, she incurred the debt to purchase assets for the business that she kept after the divorce. We hold that the trial court did not abuse its discretion in deciding the issue of the Visa debt in Albert's favor and affirm the trial court.

We now turn to the clause of the Agreement pertaining to the Edward Jones account and further hold that the Agreement is not ambiguous on this matter. Considering the complete language of the Agreement and the parties' actions, we do not believe that this settlement provision is capable of more than one different, and, more importantly, reasonable interpretation.

The only specific mention of the Edward Jones account in the Agreement is that Albert gets "all funds in a joint account the parties maintained at Edward Jones, at market value after December 14, 2000." Moreover, Violet gets all other property not specifically listed in the Agreement.

In order to shed light on the intention of the parties as to the ownership of the Edward Jones accounts upon dissolution of their marriage, we consider the steps they took regarding the accounts in the days surrounding the filing of their joint petition. Sometime around December 7, 2000, Violet called Danny Lamb at Edward Jones and instructed him that she and Albert wished to transfer the ownership of the joint accounts. In the next few days, Danny Lamb prepared the letters

of authorization necessary to complete the transfers, and both Violet and Albert signed the documents. The letters show that on December 11, 2000, Edward Jones completed the respective transfers giving Violet $1,500 in a money market account and all the assets in the Investment Co. of America account and giving Albert $1,088.35 that remained in the money market account and the assets in the New Economy Fund. So, after December 14, 2000, the couple had split the accounts, Albert now having all the funds plus interest that he originally deposited in the money market account and the assets in the New Economy Fund. Pursuant to the Agreement, Violet received the accounts now listed in her name as property not specifically listed in the Agreement.

To hold that Albert should receive all the funds purchased with his nonmarital property would ignore the language of the Agreement that reads "at market value after December 14, 2000." The parties inserted this language for a reason that may be ascertained by their actions regarding the accounts during the week they filed the joint petition for dissolution.

Albert argues that the phrase "at market value after December 14, 2000" is of no consequence since Violet had already taken independent steps to divide the account on December 7, 2000. In addition, Albert asserts that the initial deposit of $11,000 that funded the accounts were his non-marital funds.

To the contrary, as discussed in the preceding paragraph, we believe the phrase "at market value after December 14, 2000" is of consequence and must be considered in conjunction with both Violet and Albert's signatures on the letters of authorization. If the parties intended Albert to have everything in the Edward Jones accounts, then there would be no reason to add a qualifying date of December 14, 2000. Moreover, Albert has made no allegation of fraud in signing the letters of authorization. Finally, no matter how the parties initially funded the accounts, they both signed a property settlement agreement to dispose of their property; therefore, the terms of the agreement are enforceable as contract terms absent a finding that the Agreement is unconscionable. See KRS 403.180(2),(5).

On the issue of the joint investment accounts, we reverse the trial court's conclusions of law and remand for entry of an order consistent with this opinion. The Edward Jones accounts shall remain as the parties designated them pursuant to the Agreement and the letters of authorization they signed around December 11, 2000.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed in part and reversed and remanded in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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