

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002738-MR
AND
NO. 2002-CA-000044-MR

LYNN GOLDSTEIN NICHOLS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 99-FC-000533

THOMAS M. NICHOLS

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS and McANULTY, Judges; and JOHN D. MILLER, Special Judge.¹

COMBS, JUDGE: Lynn Goldstein-Nichols appeals from a post-dissolution order of the Jefferson Family Court entered November 27, 2001. The order enforced the terms of an antenuptial agreement executed prior to Lynn's marriage to Thomas M. Nichols in 1991.² We affirm.

¹Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

²Nichols has abandoned his cross-appeal.

Lynn and Thomas Nichols married on October 19, 1991 after having executed an antenuptial agreement approximately two months earlier. They separated in January 1999, and a decree of dissolution was entered on March 2, 2000.

Following an evidentiary hearing held in January 2001, the trial court upheld the validity of the parties' antenuptial agreement. On appeal, we affirmed.³ In November 2001, following another evidentiary hearing, the trial court entered an order assigning and dividing the couple's property in accordance with the terms of the antenuptial agreement. It is from that order that Lynn now appeals.

Lynn contends that the trial court erred in its division of property by failing to conclude that Tom dissipated the marital estate in contemplation of divorce. She alleges that he dissipated the marital estate in part by making large contributions to his retirement funds, by increasing the equity in his real estate holdings, and by providing financial support to his parents. We disagree.

A spouse can be charged with the dissipation of marital assets only under clearly-defined circumstances. Kentucky courts have found dissipation of assets only where one party to the marriage has intentionally misappropriated or disposed of marital assets for non-marital purposes after separation or during a

³Our opinion affirming was rendered March 26, 2002. Lynn's motion for discretionary review is currently pending before the Kentucky Supreme Court.

period when separation is clearly contemplated C but before entry of a decree. Bratcher v. Bratcher, Ky., App., 26 S.W.3d 797 (2000); Brosick v. Brosick, Ky., App., 974 S.W.2d 498 (1998). Here, however, Tom's pattern of alleged dissipation of marital assets began long before the parties separated. Absent clear and convincing evidence that Tom anticipated and intended to separate, his use of those assets cannot legally be characterized as a dissipation. Lynn presented no such evidence of Tom's intent to separate and divorce at the time she claims that he dissipated the marital estate. Therefore, the trial court did not err by refusing to consider Tom's expenditures during the marriage in the course of assigning and dividing the marital property.

Lynn also contends that the trial court erred by failing to award her a greater share of the marital property under the provisions of KRS 403.190(3). We disagree. Pursuant to the provisions of KRS Chapter 403, any property that a husband and wife acquire during the course of their marriage shall be subject to equitable division between them in the event of divorce.

However, by virtue of the terms of their prenuptial agreement, Tom and Lynn agreed to forego this statutory right of equitable division. Under the agreement, Lynn had no rights to much of the property acquired during the marriage C nor to the increase in value of Tom's nonmarital assets. Under the terms of

the antenuptial agreement, the only real property subject to division as marital property was the marital residence. Although their respective contributions toward the purchase of the residence were disproportionate, the trial court divided the home's equity of nearly \$200,000.00 equally between them. Under the terms of the parties' agreement, the personal property subject to equitable division consisted of vehicles, bank accounts, and various household goods and appliances. The trial court also divided these items nearly equally between the parties.

With respect to the disposition of marital assets, KRS 403.190(1) requires the assets to be divided in just proportions.[@] This determination is left to the discretion of the court. Johnson v. Johnson, Ky. App., 564 S.W.2d 221 ((1978)). From our review of the evidence, we cannot conclude that the trial court's division of the marital assets reveals any abuse of discretion. There is no indication that the trial court failed to consider all relevant factors before making its decision. Accordingly, we defer to the trial court's disposition of the assets.

Finally, Lynn contends that the trial court erred by enforcing the antenuptial agreement's waiver of maintenance provision. She contends that enforcement of the provision is unconscionable in part because of Tom's dramatically enhanced financial position. Again, we disagree.

Lynn correctly acknowledges that a finding of unconscionability in this context requires a comparison of the parties' relative financial positions at the time of divorce. A gross disparity between the parties' resources may render a prenuptial agreement unconscionable. However, the reasonable expectations of the parties as contemplated by the agreement must also be taken into account.

When the parties executed their antenuptial agreement, their financial positions were already vastly disparate. Tom had accumulated a considerable estate, while the value of Lynn's assets was relatively modest. Nevertheless, the terms of the couple's agreement specifically provided that Lynn would not share in the appreciation of Tom's assets. Nor was Lynn's contribution to the increase in value of Tom's nonmarital property beyond the contemplation of the parties' expectation and agreement. Despite Lynn's arguments to the contrary, the evidence presented does not indicate that facts and circumstances have changed since the execution of the agreement to such an extent as to render its enforcement unconscionable. Blue v. Blue, Ky. App., 60 S.W.3d 585 (2001). The trial court found that the waiver-of-maintenance provision included in the parties' antenuptial agreement is not manifestly unfair or unreasonable. That finding is well-supported by the evidence. The trial court did not abuse its broad discretion by enforcing the terms of the antenuptial agreement.

Accordingly, the judgment of the Jefferson Family Court
is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
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BRIEF FOR APPELLEE/CROSS-
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