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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001089-MR

LORETTA DEHAVEN — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
CIVIL ACTION NO. 99-CI-00103

CARL DREXEL DEHAVEN — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: PAISLEY and TACKETT, Judges; and HUDDLESTON, Senior Judge.[1]

HUDDLESTON, Senior Judge: This case arises out of the dissolution of the marriage of Loretta and Carl DeHaven and the resulting distribution of marital property. Loretta argues that the parties did not modify their agreed distribution of marital

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

property by settling a dispute regarding division of the marital home and farm, and that the circuit court erred when it enforced the decree according to the terms of the alleged settlement.

On October 2, 2001, the parties' marriage was dissolved by decree which provided, in pertinent part, as follows:

> [Loretta] shall receive the marital residence and 20 to 22 acres of the marital farm. [Carl] shall receive the remainder of the farm. To facilitate division of the farm, the parties shall employee [sic] a surveyor to survey the dividing line between the parties with each party paying one-half the cost of said surveyor. The parties shall execute the necessary deeds to transfer ownership of the parcels to the appropriate party. [Carl] shall assume and pay the mortgage on the marital farm with Commercial Bank of West Liberty and hold the wife free and harmless from liability therefor.

Following the entry of the decree, the parties attempted to find a surveyor agreeable to both sides. After some time, a survey was conducted by the surveyor who had been an expert witness for Loretta. Carl took issue with the survey,

arguing that the disputed dividing line had been improperly drawn pursuant to Loretta's instruction.

In an attempt to resolve the dispute, the parties convened a settlement conference. Both parties agree that during the conference, Loretta instructed her counsel to inquire if Carl would agree to a proposal whereby the parties would leave the disputed dividing line where it had initially been and switch properties received; i.e., Carl would now receive the house side of the property while Loretta would receive the remainder of the farm.

When Carl attempted to accept the above proposal, Loretta declined. She later said that the purported "offer" was only an inquiry to see if Carl would accept that arrangement in settlement, and was not intended to be a bona fide offer of settlement.

Carl filed a motion seeking enforcement of the agreement. Loretta defended on various grounds, including that no offer of settlement had been made. In the alternative, she argued that Carl's argument was procedurally barred by his failure to move to reopen pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 or 60.03.

Loretta's procedural argument was rejected by the Supreme Court in Brown v. Brown,[2] in which the Court said that:

> [T]he policy of the law is to encourage settlement in divorce litigation, whether prejudgment or post-judgment, and more particularly, to discourage as counterproductive to the welfare of the parties unnecessary post-judgment litigation. [] A necessary corollary of this principle is, where honest disagreement exists post-judgment as to whether the terms of a previous decree should be modified, courts approve of settlement as the method to adjust such disputes. We find nothing in the statutes to require judge resolution as opposed to voluntary settlement, openly and fairly negotiated. The statutes leave open to a party who has been overreached in any such settlement the right to further litigate upon proof of unconscionability. But there is nothing in the statutes to suggest [] that KRS 403.250(1)[3] denies

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[2] Ky., 796 S.W.2d 5 (1990).

[3] KRS 403.250(1) provides, with respect to property division, that: "The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." That version of the statute became effective July 13, 1990 (See Acts 1990, ch. 418, § 5), two months before the Court's decision in Brown.

the right to settle a post-judgment dispute, and requires a party seeking modification to go to court to reopen the judgment "pursuant to CR 60.02 or 60.03."[4]

Here, there remained a dispute regarding the exact location of the division line of the properties awarded in the decree. Accordingly, under Brown, the parties were free to resolve the dispute in a post-judgment settlement agreement. Any question regarding the existence of that settlement was one of fact for the circuit court to decide. As there is sufficient evidence in the record to support its determination, we will not disturb its ruling.[5]

Loretta argues that the circuit court failed to make a specific finding that the resulting agreement is not unconscionable. However, this argument misstates the law regarding unconscionability. KRS 403.180(2) provides that the terms of a separation agreement, except those relating to children, are binding on a court unless the court finds that the

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Ky. Rev. Stat. (KRS) 403.180(6) provides that a decree may expressly preclude or limit modification of terms if the separation agreement so provides; however, no such preclusion was contemplated by the parties' initial agreement, so this section is not relevant.

[4] Brown, supra, n. 2, at 8-9 (internal citation omitted.)

[5] See Owens-Corning Fiberglass Corp. v. Golightly, Ky., 976 S.W.2d 409 (1998).

agreement is unconscionable. While a court may undertake an unconscionability analysis on its own initiative or at the request of either party, it is not required to do so in every case.

The party challenging a separation agreement as unconscionable bears a high burden of proof.[6] An agreement can not be held unconscionable solely on the basis that it is a bad bargain.[7] In order for the agreement to be set aside, a party must show fraud, undue influence or overreaching.[8]

In this case, the circuit court found the parties' initial agreement regarding the division of their assets and debt to be conscionable, a finding which Loretta has not challenged. While the circuit court did not sua sponte find the modification of that agreement to be conscionable, it was not required to do so. Loretta bore the burden of showing that the modification was the result of fraud, undue influence, or overreaching, a burden which she failed to satisfy. Indeed, her argument before this Court points to no evidence in the record on which a court could base a finding that the modification was unconscionable; rather, she only argues that the circuit court

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[6] Peterson v. Peterson, Ky. App., 583 S.W.2d 707 (1979).

[7] Id. at 712.

[8] Id.

should have made a conscionability determination absent her motion. Under Peterson, the court was under no such obligation.[9]

Loretta makes two arguments regarding the proof surrounding the alleged modification. She contends that there was not a sufficient meeting of the minds in order to reach a modification agreement, or that the alleged agreement was not proven with reasonable certainty. Both arguments are essentially the same in that they both dispute the factual existence of the parties' modification agreement. Factual determinations made by the circuit court will be disturbed on appeal only if they are clearly erroneous, which is to say they are not supported by substantial evidence.[10]

In concluding that the parties reached a settlement of their property dispute, the circuit court had before it the testimony of both parties and copies of correspondence between their counsel. It found Loretta's testimony not credible regarding the purported "inquiry only" nature of her settlement offer, and instead relied on Carl's version of the events. Such a credibility determination is uniquely within the circuit

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[9] See also CR 76.12(4)(v), which requires that a brief contain sufficient citation to the record in order to show whether an issue was properly preserved for review and, if so, in what manner. Loretta has failed to show where her unconscionability argument was presented to the circuit court, making it unpreserved for review.

[10] Owens-Corning, supra, n. 5. See also CR 52.01.

court's province, and we cannot say its finding that the parties reached a negotiated settlement was clearly erroneous.

Finally, Loretta argues that the circuit court improperly divested her of a vested contractual right. However, this argument fails for several reasons.

Loretta's reliance on Keplinger v. Keplinger[11] and the cases cited therein is misplaced. In Keplinger, the Court found that the original agreement entered into by the parties at the time of the dissolution of their marriage was intended to be a final settlement of all their property claims and rights.[12] That scenario does not exist in the present case; as explained above, the decree entered in this case left open the issue of how to divide the marital home and farm. Therefore, there was no final settlement of the type contemplated by Keplinger.

Loretta's reliance on Wagner v. Wagner[13] is likewise misplaced. In Wagner, the circuit court modified an arrangement between the parties regarding sharing University of Kentucky basketball tickets simply because the court believed that "15 years is long enough for something like this to go on."[14] This Court reversed the circuit court because there was no evidence

[11] Ky., 610 S.W.2d 618 (1981).

[12] Id. at 619.

[13] Ky. App., 821 S.W.2d 819 (1992).

[14] Id. at 821.

that terminating the arrangement after 15 years was contemplated by the parties. Loretta's position would be similar to that of the plaintiff in Wagner only if it were true that she had no intention of modifying the original agreement for settlement purposes.

Morgan Circuit Court did not err when it found that the parties modified their property settlement agreement. Its order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dana B. Quesinberry
ROBERTS & QUESINBERRY
Morehead, Kentucky

BRIEF FOR APPELLEE:

Earl Rogers III
CAMPBELL & ROGERS, PLLC
Morehead, Kentucky