

RENDERED: NOVEMBER 10, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001588-MR

DAVID L. PATTERSON

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 00-FC-004641

MARTHA Y. PATTERSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Citing procedural errors alleged to be so egregious as to constitute misconduct prejudicial to his rights, David Patterson asks this Court to vacate and remand pursuant to KRS 417.160 findings of fact and conclusions of law entered in the Jefferson Family Court by Arbitrator B. Mark Mulloy. We affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

This appeal arises from a dissolution proceeding originally scheduled for trial on April 4, 2002. Approximately one week prior to that date, the parties entered into a written agreement to arbitrate all issues related to the divorce with attorney B. Mark Mulloy acting as the agreed-upon arbitrator. The voluntary arbitration agreement, the validity of which is not in dispute, clearly states that the final judgment tendered by the arbitrator and entered by the Court "shall be binding on the parties and shall not be subject to appeal." Dissatisfied with the arbitrator's findings of fact and conclusions of law, appellant attempts to circumvent the clear import of this provision by alleging that procedural errors in the process so prejudiced his rights that the arbitrator's decision be vacated pursuant to KRS 417.160. The tactic proves unavailing for several reasons.

First, it is clear beyond dispute that appellant voluntarily waived his right of appeal by entering into the binding arbitration agreement. He cannot indirectly through an attempted application of KRS 417.160 revive the right of appeal he freely gave up. Secondly, the factors he cites as falling within the criteria set out in KRS 417.160(b) and (d) are clearly insufficient to trigger application of those provisions. For example, his complaint with regard to the failure to transcribe the hearing before the arbitrator is raised for the

first time in this appeal. We have searched without success the many motions filed of record for any hint that this complaint was lodged with the arbitrator or even the trial judge.

Instead, we find absolutely nothing which contradicts appellee's assertion that the parties agreed to forgo transcription due to financial considerations. It should have been clearly evident to both parties and their respective counsel that no court reporter was present; thus any objection with regard to lack of transcription was obviously waived.

Equally unpersuasive are appellant's claims that he was prejudiced by the delay in arbitration process or his claim that the arbitrator failed to hear testimony from two of his witnesses. Other than appellant's own self-serving statements, there is no indication that these witnesses were properly subpoenaed and failed to appear, nor is there any indication that such failure to appear was brought to the attention of the arbitrator. On this state of the record, it is abundantly clear that neither of these alleged errors even approach the type of misconduct which would permit a court to vacate an otherwise proper award. What is evident from a reading of the arbitrator's findings and conclusions is the fact that abundant testimony supported his decision. Finally in this regard, even if there had been misconduct sufficient to trigger KRS 417.160,

application must be made for the trial court before raising the matter on the appellate level.²

Review of the record in this case confirms only that appellant was dissatisfied with the arbitrator's decision and that he is now attempting to circumvent his agreement waiving the right to appeal. That being the case, there is no relief available in this forum.³

The judgment of the Jefferson Family Court is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Peter L. Quebbeman
Louisville, Kentucky

BRIEF FOR APPELLEE:

Troy DeMuth
Louisville, Kentucky

² KRS 417.200.

³ See generally, 3D Enterprises Contracting Corporation v. Lexington-Fayette Urban County Government, 134 S.W.3d 558 (Ky. 2004).