

RENDERED: September 12, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-0699-MR

LANA RUE BRADEN (NOW WILSON)

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 86-CI-0122

PAUL E. BRADEN

APPELLEE

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: JOHNSON, KNOPF, and MILLER, Judges.

KNOPF, JUDGE: Lana Rue Braden appeals the circuit court's denial of her motion for contempt against her former husband, Paul Braden. Lana claimed that Paul had failed to fulfill his obligations under a separation agreement that was incorporated into their divorce decree. The circuit court nullified the separation agreement finding that the parties had reconciled after their divorce. We believe that the circuit court erred in its application of the law and therefore, we reverse.

After being married twenty-four (24) years, Lana and Paul separated. Paul is an attorney and prepared their separation agreement. Lana was not represented by separate

counsel. The agreement divided the parties' marital and nonmarital assets. The separation agreement gave Paul the marital residence and in return Paul was to pay Lana \$45,000.00 over ten (10) years with eight percent (8%) interest. The separation agreement also obligated Paul to execute an unsecured promissory note to Lana for \$35,000.00 over ten (10) years plus eight percent (8%) interest. The agreement called for Paul to pay \$50,000.00 if he settled a certain lawsuit and if he sold "the Farm" Lana was to receive half of the proceeds. The separation agreement was incorporated into the divorce decree which was entered on October 17, 1986.

After the divorce, Lana moved into an apartment. On October 31, 1986, Paul paid \$50,000.00 to Lana as a result of settling his lawsuit referred to in the separation agreement. Paul also began paying Lana money in satisfaction of other provisions of the agreement. More than a year after their divorce, in December 1987, Lana agreed to move back into the marital residence. Lana claims that she returned for the sake of her sixteen (16) year old daughter who was having a difficult time adjusting to the divorce. Lana claims she moved in only until her daughter could graduate from high school.

Lana did in fact move out of the house after her daughter graduated from high school. Paul began paying Lana \$500.00 a month. He claims these payments were completely gratuitous on his part and only to help Lana with living expenses. Paul has not, however, paid Lana the \$45,000.00 plus interest or \$35,000.00 plus interest as required by the

separation agreement. Paul has also refused to provide information about whether "the Farm" has been sold. Consequently, Lana filed a motion to hold Paul in contempt for failing to comply with the terms of the separation agreement.

The circuit court found that the separation agreement was incorporated into the divorce decree but that neither party had performed accordingly. The court also found, "In addition, evidence has been presented that the parties reconciled, or at least attempted a reconciliation for a period of time." The evidence was that the parties cohabited for at least a year after the divorce, Paul testified that the parties discussed annulment of the divorce, and the parties vacationed together. Most importantly, the court found that neither party followed the terms of the agreement and thus they showed their intent to set it aside. Citing, Peterson v. Peterson, Ky. App., 583 S.W.2d 707 (1979), the Court concluded that because the agreement had remained executory and the parties intended for it to be set aside, the agreement was nullified.

Peterson v. Peterson, supra involved a situation where the couple entered into a separation agreement and then reconciled. After their reconciliation, the couple subsequently obtained a divorce. The former wife attempted to enforce the separation agreement. The Court held:

Where the provisions of a settlement agreement are executory, however, '[t]he rule followed in this jurisdiction is that a reconciliation of the spouses and [a] resumption of cohabitation by the parties to the separation agreement nullifies the agreement. . . .'

Id. At 709.

The Court in Peterson found, however, that because the wife never intended to permanently reconcile, there was no mutual intention to resume normal cohabitation. Thus, the Court affirmed the trial court's incorporation of the separation agreement in the divorce decree.

In Peterson and other cases discussing the effect of reconciliation on separation agreements, the reconciliation occurred **before** a legal divorce decree was entered. As Baldwin's Ky Domestic Relation's Law, § 7.05 (A) notes "the rule [regarding reconciliation] has developed in cases involving actual but not legal separation." Baldwin further explains that underlying the reasoning all of these cases on reconciliation is the general fairness of the agreement. See, Gordon v. Gordon, Ky., 335 S.W.2d 561 (1960), Hartley v. Hartley, 305 Ky. 350 203 S.W.2d 770 (1947), and Gardner v. Gardner, Ky., 280 S.W.2d 198 (1955).

In this case, however, the parties were legally divorced and a decree was entered. The separation agreement became part of the divorce judgment. The alleged reconciliation did not occur until over a year after the divorce. Thus, Peterson is not relevant. Instead, Gray v. Gray, Ky. App., 745 S.W.2d 657 (1988), is more instructive.

In Gray the parties not only reconciled but remarried after a divorce decree was entered. The Court held that the remarriage did not annul the divorce and the property settlement of the divorce. Rather, the divided property became separately

owned by the parties once the decree was entered and the remarriage did not affect those property rights.

Furthermore, the law is clear that a divorce decree embodying a property settlement cannot be modified absent a showing under CR 60.02 or 60.03. See, Turner v. Ewald, 290 Ky. 833, 162 S.W.2d 181 (1942) and KRS 403.250. Also, a divorce decree can only be annulled by following the statutory procedures in KRS 403.041. The statutory procedures must be followed to completion in order to successfully annul the divorce. Arnz v. Johnson, 299 Ky 529, 186 S.W.2d 4 (1945), and Cecil v. Farmer's National Bank, 245 S.W.2d 430 (1952).

In this case, Paul and Lana did not annul their divorce. In fact they both remarried other people. Paul did not move to modify, vacate or set aside the property division of the divorce decree under CR 60.02 or 60.03 which would have left this divorced couple without any property settlement. Paul and Lana also did not attempt any reconciliation before the divorce decree and judgment was entered. Thus, the divorce decree settles the parties' property rights. Lana's rights under the agreement can be enforced as a judgment.

For these reasons, the judgment of the Rockcastle Circuit Court is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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