

RENDERED: JUNE 24, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0981-MR

GLENN EDWARD HIGDON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA K. ADDINGTON, JUDGE
ACTION NO. 15-CI-00697

KIMBERLY JANE HIGDON

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: GOODWINE, JONES, AND MAZE, JUDGES.

MAZE, JUDGE: The single question in this appeal is whether the Hardin Family Court erred in denying appellant Glenn Higdon’s motion to convert the parties’ legal separation decree into a decree of dissolution of marriage. Because we are convinced that the family court erred in concluding that Glenn waived his right to request that relief under Kentucky Revised Statute (“KRS”) 403.230, we reverse

the decision of the family court and remand for entry of a decree dissolving the parties' marriage.

The facts are neither complex nor in dispute. In 2015, Glenn ("Husband") filed a petition for dissolution of marriage in the Hardin Family Court. When the parties appeared before the court for a final hearing in March 2017, they announced that they had reached an agreement which was subsequently read into the record. Based upon that agreement, the family court entered an order dated April 25, 2017, which settled all pending issues before the court and recited the following provisions pertinent to this appeal:

4. Respondent [appellee Kimberly Higdon ("Wife")] shall receive 50% of [Husband]'s Kentucky Monthly Allowance from the Kentucky Employees Retirement System which is currently \$3,257.35 gross and \$2,959.62 net. [Husband] is currently in a post-retirement status and [Wife] shall be responsible for preparing all necessary and required documents to ensure [Wife] receives a direct payment each month from the Kentucky Retirement System reflecting her 50% portion of [Husband]'s Kentucky Monthly Allowance from the Kentucky Employees Retirement System.

5. [Husband] shall continue to pay \$1200 per month to [Wife] on or before the 15th day of the month as maintenance until such time as [Wife] receives her first payment for her portion of [Husband's] Kentucky Monthly Allowance from the Kentucky Employees Retirement System and at that time [Husband's] obligation to pay \$1200 to [Wife] ends.

....

10. The parties shall convert the divorce proceedings to proceedings for a legal separation. Both parties agreed on the record and it is so ordered that for either party to convert a legal separation decree to a divorce decree that both parties shall agree in writing and their signatures shall be attested by a notary public **and for any reason if either party goes back to court to have this provision set aside then either party may re-litigate the division of assets.**

(Emphasis added.) On December 7, 2017, the family court entered a decree of legal separation, incorporating the terms of the April 2017 order.

Thereafter, on February 8, 2021, substantially more than one year after the entry of the legal separation decree, Husband filed the following motion:

Comes the Petitioner, Glenn Edward Higdon, by and through counsel, and upon the basis of his accompanying affidavit, moves the court to restore this case to the active docket in that it has been over six months since the last action was taken in the case and to convert the legal separation decree entered on December 7, 2017 to a Divorce Decree.

Husband also requested that the court docket the matter for a hearing. Included in Husband's affidavit supporting the motion were the following averments:

5. It has been three (3) years since the Court entered the Decree of Legal Separation and there is no chance that [Wife] and I will reconcile. We have grown further and further apart and it is time to break any ties we may have due to the legal separation and convert the legal separation to a divorce decree.

6. I am requesting that based on paragraph 10 of the April 25, 2017 Order and December 7, 2017 Decree of Legal Separation, that the Court set aside the provision in

paragraph 10 and convert the Legal Separation Decree to a Divorce Decree.

7. I am also fully aware that based on paragraph 10 “if either party goes back to have this provision set aside then either party may re-litigate the division of assets.”

Husband also stated his belief that re-litigating a division of assets would be a waste of the family court’s time given the current state of the parties’ finances. In addition, Husband suggested that if Wife agreed to a divorce decree, she would actually receive more money from his retirement by having her portion of the monthly amount sent directly to her from the retirement system due to tax consequences of the current payment arrangement.

Wife lodged two objections to Husband’s motion to convert the legal separation into a decree of dissolution: 1) that a divorce decree would prevent her from receiving communion in her church; and 2) that a divorce decree would preclude her receipt of state retirement survivor benefits upon Husband’s death.

After a hearing, the family court denied Husband’s motion to convert the separation decree into a dissolution decree based upon its conclusion that Husband had specifically waived the right to seek conversion under KRS 403.230 by his voluntary agreement to the terms incorporated into the April 2017 order. The family court was of the opinion that Husband had breached the parties’ agreement by seeking to convert the legal separation decree. We are convinced, however, that

the decision of the family court is at odds not only with the plain language of the parties' agreement, but also with the unequivocal dictates of KRS 403.230.

Subsection (1) of KRS 403.230 provides:

No earlier than one year after entry of a decree of legal separation, **the court on motion of either party shall convert the decree to a decree of dissolution of marriage.**

(Emphasis added.) In its analysis, the family court recognized the mandatory language of the statute, but nevertheless concluded that Husband had waived his right to move to convert the decree. Ultimately, the family court entered the following judgment which precipitated this appeal:

It is hereby ORDER[ED] AND ADJUDGED AS FOLLOWS:

1. The parties Legal Separation shall not be converted into a Decree of Dissolution;
2. If the parties Legal Separation i[s] converted into a Decree of Dissolution, [Husband] shall immediately take out a life insurance policy on himself and maintain such for the amount [Wife] was to receive pursuant to [Husband's] retirement plan.

We are persuaded that the family court's judgment is erroneous for several reasons.

First, we agree with Husband that rather than foreclosing his right to convert the decree of legal separation into a decree of dissolution, the plain language of the parties' agreement incorporated into the April 2017 order specifically *provides for* such an eventuality: "and for any reason if either party

goes back to court to have this provision set aside then either party may re-litigate the division of assets.” As Husband correctly posits, the family court was not free to enforce certain of the agreement’s provisions while simply ignoring others. The Supreme Court of Kentucky emphasized this principle in *City of Louisa v.*

Newland, 705 S.W.2d 916, 919 (Ky. 1986):

Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible. The legal interpretation of a contract should be made in such a way as to make the promises mutually binding on all parties unless such a construction is wholly negated by the language used.

Had the parties intended to fully foreclose any possibility that the legal separation decree could be converted into one of dissolution, there would be no reason to insert language providing for such an eventuality and to provide for the re-litigation of the division of assets. Accordingly, we are convinced that the family court erred in concluding that Husband breached the parties’ agreement by moving to convert the legal separation decree into a dissolution decree.

Next, we consider the somewhat contradictory nature of the family court’s judgment. On one hand, the family court judgment specifically orders that “[t]he parties (sic) Legal Separation shall not be converted into a Decree of Dissolution.” However, the judgment goes on to provide for the exact opposite of its denial of Husband’s motion: “[i]f the parties (sic) Legal Separation i[s] converted into a Decree of Dissolution, [Husband] shall immediately take out a life

insurance policy on himself and maintain such for the amount [Wife] was to receive pursuant to [Husband's] retirement plan.” In our view, neither of these competing judgment provisions comports with the plain and unambiguous language of section 10 of the parties' agreement.

Rather than re-litigating the division of assets as provided for in the agreement, the family court unilaterally imposed what appears to be a sanction for its perceived breach of section 10 by requiring Husband to “immediately take out a life insurance policy on himself and maintain such for the amount [Wife] was to receive pursuant to [Husband's] retirement plan.” As Husband correctly asserts, not only is that order contrary to the parties' agreement concerning a unilateral request for a dissolution decree, but it would be difficult, if not impossible, to calculate the amount of an insurance policy which would comply with the family court's requirement. The family court's insurance policy requirement not only presupposes that Wife will outlive Husband, but also requires speculation as to the number of years she will outlive him. Nevertheless, because the parties' agreement specifically and unambiguously provides that either party may re-litigate the division of assets should the other party seek a conversion of the legal separation into a decree of dissolution, the family court is required to enforce that provision as written.

In sum, because the parties' agreement provided for the possibility that one of the parties might unilaterally seek to convert the legal separation decree under KRS 403.230(1) and provided for a possible re-allocation of assets should that occur, we hold that the family court clearly erred in denying Husband's motion to convert the decree and in imposing the insurance policy requirement as a breach of contract sanction. Upon remand, should Wife desire to re-litigate the division of assets, the family court is directed to entertain a proper motion for that relief and conduct appropriate proceedings to effectuate the parties' agreement on that issue.

Accordingly, the judgment of the Hardin Family Court is reversed and the case remanded for entry of an order converting the parties' decree of legal separation into a decree of dissolution and for the conduct of additional proceedings as may be required to re-litigate the division of the parties' assets, if requested.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lyn Taylor Long
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BRIEF FOR APPELLEE:

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