

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001998-MR

DONALD C. CAMERON

APPELLANT

v. APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE DAVID E. MELCHER, JUDGE
ACTION NO. 02-CI-00092

S. LYNEA CAMERON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER¹ AND DIXON, JUDGES; PAISLEY,² SENIOR JUDGE.

BARBER, JUDGE: This matter originated from dissolution of marriage proceeding in Nicholas County, Kentucky. Appellant, Donald C. Cameron, filed for a divorce from Appellee, Susan Lynea Cameron. This was the parties' second marriage to one another.

¹ Judge David A. Barber completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

There are two questions for our court: (1) Whether the trial court was clearly erroneous when it found the parties had not reconciled after the parties signed the Separation Agreement³ and (2) whether the trial court was clearly erroneous when it found the Agreement conscionable. Following a review of the record, we affirm.

Background

The parties were first married in 1988 and had a daughter the following year. In 1998, Donald filed for divorce. A bifurcated decree was entered in 2000, but there was never any disposition of debts and property.

Donald then remarried another woman whom he divorced shortly thereafter. Donald's father then gifted him several farms located in Nicholas County totaling approximately 1,400 acres. The PVA value of the gifted properties totaled over \$650,000.00.

In January 2002, Donald and Lynea married a second time. However, Donald filed for divorce in October that same year. Donald's attorney drafted the Agreement which was signed by the parties on December 20, 2002. Lynea was unrepresented by counsel. The Agreement was not filed in the action at that time.

³ The Agreement was prepared by Donald's first counsel who withdrew per order entered August 17, 2004.

Lynea later hired counsel and filed a dissolution action in Mason County in July 2003.⁴ Her case was dismissed when it was discovered that the Nicholas County action was still active. Lynea then filed an answer and counter petition in the Nicholas County action in July 2004 attaching the Agreement as an exhibit.

Donald quickly contested the Agreement because it divided all property, whether marital or non-marital, equally between the parties. He argued the parties had reconciled following the Agreement's signing or, alternatively, the Agreement was unconscionable.

A hearing was held October 8 and 25, 2004, on the Agreement issues. The trial court found the parties did not reconcile following the signing of the Agreement and that it was conscionable. Donald filed a motion to alter, amend, or vacate the order. In its Supplemental Findings of Fact, Conclusion of Law and Judgment, the trial court overruled Donald's motion and incorporated the Agreement into the final decree. It is from this order which Donald appeals.

Standard of Review

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. CR

⁴ Lynea lived in Mason County with her mother at that time.

52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954, 956 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)).

Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000). We next examine Donald's arguments.

Legal Authorities and Analysis

Donald first argues that the parties reconciled after they signed the Agreement. We note that only the second day of the hearing, October 25, 2004, was designated in the record on appeal.

We were once required to assume that any evidence in the record not before us supported the findings of the lower court. See Colonial Life & Accident Insurance Co. v. Weartz, 636 S.W.2d 891, 893 (Ky.App. 1982). However, that rule was partially overruled where an appellant presents evidence that is adequate to support a conclusion to the contrary. See Mifflin v. Mifflin, 170 S.W.3d 387, 389 (Ky. 2005). We now review Donald's reconciliation argument.

The effect of reconciliation on settlement agreements depends upon whether the provisions of the agreement are executed or merely executory. Peterson v. Peterson, 583 S.W.2d 707, 709 (Ky.App. 1979). With fully executed property settlements, reconciliation does not abrogate the agreement unless the parties intended it to do so. Id., (citing Gordon v. Gordon, 335 S.W.2d 561 (Ky. 1960)). Where the provisions of the agreement are executory, the rule followed is that a reconciliation of the spouses and a resumption of cohabitation by the parties nullifies the agreement. Id., (citing Goodaker v. Littell, 314 S.W.2d 539, 540 (Ky. 1958)).

However, even with executory agreements, reconciliation will not abrogate the agreement if the court can determine the real intention of the parties from other evidence. Id. In other words, the most important factor in determining whether there has been a reconciliation is the parties' intentions.

Applying these principles to the instant case leads us to believe the decision below was not clearly erroneous. The parties testified they took a couple of trips to Mexico, one of which was alone, following the Agreement signing. Donald testified the parties did reconcile after the signing. He further testified he and Lynea had looked at homes to purchase so they could move back in together. Lynea testified she spent

a few nights with Donald in his home after the Agreement signing, but never resumed cohabitation with him, nor ever intended to do so.

Donald also argues that Lynea's filing of a dissolution action in Mason County proves she thought they had reconciled resulting in dismissal of the Nicholas County case. However, Lynea testified she thought she was moving the Nicholas County case to Mason County. She also testified that she did not think the Nicholas County action had been dismissed.

The trial court found that Lynea intended to attempt reconciliation with Donald only. Due regard shall be given to the trial court to judge the credibility of the witnesses. CR 52.01. We do not believe the trial court erred when it found no reconciliation occurred between the parties following the Agreement signing. Attempted reconciliation is insufficient to abrogate the Agreement. We examine Donald's next argument.

Donald's second argument is that the Agreement is unconscionable. Kentucky Revised Statute 403.180 governs separation agreements in dissolution proceedings. Kentucky Revised Statute 403.180(2) states, in relevant part, "[T]he terms of the separation agreement . . . are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant

evidence . . . that the separation agreement is unconscionable." Unconscionable has been defined as "manifestly unfair or inequitable." Burke v. Sexton, 814 S.W.2d 290, 292 (Ky.App. 1991), (citing Wilhoit v. Wilhoit, 506 S.W.2d 511, 513 (Ky. 1974)). An agreement cannot be held unconscionable solely on the basis that it is a bad bargain. Peterson, supra, 583 S.W.2d at 712.

A party challenging an agreement as unconscionable has a high burden of proof. Id. Since the trial court is in the best position to judge the circumstances surrounding the agreement, its finding on the issue of conscionability should not be set aside on appeal unless there is some evidence of fraud, undue influence, overreaching, or evidence of a change of circumstances since the execution of the original agreement. Id.

The Agreement drafted by Donald's attorney at his request reads, in pertinent part:

PROPERTY ISSUES

3. In the event of a dissolution of marriage, any and all property, real, personal and mixed, tangible and intangible, of whatsoever nature and wheresoever situated, which is held by either party at the time of the parties' date of separation, including, but not limited to, any life insurance, bank account, retirement, pension, or annuity program, or contract, and other personalty, and further including any and all real estate, whether said

property be classified as marital or non-marital property, shall be awarded to each party equally, thus, being divided equally by and between them.

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DISCLOSURE

8. Each party has made to the other a full, candid, and truthful disclosure of his and her property assets, both real and personal, and the estimated value thereof.

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11. It is understood and agreed that this contract and the terms thereof may and shall be made a party of the record of the parties' Dissolution action and shall be incorporated in such action by supplemental decree by reference only as through fully copied therein without the necessity of the provisions of this contract being set out in detail, provided, however, that the terms of this agreement shall be effective at once.

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14. **Each party hereby acknowledges the conscionability of this document and that it was entered into with full, fair and knowing disclosure** and represents a final settlement of the matters addressed by the agreement between the parties. (Emphasis added.)

15. **Each party acknowledges that there was no undue influence, duress, or coercion exercised by one party upon the other in order to induce either party to execute this agreement.** (Emphasis added.)

Donald testified he signed the Agreement thinking it would dismiss the divorce action, but gave no further explanation why this was his belief. Lynea testified that she

understood that the document explained what she would receive if they divorced.⁵

The Agreement is clear and unambiguous that the parties would divide all property, whether marital or non-marital, equally in the event the divorce proceeded. Donald produced no evidence of fraud, undue influence, overreaching, or a change of circumstances since the execution of the original Agreement. While the Agreement may be described as a bad bargain, we agree it does not rise to the level of unconscionable. Therefore, the trial court was not clearly erroneous.

CONCLUSION

Based on the foregoing, we do not believe the trial court was clearly erroneous when it found the parties' Agreement not abrogated by reconciliation and conscionable. Therefore, we affirm the Nicholas Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Patrick E. Price
Flemingsburg, Kentucky

BRIEF FOR APPELLEE:

Raymond S. Bogucki
Maysville, Kentucky

⁵ Both parties were college educated.