

RENDERED: SEPTEMBER 4, 2009; 10:00 A.M.  
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky  
Court of Appeals**

NO. 2007-CA-002423-MR

ELAINE KRISTAN

APPELLANT

APPEAL FROM WAYNE CIRCUIT COURT  
v. HONORABLE VERNON MINIARD, JR., JUDGE  
ACTION NO. 07-CI-00081

THE ESTATE OF WILLIAM J. KRISTAN,  
BY AND THROUGH THE PERSONAL  
REPRESENTATIVE, WILLIAM J.  
KRISTAN, II, EXECUTOR

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; LAMBERT,<sup>1</sup>  
SENIOR JUDGE.

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: This appeal is from a final order and judgment of the Wayne Circuit Court denying Appellant's petition to set aside a Separation Agreement she entered into with her late husband, William J. Kristan.

Appellant and William J. Kristan were married for thirty-seven years. Throughout their marriage, Appellant struggled with mental illness, culminating in her involuntary hospitalization at Lake Cumberland Regional Hospital by court order in the spring and early summer of 1999. Appellant was involuntarily hospitalized again in the winter of 1999 and 2000 at Eastern State Hospital. She was diagnosed at various times with bipolar disorder, chronic schizophrenia and paranoid delusional disorder. While Appellant was deeply troubled, her medical records indicate that she often had lucid periods during which she understood what was going on, and showed a marked decrease in her paranoid delusions.

The late Mr. Kristan filed a petition for legal separation from Appellant in June 1999 at which time he also asked that a guardian *ad litem* be appointed to represent her interests. He noted in his petition that Appellant "suffers from a mental disability and is of unsound mind." A guardian *ad litem* was appointed for Appellant, but the guardian *ad litem* was subsequently relieved of his position when Appellant obtained private counsel. The guardian *ad litem* noted in his report that he felt the private counsel would "well and competently protect the rights and interest of" Appellant.

In October 1999 the parties entered into a Separation Agreement, which stated in the recitals that "the parties are desirous of effecting a settlement of

their property rights, irrespective of whether or not a decree dissolving their marriage is entered[.]” The body of the Agreement provided that Appellant “does hereby waive, release, and relinquish unto Husband, his heirs and assigns forever, all of her right, title, and interest in and to all property now owned or hereafter acquired by Husband, including the right of dower[.]” Both parties were represented by counsel during the settlement negotiations. In addition to the parties’ signatures, the Agreement was signed by counsel for the parties. Appellant was allocated \$163,740 of marital property, and Mr. Kristan was allocated \$368,003 of marital property. Under the Agreement Mr. Kristan was also to pay Appellant \$102,131.50 to compensate for the difference in the value of marital property he received.

The circuit court made findings of fact, conclusions of law, and rendered a decree of legal separation in October 1999 incorporating the Separation Agreement by reference. The Agreement was fully performed. Thereafter, Mr. Kristan was appointed Appellant’s guardian, and they lived together until his death in March of 2006. Appellant was omitted from his will. As his spouse, she executed a renunciation of the will a short time later.

Upon a declaratory judgment action, the circuit court concluded that there was no evidence that Appellant was not competent at the time of execution of the Separation Agreement and that the only evidence addressing Appellant’s competency related to time periods other than the time of execution of the Agreement. The circuit court further found that such testimony was irrelevant

because Appellant was represented by counsel in the proceeding. Appellant's counsel signed the Separation Agreement in his capacity as her attorney. We note that Appellant's counsel in the 1999 proceeding for legal separation and who signed the Separation Agreement indicating his view that Appellant was competent, now represents her in this proceeding where he asserts her incompetence at that time.

On appeal, Appellant first contends that the circuit court's finding that she was competent to enter into the Separation Agreement was not supported by substantial evidence. Appellant also argues that the circuit court's finding that the parties' reconciliation does not void the Separation Agreement was erroneous.

Kentucky law permits spouses to enter into written separation agreements addressing the "disposition of any property owned by either of them, and custody, support and visitation of their children." [KRS 403.180](#)(1). Except as to terms of child custody, support and visitation, the trial court is bound by the terms of the parties' agreement unless the court finds, after considering "the economic circumstances of the parties and any other relevant evidence produced by" them, that the agreement is unconscionable. [KRS 403.180](#)(2).

Appellant does not assert that the Agreement she made is unconscionable, but rather that her mental illness caused her to be incompetent to commit to the terms of the Agreement. She states in her brief that "the issue is not whether or not the agreement between [Appellant and Mr. Kristan] is a fair division of their marital property." Therefore, we will analyze the formation of the

Agreement in terms of Appellant's capacity rather than whether the Agreement was unconscionable.

To establish mental incapacity, Appellant must show that she was incapable of understanding and of assenting to the Agreement. *Hagemeyer v. First Nat. Bank & Trust Co.*, 306 Ky. 774, 209 S.W.2d 320, 321 (1948). In *Hagemeyer*, the Court noted that courts are hesitant to find a contract unenforceable for general lack of mental capacity, stating that:

(2) mental weakness alone does not justify the annulment of a contract or deed if it is not such an infirmity as to destroy the party's power to act voluntarily and to appraise the consequences of his act; (3) courts will hesitate to upset a transaction which is entered into in good faith and where no undue advantage or fraud is shown; and (4) the true test is the person's capacity to understand and assent to the particular transaction in question.

*Hagemeyer*, 209 S.W.2d at 321 (internal citations omitted). The unsoundness of mind must directly relate to the precise time the Agreement was entered into by the parties. *Jefferson Standard Life Ins. Co. v. Cheek's Adm'r*, 258 Ky. 621, 80 S.W.2d 518, 521 (1935).

As the trial court noted, although Appellant introduced evidence that she was mentally impaired, both before and after she signed the Separation Agreement, she provided no evidence of her mental incapacity at the time she signed the Agreement. Her medical records indicated that she had many lucid intervals in which she was competent. Additionally, the presence and participation of counsel for Appellant tends to diminish the argument that she was incompetent

at the time the agreement was signed. Upon these facts, we cannot conclude that the trial court's decision was clearly erroneous.

Appellant next argues that the marital partners' reconciliation effectively vacated the Separation Agreement. Kentucky courts have held that "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). When a property settlement agreement has been fully executed, reconciliation does not vacate the agreement unless the parties so intend. *Gordon v. Gordon*, 335 S.W.2d 561, 563 (Ky. 1960). Parties' intent to nullify an agreement may be shown by the acts and conduct of the parties and the surrounding circumstances.

On the other hand, where the provisions of a separation agreement are executory, the rule in Kentucky is that "a reconciliation of the spouses and . . . resumption of cohabitation by the parties to the separation agreement nullifies the agreement." *Peterson*, 583 S.W.2d at 709 (quoting *Goodaker v. Littell*, 314 S.W.2d 539, 540 (Ky. 1958)). However, even with executory agreements, reconciliation will not terminate the agreement "if the court can determine from other evidence the real intention of the parties." *Peterson*, 583 S.W.2d at 709 (quoting *Goodaker*, 314 S.W.2d at 540).

In this case, the provisions of the Separation Agreement were carried out by the execution, delivery, and recordation of deeds and the transfer of funds and property. The terms of the Agreement were executed, and the evidence shows

that all property remained separate until the date of Mr. Kristan's death. There was no proof of any commingling of properties or assets.

Finally, the Agreement itself may be of such character as to prevent renunciation by subsequent events. In *Hartley v. Hartley*, 305 Ky. 350, 203 S.W.2d 770 (1947), the agreement stated that it was the parties' intention for the agreement's provisions to remain in effect whether a divorce was granted or not, and to stand "in any action." In reaching the result that the agreement was not annulled by reconciliation, the Court wrote:

[i]t is clear to us that the provision of the contract was inserted to give permanence to the agreement, and that it clearly manifests that it was the intention of the parties at the time that no subsequent conduct should have any effect upon the division of the property.

*Id.* at 773. The preamble these parties used may be construed as having the same effect. It states, "the parties are desirous of effecting a settlement of their property rights, irrespective of whether or not a decree dissolving their marriage is entered." Other provisions of the agreement leave no doubt that it was intended to be final and irrevocable. Therefore, the trial court was not clearly erroneous in its conclusion that the parties did not intend to vacate their agreement by reconciliation.

For the foregoing reasons, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey C. Hoehler  
Monticello, Kentucky

BRIEF FOR APPELLEE:

Gordon T. Germain  
Monticello, Kentucky