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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-002084-MR

LINDA DAVIS — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 11-CI-00749

KAREN DAVIS and
THE ESTATE OF MATTHEW
DAVIS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER,[1] AND MAZE, JUDGES.

KRAMER, JUDGE: Linda Davis appeals an order of summary judgment from the Greenup Circuit Court dismissing various contractual and equitable claims she asserted against the estate of her former husband, Matthew Davis, and Matthew's widow, Karen Davis. We affirm.

[1] Judge Joy A. Kramer, formerly Judge Joy A. Moore.

The litigation forming the basis of this appeal was originally initiated on November 10, 2011, by Karen Davis and the estate of Matthew Davis against Monumental Life Insurance Company. Matthew had maintained a life insurance policy with Monumental since September 1997, and the object of the underlying proceedings was to compel Monumental to pay $100,000 representing the proceeds of that policy to Karen, Matthew's widow and designated beneficiary. However, Linda Davis—whom Matthew had divorced prior to marrying Karen—intervened to assert her own claim to the $100,000 in proceeds. She argued that the insurance policy should be equitably reformed to designate herself rather than Karen as the beneficiary. Alternatively, Linda filed a third-party complaint against Matthew's estate, asserting that if equity did not permit substituting herself as the beneficiary, Matthew's estate was nevertheless liable to her in the amount of $100,000 for breach of contract.

Linda's theories of recovery, whether characterized as legal or equitable, depended entirely upon the proposition that a "property settlement agreement that she and Matthew executed in their dissolution of marriage proceedings in Wayne Circuit Court constituted a binding and enforceable contract. The agreement was filed in the record and contained the following provision:

> 3. PROPERTY AND DEBTS:
> . . .
>
> F. Respondent [Matthew Davis] agrees to maintain his policy of life insurance with Monumental Life Insurance

> Company in the total amount of $100,000.00 and will keep the Petitioner as the beneficiary.

As this provision would imply, Linda was the original beneficiary of Matthew's life insurance policy with Monumental. Based upon this provision, Linda argued that Matthew had contracted to waive his otherwise absolute right to change the beneficiary of his Monumental policy to someone other than herself. Linda argued that in making this purported waiver, Matthew had granted her an enforceable "vested interest" in the proceeds. This "vested interest" was the right that Linda was seeking to vindicate by intervening and filing her third-party complaint.

In response to Linda's claims, Matthew's estate and Karen both contended that the aforementioned "property settlement agreement" was not a valid contract and, therefore, it granted Linda nothing. One of the reasons they offered in support of their contention--and the reason the Greenup Circuit Court ultimately found dispositive in summarily dismissing the balance of Linda's claims--was that when the Wayne Circuit Court dissolved Matthew's and Linda's marriage on May 27, 2003, its decree of dissolution entered on that date never incorporated or referenced the property settlement agreement, as mandated by Kentucky Revised Statute (KRS) 403.180(4)(a) and (b). This failure, the Greenup Circuit Court reasoned, effectively rendered the "property settlement agreement" a legal nullity.

Consequently, the issue presented in this appeal is whether the Wayne Circuit Court's failure to incorporate or reference the May 23, 2003 "property settlement agreement" document in its decree of dissolution rendered that document a legal nullity. Upon review, we agree that it did.

The apparent purpose of the May 23, 2003 "property settlement agreement" was to determine the division of marital assets between Matthew and Linda, along with the amount of maintenance Linda would receive, post-divorce. Generally speaking, KRS 403.180 authorizes spouses anticipating divorce to enter into these types of agreements (*i.e.*, "separation agreements"). But, this authorization is limited. In full, the statute provides:

> (1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.
>
> (2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.
>
> (3) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, support, and maintenance.

> (4) If the court finds that the separation agreement is not unconscionable as to support, maintenance, and property:
>
> > (a) Unless the separation agreement provides to the contrary, its terms shall be set forth verbatim or incorporated by reference in the decree of dissolution or legal separation and the parties shall be ordered to perform them; or
> >
> > (b) If the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and state that the court has found the terms not unconscionable.
>
> (5) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.
>
> (6) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

In *Shraberg v. Shraberg*, 939 S.W.2d 330 (Ky. 1997), the Kentucky Supreme Court explained that KRS 403.180 was designed by the General Assembly to protect parties from "their own irresponsible agreements." *Id*. at 333. To that end, KRS 403.180 requires courts to approve separation agreements. And, this statute only permits courts to approve separation agreements in one of two ways: (1) by setting forth the terms of the agreement verbatim or incorporating them by reference into the decree of dissolution, in which event the terms of the

agreement become enforceable as a judgment;[2] or (2) by identifying the separation agreement in the decree and stating that the terms of the agreement are not unconscionable, in which event the agreement simply becomes a contract.[3]

Here, when the Wayne Circuit Court entered its dissolution decree with respect to Matthew's and Linda's marriage, it failed to do either of these things; in fact, it made no mention of any property settlement agreement between Matthew and Linda. A panel of this Court has also determined that it is impermissible for Linda to reopen her divorce proceedings for the purpose of adding the requisite approval language into the dissolution decree. That determination is now binding. *See Davis v. Davis*, No. 2012-CA-001243-MR, 2013 WL 2450204 (Ky. App. June 7, 2013), *review denied* (April 9, 2014). Accordingly, the May 23, 2003 "property settlement agreement" between Matthew and Linda has never achieved and will never achieve court approval. Thus, it has never achieved and will never achieve any kind of legal viability.

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[2] *See* KRS 403.180(4)(a) and (5). As an aside, KRS 403.180(5) does not stand for the proposition, as Linda appears to insinuate over the course of her brief, that terms from a settlement agreement that have been incorporated into a dissolution decree become both a judgment *and* a contract. It merely stands for the proposition that once those terms have been incorporated into a judgment, those terms are subject to legal interpretation, rather than principles of equity. *See Bailey v. Bailey*, 231 S.W.3d 793, 797 (Ky. App. 2007).

[3] *See* KRS 403.180(4)(b), which simply reflects court *approval* of a separation agreement, as opposed to approval and incorporation. Approval of a separation agreement, standing alone, is not a command to pay what is due by its terms; therefore, there is no order of the court or decree of the court that has been violated in the event of nonpayment or nonperformance. Thus, when a party to a divorce action, where the court has only approved and ratified the agreement, asserts non-payment under its conditions, he or she is confined to a claim on contract, as opposed to contempt proceedings. This is implicit in KRS 403.180(5). For parity of reasoning, *see also Oedekoven v. Oedekoven*, 538 P.2d 1292, 1294 (Wyo. 1975).

Nevertheless, Linda attempts to rebut this outcome. In her brief, she makes the following argument:

> A claim for unjust enrichment is created by the common law and is not a statutory creation. If a statute such as KRS 403.180(5) does not expressly manifest an intention to abrogate the common law authority, it is well settled that the legislature intention [sic] to abrogate the common law will not be presumed and that such an intention must be clearly apparent. *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. App. 1981). Therefore, as KRS 403.180(5) does not make the agreement void, the attempt by Appellee Karen Davis to have this Court find that the statute prevents Appellant Linda Davis from maintaining an action for unjust enrichment is wrong in that it overrules the common law where the statute itself did not provide that the agreement would be void.

The essence of Linda's argument appears to be that because KRS 403.180 does *not* specifically provide that separation agreements that have *not* been approved by a court are absolutely *void*, they must be *valid* under the common law. And, reasoning that she and Matthew therefore had a valid separation agreement under the common law, Linda argues that where a valid separation agreement provides that one spouse promises to maintain the other spouse as a beneficiary to a life insurance policy and that promise is subsequently broken and the beneficiary is changed to another person, a court of equity may allow the aggrieved spouse to assert an unjust enrichment claim against the new beneficiary and impose a constructive trust upon the proceeds of the life insurance policy.

The fundamental problem with Linda's argument in this vein is that it is premised upon the notions that divorce, dissolution, and, by extension, separation agreements entered in anticipation of dissolution are based upon either common law rights or common law causes of action; and, that those common law rights or common law causes of action would continue to exist unless clearly and unequivocally abrogated by statute. As a general proposition, Linda is correct that the General Assembly only abrogates common law rights and causes of action by enacting statutes that clearly reflect its intent to do so. *See James,* 620 S.W.2d at 324. This is irrelevant, however, because divorce, dissolution, and, by extension, separation agreements entered in anticipation of dissolution are not common law rights or causes of action. As explained in *Peniston v. Peniston*, 511 S.W.2d 675, 676 (Ky. 1974),

> Divorce is a creature of statute in the United States, and the power of the legislature over the subject of marriage as a civil status and its dissolution is unlimited and supreme except as restricted by the Constitution. 24 Am.Jur.2d, Divorce and Separation, Section 4, page 178.
>
> The Commonwealth of Kentucky has adopted this general rule, and this court [h]as held that the legal right to a divorce in this state is purely statutory. *Williams v. Williams*, 136 Ky. 71, 123 S.W. 337 (1909).
>
> The legislative authority governing divorce proceedings is reflected by the statutes adopted.

Stated differently, the question is not whether KRS 403.180 was intended to *abrogate* a common law right that otherwise would have permitted Linda to make a legally binding separation agreement with Matthew. Rather, the

question is whether KRS 403.180—which is the *only* source of Linda's right to make a separation agreement with Matthew—gave Linda the right to enter into a legally enforceable separation agreement with Matthew, absent court approval. It did not. Therefore, Linda had no such right.

For these reasons, we AFFIRM the judgment the Greenup Circuit Court summarily dismissing Linda's claims against Matthew's estate and Karen.

ALL CONCUR.

BRIEF FOR APPELLANT:

D. Bruce Orwin
Somerset, Kentucky

BRIEF FOR APPELLEES:

John F. Vincent
Ashland, Kentucky