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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001369-MR

LINDA KAY LEWIS — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 13-CI-00365

ESTATE OF RICHARD D. LEWIS;
RUSSELL DEAN LEWIS, INDIVIDUALLY
AND AS CO-EXECUTOR OF THE
ESTATE OF RICHARD D. LEWIS; AND
DUSTIN RYAN LEWIS, INDIVIDUALLY
AND AS CO-EXECUTOR OF THE
ESTATE OF RICHARD D. LEWIS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES, AND NICKELL, JUDGES.

NICKELL, JUDGE: Linda Kay Lewis has appealed from the Greenup Circuit Court's July 16, 2015, order denying her claim against the estate of her deceased

husband, Richard D. Lewis, and the subsequent denial of her post-judgment motions to alter, amend or vacate the judgment and seeking additional factual findings.[1] Following a careful review, we affirm.

Linda and Richard jointly engaged the services of Hon. James Armstrong to assist them in obtaining a divorce. Armstrong prepared the necessary documents and aided the couple with what appeared to be an amicable divorce. A decree of dissolution was entered on April 5, 2010. In conjunction with the decree, the parties entered into a marital settlement agreement (MSA) which divided their assets. Pertinent to this appeal, the MSA contained a provision requiring Linda to execute a special warranty deed conveying the marital home to Richard. While Richard was free to convey the property during his lifetime, the MSA required him to execute a will devising the home and its contents to Linda at his death, in the event the property was not sold. Linda was to execute a will devising all her property to the parties' two sons, Russell Dean Lewis and Dustin Ryan Lewis.

Shortly before the decree was entered, Armstrong prepared drafts of the wills conforming to the requirements of the MSA and forwarded them to the parties for their review. The day after the decree was entered, Richard and Linda met with Armstrong to execute the deed and their wills. Linda signed her will as

[1] No arguments are presented to this Court challenging the denial of Linda's post-judgment motions. Thus, further discussion of those decisions is unwarranted.

Armstrong had prepared it. However, Richard's will was modified to mirror Linda's in leaving all of his property to their two sons.

Richard died on December 13, 2012, and his will, dated April 6, 2010, was admitted for probate shortly thereafter. On April 19, 2013, Linda filed a claim against Richard's estate for possession and ownership of the marital home and its contents. When the claim was denied, Linda filed the instant action seeking specific performance of the MSA and a conveyance to her of the marital home and its contents.

The parties filed stipulated facts along with deposition testimony from Linda, Russell, Dustin and Armstrong. Pertinent to the issues in this appeal, Armstrong testified Richard and Linda arrived at his office together and indicated their mutual desire to modify the language in Richard's will. He stated he advised the pair that such a change would contravene the language of the MSA and the proper course of action would be to file an amended MSA with the court if they desired to make such a change. The parties declined his advice, indicating they did not wish to expend additional funds to employ Armstrong to bring the matter before the court. After the two left his office, Armstrong drafted a brief memo to his file regarding what had occurred. Subsequently, Armstrong prepared an Affidavit more fully explaining the events of April 6, 2010. The memo and Affidavit were attached as exhibits to his deposition. Contrary to Armstrong's statements, Linda testified she was unaware of the modification of Richard's will and believed the marital residence would belong to her at his death. She stated she

was not in Armstrong's office with Richard on April 6, 2010, and "wouldn't have went any place with my ex-husband." Linda vehemently denied agreeing to the change in Richard's will and classified nearly all of Armstrong's statements as lies. Finally, Dustin testified he believed his parents had agreed to leave the marital home to him and his brother while Russell indicated he was unaware of whether an agreement existed.

The matter was submitted to the trial court for adjudication based on the pleadings, stipulated facts, tendered depositions and arguments of counsel. The trial court's order concluded Richard and Linda had agreed and orally modified the MSA with respect to marital residence. Based on this conclusion, the trial court implicitly denied Linda's claim and ordered the probate estate proceed as normal. Linda's subsequent motion to alter, amend or vacate pursuant to CR[2] 59.05 was overruled and this appeal followed.

Linda contends the MSA specifically precluded modification. Relying on *Brown v. Brown*, 796 S.W.2d 5 (Ky. 1990), she asserts the parties had settled their affairs "with a finality beyond the reach of the court's continuing equitable jurisdiction[.]" *Id.* at 8. Thus, Linda believes the trial court erroneously entered the order purporting to alter the terms of the MSA and more specifically, concluding oral modification of the MSA had occurred.

Before discussing the propriety of the trial court's ultimate rulings, we first undertake a brief discussion centering on Linda's contention the trial court

[2] Kentucky Rules of Civil Procedure.

improperly considered testimony from Armstrong as evidence. She cites no authority for her position save a single reference to a model rule of the American Bar Association, and precious little in the way of explanation or discussion. We will not search the record to construct Linda's argument where she has not done so, nor will this Court undergo a fishing expedition to find support for underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). We discern no error in the trial court's consideration of Armstrong's testimony and move to analysis of the merits of the appeal.

A close reading of the MSA provision at issue reveals the prohibition on modification is applicable only to "subsequent orders of the Court." No prohibition exists as to amendments or alterations by the parties themselves. Linda does not cite us to any precedent or statutory provision denying parties the right to settle post-decree issues nor requiring judicial intervention to modify agreements such as the MSA in issue here. We are convinced no such authority exists.

> As we have recently stated in other cases, in different context, the policy of the law is to encourage settlement in divorce litigation, whether prejudgment or post-judgment, and more particularly, to discourage as counterproductive to the welfare of the parties unnecessary post-judgment litigation.

Brown, 796 S.W.2d at 8-9 (citing *Likins v. Logsdon*, 793 S.W.2d 118 (Ky. 1990); *Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990)). In the instant

matter, the trial court was not asked to modify any term of the MSA. Rather, it was tasked with enforcing the parties' agreement, including any possible modifications to the terms.

After considering all the evidence before it, the trial court determined Richard and Linda had orally modified the terms of the MSA and enforced those terms.

> In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be 'clearly erroneous.' [CR] 52.01; *Stafford v. Stafford*, [618 S.W.2d 578 (Ky. App. 1981)]. This principle recognizes that the trial court had the opportunity to judge the witnesses' credibility.

R.C.R. v. Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36, 39 (Ky. App. 1998). The clearly erroneous standard set forth in CR 52.01 is based on a review for clear and convincing evidence. *W.A. v. Cabinet for Health and Family Services, Commonwealth*, 275 S.W.3d 214, 220 (Ky. App. 2008). As this Court has previously stated, clear and convincing proof does not mean uncontradicted proof. *Id.* Rather, it is sufficient if there is proof of a "probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 423-24 (Ky. App. 1986) (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)). We review the application of the law to the facts *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Although the evidence presented herein was certainly controverted and Linda disagrees with the weight and credibility assigned by the trial court, there was sufficient probative evidence to support the trial court's factual findings. Thus, no clear error exists. Additionally, we discern no error in the trial court's application of the law to the facts. An oral modification to an MSA will be enforced if the terms of the agreement can be reasonably established and the agreement is fair and equitable under the circumstances. While Linda now complains the trial court failed to specifically determine whether the modified terms would be fair or equitable, our review of the record reveals she never made such an argument below. It is axiomatic the trial court should first be given the opportunity to rule on questions before they are available for appellate review. "It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court." *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (citation omitted). The evidence before the trial court adequately permitted it to discern the terms of the modified agreement. There being no allegation now, nor before the trial court, that the modified agreement was unfair or inequitable, we cannot find fault in the trial court's decision. We discern no error.

For the foregoing reasons, the judgment of the Greenup Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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