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# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-000739-MR

ROBERT W. KENISON — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
DIVISION III/FAMILY COURT
HONORABLE MARCUS L. VANOVER, JUDGE
ACTION NO. 11-CI-01379

FRANCES E. KENISON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, NICKELL, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: Robert Kenison appeals an order of the Pulaski Family Court requiring him to pay $110,445.30 to his ex-wife, Frances Kenison, as reimbursement for Frances's payment of a margin loan debt associated with a Hilliard Lyons stock account. Upon review, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Robert and Frances were married on May 24, 1980. The parties separated in 2011, and Robert filed a petition for dissolution, through counsel, on November 23, 2011. Frances signed a written entry of appearance in the matter and was unrepresented. A "Marital Separation Agreement," signed by both parties, was filed with the family court on June 13, 2012.[1] Although Robert had representation throughout the proceedings, his attorney at the time did not sign the separation agreement, and there is no indication in the body of the document that an attorney reviewed it with either party. A decree of dissolution was entered on June 26, 2012.

On December 31, 2014, Frances, after obtaining counsel, filed a motion to re-open and re-docket the matter and a separate motion to compel. Frances sought an order from the family court compelling Robert to comply with various terms of the separation agreement, including reimbursing her for payment of one-half of the margin loan debt on a Hilliard Lyon's stock account. Frances argued that the debt was not her responsibility under the terms of the parties' separation agreement. After continuing the matter several times, the family court heard Frances's motions on March 13, 2015. Robert did not appear and was

[1] Robert signed the separation agreement on November 8, 2011. Frances signed on November 9, 2011.

unrepresented. Neither Robert nor his attorney filed a responsive pleading to Frances's motion.[2] On March 19, 2015, the family court entered an order requiring, in relevant part, that Robert pay Frances $132,119.83 "subject to any set-offs that may apply due to sums owed by the Respondent, **Frances E. Kenison**, to the Petitioner, **Robert W. Kenison**." (Emphasis in original). Robert timely appealed the order. His appeal was narrowly focused on whether the family court had jurisdiction to re-open the matter and whether service was proper. This Court affirmed.[3]

On October 6, 2016, Frances filed a motion to show cause stating that Robert had still not reimbursed her for the margin loan debt as previously ordered. The parties were ordered to attend mediation, which was unsuccessful. Frances filed a motion to submit for compliance on January 4, 2017. The matter was heard on January 30, 2017, and both parties were present and represented by counsel. The family court entered an order requiring Robert to pay $110,445.30 plus post-judgment interest to Frances. This amount represented $132,119.83 reimbursement for the margin loan debt, off-set by a credit to Robert of $28,000

[2] The record contains only email correspondence from March 11-12, 2015, between the parties' attorneys.

[3] *See Kenison v. Kenison*, 2015-CA-000601-MR, 2016 WL 4575634 (Ky. App. Sep. 2, 2016). Robert's first appeal focused on procedural matters only. We affirmed the family court on those issues, but the merits of the family court order were not considered. Therefore, we did not affirm the family court beyond the scope of the procedural issues raised in the first appeal.

for maintenance reimbursement. The court also awarded Frances attorney's fees of $6,325.51.[4] This appeal followed.

Robert claims that the family court erred in (1) assigning him 100% of the margin debt on the Hilliard Lyons stock account;[5] (2) awarding attorney fees to Frances; and (3) applying the doctrine of *contra proferentem* in its judgment. Robert argues that, as contained within the four-corners of the separation agreement, there is no ambiguity and that the margin loan debt was to be divided 50/50 between the parties. Alternatively, Robert argues that, if the contract is ambiguous, the family court erred by applying the doctrine of *contra proferentem*. Frances contends that the appeal should be dismissed under the doctrine of *res judicata*. Alternatively, Frances argues that there is no ambiguity in the separation agreement and that the terms of the contract, contained within the four corners of the document, clearly indicate that Robert was to assume the margin loan debt associated with the Hilliard Lyons account. Further facts will be developed as necessary.

[4] Robert was ordered to pay the attorney's fees directly to Frances, not to her attorney. *See, e.g., Fink v. Fink*, 519 S.W.3d 384, 385 (Ky. App. 2016).

[5] Robert is not disputing the amount of the margin loan debt, only the allocation of the entire amount to him.

## ANALYSIS

### I. Enforcement of the Separation Agreement

We must first correct two misapprehensions from the family court proceedings. The first is that this case involves enforcement of a separation agreement as a judgment. KRS[6] 403.180(5), cited by the family court below, states as follows with respect to separation agreements:

> 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.

(Emphasis added).

The separation agreement signed by both parties and entered into the record on June 13, 2012, was not set forth verbatim, nor was it incorporated by reference, into the decree of dissolution entered June 26, 2012.[7] The family court did not order the parties to perform according to its terms. The separation agreement did not state whether the parties intended that its terms be set forth in the decree of dissolution. Moreover, the family court did not make a finding of conscionability regarding the separation agreement.[8] The only reference to the

[6] Kentucky Revised Statutes.

[7] KRS 403.180(4)(a).

[8] KRS 403.180.

parties' separation agreement contained in the decree of dissolution is paragraph six, which states, "The parties have entered into a Written Separation Agreement and request that a Final Decree be entered in this matter."[9]

Because the separation agreement was not incorporated into the decree of dissolution, KRS 403.180(5) is inapplicable. However, KRS Chapter 403 is not the only source of jurisdiction for determining enforcement of the separation agreement. The family court is a division of the circuit court with general jurisdiction, defined by Section 112 of the Constitution of Kentucky, as well as statutorily through KRS 23A.100 and KRS 23A.110. As such, the family court may enforce the separation agreement between the parties in the instant action as a contract, even though the separation agreement was not incorporated into the final decree of dissolution pursuant to KRS 403.180. *Davis v. Davis*, 489 S.W.3d 225 (Ky. 2016). Neither party challenges the validity and enforceability of the separation agreement. Both parties are seeking enforcement of the agreement as a contract, albeit with competing interpretations.

## II. The doctrine of *res judicata*

The second misapprehension in this case comes from Frances, who asserts that Robert is estopped from arguing the merits of the order entered by the

[9] Although the opinion rendered in the first appeal stated, in *dicta*, that the decree incorporated the terms of the separation agreement, it did not.

family court on March 19, 2015 (specifically, the portion that ordered Robert to pay $132,119.83 to Frances), because Robert should have raised these issues in his first appeal. We disagree. The doctrine of *res judicata* is inapplicable to the case at bar because the action was not decided on its merits by the order entered in the family court on March 19, 2015. Rather, the case was fully resolved on its merits upon entry of the family court's order on March 14, 2017.

Frances moved to dismiss this appeal pursuant to the doctrine of *res judicata*. Although we denied Frances's motion in an interlocutory order, that ruling does not preclude us from revisiting the issues raised by Frances in her motion to dismiss. *Knott v. Crown Colony Farm, Inc.*, 865 S.W.2d 326, 329 (Ky. 1993). In her brief on the merits, Frances argues that *res judicata*, "prohibits the relitigation of claims that were litigated or could have been litigated between the same parties in a prior action." *See Miller v. Administrative Office of the Courts*, 361 S.W.3d 867, 871 (Ky. 2011). Frances asserts that, in challenging the family court's assignment of the margin loan debt to him, Robert is trying to relitigate claims that could have been litigated in his first appeal, but that he chose not to raise at that time.

"The doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, *is conclusive of causes of action and of facts or issues* thereby

litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998) (internal citation omitted) (emphasis added). The general rule for determining the question of *res judicata* as between parties in actions embraces several conditions. First, there must be identity of parties. Second, there must be identity of the two causes of action. Third, the action must be decided upon its merits. *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970).

CR[10] 54.01 defines a final or appealable judgment as a final order "adjudicating all the rights of all the parties in an action or proceeding." CR 54.02 provides a limited exception in that it allows for an appeal when less than all the rights of all the parties have been adjudicated, but only upon a determination that it is final and that there is no just reason for delay. Otherwise, the order is interlocutory and subject to modification and correction before becoming a final and appealable judgment or order. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

In the March 19, 2015 order, the family court determined that Robert owed Frances $132,119.83 subject to any "set-offs." Without a finding as to the exact amount of the "set-offs" due to Robert, if any, the action was not finally adjudicated because the exact amount Robert owed to Frances remained

[10] Kentucky Rules of Civil Procedure.

unresolved. The court did not state in the order that it was final and that there was no just reason for delay. Rather, the order remained subject to correction and modification based on any amounts Frances may have owed to Robert.

Robert went into the hearing on January 30, 2017, claiming that he was due "set-offs" totaling $372,101.97 from Frances. However, Robert produced no documentation to support his claims;[11] none of the amounts Robert alleged were addressed in any provision of the separation agreement; and the family court declined to give him credit for the claims, with the exception of $28,000 for maintenance reimbursement.[12] The family court's order became final when it determined that Robert owed Frances $110,445.30. Robert has not appealed any finding of the trial court related to the "set-offs."

## III. Standard of Review

The construction and interpretation of a contract is a matter of law and is reviewed *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

[11] Because Robert had failed to follow the family court's prior order to turn over financial transaction documents to Frances's counsel prior to the hearing, the family court, upon Frances's objection, declined to allow Robert to submit any financial documentation into evidence. The record does contain a spreadsheet, prepared by Robert, that lists various items and transactions for which he believed he was entitled reimbursement from Frances, totaling $372,101.97. Many of the items and transactions listed were during the marriage and prior to the parties' separation. Frances disputed the dollar amounts and Robert failed to provide proof for any item or transaction listed.

[12] Frances agreed that she owed this amount to Robert. Maintenance reimbursement is also addressed in paragraph 11 of the parties' separation agreement.

## IV. Assignment of the margin loan debt

Paragraph 9(d) of the parties' separation agreement reads, in relevant part:

> Robert Kenison and Frances Kenison own and agree to divide their retirement accounts as follows…
>
> Account Name: Robert Kenison, Annuity, Stocks, and Mutual Funds
> Financial Institution: Hilliard Lyons
> Current Account Owner: Robert Kenison
> Husband Receives: 50%
> Wife Receives: 50%

When Frances decided to liquidate the stocks in 2013, one-half of the account formerly owned entirely by Robert had been allocated to her by Hilliard Lyons. However, Hilliard Lyons had also transferred half of the margin loan debt associated with the original account to Frances. Hilliard Lyons informed her, via letter, that $132,119.83 was owed on the margin loan debt and that it must be paid before any disbursement could be made. Frances paid the debt. The remainder of the debt, also totaling $132,119.83, stayed with the half of the account still in Robert's name. Robert testified that the Hilliard Lyons stock account was divided 50/50 shortly after the parties signed the separation agreement (November 8 or 9, 2011). In his preliminary verified disclosure statement filed in the family court on June 11, 2012, Robert listed the fair market value of the Hilliard Lyons stock account that he owned (which would have been half of the original at that point) as

$200,000. The margin loan debt associated with the account was not listed on the preliminary verified disclosure statement. Frances testified that she had anticipated receiving approximately $200,000 from liquidation of her half of the Hillard Lyons stocks. She ultimately received approximately $75,000 (the margin loan debt did not exceed the value of the stocks).

Robert argues that Frances agreed to receive 50% of the margin loan debt associated with the Hilliard Lyons account when she agreed to 50/50 division of the stocks. He argues that, in all other aspects of property distribution, each party received the debt associated with any asset, and that this evinces the parties' intention that all debt was to be divided 50/50. Frances argues that the debt is not listed in the separation agreement; that she did not know about the margin loan debt when she signed the separation agreement; and that the agreement does in fact provide that the debt must be paid by Robert. We agree.

We review the assignment of the margin loan debt to Robert in the context of *Money v. Money*, 297 S.W.3d 69 (Ky. App. 2009). Margin loan debt is not just part of the overall value of an account, rather, it is separate indebtedness. Briefly, in *Money*, the wife received certain Ameriprise accounts with specified values pursuant to the terms of the parties' separation agreement. Upon allocation of the accounts after the divorce, Ameriprise also allocated a margin loan account to wife that had an outstanding debt of over $58,000. Ameriprise allocated the

debt to wife because it believed the indebtedness followed the account that wife received. The margin loan debt was not allocated in the parties' separation agreement. In affirming the lower court's decision to assign the debt to the husband, this Court looked to a subsection of the separation agreement that provided that the husband, "shall assume and pay all other indebtedness," and held that it was unambiguous.

The instant case has a similar fact pattern. Frances received half of a Hilliard Lyons account that had, at all times prior, been in Robert's name. Allocation of the account to Frances by Hilliard Lyons resulted in Frances receiving margin loan debt totaling $132,119.83. The margin loan debt was not addressed in the parties' separation agreement. The separation agreement signed by Robert and Frances also contained a "catch-all" clause regarding any debt not specified in the document. Paragraph 10 of the parties' separation agreement states:

> DEBTS. Each spouse will be responsible for any indebtedness incurred in his or her individual name prior to the date of marriage unless otherwise specifically stated in this agreement. Each spouse will be responsible for any indebtedness incurred in his or her individual name subsequent to the date of separation September 7, 2011 unless otherwise specifically stated in this agreement. Each spouse will be responsible for any indebtedness incurred in his or her individual name during the course of the marriage unless otherwise specifically stated in this agreement.

Each party was allocated certain debts in the separation agreement. For example, both parties assumed certain credit card debt and the amounts of those debts were listed. Frances assumed the $18,000 debt on a vehicle that she received. The debt on two pieces of real property that were to remain jointly owned after the dissolution was divided 50/50, and those amounts were also listed in the separation agreement.

Paragraph 10 of the separation agreement is unambiguous. The separation agreement lists Robert as the owner of the Hilliard Lyons account. It is undisputed that the Hilliard Lyons account was in Robert's name during the marriage and at the time the parties signed the separation agreement. Robert admitted that he was the sole owner of the account at the time the debt was incurred. The separation agreement does not specifically state that there is a margin loan debt associated with the Hilliard Lyons account. Robert did not dispute Frances's testimony that she never had access to the Hilliard Lyons account during the marriage and that she was not involved in Robert's decision to incur debt against the account.[13] Accordingly, Robert is responsible for the entirety of the margin loan debt associated with the Hilliard Lyons account. The

[13] Robert testified that the margin loan debt was incurred to purchase more stocks.

family court did not err in ordering him to pay $132,119.83 to Frances, pursuant to this Court's decision in *Money,* subject to any "set-offs."

Robert also argues that the family court erred in applying the doctrine of *contra proferentem* in assigning him the entirety of the margin loan debt. The doctrine of *contra proferentem* is inapplicable to the case at bar because there is no ambiguity in the separation agreement. However, any application by the family court was harmless error pursuant to CR 61.01.

The family court did not specifically find that there was or was not ambiguity in the separation agreement with regard to the margin loan debt. The family court recited two separate conclusions of law related to contract ambiguity. Paragraph 2 of the family court's conclusions of law states, "Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.,* 94 S.W.3d 381, 385 (Ky. App. 2002) (internal citations omitted). Paragraph 3 of the family court's conclusions of law states, "If an ambiguity is found in a marital separation agreement, the law requires that any such ambiguities be construed against the drafter of the document pursuant to the doctrine of *contra proferentem*." *McMullin v. McMullin,* 338 S.W.3d 315, 322 (Ky. App. 2011).

While these conclusions of law appear to be competing in the absence of a finding of ambiguity (or not) by the family court, even if we accept Robert's argument that paragraph 3 of the family court's conclusions of law is incorrect, paragraph 2 of the family court's conclusions of law is correct. Regardless, as previously stated, our review of the construction and interpretation of the contract is *de novo*; we find no ambiguity. The parties' intentions are discernable from the four corners of the document. *Cantrell Supply, Inc.*, 94 S.W.3d at 385. The fact that the family court cited the doctrine of *contra proferentem* is harmless error under CR 61.01.

## V. Attorney's fees

Citing KRS 403.220, the family court awarded Frances attorney's fees, in part, "due to the delay caused by the Petitioner through his willful failure to comply with the terms of the agreement." Robert claims that the family court failed to make necessary findings to entitle Frances to an award of attorney's fees. Specifically, he argues that the trial court failed to make a finding of financial disparity between the parties and failed to find that the award was reasonable. We disagree.

KRS 403.220 states, in relevant part, "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any

proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment." The Kentucky Supreme Court has held that the language of KRS 403.220 "requires only that the trial court consider the financial resources of the parties before awarding attorney's fees—not that a financial disparity exist." *Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018).[14]

The Kentucky Supreme Court has identified other relevant factors in determining an award of attorney's fees pursuant to KRS 403.220; namely (a) amount and character of services rendered; (b) labor, time, and trouble involved; (c) nature and importance of the litigation or business in which the services were rendered; (d) responsibility imposed; (e) the amount of money or the value of property affected by the controversy, or involved in the employment; (f) skill and experience called for in the performance of the services; (g) the professional character and standing of the attorneys; and (h) the results secured. Additionally, "obstructive tactics and conduct, which multiplied the record and the proceedings" are proper considerations "justify[ing] both the fact and the amount of the award." *Sexton v. Sexton,* 125 S.W.3d 258, 272-73 (Ky. 2004).

[14] *Smith* overrules *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001), which was cited by Robert in his brief.

The family court heard extensive testimony regarding the financial resources of both parties, including businesses and real property owned both jointly and individually. The March 19, 2015 order indicated that Robert was perhaps entitled to "set-offs," but Robert never motioned the family court to determine specific amounts, even though he eventually claimed that Frances owed him over $372,000.[15] Rather than seek determination through the family court, Robert prolonged the litigation by continuing to refuse to pay Frances. He also failed to comply with at least one family court order requiring him to turn over financial documentation to Frances. As a result, Frances was forced to repeatedly bring the matter back before the family court. By the time the family court entered its final order, Frances had been trying to collect the money Robert was ordered to pay for over two years. The family court had substantial information before it to justify an award of attorney's fees to Frances.

## Conclusion

For the foregoing reasons, the judgment of the Pulaski County Family Court is affirmed.

[15] The record shows that Robert filed a motion to reopen evidence on February 13, 2017 (two weeks after conclusion of the final hearing), because he wanted to present email messages between the parties that purportedly addressed funds he claimed were owed to him by Frances from the sale of a condominium. The family court did not directly rule on Robert's motion, but declined to give him the $50,000 credit he claimed. Robert is not appealing that portion of the family court order.

NICKELL, JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent from the portion of the opinion assigning the margin debt in the retirements account to Robert. I disagree that a *de novo* reading of the parties' separation agreement requires that Robert pay the margin debt associated with his retirement account; instead, the separation agreement should clearly be interpreted to equally divide the value of this retirement account.

The majority opinion misreads *Money v. Money*, 297 S.W.3d 69 (Ky.App. 2009), and conflates the accounts discussed there with the single account at issue here; therefore, *Money* is distinguishable and does not control the situation before us. In *Money*, the wife was awarded four accounts from Ameriprise under a settlement agreement: an IRA money market fund, joint mutual funds, an IRA mutual fund and a joint security fund. *Id.* at 71. It was Ameriprise that assigned a fifth account to her, a margin loan account with a negative cash balance of $58,469.52. *Id.* It is unclear from the *Money* decision just what was in the account; likely the margin loan account had stocks in it as security but these assets were worth less than the outstanding debt balance, resulting in that negative cash balance.

Margin loan accounts may have a negative or positive balance, with stocks deposited in the account as security for loans used to purchase additional stock. In *Money*, the margin loan account, which was not listed in the settlement agreement, was a debt and properly the husband's responsibility because he agreed to pay all other indebtedness. *Id*. at 71-72.

In contrast, Robert's retirement account appears to either be a single account, or subject to treatment by the parties as a single account, as it is denoted in the settlement agreement as "Account Name: Robert Kenison, Annuity, Stocks, and Mutual Funds[.]" This retirement account, as an indivisible whole, was divided in equal halves between Robert and Frances. Even though the annuity, stocks and mutual funds are each separate assets, here the margin debt was not contained in a separate account but irrevocably linked to the retirement account and secured by its assets as noted in the majority opinion.

Unlike the accounts discussed in *Money*, the margin debt was part and parcel of the retirement account. It ran with the retirement account, specifically with the stocks that were part of that account, much like a mortgage runs with the land encumbered by it. The value of the retirement account is the net value of the annuity, stocks and mutual funds, less any margin debt. Under these circumstances, to order Robert to pay Frances the margin debt is inequitable.

Frances is not challenging the validity and enforceability of the separation agreement. If she were doing so under the belief that Robert committed fraud in disclosing the value of the retirement account without accounting for the margin debt encumbering it, then that would be a separate issue which could be decided by extrinsic evidence as to the settlement negotiations.

I concur that the separation agreement could properly be enforced as a contract and that *res judicata* does not estop Robert from arguing the merits of the family court's order. I also concur that attorney fees were properly awarded to Francis under the circumstances.

Accordingly, I concur in part and dissent in part.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| David Jorjani<br>Corbin, Kentucky | Heidi S. Powers<br>Somerset, Kentucky |