

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001078-MR

JIMMY LEE GARDNER

APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 96-CI-000187

ANNIE MAE GARDNER

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; HUDDLESTON, KNOX, JUDGES.

KNOX, JUDGE: Appellant, Jimmy Lee Gardner (Jimmy Lee), appeals an order of the Logan Circuit Court affirming the recommendation of the domestic relations commissioner that the terms of the Gardeners' separation agreement, incorporated into their dissolution decree, were not unconscionable.

Jimmy Lee and appellee, Annie Mae Gardner (Annie Mae), were married on March 3, 1984. Annie Mae commenced receiving disability benefits and a nominal retirement sometime during 1985, as a result of mental illness. Jimmy Lee was employed by the Tennessee Valley Authority (TVA) until he suffered some form of injury on or about October 5, 1990. In 1991 and 1992, Jimmy

Lee was granted disability and retirement benefits respectively. Further, as a result of his injury, Jimmy Lee filed a workers' compensation claim in 1991. The claim was denied and, in 1994, Jimmy Lee appealed this unfavorable decision which remained pending at the time the present appeal was briefed by the parties.

Initially, the parties intended to dissolve their marriage in May 1995. At this time, Annie Mae sought the advice of an attorney, Lela Shepherd (Shepherd), who counseled Annie Mae on dissolution proceedings. Jimmy Lee and Annie Mae met with Shepherd and communicated their desires with respect to the terms of a separation agreement. Jimmy Lee signed an affidavit affirmatively stating that he specifically waived any objection to Shepherd's representation of Annie Mae. For reasons that are not clear to this Court, the parties requested attorney Shepherd withdraw the dissolution documents, although same had been delivered to the circuit clerk's office but not opened.

The parties, again, sought to dissolve their marriage in May 1996. Once more, they sought the assistance of attorney Shepherd. The original separation agreement of May 1995 was provided to Jimmy Lee for his review and approval. Apparently, he sought a third party's opinion with respect to the contents and conditions set forth in the documents. Upon return to Shepard's office, the only revision Jimmy Lee requested was that Annie Mae be removed as recipient of the survivor benefits under Jimmy Lee's TVA retirement plan. In Jimmy Lee's presence, Shepard contacted the TVA who informed that since Jimmy Lee

elected retirement status in 1992, at which time he exercised the survivor option, he was precluded from altering his contract. Other than this request, neither party made any noteworthy modification to the original separation agreement of 1995.

The findings of fact, conclusions of law, and decree of dissolution of marriage were entered on June 6, 1996, and provided, inter alia: (1) life time maintenance to Annie Mae in a sum of \$496.50 per month; (2) one-half of Jimmy Lee's workers' compensation award to Annie Mae, should Jimmy Lee prevail on appeal; (3) division of marital property; and, (4) identification of marital debts.

In November 1996, Jimmy Lee filed a motion to vacate, alter or amend the dissolution decree, alleging that since he retained only minimal reading and writing skills, he did not understand the contents and consequences of the legal documents he had executed. The matter was heard before the domestic relations commissioner on November 19, 1996, who concluded the agreement was not unconscionable and, thus, not subject to be set aside. Several hearings were subsequently held in this matter with, ultimately, the circuit court holding the agreed findings of fact, conclusions of law and decree enforceable. It is from that order this appeal ensued.

Jimmy Lee argues the separation agreement as incorporated in the decree of dissolution is unconscionable within the meaning of KRS 403.180, respecting the issues of division of personal property, any workers' compensation award Jimmy Lee may receive, and the award of lifetime maintenance. He

further contends that he understood his maintenance obligation was to remain in effect only through December 1996. He posits his illiteracy hindered his ability to comprehend the nature and ramifications of the agreement which he entered into and permitted Annie Mae to engage in overreaching.

On the other hand, Annie Mae, proceeding pro se, asserts Jimmy Lee was fully aware of the terms and conditions of the separation agreement, having entered into same voluntarily. She asserts Jimmy Lee had ample opportunities to obtain legal counsel had he any doubts as to the implications of the agreement and chose to forego that avenue. Rather, Annie Mae believes Jimmy Lee's new romantic interest prompted him into welching on his prior promises.

The separation agreement, as incorporated in the final decree provides, in pertinent part:

IX.

That Respondent/Husband, Jimmy Lee Gardner, should be required to pay maintenance to Petitioner/Wife, Annie Mae Garner, in the amount of \$496.50 per month beginning 5th of month following month of sale of marital residence and both move from said marital residence; the \$496.50 per month is calculated by adding together Annie's and Jimmy's retirements and Annie's and Jimmy's Social Security benefits received[,] then dividing by two and Jimmy's paying to Annie the amount which gives to both Annie and Jimmy the same amount of money. At the time the Social Security checks amounts change, this calculation shall be made and the amount which will cause Annie and Jimmy each to have the same amount, shall be paid by Jimmy to Annie. Further, Jimmy shall not change his retirement contract which states that should Jimmy predecease Annie that Annie shall continue to receive Jimmy's TVA retirement benefit but in the amount of one-half the amount Jimmy receives.

. . . .

That marital property should be set aside as follows:

7. ½ of Jimmy's Workers Compensation claim yet to be settled[.]

The remaining provisions respecting the division of property grant Annie Mae her automobile, a lawnmower, a weed eater, wrought iron table, chairs and swing, two (2) antique chairs from the front porch, all household items excepting an antique dresser, the Chow Chow dog "Blackie," and her personal items. Similarly, Jimmy Lee received his automobile, a pick-up truck, a fiberglass boat, a John Deere riding lawnmower, a John Deere garden tiller, a satellite dish, an antique dresser, one-half (1/2) of Jimmy Lee's pending workers' compensation award, and personal items.

The law concerning modification of separation agreements is codified in KRS 403.180 and KRS 403.250. Specifically, KRS 403.180(2) addresses modification "[i]n a proceeding for dissolution of marriage[,]" providing that the court may direct a separation agreement to be modified, prior to entering the final decree, where the court deems the agreement unconscionable. The gist of this statutory provision is to permit the trial court to ascertain the reasonableness of the agreement where the parties offer no proof of economic circumstances, in that the proceeding is "uncontested." Trial courts can request such information, but as a general practice, viewing the matter as "agreed," usually decline to do so.

Here, the domestic relations commissioner made a specific finding that the terms of the original findings of fact and conclusions of law were not unconscionable. This finding followed a hearing on Jimmy Lee's motion to alter, amend or vacate the dissolution decree, which the domestic relations commissioner treated as a motion under CR 60.02. Jimmy Lee's challenge goes to both aspects of maintenance and property division. Ordinarily, since the request for modification has arisen post-decree, KRS 403.250(1)¹ would be applicable. However, because KRS 403.180 contemplates a challenge of unconscionability by a party to the agreement, our analysis focuses on the factors necessary to support such an argument.

We first note that KRS 403.180 was designed to permit parties to a dissolution proceeding the ability to divide their property and interests by way of contract. KRS 403.180(1) provides that in order to promote amicable settlement of disputes between parties attendant to their separation or dissolution of their marriage, they may enter into a separation agreement containing provisions for maintenance, disposition of property, custody, support and visitation of children.

¹ KRS 403.250(1) provides:

Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(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.

KRS 403.180(2)(3).

Modification cases analyzed under KRS 403.250 have defined unconscionable as "manifestly unfair and inequitable." Wilhoit v. Wilhoit, Ky., 506 S.W.2d 511, 513 (1974). In Peterson v. Peterson, Ky. App., 583 S.W.2d 707, 712 (1979), this definition was deemed applicable to a court's initial ruling on agreements under KRS 403.180. "Thus, an agreement could clearly be set aside on the basis of fraud, undue influence, or overreaching. On the other hand, an agreement could not be held unconscionable solely on the basis that it is a bad bargain." Id. Further, deceit, mental instability, threats, inducement of guilt, and economic provisions are additional factors to be considered in ascertaining the reasonableness of the agreement. Shraberg v. Shraberg, Ky., 939 S.W.2d 330, 333 (1997). In that the law favors stability with respect to these agreements (KRS 403.110, KRS 403.180), the party challenging same bears a "definite and substantial burden" of proof. Peterson, 583 S.W.2d at 711. (Citations omitted). As such, the trial court's decision

on conscionability, or lack thereof, should not be set aside unless clearly erroneous.

In the instant case, the domestic relations commissioner, after considering the circumstances surrounding the agreement and hearing the evidence regarding the parties' economic positions concluded: (1) the parties announced their agreement to attorney Lela Shepherd, who "reduced it to a written form, and each of them signed it as having not only agreed to it but also having read it and understood it[;]" (2) the 1996 decree was really a second attempt at a divorce the parties initiated in 1995, the only distinction between the entered decree and the original 1995 proposal being several amendments the parties made during the interim period; (3) there was no merit to Jimmy Lee's position that he believed attorney Shepherd was acting as his attorney, hence providing him with legal advice regarding the agreement, in that (a) Shepherd's own testimony refuted this notion and, in fact, (b) Jimmy Lee signed a waiver in 1995 indicating his understanding of Shepherd's representation of Annie Mae, and there being no indication that he believed any differently in 1996; (4) there was ample opportunity in which to have the proposed agreement reviewed by another, whether an attorney or not, so as to negate his position that he neither read nor understood the agreement; specifically, the fact that Jimmy Lee desired to have the beneficiary provision of his TVA retirement plan changed, to exclude Annie Mae as the recipient of same should he predecease her, underscored the fact that Jimmy Lee was fully aware of the benefits and form of maintenance

contained in the agreement; and, (5) while Jimmy believed the agreement to be a bad bargain, such was not a legal basis to set aside the agreement, and upon review the terms to which the parties agreed, as set out in the findings of fact and conclusions of law and decree of dissolution of marriage, were not unconscionable.

The circuit court thoroughly reviewed the commissioner's report and, following several hearings on the matter, entered an order on April 8, 1997, directing, inter alia:

[T]hat as it pertains to the above motions filed on behalf of the Respondent for exceptions to the previous Commissioner's Report dealing with his maintenance obligation, the Court specifically finds that the Respondent was aware of the terms set forth in the Agreed Findings of Fact and Conclusions of Law, and was specifically aware that the parties had negotiated a method by which they would have an equalization of income after the divorce and the attempts now raised by the Respondent to set aside those provisions so as to deprive the Petitioner the benefit of such bargain and receiving a maintenance in the amount of \$496.50 per month for the rest of her life on the basis that he either did not understand same, or did not think the provisions would last beyond December of 1996 are without merit.

Our review of the record reflects that Jimmy Lee falls short in meeting his burden of proof. There is no evidence of fraud, deception, overreaching or otherwise a showing of fundamental unfairness. There is no evidence Jimmy Lee's economic circumstances had changed from the time he executed the agreement, or that the terms of the agreement cast him into financial straits. Rather, as the court correctly concluded, the

agreement merely equalized the income of both parties, as intended.

Further, with respect to the division of any potential workers' compensation award Jimmy Lee may receive, or the allocation of marital property, we believe the parties' right and ability to contract controls. In construing a contract, and the manner in which it is to operate, the court must acknowledge the parties' intent at the time of the agreement as governing. See Leathers v. Ratliff, Ky. App., 925 S.W.2d 197, 198-99 (1996). There is not so disparate a division of property as to render the separation agreement noticeably lopsided. Rather, the record reflects Annie Mae to have entered the marriage with substantial non-marital equity in her former home. As such it is reasonable to perceive the parties divided their belongings and financial resources according to their knowledge of specific financial facts. Since the trial court is in the best position to discern the evidence and circumstances surrounding the agreement, as well as to ascertain the credibility of the witnesses, its findings will not be disturbed absent evidence of fraud, undue influence, overreaching, emotional distress, or a change in circumstances from the time the original agreement was executed. Peterson, 583 S.W.2d at 712. Applying that standard to the facts and circumstances before us leads to the conclusion that the decision below was not clearly erroneous.

The judgment of the Logan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

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