

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000032-MR  
AND  
CROSS-APPEAL NO. 1998-CA-000212-MR

THOMAS E. TERWILLIGER

APPELLANT/CROSS-APPELLEE

v. APPEALS FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES GREEN, JUDGE  
CIVIL ACTION NO. 93-FD-02892

JUDITH H. TERWILLIGER

APPELLEE/CROSS-APPELLANT

### OPINION AND ORDER

REVERSING APPEAL NO. 1998-CA-000032-MR

AND

DISMISSING CROSS-APPEAL NO. 1998-CA-000212-MR

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BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge. Thomas Terwilliger appeals from a Jefferson Family Court order that modified a marital settlement agreement, which had been incorporated into a Decree of Dissolution of Marriage. Thomas argues that the family court was without jurisdiction to modify the settlement agreement and abused its discretion in modifying the division of property agreed to by the

parties. Judith Terwilliger cross-appeals on grounds that the family court abused its discretion in the valuation of Thomas' alleged business damage settlement.

In October 1993, Thomas filed a petition for dissolution of marriage. Without the aid of counsel, Thomas and Judith negotiated a marital settlement agreement that provided for the custody and visitation of their two minor children, support, maintenance and division of their marital property and debt. As part of the division of marital property, Thomas agreed to transfer ten shares of stock, the equivalent of ten percent ownership, in each of five privately owned corporations to Judith. Thomas, who prepared a list of assets and liabilities of both parties, valued the stock in all five corporations at \$111,000.00. Shortly after the settlement agreement was signed, Thomas began to negotiate the sale of one of the five corporations listed in the settlement agreement, Health Services, Inc., d/b/a Trans-American Cable and Mid-American Cable, Inc. The negotiations, however, did not result in a sale. On January 6, 1994, the family court dissolved the marriage and entered a Decree of Dissolution which incorporated the settlement agreement by reference.

In February 1994, Thomas agreed to sell Mid-American Cable, Inc. to ICG Access Services, Inc. for \$1,600,000.00. In December 1994, Judith filed a motion to reopen the Decree of Dissolution and modify the settlement agreement pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 and Kentucky Revised Statute (KRS) 403.250. Specifically, Judith alleged that the stock transfer she had agreed to in the settlement agreement was procured

through fraud, misrepresentation, lack of full disclosure and overreaching on behalf of Thomas. On March 18, 1996, Jefferson Family Court granted Judith's motion to reopen the Decree of Dissolution. On December 8, 1997, after holding a hearing, the family court modified the division of property and awarded Judith \$384,166.50 (equaling one-half of the profits realized from the sale of Mid-American Cable, Inc., less monies she previously received from the sale), a couch valued at \$800.00 in exchange for the return of Thomas's tools, and a one-half interest in a Fantasy speedboat valued at \$5,000.00. This appeal and cross-appeal followed.

On appeal, Thomas argues that Judge James M. Green, a district court judge serving as a "special circuit judge" in the Jefferson Family Court project, was without jurisdiction to modify a Decree of Dissolution entered by a circuit court judge. While Thomas acknowledges that the Kentucky Supreme Court, in Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679 (1994), upheld the Chief Justice's authority to assign a district judge to the Jefferson Family Court project to serve as a special circuit judge and decide cases that were normally within the exclusive jurisdiction of the circuit court, he argues that due to the temporal nature of the Chief Justice's authority, the appointment's are no longer constitutional. We disagree. After reviewing Kuprion, supra, we find that the analysis provided therein is still applicable.

Next, Thomas argues that the family court erred in modifying the Decree of Dissolution. The provisions of a Decree of Dissolution relating to the disposition of property "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." KRS 403.250(1). The law of this state relating to the reopening of a judgment is found in CR 60.02. In Judith's brief to this Court, she maintains that her motion, filed pursuant to CR 60.02(d), was based on fraud, mistake, overreaching and/or unconscionability.

A court may relieve a party from its final judgment on grounds that there was "fraud affecting the proceedings, other than perjury or falsified evidence." CR 60.02(d). The type of "fraud affecting the proceedings" necessary to justify reopening under CR 60.02(d) generally relates to extrinsic fraud. Rasnick v. Rasnick, Ky. App., 982 S.W.2d 218, 219 (1998) (citing 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 60.02, cmt. 6 (5th ed. 1995)). Extrinsic fraud covers "fraudulent conduct outside of the trial which is practiced upon the court, or upon the defeated party, in such a manner that he is prevented from appearing or presenting fully and fairly his side of the case." Id.

In the case sub judice, the family court reopened the Decree of Dissolution upon finding that: (1) Thomas convinced Judith to proceed without the aid of counsel in order to save money; (2) Thomas prepared the settlement agreement; and (3) Thomas convinced Judith that the corporations were near bankruptcy and she needed to sign the settlement agreement to prevent the possibility of losing her home to creditors. While Thomas's behavior, as evidenced by the findings stated above, is extremely disturbing, it

does not rise to the level of "fraud affecting the proceedings" within the meaning of CR 60.02(d).

Judith moved the family court to reopen the Decree of Dissolution because Thomas fraudulently led her to believe that the corporations were near bankruptcy, which resulted in her agreement to accept a ten percent transfer of ownership rather than a more proportional share. This is the same argument which was rejected in Rasnick, supra. In that case, the circuit court divided the Rasnick's marital property according to a property settlement agreement executed by the parties. Several months later, Suzanne Rasnick moved the court, pursuant to CR 60.02, for relief from the property settlement claiming that she was fraudulently led to believe that the parties' net worth was far less than it actually was and, as a result, gave up a disproportional amount of property accumulated during the marriage. The circuit court's denial of Suzanne Rasnick's motion, insofar as it related to the property dispositions, was affirmed because the "nondisclosure of assets in a dissolution action does not constitute 'fraud affecting the proceedings' as the term is used in CR 60.02(d)." Rasnick, 982 S.W.2d at 221.

The same reasoning can be applied to the case sub judice. Judith has failed to demonstrate how Thomas' failure to disclose the true value of the corporations is fraud "affecting the proceedings." CR. 60.02(d). In addition, the value of the corporations could have been obtained through formal discovery had Judith elected not to sign the settlement agreement. McMurry v. McMurry, Ky. App., 957 S.W.2d 731 (1997).

As an alternative ground to reopen the dissolution decree, Judith contends that the settlement agreement was unconscionable. She argues that according to Shraberg v. Shraberg, Ky., 939 S.W.2d 330, 330 (1997), the trial court was in the best position to determine whether the agreement was unconscionable and this court should grant broad deference to such determination. In a post-dissolution motion, before a trial court may consider the unconscionableness of an agreement, one of the grounds listed in CR 60.02 must be found and the decree reopened. Judith's failure to satisfy her burden under CR 60.02 prohibits the court from reopening the decree and determining whether it was unconscionable.

For the reasons stated above, we find that the family court erred in granting Judith's CR 60.02 motion and by modifying the division of property provisions in the marital settlement agreement incorporated into the January 6, 1994, Decree of Dissolution and, accordingly, its December 8, 1997, order is reversed.

Judith's cross-appeal is directly related to the manner in which the family court distributed the funds from the sale of the corporation. Because the cross-appeal involves an issue which arose after the circuit court incorrectly reopened the Decree of Dissolution, it is hereby ordered dismissed.

KNOPF, Judge, CONCURS.

GUDGEL, Chief Judge, DISSENTS.

ENTERED: October 22, 1999

/s/ Joseph R. Huddleston  
Judge, Court of Appeals

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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