

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000986-MR

KATHY ANN COX KELLEY

APPELLANT

v. APPEAL FROM CHRISTIAN FAMILY COURT
HONORABLE JUDY A. HALL, JUDGE
ACTION NO. 03-CI-00109

FLOYD MICHAEL KELLEY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹
MILLER, SENIOR JUDGE. Kathy Ann Cox Kelley (Kathy) brings this
appeal from a Final Decree of Dissolution of Marriage, entered
August 12, 2004, from the Christian Family Court. Before us,
Kathy argues that the family court abused its discretion in 1)
finding that the prenuptial agreement was enforceable; 2)
finding that no marital equity existed in the Pyle Lane real

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

property; 3) assessing the amount of nonmarital interest in the Pat Avenue real property; 4) failing to award Kathy maintenance; and 5) failing to award Kathy attorney fees and expenses.

We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01 and questions of law *de novo*. Bob Hook Chevrolet Isuzu, Inc. v. Transportation Cabinet, 983 S.W.2d 488, 490 (Ky. 1998). As we conclude that the findings of the trial court are supported by substantial evidence and the trial court correctly applied the law, we affirm.

Kathy and Appellee Floyd Michael Kelley (Mike) met in 1994. At the time, Kathy was 32, twice-divorced with a minor child, living in Hopkinsville, and working at her sister's collection agency. Mike was 49, in the midst of a divorce, living in Louisville, and had owned Nationwide Collection Corporation (NCC) for fifteen years.

In March, 1995, Kathy moved into Mike's east-end Louisville residence. She began working at NCC, and was responsible for managing and collecting accounts at a salary of \$800.00 every two weeks or \$1,733.00 monthly.

In the two years they lived together before they married, Mike testified that Kathy became aware of and had seen documents relating to his personal finances, including his net worth and investments. Kathy, however, indicated that all she

knew was that Mike owned NCC and some Vencor stock. In any event, it was undisputed that because of Mike's pending divorce Mike and Kathy had discussions regarding Mike's net worth and property distribution.

Following from discussions as to such in the year before they married, Mike's attorney prepared a prenuptial agreement. Kathy had the document reviewed by an attorney in Hopkinsville who advised her in writing of interests that she was waiving by signing it, specifically that in the event of death or a divorce the parties waived any interest in each other's estates and marital property, as well as spousal support. Per the attorney's advice, the agreement was modified only insofar as it related to the wording of the circumstance upon which Kathy would receive \$500.00 per month for twelve months upon leaving the marital home.²

² In relevant part, the agreement states:

2. . . . (E)ach party hereby releases and discharges the other completely and forever from any and all rights of past, present and future support, (except for child support for children born of this marriage), division of property, right of dower, right to act as administrator or executor in either estate, right of distributive share in either estate, or any other property rights, benefits or privileges accruing to either by virtue of said marriage relationship or otherwise, and whether the same are conferred by the statutory law or the common law of Kentucky, of any other state or of the United States. . .

4. It is the understanding between the parties that this Agreement except as otherwise provided herein, forever and completely adjusts, settles, disposes of, and completely terminates, any and all rights, claims, privileges and benefits that each other now has, or each may have reason to believe each has against the other, arising out of said marriage relationship or otherwise, and whether the same are conferred by the laws of the Commonwealth of Kentucky, of any other state, or of the United States, and which are now, or which may hereafter be, in force and effect.

5. This Agreement is intended to settle all possible future problems and lead to a more tranquil marriage and, if it occurs, the dissolution of

After eight months of marriage, the parties separated. Kathy returned to Hopkinsville and lived in a house on Pat Avenue that was purchased for \$76,500.00. Mike paid the down payment of \$16,500.00 and the remainder of the purchase price (\$60,000.00) was obtained through a mortgage. Although Kathy no longer worked at NCC, she continued to draw her salary, and used this money to make the mortgage payment.

Eight months later, in August, 1998, Mike sold NCC, netting \$399,659.24. Employment agreements with NCC yielded \$375.00 twice each month and health insurance coverage for Mike; and \$125.00 twice each month and health insurance coverage for Kathy. It was also agreed that Mike would be paid \$49,000.00 annually not to compete with NCC.

After the sale Mike moved to Hopkinsville. Mike paid a down payment of \$37,500.00 on a residence and adjoining lot on Pyle Lane. Although a mortgage of \$180,000.00 secured the remainder of the purchase price, shortly after the purchase the mortgage was retired from Mike's NCC proceeds.

Sixty-thousand dollars in improvements (for an in-ground pool and bath house/shop) were made to the property,

marriage with as few points of contention as possible. The parties acknowledge that they have had the opportunity of advice of counsel of their own selection and that they are entering into this Prenuptial Agreement freely, voluntarily, and with full knowledge of its legal effect.

6. If, during the marriage, the parties separate and the wife moves from the marital home, the husband will pay the wife \$500.00 per month for twelve months.

funded by a line of credit on the property. Mike paid for one-quarter of these improvements out of his personal account.

Mike and Kathy lived on their income from the employment agreements, the noncompete clause, and other amounts owed by the purchase of NCC to Mike. Kathy also received \$400.00 monthly in child support. Over a period of time Mike's payments from the sale of NCC reduced from \$6,900.00 monthly to an inconsistent \$2,000.00 monthly.

After five and one-half years of marriage the parties separated and Mike filed for dissolution. Kathy later failed in her attempt to have the prenuptial agreement declared unenforceable.

The matter came to trial on February 20, 2004. At the time of the trial, both parties were driving leased vehicles. Kathy's lease of a Buick Rendezvous (in Mike's name) was \$570.00 per month. Mike's lease of a Nissan Maxima was \$404.00 per month. Mike paid both lease payments, the car insurance premiums, the loan on the indebtedness on the Pyle Lane property, the mortgage payments on the Pat Avenue property, and the homeowners insurance on both parcels of real property.

Also at the time of the trial, Kathy was employed full-time by Pennyrile Collection, earning \$8.00 per hour and working 40 hours per week. Mike was employed in a consulting capacity with NCC and had a furniture business on the side.

Kathy's credit card debt, which was solely in her name, increased from \$5,000.00 at the time of the marriage to \$12,000.00 at the time of the separation to in excess of \$45,000.00 by the time of the final hearing.

Both parties appeared with counsel, and the family court made findings and conclusions as to real property, maintenance, and attorney fees/costs now contested on appeal by Kathy.

Kathy first contends that the family court abused its discretion in finding the prenuptial agreement enforceable. Gentry v. Gentry, 798 S.W.2d 928, 936 (Ky. 1990) provides that while antenuptial agreements are permitted, enforcement of such agreements is subject to the trial judge employing three criteria in determining whether to enforce such an agreement in a particular case: 1) was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts; 2) is the agreement unconscionable; and 3) have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable. Before us, Kathy argues that the family court's findings are erroneous as to the first criteria (non-disclosure of material facts) and third criteria (change of circumstances rendering enforcement unfair and unreasonable).

On November 20, 2003, the family court entered an order finding that the prenuptial agreement was not unconscionable on its' face, finding in relevant part:

Both [Mike] and [Kathy] were previously married. For over two (2) years during the pendency of [Mike's] divorce, [Kathy] cohabitated with [Mike]. During this time, [Mike] was actively involved in an acrimonious divorce proceeding with his now former wife. [Mike] testified that he talked to [Kathy] on many occasions concerning property, stocks and assets that were at issue in his previous divorce.

[Kathy] was employed by [Mike] from March of 1995 to March of 1997. [Kathy] was solely responsible for managing and collecting accounts as well as working with various layers (sic) and law firms for collection purposes. [Kathy] had access to, and opportunity to review documents in regard to [Mike's] financial statements. During this time [Mike] began negotiations to sell his company.

Subsequent to [Mike] providing a draft of the prenuptial, [Kathy] sought separate counsel from Hon. Robert Ison. On or about March 12, 1997, [Kathy] and her attorney telephonically discussed the prenuptial agreement. On March 13, 1997, counsel for [Kathy] faxed a follow up letter from his prior telephonic conversation with [Kathy] advising [Kathy] of her rights. The letter sets forth several strong warnings to [Kathy] concerning the rights she would be waiving in property, support and/or maintenance. Hon. Robert Ison encouraged [Kathy] to contact him if she had further questions or concerns. [Kathy] did not communicate further with her attorney. The prenuptial agreement was modified by [Mike] to reflect changes requested by [Kathy's] counsel. The prenuptial agreement is not unconscionable on its' face.

Kathy first contends that the family court erred when it found that prior to the signing of the agreement that Mike's financial condition was sufficiently disclosed to her by virtue of the ongoing discussions regarding property, stocks and assets that were at issue in his previous divorce while they lived together; his ownership of NCC; and her employment at NCC where she was solely responsible for managing and collecting accounts and had access and the opportunity to review Mike's financial statements.

Having reviewed the record, we cannot conclude that these findings are clearly erroneous. It was undisputed that Kathy was twice divorced; had worked in her sister's collection agency and was thus knowledgeable of that type of business; lived in Mike's east-end Louisville residence for two years before they married; knew that Mike owned NCC, a medium sized business operating out of two locations and employing fifteen to twenty people; and at NCC was knowledgeable enough to have been given the sole responsibility for managing collection accounts. Although Kathy indicated that she had not seen or knew Mike's personal finances, he testified that Kathy had seen his financial statements in the years they were together; that she knew his net worth; that they lived in a house next to a country club and went to the club every Friday night; and that they spoke many time about investments. We are to give due regard to

the opportunity of the trial court to consider the credibility of the witnesses. Lawson v. Loid, 896 S.W.2d 1, 3 (Ky. 1995). As the family court's findings are supported by substantial evidence we can find no abuse of discretion on the disclosure issue.

Kathy also contends that the prenuptial agreement was unfair and unreasonable due to changed facts and circumstances, in that she can no longer meet all of her financial obligations if she is limited to her income from employment. According to Blue v. Blue, 60 S.W.3d 585, 590 (Ky.App. 2001), the emphasis of the unconscionability inquiry "relates to the reasonable expectations of the parties as contemplated by the agreement." Herein, the parties' financial resources were disparate from the beginning of their relationship, with Kathy entering the relationship with employment at her sister's collection agency, a car and \$5,000.00 in credit card debt. She lived with Mike for two years before the marriage, working in a high level management position at his company. After they separated, even though she moved to Hopkinsville, she still drew her same salary from NCC. Following the sale of the company, she participated in an employment agreement which resulted in her receiving health insurance and \$220.00 monthly which continued at the time of the hearing. At the time of the hearing, she had obtained employment and was earning between \$1,600.00 and \$1,900.00 per

month. Unfortunately, from the time of the separation to the hearing, Kathy was unemployed and on her own incurred in excess of \$45,000.00 in credit card debt. Pursuant to Blue at 591:

To set aside the agreement, [Kathy] must show more than that [Mike's] position has improved. She must also show that her position has suffered in a manner which was beyond the contemplation of the parties when they signed the agreement. In the alternative, [Kathy] must establish that the agreement is oppressive or manifestly unfair to her at the time of dissolution.

The parties cohabitated for two years. Kathy entered the relationship with a full-time job, a car, and \$5,000.00 in debt. Although married for seven years, they were separated for a large part of their marriage, during which time Kathy alone amassed a large amount of credit card debt. Kathy presented no evidence that Mike's position has dramatically improved since the agreement, and has presented no evidence indicative of her inability to obtain full-time employment at the same level as when she signed the agreement. We find, therefore, that the family court's finding is supported by substantial evidence and it correctly applied the law in holding the prenuptial agreement enforceable.

Kathy next asserts that the family court abused its discretion in finding that no marital equity existed in the Pyle Lane real property. With regard to this property, the family court found:

The parties acquired the Pyle Lane residence and lot in July 15, 1998. The property was purchased with funds from the sale of [Mike's] business, Nationwide Collection Corporation, a collection agency in Louisville which [Mike] owned from 1979 until the sale of the business on August 31, 1998. This Court being satisfied that [Mike's] business, Nationwide Collection Corporation, was non-marital and the funds derived from the sale of said corporation having been deposited into [Mike's] personal account, also held solely in his name, and used within one (1) day of the deposit to purchase the residence at 1051 Pyle Lane and the adjacent lot, said real property and home are found to be [Mike's] non-marital real property derived from a traceable non-marital asset. [Kathy's] name appearing on the deed did not change the character of the property. (Angel v. Angel, Ky.App., 562 SW 661, 665 (1978)).

On December 31, 1998, an equity line mortgage was taken on the Pyle Lane property for improvements to the property represented by addition of an in ground swimming pool, bath house and shop. Proceeds of the loan were additionally applied to payment of taxes and improvements to the exterior and interior of the residence. [Mike] testified that \$10,000.00 was expended by [Kathy] as start-up money for her personal business. The current balance of the equity loan is \$139,724.88. The balance of the equity loan in December of 2002. (sic) at the time of the parties' separation, was \$77,030.17. Loan funds in the amount of \$54,000.00 are currently frozen by the Court. The fair market value of the Pyle Lane property is \$291,000. The difference between the fair market value and the purchase price is \$74,000. The current indebtedness on the property is \$139,724.88. The Court finds there is no marital equity in the Pyle Lane property. [Mike] is restored his non-marital interest in the Pyle Lane property and [Mike] shall take and own the Pyle Lane

property and shall assume and pay any indebtedness thereon and hold [Kathy] harmless. Additionally any and all funds that are currently frozen by this Court are unfrozen and awarded to [Mike] and [Mike] shall assume and pay any and all indebtedness associated therewith and hold [Kathy] harmless thereon.

Kathy does not dispute that the Pyle Lane property was bought with the proceeds from the sale of Mike's non-marital business, and was thus at the onset, non-marital property. Instead, Kathy argues that the family court erred by failing to find marital property in the increase in the value of the property during the marriage, specifically \$60,000.00 for an in-ground swimming pool, bath house, shop, fencing and paving.

Shortly after Mike's purchase of the property with non-marital funds, a line of credit on the property was secured. Approximately \$45,000.00 of this line of credit (\$60,000.00 less \$15,000.00 in non-marital contributions from Mike) may have been used for the above-mentioned improvements to the property. Due to the improvements, the fair market value of the property increased \$74,000.00.

Typically, the \$45,000.00 in improvements that cannot be traced to non-marital funds are subject to apportionment in a manner consistent with Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky.App. 1981). Because, however, the debt on the property, all of which was assigned to Mike in the decree, far exceeds the

improvements and any marital share that would be attributed to Kathy under the Brandenburg formula, we conclude that the family court's conclusion is supported by the evidence and it correctly applied the law.

Kathy next contends that the family court abused its discretion in the amount of marital equity found in the Pat Avenue property. The family court made the following findings:

The parties purchased a residence located at 716 Pat Avenue, Hopkinsville, Kentucky on January 16, 1998. Approximately, \$17,905.59 was made as a down payment on Pat Avenue from a personal checking account held solely in [Mike's] name from funds derived from the sale of non-marital assets. The purchase price of said residence was \$76,500.00 and [Mike's] contribution of non-marital funds to provide [Mike] a 23.40% non-marital equity interest in said property. The fair market value of said property is \$81,000.00. The mortgage indebtedness is \$53,891.79, with net equity in the amount of \$27,109.00. Using the Brandenburg formula, the Court determines that 23.40% of the \$81,000.00 is \$18,954.00 which represents [Mike's] non-marital equity in the property. Subtracting [Mike's] non-marital equity from the present equity in the amount of \$27,109.00, there remains \$8,155.00 as marital equity in the Pat Avenue residence. Equally dividing the marital equity, between the parties, \$4,077.50 represents [Kathy's] equity in the Pat Avenue residence and [Mike's] non-marital and marital interest total \$23,031.50. During the pendency of this action, [Kathy] has resided in the Pat Avenue property. [Mike] has been kept current the mortgage payment and insurance.

[Mike] shall take and own the Pat Avenue property and assume and pay any

indebtedness there on and hold [Kathy] harmless, subject to payment by [Mike] to [Kathy] of her non-marital and marital equity interest therein in the amount of \$4,077.50 within sixty (60) days of entry of this order.

[Kathy] shall be entitled to retain possession of the Pat Avenue property until June 30, 2004. [Kathy] shall pay the mortgage indebtedness for May and June of 2004. And any and all expenses associated with occupancy.

Kathy contends that the family court improperly applied the percentage arrived at from the division of the non-marital contribution by the total contribution to the fair market value of the property, instead of the equity therein. Having reviewed the family court's analysis, we see no error in its evaluation and distribution of the Pat Avenue property.

Kathy also contends that the family court abused its discretion by following the prenuptial agreement and failing to award her maintenance, arguing that, given the substantial indebtedness assigned to her, she did not receive sufficient marital property to provide for her reasonable needs nor will she be able to support herself through employment. We fail to see, however, how this issue was preserved for our review. Kathy failed to include a statement regarding issue preservation at the beginning of this argument pursuant to CR 76.12(4)(c)(v). She further admitted in her proposed "Findings of Fact and Conclusions of Law," tendered to the family court at the

conclusion of the trial, that she was *not* entitled to maintenance either under the terms of the prenuptial agreement or under the relevant statutory factors, and that she should assume all indebtedness incurred in her name, specifically acknowledging the \$45,000.00 in credit card debt.

Moreover, in any event we fail to see how the family court abused its discretion in failing to award maintenance.

The family court's specific findings are as follows:

Indebtedness. There are a number of debts that each party has incurred in their own name both during the marriage and after separation, and pursuant to the terms of the Prenuptial Agreement, specifically numerical paragraphs two (2) and four (4), each party is to assume and be responsible for all debt incurred solely in their names.

Maintenance. The parties entered into a Prenuptial Agreement on or about the 14th day of March, 1997. By Order entered November 20, 2003, said Prenuptial Agreement was found to be conscionable and enforceable. Pursuant to the terms of the Prenuptial Agreement, [Kathy] was entitled to and has received \$500.00 a month for twelve (12) months from February 2003 until February 2004. This Court having determined that both parties are gainfully employed pursuant to the terms of the Prenuptial Agreement neither party is henceforth entitled to any form of future support or maintenance.

Having reviewed the record, it appears that the financial condition of the parties remained as disparate at the time of the agreement as at the time of the dissolution. Thus, even if this issue had been preserved for our review, or not disposed of

by the prenuptial agreement, we conclude that the family court did not abuse its broad discretion by enforcing the terms of the prenuptial agreement.

Kathy lastly contends that the family court abused its discretion in failing to award her attorney fees and the costs in defending the action. Again as above, it does not appear that Kathy preserved this issue. There is no statement regarding issue preservation as required by CR 76.12(4)(c)(v). Also, her tendered "Findings of Fact and Conclusions of Law" specifically indicates as a conclusion that "(n)o attorneys' fees are awarded to either party." Moreover, we cannot consider attorney fees because Kathy's counsel was not made a party to the appeal. Kentucky Revised Statutes (KRS) 403.220, Beaver v. Beaver, 551 S.W. 2d 23, 25 (Ky.App. 1977).

In any event, noting that pursuant to KRS 403.220 and Gentry, supra, it is within the trial court's discretion as to the award of attorney fees, we fail to find any abuse of discretion by the family court.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia T. Crenshaw
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BRIEF FOR APPELLEE:

Stephen E. Underwood
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