RENDERED: OCTOBER 5, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001832-MR

ZULA BEWLEY COWLES — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 04-CI-01421

BILL COWLES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Zula Bewley Cowles, appeals from a judgment of the Warren Circuit Court setting aside a settlement agreement and dividing marital property in this dissolution action. Finding no error, we affirm.

Zula and Bill Cowles were married on August 18, 1956. The parties' marriage was dissolved by a decree entered in the Warren Circuit Court on February 14,

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

2005. The parties thereafter participated in a mediation on April 7, 2005, wherein a settlement agreement was reached. On June 3, 2005, Bill filed a motion to set aside the settlement agreement. However, health problems prevented him from attending several scheduled hearings on the motion and on July 26, 2005, the trial court ordered the enforcement of the agreement.

On July 28, 2005, Bill filed a motion to alter, amend or vacate the trial court's order on the grounds that the settlement agreement was unconscionable. During a hearing conducted on August 17, 2005, Bill testified that he had been in poor health for some time and, as a result, was unable to attend the scheduled court dates. Further, he claimed that although he was present at the mediation session, he was quite sick and unable to meaningfully participate or appreciate the consequences of the agreement reached therein. Bill's daughter, Yvonne Cowles, also testified to his health problems.

On November 30, 2005, the trial court ordered that its previous order and judgment regarding the settlement agreement be held in abeyance until the parties could be heard regarding the conscionability of the agreement. A hearing was thereafter held in January 2006, after which the trial court declared the agreement unconscionable. The trial court noted,

> The Petitioner argues that the settlement agreement reached by the parties during mediation should be set aside because he was ill the day of the mediation and was, therefore, unable to appreciate the consequences of his actions. KRS 403.180(2) provides in relevant part:
>
> > [t]he terms of [a] separation agreement . . . 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, . . . that the separation agreement is unconscionable.
>
> It is proper for a trial court to refuse to confirm a separation agreement where it was not made freely, voluntarily, or with an appreciation by the party of their rights. *Peagram v. Peagram,* 219 S.W.2d 772 (Ky. 1949).
>
> The Petitioner is seventy-six years of age and his health is failing. He testified that he only signed the settlement agreement on the day of the mediation because he was not well the day the mediation took place, and after five continuous hours of trying to reach an agreement, his overriding concern was going home. The Court finds that the Petitioner did not enter into the settlement freely or with an appreciation of his rights. Therefore, the Court finds that the parties' settlement agreement entered into on April 7, 2005, is unconscionable and should not be enforced.

The trial court thereafter restored the parties' nonmarital property and divided the marital property. It is from that judgment that Zula appeals.

Zula first argues that the trial court's decision to set aside the property agreement as unconscionable was not supported by the evidence and was an abuse of discretion. We disagree.

"Unconscionable" is defined as "manifestly unfair or inequitable." *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997); *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974). A finding of unconscionability requires only a "showing of fundamental unfairness as determined 'after considering the economic circumstances of the parties and any other relevant evidence.' KRS § 403.180(2)." *Bratcher v. Bratcher,* 26 S.W.3d 797, 799 (Ky.App. 2000). This Court has held that under the totality of the

circumstances, "the trial judge is in the best position to determine whether a particular settlement agreement is manifestly unfair or inequitable." *Shraberg, supra*, at 335. And a trial court's finding on the issue of conscionability "should not be set aside on appeal unless there is some evidence of fraud, undue influence, overreaching, or evidence of a change in circumstances since the execution of the original agreement." *Peterson v. Peterson,* 583 S.W.2d 707, 712 (Ky.App. 1979).

In the instant matter, Bill testified that he was not well on the day of the mediation, and only signed the settlement agreement after five continuous hours of discussion because his primary concern was going home. In fact, his health prevented him from attending the hearings scheduled on his motion to set aside the settlement agreement. Bill's daughter confirmed that her father was in poor health, and was confronted with the possibility of losing sight in one of his eyes. Yvonne testified that on the day of mediation, her father was suffering from fluctuating blood pressure, primarily caused by the stress of the proceedings. Further, Bill introduced a note from Dr. Stuart Yeoman, detailing Bill's inability to participate in the July 15, 2005, hearing because of his illness.

A trial court is not prohibited from considering factors such as the mental distress of a party to a separation agreement, or the emotional state of the complaining party when determining whether a separation agreement should be held unconscionable. *McGowan v. McGowan,* 663 S.W.2d 219 (Ky.App. 1983); *Shraberg, supra*, at 333 (c*iting Clark v. Clark,* 192 S.W.2d 968, 970 (Ky. 1946)). A determination that a

separation agreement was "not made freely or voluntarily or with an appreciation of [a party's] rights" substantiates a showing of fundamental unfairness, and would sustain a finding of unconscionablilty. *Peagram v. Peagram,* 219 S.W.2d 772, 775 (Ky. 1949). We conclude that the trial court was well within its discretion in determining that Bill's medical condition on the day of the mediation rendered the resulting settlement agreement unconscionable.

Zula next argues that the trial court erred in ruling that a 40-acre tract of land was Bill's nonmarital property. The record establishes that Bill purchased the 40 acres in 1950, prior to his marriage to Zula. According to the terms of the note, Bill was to have paid the mortgage in full by 1953. However, the note bore a stamp indicating that it was not paid until December 17, 1956, after the parties' August 1956 wedding. Nevertheless, the trial court held,

> The Petitioner testified that he paid the debt associated with the 40-acres in 1953 and then borrowed additional money from the bank to purchase farm equipment. It appears that rather than release the Petitioner from the note associated with the purchase of the land, the bank retained the note and loaned the Petitioner additional monies. Therefore, the Court finds that the Petitioner purchased the 40 acres in question in 1950 and owned said real estate free of any mortgage in 1953. Hence, the Court finds that these 40 acres are the Petitioner's nonmarital property, as the parties were not married until August 15, 1956.

Thus, the trial court restored the 40 acres to Bill as his nonmarital property.

KRS 403.190 provides, in pertinent part,

> 2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
>
> (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (c) Property acquired by a spouse after a decree of legal separation;
>
> (d) Property excluded by valid agreement of the parties; and
>
> (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.
>
> (3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

In a dissolution proceeding, a party claiming property acquired after marriage as his/her nonmarital property bears the burden of overcoming the presumption found in KRS 403.190(3). *Hunter v. Hunter*, 127 S.W.3d 656 (Ky.App. 2003). Further, property acquired prior to the marriage retains its non-marital character even if marital

funds are used to enhance value of that property. *Overstreet v. Overstreet,* 144 S.W.3d 834 (Ky.App. 2003).

The trial court herein engaged in a detailed and thorough analysis of standard by which a party can rebut the presumption found in KRS 403.190(3). However, it concluded that Bill produced sufficient evidence to prove that the property in question was paid in full prior to the parties' marriage. As the property was not acquired "subsequent to the marriage," there is no need to engage in an analysis under KRS 403.190(2). Clearly, the 40 acres in question was nonmarital property.

In reviewing issues in an action for dissolution of marriage, we must defer to the considerable discretion of the trial court unless it has committed clear error or has abused that discretion. *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). The trial court as finder of fact is in the best position to determine the credibility of the witnesses and to resolve conflicting evidence. *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (1999). An appellate court "cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous." *Cochran v. Cochran*, 746 S.W.2d 568, 569-70 (Ky.App.1988). We conclude that the trial court herein did not abuse its discretion.

The decision of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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