

RENDERED: MARCH 5, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000592-MR

KATY J. CREECH

APPELLANT

v. APPEAL FROM KENTON FAMILY COURT  
HONORABLE LISA O. BUSHELMAN, JUDGE  
ACTION NO. 03-CI-00586

ERNEST R. CREECH

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Katy Creech appeals from the February 25, 2008, Second Amended *Nunc Pro Tunc* Decree of Dissolution of Marriage of the Kenton Family Court. As we have discerned no abuse of trial court discretion, we affirm.

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<sup>1</sup> Senior Judge Joseph E. Lambert 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.

The parties were married in May 1984. On March 4, 2003, Ernest R. Creech filed a verified petition for dissolution of marriage. For various reasons, the action was drawn out over several years, and on June 20, 2006, a final hearing was held before Kenton Circuit Judge Gregory M. Bartlett. During this final hearing, the parties informed the court that they had come to an agreement. Among other things, the agreement included a provision that Katy would receive half of Ernest's military retirement benefits accrued during the marriage. Judge Bartlett found that the agreement was not unconscionable. For reasons unknown, the agreement was never reduced to writing. However, the agreement was dictated into the record, and there is no dispute as to its contents. On November 9, 2006, Katy filed a motion for a supplemental hearing in which she sought an order requiring Ernest to pay her spousal support for the months of March and April 2006, an order requiring Ernest to designate her as a beneficiary on his military survivor benefit plan, an order requiring Ernest to maintain health insurance on her through his military benefits plan, and an order clarifying her entitlement to one half of Ernest's military and/or disability benefits.

A hearing on these motions was held on December 4, 2007. In the interim, between the June 20, 2006, hearing and the December 4, 2007, hearing, a family court was established in the Kenton Circuit Court, and the case was reassigned to Family Court Judge Lisa Bushelman. On December 21, 2007, Judge

Bushelman entered a *Nunc Pro Tunc* Decree of Dissolution of Marriage which set forth the provisions of the agreement between the parties as related to Judge Bartlett at the June 20, 2006, final hearing. One of the provisions stated “[t]he husband’s military retirement accounts, for the marital portion only, will be divided equally between the parties.” Judge Bushelman’s order did not grant the relief sought in Katy’s November 9, 2006, motion. On December 28, 2007, the trial court entered an Amended *Nunc Pro Tunc* Decree of Dissolution in which the following provision was added: “[t]he wife’s pension plan, for the marital portion only, will be divided equally between the parties.”

On January 2, 2008, Katy filed a motion to alter, amend, or vacate the previous order stating that the decree failed to “adequately protect her rights to [Ernest’s] military pension as it does not set forth the language necessary to divide the marital portion of the pension accounts according to military procedure at this time.” On January 7, 2008, Ernest filed a motion to amend the decree, to the extent that it failed to indicate that maintenance was only to be for a predetermined period of time. On February 25, 2008, the trial court entered a Second Amended *Nunc Pro Tunc* Decree of Dissolution, in which it made the change requested by Ernest, but not the change requested by Katy. This appeal followed.

The division of marital property is within the sound discretion of the trial court and will not be disturbed unless there is an abuse of that discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001). The trial court is bound by KRS 403.190, which calls for the division of property, including retirement

benefits, in “just proportions.” KRS 403.190(1). Katy argues that the trial court abused its discretion by denying her right to present evidence at a supplemental hearing as requested in her motion filed on November 9, 2006.

In support of her argument, Katy cites to *Hollon v. Hollon*, 623 S.W.2d 898 (Ky. 1981), in which the Kentucky Supreme Court reversed a trial court’s divorce decree because it was held that the trial court erred when it failed to make findings to support its property distribution and maintenance award. Unlike *Hollon*, where the trial court determined asset division, the parties herein determined their own asset division per their agreement. Furthermore, Judge Bartlett specifically asked the parties if such was their agreement, and they agreed that it was. For this reason, *Hollon* is not controlling in the present action.

Katy also cites to *Hoffman v. Hoffman*, 553 S.W.2d 474 (Ky. App. 1977), arguing that the Court in *Hoffman* ruled “that because of the state of confusion of the record in the case that it had to be reversed and remanded for further evidence to be taken to provide sufficient proof to support a ruling based on the evidence.” However, our interpretation of *Hoffman* differs. While we agree that the *Hoffman* Court provided instruction to the lower court as to the taking of further proof, the Court clearly stated that the case was being reversed without considering its merits due to the appellee husband’s failure to file a brief. *Hoffman*, 553 S.W.2d at 475-76. Furthermore, even if the Court had based its reversal solely on the poor state of the record, such is not the situation in this case. Although the record is drawn out over a long period of time and contains *nunc pro*

*tunc* orders, it is not in a state of confusion. The record clearly supports the result of the property division agreed to by the parties.

The terms of a separation agreement are binding on the court unless it finds that the agreement is unconscionable. KRS 403.180(2). Katy did not allege that the terms were unconscionable, nor did the trial court so find. Instead, Katy argued that she was entitled to additional benefits by virtue of her entitlement to a portion of Ernest's military pension. These additional benefits were not put before the trial court when the parties agreed and the agreement was read into the record by Katy's attorney. Her subsequent claims appear to be an afterthought. A "definite and substantial" burden of proof is placed upon the party challenging an agreement as unconscionable. *Peterson v. Peterson*, 583 S.W.2d 707, 711 (Ky. App. 1979).

The modification cases define unconscionability as manifestly unfair and inequitable. . . . 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.* at 711-12 (internal citation and quotation omitted).

During the supplemental hearing, Katy's attorney argued that she was entitled to the additional benefits by virtue of federal law. However, any interest Katy may have had in her ex-spouse's military benefits could be waived in a separation agreement so long as that agreement was not unconscionable. KRS 403.180(2). Katy is not entitled to a new decree simply because she failed to

bargain for benefits to which she may have been entitled. Furthermore, it is not the duty of the trial court to advise the parties of their legal entitlements but only to determine whether the agreement they reach is unconscionable. As there are neither allegations nor evidence that the agreement was unconscionable, there was no error in the trial court's failure to so find.

For the foregoing reasons, the February 25, 2008, Second Amended *Nunc Pro Tunc* Decree of Dissolution of the Kenton Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE FILED.

David L. Drake  
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