

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000359-MR

ANDREA BARNETT

APPELLANT

v. APPEAL FROM MAGOFFIN FAMILY COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 06-CI-00164

KATHY LOVELY, EXECUTRIX
OF THE ESTATE OF DONNIE RAY
BARNETT, DECEASED

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND VANMETER, JUDGES; GRAVES,¹ SPECIAL
JUDGE.

GRAVES, SPECIAL JUDGE: Andrea Barnett appeals from a summary judgment
granted by the Magoffin Circuit Court to Kathy Lovely, the executrix of the estate

¹ Retired Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

of Donnie Ray Barnett, Andrea Barnett's late ex-husband. At issue is whether an antenuptial agreement executed by Donnie and Andrea is valid and enforceable.

Donnie and Andrea entered into the antenuptial agreement on October 15, 2003, the day before their marriage. The agreement provided that all property owned by the parties would be characterized either as "separate property" or "joint property." The agreement provided that in the event of a divorce, "all separate property shall be deemed nonmarital property, as defined by KRS Chapter 403, and neither party shall assert any claim to the other's separate property. All such separate property shall be set aside to the owner thereof." All property owned by the parties at the time of the marriage was defined as "separate property" and would remain so unless converted to "joint property."

"Joint property" was defined as property acquired during the marriage in the parties' joint names, with or without rights of survivorship. Upon termination of the marriage each party would receive an undivided one-half interest in the jointly-owned property held with right of survivorship.

The agreement also provided that the parties waived maintenance and spousal support in the event the marriage was dissolved.

An itemized disclosure of the couple's assets was attached to the agreement. Donnie listed assets totaling over \$1.8 million, including numerous business interests which he held in the form of limited partnerships. The disclosure list contained the percentage of interest he held in each of these entities,

and a specific valuation of that interest. Andrea's stated assets totaled a little over \$110,000.00.

The couple separated about two years later, on January 5, 2006. On October 17, 2006, the Magoffin Circuit Court entered a bifurcated findings of fact, conclusions of law and decree of dissolution of the marriage which reserved for future disposition the division of assets and debts. Donny died after the decree was entered but before the assets were divided. By order of March 13, 2007, Kathy Lovely, the executrix of Donnie's estate and his first ex-wife, was substituted as the petitioner in the dissolution action.

Following initial discovery, Andrea filed a motion for summary judgment, arguing that the antenuptial agreement should be set aside because Donnie had significantly understated the value of his assets. The deposition of Donnie's business manager was taken for the purpose of introducing audited financial statements and income tax returns for each of Donnie's business interests for 2003 (the year the antenuptial agreement was executed). According to Andrea's expert, Terry Fyffe, a certified business appraiser, the records showed that Donnie had understated the value of those assets by over \$2.7 million, less than one half of their actual value. Kathy filed a response and cross motion for summary judgment. The circuit court entered a summary judgment in Kathy's favor on January 26, 2009. The order was made final on February 18, 2009, and this appeal followed.

The Kentucky Supreme Court has set forth the following criteria for determining whether an antenuptial agreement is enforceable:

- (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts?
- (2) Is the agreement unconscionable?
- (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable?

Gentry v. Gentry, 798 S.W.2d 928, 936 (Ky. 1990).

Andrea argues that Donnie's failure to disclose the full extent of his financial assets rendered their antenuptial agreement unenforceable. She contends that if Donnie had been more open and honest in his valuation, she would have been able to make a better-informed decision regarding whether to sign the agreement. According to Andrea, had she known the extent of Donnie's assets, she would not have executed the agreement or agreed to waive maintenance or spousal support in the event their marriage ended in divorce.

In reviewing a trial court's decision granting summary judgment, this Court must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "The record is viewed in a light most favorable to the party opposing summary judgment, and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Even if the facts are viewed in the light most favorable to Andrea, as they must be under the summary judgment standard, she has failed to allege facts showing that the agreement was obtained through misrepresentation. Although our case law stresses that “the wife must be fully apprised of the extent and nature of the estate and value of what she is surrendering in the agreement[,]” *Lawson v. Loid*, 896 S.W.2d 1, 2 (Ky. 1995), we fail to see how the knowledge that some of Donnie’s assets were worth \$4 million rather than \$1.8 million would have caused Andrea to refuse to sign the agreement. As the trial court aptly concluded, “based upon the significant disparate income and asset ownership positions of the parties at the time of entry of the Antenuptial Agreement, even when viewed in a light most favorable to the moving party, the difference in values as claimed by movant’s expert will not invalidate the agreement.”

Andrea also argues that she was not provided with sufficient time to consult an attorney before signing the agreement. According to the record before us, however, this argument was never raised before the trial court and cannot therefore be raised for the first time on appeal. “The Court of Appeals is without authority to review issues not raised in or decided by the trial court.” *Regional Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

Finally, Andrea argues that actions taken by Donnie since the agreement was executed resulted in changed facts and circumstances that make its enforcement unconscionable. Specifically, she points to the fact that immediately upon entry of the bifurcated dissolution decree, Donnie transferred his one-half

interest in the home he and Andrea had acquired during their marriage to his first ex-wife, Kathy. Andrea did not learn of the transfer to Kathy until after Donnie died. Donnie also built two apartment complexes and a residence during the course of his marriage to Andrea and later transferred ownership in these properties to Kathy. Andrea argues that these properties should be declared marital property, and that she should receive a one-half undivided interest in each of them. She also asserts that Donnie sold other real estate during their marriage for which she received no monetary benefit. She contends that these property transfers are evidence that Donnie schemed to defraud her, and hid and transferred assets in such a way as to render the antenuptial agreement unenforceable. She contends that if she had known he would take such actions, she would never have signed the agreement waiving her claims to maintenance in the event of a divorce.

An antenuptial agreement will not be enforced if facts and circumstances have changed so as to make its enforcement unconscionable.

Gentry v. Gentry, 798 S.W.2d 928, 936 (Ky. 1990).

Often there will be many years between the execution of an antenuptial agreement and the time of its enforcement. It is, therefore, appropriate that the court review such agreements at the time of termination of the marriage, whether by death or by divorce, to insure that facts and circumstances have not changed since the agreement was executed to such an extent as to render its enforcement unconscionable.

Id.

In reviewing an antenuptial agreement, the trial court must make a finding that

that the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work an injustice.

Blue v. Blue, 60 S.W.3d 585, 590 (Ky. App. 2001).

In *Blue v. Blue*, during the course of a ten-year marriage, the husband's nonmarital property increased in value from \$5 million to as much as \$77 million. The wife's property was valued at about \$190,000.00 at the beginning of the marriage. Under the terms of the antenuptial agreement she was left \$650,000.00 in assets. This Court ruled that even the massive increase in the husband's assets was insufficient to render the agreement unconscionable as to the wife. It further held that in order to set aside the agreement, the wife had to show "that her position has suffered in a manner which was beyond the contemplation of the parties when they signed the agreement." *Id.* at 591. Andrea and Donnie's marriage was of far shorter duration than the marriage in *Blue*, and as in *Blue*, "the parties' financial situations were already disparate when they entered into the agreement." *Id.* at 590-91. Andrea's allegations regarding Donnie's transfers of property to Kathy simply do not rise to the level of showing that Andrea's position had suffered in a manner that was beyond her contemplation when she signed the agreement.

The summary judgment of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Larry D. Brown
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BRIEF FOR APPELLEE:

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