

RENDERED: MAY 7, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-000195-MR

STEVEN COLLINS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE SAMUEL T. WRIGHT, III, JUDGE  
ACTION NO. 07-CI-00057

OLIVIA COLLINS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, KELLER, AND VANMETER, JUDGES.

KELLER, JUDGE: Steven Collins (Steven) appeals from a Final Order

Overruling Exceptions entered by the Letcher Circuit Court on January 20, 2009.

For the reasons set forth below, we affirm.

### FACTS

Steven and Olivia Collins (Olivia) were married on May 15, 2004. In 2005, a petition for dissolution of marriage was filed following the birth of the

parties' first child. On October 31, 2005, the parties entered into an Agreement as to Alimony, Timesharing, and Property Division (the separation agreement), which was filed with the trial court on November 1, 2005, and is the subject of this action.

Both parties were represented by counsel at the time they entered into the separation agreement. The separation agreement stated that its purpose was to settle matters:

with respect to [the parties'] real estate, personal property, child timesharing and support and spousal alimony irrespective of whether those differences have become irreconcilable making it impossible for them to hereafter live as Husband and Wife.

The separation agreement further stated that it “shall be in effect and in force whether a divorce is or is not sought and obtained by either party, in any legal action that may be brought by either of the parties at anytime hereafter seeking to dissolve the marriage of the parties and other appropriate relief.” The separation agreement provided that it was binding upon the parties immediately upon execution. The relevant provisions of the separation agreement to this appeal are the following:

**4. Marital Property:** The following properties of value specifically set forth are arguably a hybrid of non-marital and marital nature, but shall be distributed according to the terms expressed herein. The parties have separate vehicles obtained or used during the marriage, which are at this time are [sic] a 2003 Mitsubishi Montero and a 1997 Toyota Tacoma. Each were obtained by Olivia D. Johnson Collins and paid for through her premarital funds. Olivia D. Johnson Collins will keep and retain the Mitsubishi . . . . She will as part of the valuable and mutual considerations herein, and in exchange for the

releases provided in Paragraph 6, below, by Steven Collins, release and transfer all her right and claim to the Toyota, or any subsequent vehicle purchased by trade or sale of said Toyota to Steven Collins in recognition of the approximate \$7,000 value of the vehicle. Steven Collins shall also receive as part of the valuable consideration exchanged under Paragraph 6 herein, the entirety of any social security benefits, pension, retirement, IRA, or profit sharing plan earned by him, now or in the future, exclusive of any and all claim by Olivia D. Johnson Collins . . . . [T]he real property located at 149 Solomon Road, Whitesburg, Kentucky . . . was acquired by the parties as single persons prior to and in anticipation of the marriage, by the exclusive purchase monies of Olivia D. Johnson Collins, but has been minimally improved during the marriage. The majority of improvement thereon was financed by the expenditure of Olivia D. Johnson Collins' premarital funds. In recognition that this property should equitably be treated as Wife's sole and non-marital property, forever exclusive of any claim or privilege by Husband, the parties have executed a Deed of Conveyance for valuable consideration of FIFTEEN THOUSAND DOLLARS (\$15,000.00) of even date with this document.

. . . .

**6. Non-Marital Real and Personal Property:**

Specifically, it is known and agreed that the real estate owned by Olivia D. Johnson Collins at Dry Fork, Letcher County, Kentucky . . . is the sole and exclusive premarital property of Olivia D. Johnson Collins, has been and will at all times hereinafter be improved solely by her through expenditure of her exclusive premarital personal property and funds obtained by right and demand as a result of her prior husband's untimely death and Steven Collins, Respondent, has no claim, makes no claim and forever relinquishes any potential claim that might have been brought concerning either, and provided further that he shall receive the sum of FIVE THOUSAND DOLLARS (\$5,000.00), cash in hand paid, and other valuable properties as set forth in Paragraph 4, above, the receipt of which is hereby acknowledged, in

consideration of his quitclaim and enduring permanent release and relinquishment of any known or future claim against said real estate . . . .

Pursuant to the separation agreement, Olivia paid Steven \$20,000.00 and gave Steven clear title to the 1997 Toyota. Steven executed and delivered to Olivia a Deed of Conveyance to the real estate located at Solomon Road.<sup>1</sup>

On February 9, 2006, the parties entered into an Agreed Order dismissing the pending dissolution of marriage action. Pursuant to the Agreed Order, Steven agreed to acknowledge under oath to the trial court that he understood and accepted the terms of the separation agreement. In the Agreed Order, the trial court noted the following:

After inquiry with the Respondent the Court makes the finding of fact that [Steven] knowingly, voluntarily and intelligently made, entered into and executed the Agreement as to Alimony, Timesharing and Property Division on October 31, 2005 and after consultation with counsel ratifies the binding legal effect of the document.

The parties attempted reconciliation and had a second child in October of 2006. However, the reconciliation was short-lived, and on February 15, 2007, Olivia filed a petition for dissolution of marriage. After conducting a hearing, the Special Domestic Relations Commissioner (DRC) of the Letcher Circuit Court entered its Findings of Fact, Conclusions of Law, and Decree of Dissolution on April 10, 2008.

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<sup>1</sup> Although Olivia used her pre-marital funds to purchase the property on May 5, 2004, both parties' names were placed on the deed in anticipation of their marriage which occurred ten days later. The Dry Fork property was deeded solely to Olivia by her grandmother and father in November, 2003.

In its conclusions of law, the DRC determined that the separation agreement was binding on the parties. The DRC concluded that Steven received money and a 1997 Toyota as consideration for the release of any interest he may have had in the Solomon Road and Dry Fork properties. The DRC determined that pursuant to the separation agreement, the residence on Solomon Road was non-marital property, having been purchased solely from pre-marital funds of Olivia and that its minimal increased value because of improvements made during the parties' marriage was marital property which was apportioned to Steven consistent with the separation agreement. The DRC further determined that the Dry Fork property was non-marital property purchased with Olivia's non-marital funds and that any possible interest held by Steven in such property was purchased by Olivia pursuant to the terms of the separation agreement.

On April 30, 2008, Steven filed Exceptions to the DRC's Findings of Fact, Conclusions of Law, and Decree of Dissolution, and on July 16, 2008, the DRC entered an order overruling Steven's Exceptions. On July 25, 2008, Steven filed Exceptions to the DRC's order, and the trial court entered a Final Order Overruling Exceptions on September 19, 2008. Steven filed a Motion to Alter, Amend or Vacate on September 30, 2008. On January 20, 2009, the trial court again entered a Final Order Overruling Exceptions. This appeal followed.

#### STANDARD OF REVIEW

We review questions of law *de novo*. *Western Ky. Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

However, findings of fact will “not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [trial] court to judge the credibility of the witnesses.” Kentucky Rule of Civil Procedure (CR) 52.01. As stated in *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007):

A [trial] court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A [trial] court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the [trial] court, unless its findings are clearly erroneous.

(citations omitted).

#### ANALYSIS

Steven first contends that the trial court erred in not applying *Clark v. Clark*, 425 S.W.2d 745 (Ky. 1968) to the instant case. We disagree.

In *Clark*, the parties entered into a reconciliation agreement that provided that “the parties shall be divorced” if the reconciliation attempt failed. The former Kentucky Court of Appeals interpreted the provision as being contrary to public policy as facilitating the obtention of divorce. The Court further noted that the consideration for the agreement was divorce. Although it is not clear from his brief, it appears that Steven is arguing that the separation agreement was done in contemplation of a possible future separation, and is therefore contrary to public policy pursuant to *Clark*.

However, unlike in *Clark*, the separation agreement in this case was not conditioned on the parties obtaining a divorce. Instead, the separation agreement stated that it

shall be in effect and in force whether a divorce is or is not sought and obtained by either party, in any legal action that may be brought by either of the parties at anytime hereafter seeking to dissolve the marriage of the parties and other appropriate relief.

The separation agreement further provided that:

in the event of any separation, reconciliation and resumption of the marital relationship between the parties this agreement shall continue to have full force and effect, except as otherwise provided by written agreement duly executed by each of the parties for valuable consideration after the date of reconciliation.

Accordingly, the trial court correctly determined that the *Clark* decision did not apply.

Separation agreements like the one in the instant case have been upheld by Kentucky courts. *See Goodaker v. Littell*, 314 S.W.2d 539, 540 (Ky. 1958). For instance, in *Hartley v. Hartley*, 203 S.W.2d 770 (Ky. 1947), the parties filed four actions for dissolution of marriage. Prior to the third action being filed, the parties executed an agreement which provided that it would be effective “whether a divorce is or is not granted . . . in *any action* that may be brought by either of the parties hereafter.” *Id.* at 773 (emphasis in original). The Court concluded that such an agreement was valid and was not nullified by the parties’ reconciliation. The Court further noted that the contract the parties entered into

showed that they intended to settle once and for all their property rights. *Id.*

Likewise, the separation agreement in the instant case showed that the parties intended a complete and final settlement of their property rights.

Steven also argues that the separation agreement should be held as null and void because he cannot read or write, he did not understand the future effect of what he was signing, and that Olivia knew he could not read or write. Although Steven testified that he could not read or write, Olivia testified that Steven does read and write and provided examples. Additionally, Steven was represented by counsel when the separation agreement was entered into and acknowledged under oath to the trial court when the parties entered into the Agreed Order dismissing the first dissolution of marriage action that he understood and accepted the terms of the separation agreement. As noted above, the trial court, as the finder of fact, had broad discretion in determining the credibility of testimony and in choosing which party to believe. *Bailey*, 231 S.W.3d at 796. Based on the evidence, we cannot say that the trial court's finding that Steven knowingly and willingly entered into the separation agreement was erroneous.

Next, Steven contends that the trial court erred when it determined that the separation agreement was not unconscionable. We disagree.

Kentucky Revised Statute (KRS) 403.180(2) provides that the terms of a separation agreement

except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering economic circumstances of the



parties and any other relevant evidence produced by the parties . . . that the separation agreement is unconscionable.

“In finding that the agreement between the parties was not unconscionable, the trial court was obligated to follow the case law of this state and enforce the contract unless it was found to be ‘manifestly unfair or inequitable.’” *Cameron v. Cameron*, 265 S.W.3d 797, 801 (Ky. 2008) (quoting *Burke v. Sexton*, 814 S.W.2d 290, 292 (Ky. App. 1991)). Steven, as the party challenging the agreement as unconscionable, had the burden of proof. *Peterson v. Peterson*, 583 S.W.2d 707, 711 (Ky. App. 1979).

In Steven’s brief, he complains that the separation agreement is lopsided. However, he fails to note that both pieces of property were acquired through Olivia’s pre-marital funds and that Steven received \$20,000 and a 1997 Toyota as consideration for the release of any interest he may have had in such properties. The record reflects that he willingly entered into the separation agreement and was represented by competent counsel when he entered into the agreement. Moreover, Steven again acknowledged under oath to the trial court that he understood and accepted the terms of the separation agreement when the parties entered into the February 9, 2006, Agreed Order dismissing the first dissolution of marriage action. Based upon our review of the record, we cannot conclude that the trial court abused its discretion by finding the separation agreement conscionable.

For the foregoing reasons, we affirm the order of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II  
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Frank R. Riley, III  
Whitesburg, Kentucky