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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000468-MR
&
NO. 2009-CA-000512-MR

DON R. WILKINS — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM OLDHAM CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 04-CI-00467

GRACE WILKINS (NOW WOODING) — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

TAYLOR, CHIEF JUDGE: Don R. Wilkins brings this appeal from October 24, 2007, December 3, 2008, and March 4, 2009, orders of the Oldham Circuit Court, Family Court Division, and Grace Wilkins (now Wooding) brings this cross-appeal from the same orders. This case involves various issues relating to Grace's substantial accumulation of assets and property both before and during the

marriage. We affirm Appeal No. 2009-CA-000468-MR and Cross-Appeal No. 2009-CA-000512-MR.

Don R. Wilkins and Grace Wilkins (now Wooding) were married June 20, 1987. This was a second marriage for both parties. At the time of the parties' marriage, Don was employed as a teacher for the Jefferson County Public Schools. No children were born of the marriage.

Prior to the parties' marriage, Grace and her first husband, Ronald Biddle, formed a company with another couple in 1971. The company, known as Eduplay, Inc., was conceived by Grace to fill a void in the available child care options. Eduplay eventually owned and operated nine child care facilities. By the mid-1970's, Eduplay shifted from child care facilities to nursing home facilities. As the nursing home business proved more profitable than child care, Eduplay was eventually phased out and the company became EPI Corporation.[1]

Grace and Ronald were divorced in the mid-1970's. Pursuant to their property settlement agreement, Grace received 28,750 shares of Eduplay stock, which subsequently evolved into 29,500 shares of EPI stock. EPI came under the direction of John Snyder, who was the Chief Executive Officer. Under his leadership, EPI became a very successful operator of nursing home facilities. To facilitate the operation of these nursing homes and improve the value of EPI, Snyder and other EPI officers carried out a business plan that included EPI or its shareholders acquiring interests in six derivative companies. Grace acquired her

[1] Pursuant to a June 26, 1981, Certificate of Amendment to Articles of Incorporation, Eduplay, Inc., changed its name to EPI Corporation.

interests in the six derivative companies during the parties' marriage. The six derivative companies were known specifically as Kentucky Venture Fund, Melbourne, Brisbane, Perth, MedCap and Rehab Management Services.

In July 2004, Don filed a Petition for Dissolution of Marriage. A decree of dissolution of marriage was entered on December 19, 2005. The decree reserved all property issues "for further resolution."

In February 2006, the parties executed a Partial Property Settlement Agreement (settlement agreement). In the settlement agreement, the parties agreed to reserve for the family court the issue of whether EPI constituted a marital or nonmarital asset. The parties also agreed that the six derivative companies were marital assets and were to be divided equally.

After execution of the settlement agreement, Grace's attorney, Dan Owens, and Don's attorney, John Ruby, unilaterally revised a "mathematical error" in the settlement agreement. The revision resulted in an increased equalization payment to Don in the amount of $50,000. On February 23, 2006, Owens filed the settlement agreement, which included the revision, with the family court. The court, however, neither ruled upon the conscionability of the settlement agreement nor incorporated same into an order at that time.

In February 2007, Grace terminated the services of attorney Owens and retained new counsel to represent her. Thereafter, Grace filed a motion to set aside the settlement agreement or, in the alternative, to conform the settlement agreement to reflect the parties' original agreement. Following several hearings,

the family court refused to set aside the settlement agreement. However, the court did find the parties' settlement agreement unconscionable as it related to EPI and the six derivative companies. Particularly, the court determined that EPI and the six derivative companies were Grace's nonmarital property. As to the remaining portions of the settlement agreement, the court found the agreement conscionable and incorporated same into its order. The court also ordered Don to "keep all disbursements received to date in order to effectuate an equitable total distribution of marital property." These disbursements totaled over $4 million.[2] Don also was awarded attorney's fees in the amount of $50,000. This appeal and cross-appeal follow.

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Don contends that the family court erred by finding certain terms of the settlement agreement unconscionable. In particular, Don believes the terms of the settlement agreement as to the six derivative companies were not unconscionable and should have been enforced by the family court. Don argues that he is entitled to a one-half interest in the six derivative companies per the terms of the settlement agreement. We disagree.

KRS 403.180(2) authorizes the family court to review settlement agreements for unconscionability:

> In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of

[2] Pursuant to the parties' Partial Property Settlement Agreement, Donald R. Wilkins received disbursements totaling $4,034,719.38.

> children, 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, on their own motion or on request of the court, that the separation agreement is unconscionable.

Thereunder, the family court is directed to consider the parties' economic circumstances and any other relevant evidence. To support a finding of unconscionability under KRS 403.180(2), the terms of the settlement agreement must be fundamentally unfair upon considering the totality of the circumstances. *Shraberg v. Shraberg*, 939 S.W.2d 330 (Ky. 1997); 15 Louise E. Graham & James E. Keller, *Kentucky Practice – Legal Separation* § 9.13 (3rd ed. 2008).

Our review of the family court's finding of unconscionability under KRS 403.180(2) is highly deferential as "the trial court is in the best position to make such an analysis." *Shraberg*, 939 S.W.2d at 333. And, of course, the family court's findings of fact will not be reversed unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. A finding of fact is clearly erroneous if not supported by substantial evidence of a probative value. *Cameron v. Cameron*, 265 S.W.3d 797 (Ky. 2008).

In our case, the family court found the terms of the settlement agreement unconscionable as to EPI and the six derivative companies. It reasoned:

> With regard to EPI and the six derivative entities, not only is the Partial Property Settlement Agreement a harsh bargain, the agreement and the process by which it was obtained were manifestly unfair to [Grace]. . . .
>
> To clarify, this court found that [Grace's] ownership of the EPI stock was nonmarital property and that the six

> derivative companies, which were spun off from EPI with little or no input from either during the period of their marriage, was also considered by this Court to be [Grace's] nonmarital property.

Essentially, the court found the terms of the settlement agreement as to the six derivative companies fundamentally unfair to Grace and, in part, relied upon its determination that EPI and the derivative companies were Grace's nonmarital property.

We agree with the family court that EPI was clearly Grace's nonmarital asset. Grace's shares in EPI were acquired before the marriage, and the number of shares only marginally increased during the marriage.[3] KRS 403.190(2). Moreover, the evidence was more than sufficient to demonstrate that any increase in value to EPI was not the result of the parties' efforts during the marriage. KRS 403.190(2)(e). Indeed, the evidence was overwhelming that EPI's increase in value was due to company performance under the leadership of its Chief Executive Officer, John Snyder.

As to the six derivative companies, the evidence demonstrates that Grace acquired her interests therein during the marriage. However, the evidence also demonstrated that these six derivative companies were closely associated with EPI and were, in fact, inextricably intertwined with EPI. EPI's CEO, Snyder, not its shareholders, orchestrated the creation of and purchase of interests in the six derivative companies. In fact, according to the testimony of EPI's president and

[3] During the marriage, Grace's number of shares was slightly increased because of a redistribution of EPI stock among the shareholders.

chief financial officer, EPI either directly purchased interests or made distributions to EPI shareholders to purchase interests in the six derivative companies. Either way, the six derivative companies were acquired with funds from EPI in accordance with a complex business plan enacted for tax advantages and to increase profits. And, the evidence was sufficient to demonstrate that any increase in value of the six derivative companies was not the result of the parties' efforts during the marriage. KRS 403.290(2)(e). Based upon these unique circumstances, we agree with the family court that Grace's interests in the six derivative companies were nonmarital under KRS 403.190(2)(b) and (e).

To further support its findings of unconscionability, the family court also cited to "the process by which [the settlement agreement] was obtained." The facts clearly show that after the settlement agreement was executed, Grace's attorney and Don's attorney unilaterally revised the agreement to correct a "mathematical error." This revision resulted in an increased equalization payment to Don in the amount of $50,000. And, Grace asserts that she was never informed of the revision.

Considering the whole of the case, we cannot say the family court committed error by finding the terms of the settlement agreement as to the six derivative companies unconscionable. As recognized by the Supreme Court, the family court is to be given great latitude in its unconscionability finding under KRS 403.180(2). *Shraberg*, 939 S.W.2d 330. Hence, we believe that the family

court did not err by finding the terms of the settlement agreement as to the six derivative companies unconscionable under KRS 403.180(2).

To summarize, we hold that the family court did not err by finding the terms of the settlement agreement as to the six derivative companies unconscionable. We also conclude that Grace's interests in EPI and the six derivative companies constituted nonmarital property. Also, we are of the opinion that any increase in value of either EPI or the derivative companies constituted nonmarital property.

Don next asserts that the family court erred by failing to award him maintenance. Specifically, Don asserts that the court should have awarded him maintenance after finding portions of the property settlement agreement unconscionable.

Under the property settlement agreement, Don waived any claim to an award of maintenance. And, the settlement agreement as to maintenance was not deemed unconscionable by the family court. As such, its terms control, and Don has no claim for maintenance. Nevertheless, even in the absence of the settlement agreement, we do not believe Don would be entitled to an award of maintenance under KRS 403.200.

KRS 403.200 governs an award of maintenance in a proceeding for dissolution of marriage. KRS 403.200(1) clearly provides that a court may grant maintenance to a spouse only if it finds that such spouse:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

In this case, Don was awarded and received distributions from Grace totaling over $4 million. And, a substantial portion of the $4 million disbursed was in the form of cash or other liquid assets. The record reveals that Don was awarded sufficient property, including the marital residence, to provide for his reasonable needs. Moreover, the record also reveals that Don receives monthly retirement disability payments from his previous job as a teacher. As such, we do not believe that the family court abused its discretion by failing to award Don maintenance.

We view any remaining contentions raised by Don as either moot or without merit.

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Grace argues that the family court erred by not setting aside the settlement agreement or, in the alternative, by not modifying it. Specifically, Grace contends that her previous counsel and Don's counsel impermissibly and without her consent revised the settlement agreement. Grace points out that the revision resulted in an increased equalization payment to Don in the amount of $50,000. Grace also complains that the notary who notarized the settlement

agreement was not present when she signed the agreement. In support of her argument, Grace relies upon *Dulworth v. Hyman*, 246 S.W.2d 993, 995 (Ky. 1952), for the proposition that a court possesses the equitable power to reform a written contract where the instrument "fails to express the real agreement or transaction because of mistake of one party and fraud or inequitable conduct of the other." Grace believes that the family court erred by failing to exercise its equitable power in this case. *See Dulworth,* 246 S.W.2d 993.

While we agree with Grace that the family court possesses said equitable power, we do not agree that the family court erred by failing to exercise such power. In the settlement agreement, Don and Grace each agreed to pay one-half of the January 12, 2005, fourth quarter taxes. However, according to Don, the settlement agreement incorrectly recited the amount of taxes Don owed:

> [A] typographical error in negotiation communications incorrectly stated that the amount Don owed was $151,750 and not $101,750. Correcting the error caused the equalization payment figure (stated on page 6 of the Agreement) to change to $953,333.90. . . .

Don's Brief at 8. It is important to note that Grace does not contest the accuracy of such statements in her briefs.

As the settlement agreement provided that each party pay one-half of the January 12, 2005, fourth quarter taxes, the revision of Don's tax liability and, concomitantly, the revision of the equalization payment more accurately reflected the parties' intent when entering into the agreement. Stated differently, we cannot conclude that the settlement agreement failed to reflect either the parties'

agreement or their intent when entering into said agreement.[4] *See Dulworth*, 246 S.W.2d 993. As such, we hold that the circuit court did not err by failing to set aside or to revise the settlement agreement.

Grace finally asserts that the family court erred by not requiring Don to repay a portion of his total disbursements received on the premise that some of these payments to Don were from the income or sale of the six derivative companies. Grace points out that Don received the disbursements under the terms of the settlement agreement providing that the six derivative companies were marital assets and were to be equally divided. As the family court found the settlement agreement unconscionable as to the six derivative companies and further found said companies to be her nonmarital assets, she believes that the disbursements should be restored as her nonmarital property.

While not totally clear from the record, it appears that some, if not all of these disbursements were made as "equalization payments" to Don. The family court concluded that Don should retain the disbursements "in order to effectuate an equitable total distribution of marital property." We believe it was well within the family court's discretion to do so. KRS 403.190 directs that marital property be divided in "just proportions," and in making such a division, the trial court enjoys broad discretion. *Johnson v. Johnson*, 564 S.W.2d 221 (Ky. App. 1978). Simply

[4] By so concluding, we do not endorse the conduct of the parties' attorneys as concerns the revision of the property settlement agreement; absent express authority, the better practice would have been to present any revision of the settlement agreement to the parties for their respective consent.

put, we perceive no error in the family court's ruling as to Don's retention of the disbursements.

For the foregoing reasons, the orders of the Oldham Circuit Court, Family Court Division, are affirmed in Appeal No. 2009-CA-000468-MR and are also affirmed in Cross-Appeal No. 2009-CA-000512-MR.

ALL CONCUR.

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