IN THE SUPREME COURT OF THE STATE OF DELAWARE

LARRY WINTERS,	§	
	§	
Respondent Below-Appellant,	§	Nos. 56, 2001 and 229, 2001
	§	
	§	CONSOLIDATED
v.	§	
	§	Court Below—Family Court
CYNTHIA WHITE WINTERS,	§	of the State of Delaware,
	§	in and for New Castle County
Petitioner Below-Appellee.	§	File No. CN99-10377
	§	

Submitted: August 21, 2001
Decided: September 21, 2001

Before **VEASEY**, Chief Justice, **HOLLAND** and **STEELE**, Justices

O R D E R

This 21st day of September 2001, upon consideration of the appellant's opening brief, the appellee's answering brief and the appellant's reply brief (No. 56, 2001) and the appellant's opening brief and the appellee's motion to affirm[1] (No. 229, 2001), it appears to the Court that:

(1) The respondent-appellant, Larry Winters, filed an appeal from the January 5, 2001 order of the Family Court denying his motion to set aside a property division agreement. Winters subsequently filed a second appeal from the May 8, 2001 order of the Family Court denying his motion to reopen a contempt of court proceeding at which he was found in violation of the Family Court's property division order. Because these appeals stem from the same facts

[1]Supr. Ct. R. 25(a).

and raise closely related issues, we consolidated the appeals for decision. Because there is no merit to either of Winters' appeals, we AFFIRM the decisions of the Family Court.

(2) Winters claims that the Family Court committed legal error and abused its discretion in denying his motions to: a) set aside the August 8, 2000 property division agreement between Winters and his former wife, Cynthia White Winters ("White")[2]; and b) reopen the April 11, 2001 contempt hearing that resulted in sanctions against Winters for failing to carry out the Family Court's property division order.

(3) Winters and White were divorced on December 23, 1999. A property division trial was scheduled for August 8, 2000. According to Winters, he had taken various medications for depression, sinus problems and back pain on the day of trial, and drank a glass of wine during the hour prior to trial. Before trial began, Winters' counsel approached him with a proposal from White regarding the marital property, to which he agreed. Winters contends he was unaware that the proposal was a global one encompassing all aspects of the division of the parties' property, but, rather, believed it was limited solely to the escrow of funds to permit him to reside in the marital home. Winters claims that, once the parties entered the courtroom and the judge began to recite the terms of the parties' agreement, he became "anxious" because the terms went beyond the escrow of funds.

(4) As reflected in the transcript of the August 8, 2000 hearing, the parties' agreement encompassed disposition of all the marital assets, including the parties' home, cars, vacation timeshare, IRAs, pensions and personalty. After the parties' attorneys recited the terms of the agreement, the Family Court judge

[2]The Family Court entered the agreement as an order on the same date.

asked Winters if he understood "all aspects" of the agreement, to which Winters replied, "Yes, sir." The judge asked Winters if he had "any questions" about "any aspect" of the agreement, to which Winters replied, "No, sir." The judge asked Winters if "all the terms" recited reflected the agreement that had been entered into, to which Winters replied, "Yes, Your Honor." Finally, the judge asked Winters if he wanted the agreement to be entered as an order, to which Winters replied, "Yes." Following this colloquy with Winters, the Family Court judge entered the agreement as an order.

(5) On October 20, 2000, White filed a petition in the Family Court to show cause why Winters should not be held in contempt of the Family Court's August 8, 2000 property division order. As reflected in the transcript of the April 11, 2001 hearing on White's petition, Winters failed to appear. After determining that the requirements of notice had been met, the Family Court judge proceeded with the hearing. In its order dated April 11, 2001, the Family Court found Winters in contempt of its August 8, 2000 property division order[3] and applied a number of sanctions against him, including the conveyance of Winters' interest in certain marital property to White, entry of a money judgment against Winters and in favor of White, and reimbursement by Winters of White's filing fee and attorney's fees in connection with the petition.[4]

(6) As to Winters' first claim, we find no abuse of discretion or legal error on the part of the Family Court in refusing to set aside its August 8, 2000

[3]Winters was found to be in contempt of the order by failing to: make mortgage payments on the marital home; pay the maintenance fee on the parties' vacation timeshare; pay White the value of her interest in the timeshare and the difference between the value of the parties' vehicles; pay White a specified amount from his IRA; cooperate with a realtor in order to sell the marital home; and comply with the two-list method for allocating the parties' furniture and household items.

[4]On April 24, 2001, at the request of White's attorney, the Family Court judge entered an addendum to its April 11, 2001 order that provided exclusive access to the marital home to White in order to carry out the terms of the order.

property division order.[5] While Winters points to the alleged unfairness of the agreement, the hearing transcript reflects that it was agreed to by the parties, both of whom were represented by counsel, after extensive pre-trial negotiations. Moreover, the Family Court conducted its own review of the agreement before entering it as an order and deemed it to be fair in light of the parties' pretrial memoranda.[6] While Winters contends that he did not understand the scope of the proposed settlement agreement, the hearing transcript reflects that the terms of the agreement were recited clearly by the parties' attorneys in open court and that Winters failed to offer any objection to those terms. Moreover, when questioned by the Family Court judge, Winters stated definitively that he understood the terms of the agreement and wanted the agreement entered as an order of the Family Court. The burden is on Winters to establish his lack of capacity.[7] Winters' assertions that he was depressed and had consumed various medications and a glass of wine prior to the hearing, and a doctor's September 29, 2000 note stating that his depression "probably impaired his ability to make decisions" on August 8, 2000, are insufficient to establish a lack of capacity to comprehend a property division agreement whose terms were negotiated by counsel, recited clearly in open court and agreed to definitively by him.[8]

(7) Winters also argues that the Family Court's order should be vacated on the basis of "mistake, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, misconduct, and other reasons which justify relief from

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[5]Fam. Ct. Civ. R. 60(b); *Reynolds v. Reynolds*, Del. Supr., 595 A.2d 385, 389 (1991) (citing *Battaglia v. Wilmington Sav. Fund Soc.*, Del. Supr., 379 A.2d 1132, 1135 (1977)).

[6]Fam. Ct. Civ. R. 52(d).

[7]*Husband (P.J.O.) v. Wife (L.O.)*, Del. Supr., 418 A.2d 994, 995-96 (1980).

[8]*Id.; Crowley v. Tedesco*, Del. Supr., No. 220, 1996, Hartnett, J., 1996 WL 470718 (Aug. 8, 1996) (ORDER).

the judgment," including ineffective assistance of counsel.[9] These arguments were not presented to the Family Court in the first instance and will not be considered by this Court on appeal.[10] The record does not support these claims in any case.

(8) We also find no merit to Winters' second claim that the Family Court abused its discretion and committed legal error in refusing to re-open the contempt hearing at which he failed to appear.[11] As justification for his failure to appear, Winters contends that the attorney he hired to file his motion to set aside the property division order, who he believed was still representing him, did not notify him that it was necessary to appear.[12] He also contends that the Family Court improperly notified him of the contempt hearing at the marital home. The transcript reflects that, prior to the hearing on the merits, the Family Court judge determined that both White's petition and the notice of the hearing on the petition had been sent to Winters at the marital home. This was the only address for Winters on record with the Family Court and there was no notification of any change in Winters' address for purposes of mail delivery. White's attorney represented that he sent additional copies of the hearing notice to Winters at P.O. Box 12165, Wilmington, Delaware,[13] and to the attorney Winters hired to file his

[9]Fam. Ct. Civ. R. 60(b). All of these arguments, with the exception of the ineffective assistance of counsel claim, were presented for the first time in Winters' Reply Brief.

[10]Supr. Ct. R. 8.

[11]Family Court Rule 60(b); *Reynolds v. Reynolds*, 595 A.2d at 389 (citing *Battaglia v. Wilmington Sav. Fund Soc.*, Del. Supr., 379 A.2d 1132, 1135 (1977)).

[12]This attorney was different from the attorney who had represented Winters on August 8, 2000.

[13]In his Opening Brief, Winters states that, at the time White's petition was filed, he was no longer living at the marital home and was receiving his mail at this post office box. We note that Winters still had access to the marital home at this time as well, since the Family Court's order granting exclusive access to White was not entered until April 24, 2001.

motion to set aside the property division agreement.[14] White's attorney further represented that the attorney stated he would forward the notice to Winters, even though he was no longer his counsel. The record, thus, reflects that Winters was on notice of the contempt hearing scheduled for April 11, 2001. Indeed, he does not contend otherwise.[15] Moreover, Winters has presented no evidence indicating that he reasonably believed he was represented by counsel who would contact him about the hearing. As such, there is no evidence of excusable neglect and Winters has no one but himself to blame for his failure to appear.[16] In the circumstances of this case, the Family Court properly exercised its discretion and properly applied Delaware law in determining that the contempt hearing would not be re-opened.[17]

NOW, THEREFORE, IT IS ORDERED that the judgments of the Family Court dated January 5, 2001 and May 8, 2001 are AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Justice

[14]The entry of appearance filed by this attorney limited his representation to the motion to set aside the property division agreement.

[15]Nor did Winters so contend in his motion to re-open filed in the Family Court.

[16]*Brannon v. Lamaina*, Del. Supr., No. 464, 1992, Veasey, C.J., 1993 WL 61680 (Feb. 9, 1993) (ORDER).

[17]Supr. Ct. R. 25(a).