RENDERED: January 15, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002477-MR

DEBORAH A. BOSCHERT — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 96-CI-000318

GARY W. BOSCHERT — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, GARDNER, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from a denial of a motion to set aside a separation agreement pursuant to KRS 403.180. Finding no error, we affirm.

On May 20, 1996, the Kenton Circuit Court entered a decree dissolving the marriage between the appellant, Deborah A. Boschert (Deborah) and the appellee, Gary W. Boschert (Gary). The trial court's decree incorporated a separation agreement previously executed by the parties. Based upon the statements made by both parties, the trial court found that the separation agreement was not unconscionable.

On March 24, 1997, Deborah filed a motion to set aside the separation agreement, alleging that it was unconscionable. The same day, Deborah served a set of interrogatories on Gary. However, on July 3, 1997, the trial court entered an agreed order stating "that the matter will then be submitted upon the Court for the purposes of the Court ruling as to whether the Respondent has made out a case for the purposes of having a hearing on the Respondent's Motion to set aside the Agreement as being unconscionable." Following a hearing, the trial court denied Deborah's motion to set aside the separation agreement, finding:

> Based upon a review of the entire record, including the Affidavits filed by the parties on the Respondent's Motion to vacate, this Court finds that the Respondent has failed to carry her burden of establishing that the Separation Agreement is unconscionable. The Court notes that both parties were represented by competent counsel throughout the dissolution proceedings, leading to the execution of the Separation Agreement. In addition, the Respondent is a business person who, with the assistance of counsel, was in a better position than most to understand the nature of the bargain that she entered into with the Petitioner.

Record on Appeal [ROA] at 163.

Now on appeal, Deborah first argues that the trial court should have compelled Gary to answer her interrogatories. A trial court has broad power to control discovery and prevent its abuse. Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1970). In the present case, the trial court determined that Deborah should be required to present valid grounds to set aside the settlement agreement before it compelled Gary to respond to her interrogatories. We agree with this approach, and find that

the trial court did not abuse its discretion by denying Deborah's motion to compel.

In addition, the parties agreed to submit the matter to the trial court on the record and affidavits. Indeed, the agreed order submitting the matter to the trial court was prepared by Deborah's counsel. Therefore, any objection to the trial court's denial of the motion to compel discovery was waived.

Deborah next contends that the trial court failed to apply the proper standard of review to her motion to set aside the settlement agreement. She argues that the trial court should have followed the summary judgment standard set out in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). However, the provisions in a dissolution decree regarding property disposition may not be revoked or modified, except by agreement of the parties, or unless the court finds the existence of conditions that justify reopening of the judgment under CR 60.02. KRS 403.250(1); Brown v. Brown, Ky., 796 S.W.2d 5, 7-8, (1990). A determination to grant relief from a judgment pursuant to CR 60.02 is left to the sound discretion of the trial court. One of the chief factors guiding it is the moving party's ability to present her claim prior to the entry of the order sought to be set aside. Schott v. Citizens Fidelity Bank & Trust Co., Ky.App., 692 S.W.2d 810, 814 (1985). Although a motion pursuant to CR 60.02 may ultimately involve factual questions, the trial court's first inquiry must be whether the motion, on its face, states grounds for relief from the judgment. This matter is a question of law for the trial court to decide, and the summary judgment standard does not apply.

Turning to the central issue in this case, Deborah next contends that the trial court erred in ruling that the separation agreement was not unconscionable. She points out that her affidavit set out the imbalance in the assets and debts received by her and those received by Gary. As a result, Deborah argues that the settlement agreement was manifestly unfair and therefore unconscionable.

KRS 403.180(2) and (3) provide as follows:

> (2) 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 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.
>
> (3) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, support, and maintenance.

In general, this statute invites parties to wind-up their own affairs by entering into a comprehensive agreement. However, in recognition of the intimate nature of the relationship and the ability of a strong and persistent spouse to overwhelm the other spouse, the statute broadly directs the trial court to review the agreement for unconscionability. In effect, the law has established a measure of protection for parties from their own irresponsible agreements. Upon a determination of unconscionability, the trial court may request submission of a revised agreement or make its own determination as to disposition

of property, support, and maintenance. Shraberg v. Shraberg, Ky., 939 S.W.2d 330, 332-33 (1997).

The provisions for modification of a separation agreement are fairly stringent, and a "definite and substantial burden" is placed upon the party seeking modification. McKenzie v. McKenzie, Ky., 502 S.W.2d 657 (1973). As a result, the party challenging the agreement as unconscionable has the burden of proof. Peterson v. Peterson, Ky.App., 583 S.W.2d 707, 711 (1979). A separation agreement will not be set aside unless it is "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.

Gary points to Deborah's May 13, 1996 statement to the trial court that she was satisfied that the agreement was fair in all respects. Yet of more significance is the fact that both parties were represented by counsel at the time of the signing of the agreement. The trial court specifically noted that both counsel were competent. While the dissolution proceeding was vigorously contested and highly emotional, Deborah did not allege any fraudulent or overreaching conduct by Gary which would justify setting aside the agreement.

Furthermore, we agree with the trial court that Deborah failed to carry her burden of proving the separation agreement unconscionable on its face. Both Deborah and Gary are experienced business persons and were capable of making choices as to valuation and allocation of property. Even assuming that

Deborah's allegations regarding the values of the marital property and debt were accurate,[1] the record does not require a finding that the agreement was manifestly unfair or unreasonable. Based upon the economic circumstances of the parties and the relevant evidence of record, the trial court found that the separation agreement is not unconscionable. We will not interfere with that determination on appeal.

Lastly, Gary requests that this Court impose sanctions upon Deborah and her attorney for filing a frivolous appeal. CR 73.02(4) permits this Court to award costs and damages upon a determination that an appeal is so lacking in merit that it appears to have been taken in bad faith. If the court finds that the appeal is totally lacking in merit in that no reasonable attorney could assert such an argument, bad faith may be inferred, and the appeal is frivolous. The factors to be considered must necessarily be in the record which can be reviewed objectively. Leasor v. Redmon, Ky., 734 S.W.2d 462, 464 (1987).

The central question in this appeal has always been whether the separation agreement was unconscionable. We agree with the trial court that the agreement was not unconscionable. Nonetheless, we do recognize that the agreement could be interpreted as being substantially more favorable to Gary than to Deborah, particularly if Deborah's valuations are accepted. While the trial court's determination of conscionability is

[1] None of Deborah's valuations of property or debt, even those assigned to her under the separation agreement, were supported by any evidence in the record.

entitled to considerable deference, it is still subject to review by this Court. The mere fact that Deborah was unsuccessful in her challenge to the separation agreement does not mean that the appeal is frivolous. Based upon the record and the circumstances of this case, we decline to impose sanctions upon Deborah or her attorney at this stage in the appellate process.

Accordingly, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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