

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000016-MR

TIMOTHY AUBREY KLOSS

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE JOHN T. DAUGHADAY, JUDGE  
ACTION NO. 93-CI-00272

ROBIN DENISE KLOSS

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: EMBERTON, KNOFF AND KNOX, JUDGES.

EMBERTON, JUDGE: This case arises from the trial court's interpretation of a separation agreement and property settlement entered into on June 20, 1994, and which was incorporated into a Decree of Dissolution of Marriage. The trial court ordered that the appellant, Timothy Kloss, convey to appellee, Robin Kloss, three specific acres as required by the agreement. Appellant's motion to set aside the order was denied and this appeal followed.

Pursuant to the parties' agreement, appellant was restored his non-marital interest in real estate with the

exception of "three acres in the approximate front center of the property of said tract. . . ." It was further expressed in the agreement that appellee intended to construct a business on the property, and if she did not do so within five years, the land would be conveyed to appellant.

In 1997, after appellant refused appellee's request for a deed to a specific three acre tract, a rule was issued by the Graves Circuit Court for appellant to show cause why he should not be held in contempt of court for failure to convey the property. A show cause hearing was held on November 17, 1997, and after hearing arguments by both parties, the court ordered that appellant transfer the three specific acres requested to appellee by noon on December 1, 1997.

On December 1, 1997, appellant moved the court to set aside the order alleging that the agreement did not specify the precise three acres to be conveyed and that he should be permitted to choose the three acres. Although there was no sworn testimony elicited at either the November or December hearings, the court was presented with the arguments of counsel and denied the motion.

Appellant's initial complaint is that the trial court failed to conduct a full evidentiary hearing and now complains that sworn testimony was required to determine the intent of the parties when the agreement was executed. The record does not reveal that appellant ever raised this issue to the trial court; it is, therefore, waived and we decline to address it. South Bay

Enterprises v. Mirada Bay Pet., Inc., Ky. App., 957 S.W.2d 287, 290 (1997).

Property settlement agreements are contracts and are subject to the rules of construction applicable to contracts. As stated in Lafevers v. Lafevers, Ky., 255 S.W.2d 985, 986 (1953):

The universal rule is that in construing contracts courts attempt to arrive at the intention of the parties as expressed in the instrument as a whole and in so doing consider the subject matter of the contract, the situation of the parties and conditions under which the agreement is written. (Citations omitted).

In this case the court concluded that the three acres of property to be conveyed pursuant to the agreement referred to a specific three acres. The agreement referred only to a single tract of land, which to appellee's knowledge, was the only tract located on the Lebanon Clark (Church) Road, the only property discussed for location of a business, and a feasibility study was conducted prior to the execution of the agreement. Based on the record, there was no abuse of discretion by the trial court. Clark v. Clark, Ky. App., 782 S.W.2d 56 (1990).

Appellant's remaining arguments are equally without merit. The agreement permitted appellee five years to build her business. She requested the deed in 1997, just three years after its execution. Finally, appellant's contention that the non-marital nature of the property conveyed permitted him to choose which acreage to convey is specious. The characterization of the property as non-marital is rendered immaterial by appellant's agreement to the conveyance.

The judgment of the Graves Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Benjamin J. Lookofsky  
Mayfield, Kentucky

BRIEF FOR APPELLEE:

Gayle B. Robbins  
Mayfield, Kentucky