RENDERED: APRIL 28, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002754-MR

JUDITH PATIERNO GATLING — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 89-CI-00356

DANNY PATIERNO — APPELLEE

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

BEFORE: HUDDLESTON, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Judith Patierno Gatling has appealed from an order of the Pike Circuit Court concerning the proper interpretation of the agreement between the parties which settled their dissolution proceeding and was made a part of the final decree of dissolution. In dispute are the agreement's provision that Danny Patierno's child support obligation for his oldest daughter would continue so long as the daughter continued her education, and the agreement's provision for a payment by Judith to Danny relating to Danny's equity interest in the marital residence.

Judith and Danny were married on December 10, 1967. Two children were born during the marriage: Justina Lynn Patierno, born August 6, 1970, and Dana Rhae Patierno, born April 25, 1977. On March 15, 1989, Danny filed a petition to dissolve the marriage. Judith entered an appearance agreeing that the marriage was irretrievably broken and waived service of summons without retaining separate counsel. The parties entered into an agreement concerning division of marital property, child custody, child support, and all other matters relating to the marriage of the parties. On May 24, 1989, the trial court entered the divorce decree and incorporated the parties' agreement into its final judgment. The decree provided that Danny was to pay $250.00 per month in child support for each child so long as the child was continuing her education.

On May 1, 1990, Danny filed a motion to reduce his child support payments on the basis that he had injured his back and was no longer able to earn additional income by moonlighting as a swimming pool installer. Also during this time, Judith filed a motion for a wage assignment and for recovery of child support arrearages. On July 20, 1990, an agreed order was entered wherein Danny acknowledged his ongoing duty, consistent with the dissolution agreement, to pay child support of $500.00 per month. The agreed order also provided for the payment of child support arrearages and imposed a wage assignment.

Despite the terms of the dissolution agreement, and even though Justina continued to pursue her education, on August 8, 1990, Danny petitioned the trial court to reduce his child

support on the basis that Justina had married. On August 17, 1990, the trial court entered an order which, in effect, granted Danny's motion by implying that Danny's child support should be reduced to reflect support for one child only. The order provided that payment would initially be $400.00 per month, but that upon the receipt of the parties' respective check stubs, child support would be recalculated for one child pursuant to the child support guidelines. On March 27, 1991, the trial court entered an order setting child support at $453.00 per month. It appears that the order intended to set child support for only one child, Dana, pursuant to the child support guidelines. Justina was not mentioned by name, or even indirectly alluded to, in either the August 17 or March 27 orders.

On February 15, 1994, Danny filed a motion requesting a hearing on the issue of whether he was entitled to $10,000.00 of the proceeds received by Judith as a result of her sale of the marital residence. The motion was based upon paragraph 4 of the dissolution agreement, which provided that Judith may, when Dana turned 21 years of age, purchase Danny's interest in the marital home.

On March 3, 1994, as an apparent response to Danny's motion, Judith filed a motion contending that, pursuant to the dissolution agreement, Danny owed past and future child support for Justina because Justina was enrolled in school and continuing her education. The motion further requested that the trial court recalculate child support based upon the parties' current incomes and increase Danny's support obligation if appropriate. Danny's

February 15 motion and Judith's March 3 motion were referred to a Special Commissioner for the taking of evidence and for a report and recommendation.

On January 30, 1995, again despite the dissolution agreement and even though Dana was continuing her education, Danny filed a motion requesting that the wage assignment against him be released because Dana would soon be turning 18 years old and "his obligation to pay child support will thereupon cease." On April 5, 1995, Danny re-filed the same motion. On June 2, 1995, the trial court entered an order which granted Danny's petition and "suspended" his child support obligation effective the month Dana turned 18 years of age or the month she graduated from high school, whichever occurred later.

On July 27, 1995, Judith filed a motion pursuant to CR[1] 60.02 for relief from the June 2 order. The motion contended that Judith had not received proper notice of the hearing on Danny's motion and, pursuant to the parties' dissolution agreement, Danny was obligated to continue to pay child support as long as Dana continued her education, including college and post-graduate schooling.

On August 9, 1995, Judith filed a motion for back child support from June 2, 1995, and requested that Danny be ordered to pay child support until Dana completed her education. On August 25, 1995, the trial court set aside its June 2, 1995, order that had suspended Danny's child support obligation. Judith's motion for an order compelling payment of past child support and

[1]Kentucky Rules of Civil Procedure.

reinstatement of child support were abated pending further review.

On April 3, 1996, the trial court entered an order ruling that its August 17, 1990, order setting child support at $400.00 per month did not set aside the parties' dissolution agreement insofar as the agreement obligated Danny to pay child support so long as the parties' children continued their educations, including college or post-graduate work. The order required Danny to continue to pay child support for Dana so long as she continued her education, with the payments to be made directly to Dana. However, the order appears to have been intended to apply to Dana only, as Justina was not mentioned in the order, and Danny was not ordered to pay either past or future child support for Justina.[2]

On November 27, 1986, the Special Commissioner filed his report and recommendations. The Special Commissioner concluded that Danny's obligation to pay child support for Justina, pursuant to the dissolution agreement, continued until she had completed her education. The report further concluded that prior orders of the court, namely the March 27, 1991, order, did not alter Danny's support obligation in regards to Justina. With regard to Danny's interest in the marital home, the Special Commissioner concluded that Danny was entitled to $10,000.00, the

[2]It is not clear from the record exactly when Justina completed her post-high-school education. It appears that, at a minimum, she continued her education through college. Justina was born in 1970, and presumably would have completed high school in approximately 1988. She may have completed college in approximately 1992. However, post-graduate work may have extended her education for several years beyond this.

amount identified in the dissolution agreement as representing Danny's interest in the home.

Both sides filed exceptions to the Commissioner's report. The trial court accepted the Commissioner's recommendation that Danny was entitled to $10,000.00 of the proceeds from the sale of the marital residence as his share of the residence. However, the trial court rejected the Special Commissioner's recommendation with respect to Danny's child support obligation regarding Justina. In an order entered on August 11, 1998, the trial court determined that Danny had been released from the child support obligation regarding Justina by its August 17, 1990, order. Judith filed a motion to alter, amend, or vacate, which was denied on October 14, 1998. This appeal followed.

We agree with the trial court that its order of August 17, 1990, terminated Danny's child support obligation with respect to Justina. Paragraph 5 of the parties' dissolution agreement provides as follows:

> The parties hereto agree that [Judith] is the proper person to have the care, custody and control of the parties' infant children. [Danny] agrees to pay to [Judith] the sum of $250.00 per month as child support for Justina Lynn Patierno, until she is no longer continuing her education. Danny further agrees to pay to [Judith] the sum of $250.00 per month as child support for Dana Rhae Patierno until she is no longer continuing her education. Four years from the date hereof, the child support for Dana Rhae Patierno shall be increased to the sum of $400.00 per month for so long as said Dana Rhae Patierno is continuing her education, including college or post graduate work past her eighteenth birthday [emphasis added].

The law clearly allows parties to contract to have child support extended beyond the statutory standard of KRS 403.213(3), which provides that, absent an agreement, child support generally terminates when the child turns 18 years of age or graduates from high school, whichever is later.[3] In their dissolution agreement, the parties unquestionably extended Danny's child support obligation as to both Justina and Dana. The agreement provides that Danny is to be obligated to pay child support for Justina until she completes her education without regard to whether she turns 18 years of age or gets married. While the agreement does not specifically state that child support will continue beyond marriage, it likewise does not state that child support will terminate upon marriage.

Despite the dissolution agreement, on August 8, 1990, Danny filed a motion which stated, in pertinent part, as follows:

> Comes now the Petitioner and moves the Court for an Order cutting in half his wage assignment withholding order. One of the parties' children married on July 28, 1990 and the child support order should so reflect this.

On August 17, 1990, the trial court entered an order which stated, in pertinent part, as follows:

> This matter having come on for hearing on the motion to reduce child support and further on a motion for rule and the Court having heard the evidence of the parties as well as from Counsel, IT IS HEREBY ORDERED AS FOLLOWS:
>
> (1) That for the month of August, that the Petitioner shall pay to

[3] Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975); Showalter v. Showalter, Ky., 497 S.W.2d 420 (1973).

> the Respondent the sum of $400.00 Dollars per month as child support for the month of August.
>
> (2) That upon receipt of the first check of the school year for 1990-91 both parties are to provide copies of their check stubs to the Court reflecting the income rate for the school year of 1990-91.[4] Upon receipt of those checks, the Court will recalculate child support for the one infant child based upon the child support schedule [emphasis added].

Judith did not appeal or otherwise object to this order. While the order does not specifically so state, we construe this order as, by implication, granting Danny's motion to terminate his child support obligation as to Justina. The order established child support at $400.00 per month as a temporary approximation of the support obligation for one child, until current salary information could be gathered to calculate the actual obligation for one child under the schedules. For reasons that the record does not reflect, however, the calculation of the actual support obligation appears to have been delayed.

Following this delay, on March 27, 1991, the trial court entered an order which stated, in pertinent part, as follows:

> This matter having come before the Court on motion for rule as well as other matters and the parties' having represented to the Court that they have reached an agreement regarding payment of child support due and owing as well as future child support and

[4]Danny and Judith were at the time employed as educators by the Pike County Board of Education.

> payment on the second mortgage to the First National Bank of Pikeville Kentucky;
>
> IT IS HEREBY ORDERED AS FOLLOWS:
>
> 1. That the Petitioner, Danny Patierno, is to pay the Respondent, Judith Lyons Patierno, the sum of $453.00 per month as child support for the infant, Dana Rae [sic][emphases added].

The order goes on to discuss wage assignment issues and provides that Danny's wage assignment should remain at its present level until certain arrearages are satisfied, at which time it will be reduced to $453.00, the amount of child support provided for in the order. Judith did not appeal the March 27 order.

When read together, we interpret the August 17, 1990, and the March 27, 1991, orders as holding that Danny no longer has a child support obligation with respect to Justina. The August 17 order, an order addressing Danny's motion to eliminate his support obligation to Justina, refers to calculating child support for "the one infant child." "The one infant child" clearly refers to Dana. Similarly, the March 27 order omits child support for Justina from an order which is intended to establish Danny's ongoing child support obligation. By omitting a child support provision for Justina from Danny's ongoing obligation, by implication Danny's child support obligation for Justina was eliminated.

In interpreting these orders, we agree with the trial court's discussion in its August 11, 1998, order as follows:

> Danny excepts to the Commissioner's Recommendation that he pay child support for Justina after her marriage but before her education was through. According to this Court's August 17, 1990, Order, the parties

> would submit income information so that the Court could recalculate child support based on one infant child, not two. It would be patently unfair to require Danny to pay back child support on an emancipated child when he had been released from that obligation by this Court [emphasis added].

Thus, the trial court interpreted its own prior orders as having released Danny from his child support obligation as to Justina. Moreover, the conduct of the parties supports this interpretation. We cannot reconcile Judith's conduct following the entry of these orders with a belief that Danny had a child support obligation with respect to Justina. Judith otherwise aggressively litigated any arrearages owed by Danny. Her conduct in not seeking arrearages with respect to Justina following the entry of the August 17, 1990, order is wholly inconsistent with the notion that she believed she was entitled to these sums.

Judith did not appeal the August 17, 1990, order or the March 27, 1991, order. Having concluded that these orders, by implication, held that Danny no longer had a child support obligation with respect to Justina, we must also conclude that because Judith did not appeal those orders, we may not now examine those unappealed final orders for error.[5] The orders were clearly final orders and, no appeal having been taken from them, they could be set aside only by proceedings under CR 60.02.[6] There are no allegations here to warrant relief under

[5]CR 73.02(1)(a).

[6]Walters v. Anderson, Ky., 361 S.W.2d 31, 32 (1962).

that rule. Therefore, the trial court properly rejected Judith's claim.[7]

The second issue concerns Judith's claim that upon selling the marital home she did not become obligated to pay Danny $10,000.00 as a reimbursement for his interest in the property. Paragraph 4 of the parties' dissolution agreement provides as follows:

> [Judith] shall have possession and control of the marital home located at Johns Creek, Pike County, Kentucky, until such time as the parties' infant child, Dana Rhae Patierno reaches the age of 21. Upon Dana Rhae Patierno becoming 21, the respondent may purchase [Danny's] interest in the marital home for the total purchase price of $10,000.00. At such time, Danny agrees to execute a deed of conveyance to [Judith] for all his right, title and interest in and to the marital home and lot located at Johns Creek, Pike County, Kentucky [emphases added].

The discussion in the Special Commissioner's report, adopted by the trial court, thoroughly summarizes and resolves the issue, and we therefore adopt the following from that report:

> Approximately three (3) years ago [Judith] sold the marital home to friends of her parents who now occupy the same as their residence. [Judith] has not paid [Danny] $10,000.00 or any other amount as a result of this sale. [Judith] testified that it was her understanding of Paragraph 4 of the Property Settlement Agreement that she had the discretion to purchase [Danny's] interest in the marital home when the parties' youngest daughter attained the age of 21 or

[7]CR 60.02 permits relief based upon the grounds of inadvertence or mistake if the motion for relief is made within one year. Here, the applicable trial court orders were entered on August 17, 1990, and March 27, 1991. Judith first sought to rectify any inadvertence or mistake as to those orders by her motion of August 9, 1995.

> when the youngest daughter got married, which ever occurred first. It was further the understanding and contention of [Judith] that in the event of the sale of the home that she had discretion as to whether or not to remit $10,000.00 of the purchase price to [Danny]. Conversely, [Danny] testified that he understood Paragraph 4 of the Agreement to require [Judith] to pay to [Danny] $10,000.00 in the event of [Judith's] sale of the marital home as well as granting her the right to purchase [Danny's] interest in the home for $10,000.00 when the parties' youngest daughter married or attained the age of 21 which ever occurred first.
>
> Paragraph 4 of the Property Settlement Agreement does not specifically state that [Judith] shall pay [Danny] $10,000.00 if the marital home is sold. However, the language of Paragraph 4 clearly recognizes that [Danny] had an interest in the marital home. The Agreement recites that "[Danny] agrees to execute a deed of conveyance to [Judith] for all his right, title, and interest in and to the marital home and lot[.]" By those words, the parties acknowledged that [Danny] held an interest in the property. The parties, by stating the consideration to be paid in the purchase option, have valued [Danny's] interest at $10,000.00. The Agreement gives Judith no ability to defeat or diminish [Danny's] interest in the marital home by selling same to unrelated third parties. Since [Danny's] interest was apparently conveyed to the third parties as well as the interest of [Judith], [Danny] must be compensated for his portion of the marital home.

Separation agreements are reviewed by the courts under the same principles as any other contract.[8] The duty of the courts in contractual disputes is to "construe contracts and not

[8] Richey v. Richey, Ky., 389 S.W.2d 914 (1965); Nelson v. Mahurin, Ky.App., 994 S.W.2d 10 (1998); Leathers v. Ratliff, Ky.App., 925 S.W.2d 197 (1996); Lydic v. Lydic, Ky.App., 664 S.W.2d 941 (1983).

to construct them."[9] When "parties reduce their engagement to writing in such terms as to make it a complete contract, their rights must be controlled thereby."[10]

We construe the dissolution agreement as acknowledging that Danny had a marital interest in the home in the liquidated amount of $10,000.00. We further construe the buy-out language as a provision to defer the division of Danny's marital interest in the home until such time as the children left the residence. Judith's argument that Danny's interest in the home was somehow destroyed by her decision to sell the home is untenable. The trial court did not err in awarding Danny a judgment for his interest in the marital home.

For the foregoing reasons the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Pamela Robinette-May
Pikeville, KY

BRIEF FOR APPELLEE:

C. Tom Anderson
Prestonsburg, KY

[9]Snyder v. Traveler's Fire Ins. Co., 282 Ky. 555, 138 S.W.2d 1036-38 (1940).

[10]Geary-Gay Motor Co. v. Chasteen, 248 Ky. 393, 58 S.W.2d 393, 394 (1933).