RENDERED: February 2, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002825-MR

ROBERT KANE — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 97-CI-00231

CANDIE KANE — APPELLEE

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

BEFORE: BUCKINGHAM, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Robert Kane (Robert) appeals an order entered September 13, 1999, by the Greenup Circuit Court denying his CR 60.02(f) motion to set aside or modify the decree of dissolution entered on January 22, 1998. We affirm.

Robert and Candie Kane (Candie) were married on June 2, 1990. They separated on August 25, 1996, and a petition for dissolution was filed on April 23, 1997. During the pendency of the action, Robert agreed to pay $800 per month in child support and to maintain medial insurance for the parties' two minor children.

The matter was referred to the Domestic Relations Commissioner (DRC) and a hearing scheduled after limited discovery had been completed. Both parties attended the DRC hearing and each was represented by legal counsel. Counsel informed the DRC that the parties had reached an agreement on many issues but that custody, child support, tax exemption credit, medical expenses reimbursement and attorney fees could not be agreed upon. A hearing limited to those stated issues was held before the DRC. On November 27, 1997, based upon the agreement to the partial issues, and after reviewing the record and evidence provided during the hearing, the DRC filed his report. Following the DRC report, the record contains a document entitled, "PARTIAL SETTLEMENT AGREEMENT". This agreement is fully set forth below:

> The parties by and through their respective counsel do hereby agree and stipulate as follows:
>
> 1) Candie Kane will be awarded the property where she now resides located in Boyd County, Kentucky; and Mr. Kane will execute a quit claim deed over to her.
>
> 2) The Petitioner will receive $10,000 cash as a property settlement by November 1st, and she will receive maintenance in the amount of $5,000, closed in, for ten consecutive months with the first payment becoming due November 15th, 1997. In exchange, the Respondent will keep his Honeywell pension, any IRA accounts and any gold which he has in his possession.
>
> 3) Each party shall keep their own vehicle.
>
> 4) There will be no further maintenance claim.

> 5) Any encumbrances on either parties' vehicle or property that either party has, the party keeping that item is responsible for bearing those encumbrances if any.
>
> 6) It is further stipulated that the Petitioner shall have the physical custody of the two minor children of the marriage.
>
> Reserved issues before the Court are joint custody versus sole custody, child support, medicals and the issue of tax deductions.

The DRC report also states that the parties had "announced a partial agreement with certain reserved issues and having dictated same into the record...."

Thereafter each party filed separate exceptions to the DRC's report. Specifically, Robert alleged the DRC erred in deciding the issues of medical insurance, day care, child support, and legal expenses. As to child support, Robert claimed he believed his child support obligation would be reduced based upon the conveyance of his interest in the Catlettsburg property to Candie. The trial court subsequently entered its findings of fact, conclusions of law and decree of dissolution of marriage on January 22, 1998. Item 8 of the findings of fact stated:

> 8. The Petitioner and Respondent entered into a Settlement Agreement which was dictated into the record before the Domestic Relations Commissioner and the Court has approved the same and further, some issues were heard by the Domestic Relations Commissioner and Exceptions were filed by the Respondent and the parties reached an agreement concerning such Exceptions, all set forth thereinafter.

In the decree the trial court incorporated the agreement of the parties previously entered as well as the agreement reach between

the parties and counsel on the day of the court hearing on the exceptions previously filed (October 14, 1997). The decree as relevant to this appeal sets forth that the parties would share joint custody of the children, that Robert would pay $859.05 per month in child support, and that Candie would be awarded the Catlettsburg real estate with Robert executing a quitclaim deed to the property. The decree was entered January 22, 1998. Shortly thereafter on February 3, 1998, another agreed order was entered regarding each party being entitled to claim one child as a dependent for income tax purposes. Although within weeks of the entry of the decree and agreed order both parties began filing motions for rules and to modify, neither party filed an appeal.

Eventually, after numerous other motions had been filed, Robert filed a CR 60.02 motion[1] claiming the property division was unconscionable and should be set aside based upon "fraud" and "civil and constitutional rights violations justifying relief by extraordinary nature." This motion was denied by a court order entered July 26, 1999. Robert then filed a second pro se CR 60.02 motion on August 5, 1999, again alleging he was entitled to relief based upon fraud [CR 60.02(d)]. Within that motion he again alleged that the separation agreement was unconscionable and must be set aside because it was manifestly

[1]The original CR 60.02 motion is not included in the official court record. However, a copy of the motion is included as an exhibit filed by Robert with the court. Also a letter from the trial judge to Robert dated June 10, 1999, indicates that the court did, in fact, receive Robert's pro se CR 60.02. Additionally the record includes Candie's response and objection to his CR 60.02 motion for relief filed July 1, 1999.

unfair and unreasonable. This motion was supplemented when Robert hired counsel who filed a motion on September 13, 1999, to revoke or modify the decree of dissolution pursuant to the provisions of KRS 403.250(1) and CR 60.02(f). On October 29, 1999, the trial court denied Robert's CR 60.02(f) motion. This appeal followed.

In denying Robert's motion the trial court stated that the basis for Robert's motion was his belief that the property division was based upon an agreement between the parties by which he would receive an offset of his child support obligation in exchange for his interest in the marital property located in Catlettsburg. Without this offset Robert argues the difference in the division of marital assets is patently unconscionable. In denying his CR 60.02(f) motion the court found:

> The record reveals that the [Robert's] request for relief is without merit. [Robert] was at all times during the divorce proceedings represented by legal counsel. There is no indication that [Robert] made any attempts to appeal this Court's decision to enter the decree of dissolution to the Kentucky Court of Appeals, or that he made any request for modification of the decree under CR 59.05. Now, more than eighteen (18) months after the entry of the final decree, [Robert] wants to set aside the decree.
>
> The Court has carefully reviewed a voluminous record in this case and has considered all the arguments of the parties. The Court finds that [Robert] has not met his burden of proof. To grant the relief requested by [Robert] would be inequitable to [Candie]. This is in view of the fact that the Court can see from the record that to modify the decree as suggested by [Robert] would seriously disrupt the conscionability of the decree. A hearing is not warranted in this case.

> [Robert] was represented by counsel, he has had full and fair opportunity to present his case before this court, he has not offered any proof that the decree of dissolution entered by this Court in January 1998 was on its face unfair or unconscionable.

On appeal Robert contends that the trial court erred by not making specific findings as to the conscionability or unconscionability of the alleged property settlement. We disagree. The issue before the trial court and this court is not the agreement itself but whether Robert can maintain a CR 60.02(f) motion. The original decree, including the property settlement, was entered in January, 1998, and not appealed. The trial court denied Robert's first CR 60.02 in July, 1999, and that was not appealed. As to his second CR 60.02 motion, the trial court made the following findings: (1) it was without merit; (2) that he had failed to meet his burden of proof; (3) that to alter the agreement in anyway would create inequities as to Candie; and (4) any changes would "seriously disrupt the conscionability of the decree." All these findings clearly infer that the original settlement was deemed to be conscionable by the trial judge.

Both parties cite this Court to Shraberg v. Shraberg, Ky., 939 S.W.2d 330 (1997), a leading case on determining when to grant a rehearing on an alleged unconscionable agreement. The Shraberg Court put forth, in part, the following principles to guide lower courts in determining that issue:

> In general, this statute [KRS 403.180] 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.

....

Our decisions under the statute similarly show no reluctance to supervise separation agreements. A leading decision, Wilhoit v. Wilhoit, Ky., 506 S.W.2d 511 (1974), defined the term "unconscionable" as used in KRS 403.250, the modification statute, to mean "manifestly unfair or inequitable." The oft-cited Court of Appeals decision in Peterson v. Peterson, Ky. App., 583 S.W.2d 707 (1979), contains a broad analysis of the statute here under review and of separation agreements in general. It held that a bad bargain and unconscionability were not synonymous. While recognizing that "a rather harsh settlement" had been reached, the court gave great deference to the view of the trial court. "It would appear that in cases of this nature the trial court is in the best position to evaluate the circumstances surrounding the agreement." Id. at 712.

As the foregoing and other cases show, fraud, deceit, mental instability or the like, are not required to obtain invalidation of a separation agreement. What is required is a showing of fundamental unfairness as determined "after considering the economic circumstances of the parties and any other relevant evidence...." KRS 403.180(2). Undoubtedly, the trial court is in the best position to make such an analysis and the cases reflect broad deference to the trial court in this regard.

....

> Thus, a party seeking to set aside a separation agreement can satisfy his or her burden of proof by evidence of fraud, undue influence or overreaching. Absent such evidence, the movant must prove that the agreement is so one-sided as to be not just a bad bargain, but so clearly detrimental to the movant's interest as to create a prima facie case, i.e., a rebuttable presumption, that the agreement is manifestly unfair or inequitable. If the movant's evidence is insufficient to satisfy this burden, the motion to set aside the agreement must be denied. But if the movant's evidence proves prima facie that the agreement is manifestly unfair or inequitable, the burden of going forward shifts to the proponent of the agreement to produce evidence to explain why it would not be manifestly unfair or inequitable to enforce it. KRE 301.
>
> The trial judge is in the best position to determine whether, under the totality of the circumstances, a particular settlement agreement is manifestly unfair or inequitable. The judge's decision in that regard can be tested on appeal by application of the "clearly erroneous" standard for review. CR 52.01. In Peterson, supra, the trial judge's conclusion that the agreement was not unconscionable was held not clearly erroneous. Similarly, in Burke v. Sexton, supra, the trial judge's conclusion that the agreement was unconscionable appears to have been held not clearly erroneous.

Shraberg, 939 S.W.2d at 332, 333, 335.

In the case sub judice, the trial judge found the agreement to be conscionable and any change therein to be unconscionable. There is substantial evidence in the record to support these findings. For example, the discovery provided by Robert shows that he had retained approximately $20,000 in gold and jewelry, had withdrawn over $50,000 immediately prior to the filing of the dissolution (to allegedly pay off a 17-year-old college tuition debt to his father), and the child support was

set at $859 per month despite the DRC's recommendation that the guidelines required $984 per month. Thus, the trial court's conclusion that the agreement was conscionable is not clearly erroneous. We agree with the trial judge's conclusions that Robert has failed to offer any proof that the decree was unfair or unconscionable, that he has not met his burden of proof as to his CR 60.02 motion, and that the relief requested is without merit.

For these reasons, we affirm the order entered by the Greenup Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Jeffrey Scott
Grayson, KY

BRIEF FOR APPELLEE:

Bruce MacDonald
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