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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002559-MR
NO. 2000-CA-000516-MR
NO. 2000-CA-000532-MR

WILLIAM HOYNE PURSLEY — APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 91-CI-00433

SAMMYE SHAREN WALDEN PURSLEY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING WITH DIRECTIONS
** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: William Hoyne Pursley (William) appeals from an order of the Logan Circuit Court upholding as conscionable a separation agreement between himself and his former wife, Sammye Sharen Walden Pursley (Sharen). He also appeals from a judgment directing him to pay Sharen all amounts due under the agreement. Sharen cross-appeals from that same judgment, arguing that the trial court erred in its interpretation of the maintenance and child support provisions of the agreement, and that the court abused its discretion in denying her request for pre-judgment interest. Upon review of the record and the applicable law, we

find that the terms of the separation agreement relating to child support are so excessive and ambiguous as to be manifestly unfair. To the extent that the trial court awarded a judgment for child support arrearages, we reverse and remand with directions to set child support anew. However, we find that the trial court did not clearly err in upholding as conscionable the terms of the separation agreement relating to disposition of property and maintenance. We also find that the trial court's rulings interpreting and enforcing the remaining provisions of the agreement are not clearly erroneous, and that the court did not otherwise abuse its discretion.

The procedural history of this case is nothing short of bizzare, and is set forth in detail in the trial court's orders of September 13, 1996 and September 27, 1999. For purposes of this appeal, the following facts are relevant. On August 6, 1991, William filed a "complaint" in the Logan Circuit Court in the nature of a petition for dissolution of marriage. The petition was filed by Fred G. Greene, a practicing attorney in Russellville, Kentucky. However, Greene did not identify himself as William's counsel of record. Ostensibly, Greene represented both parties, although the trial court later determined that Greene had been retained by Sharen and paid by William.

On August 14, 1991, a property settlement agreement (the agreement) was filed with the trial court. The agreement was signed by both parties before a notary public and it indicated that it had been prepared by attorney Greene. The agreement included provisions for division of marital property,

maintenance, child support and custody of the parties' two minor children. On November 15, 1991, the trial court entered a Decree of Dissolution of the Marriage which adopted the provisions set out in the agreement.

In May of 1993, William moved the trial court to rule that the decree was void based upon lack of subject matter jurisdiction. The trial court initially overruled the motion, but the court later reconsidered that decision.[1] In an order entered on September 13, 1996, the trial court found that neither William nor Sharen had been a continuous resident of Kentucky for 180 days prior to the filing of the petition. Based on this finding, the court held that the decree entered on November 15, 1991 was void for lack of subject matter jurisdiction.

Nonetheless, the trial court also found that the parties had since met all of the requirements for entry of a decree. Consequently, the court entered a decree of dissolution effective from May of 1992.[2] The trial court also found that

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[1] On July 14, 1994, the trial court entered an order overruling William's motion to set aside the decree as void. The order concluded that William had failed to make the motion within a reasonable time. The order expressly stated that it was not final and appealable, and the court reserved a decision on other motions. However, on May 17, 1995, the parties conducted a hearing before the Hon. William G. Fuqua, the original trial judge in this case. At the conclusion of the hearing, Judge Fuqua expressed strong doubts concerning his decision to sign the decree. Judge Fuqua resigned as circuit judge in June of 1995, and the Hon. Tyler L. Gill was appointed as his successor. Shortly thereafter, Sharen moved to hold William in contempt for his failure to comply with the agreement, and William sought a formal order of the court concerning the validity of the decree.

[2] The trial court stated that it was entering the decree *nunc pro tunc* to May of 1992. We question the trial court's use of this rule to give retroactive effect to the decree. *See* Black's Law Dictionary (6th ed., 1990), p. 1069. *See also* Powell v. Blevins, Ky., 365 S.W.2d 104, 106 (1963); Carroll v. Carroll, Ky., 338 S.W.2d 694, 696 (1960); Montgomery v. Viers, 130 Ky.

(continued...)

"there is insufficient proof in the record for the Court to make any determination concerning whether the contract [agreement] was unconscionable when made ...." Consequently, the court stated that it would reserve a ruling on this issue until after the parties had submitted evidence.

In 1998 and 1999, the parties produced depositions and other evidence on the issues reserved by the court. The trial court also heard direct testimony from attorney Greene. Thereafter, the issue was submitted to the trial court on the evidence of record and briefs of counsel. On September 27, 1999, the trial court issued findings of fact, conclusions of law and a judgment. The court concluded that the agreement was not unconscionable when it was entered, nor was it the result of any fraud, duress or unfair coercion on Sharen's or Greene's part. Thus, the court found that all of the agreement is enforceable, except for a provision under which Sharen was entitled to the "use" of the stock purchase plan which is available to William through his employer. The trial court further addressed an issue concerning the interpretation of an ambiguous provision in the agreement.

The trial court scheduled a further hearing to determine the amount of child support and maintenance which

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[2](...continued)
701, 114 S.W. 251, 252-54 (1908). However, neither party has raised this issue on appeal. Furthermore, it appears from the record that William re-married sometime after May of 1992 but before September of 1996. We surmise that the trial court was attempting to minimize any prejudice to the parties caused by the void decree. Since the trial court had jurisdiction to enter the decree in May of 1992, we conclude that any error by the trial court in entering the decree *nunc pro tunc* is beyond the authority of this Court to review. KRS 22A.020(3).

William owed under the agreement. On January 14, 2000, the trial court entered a "Final Judgment As to Maintenance and Child Support Arrearages." Under the agreement, William is required to pay ten percent (10%) of his net salary and bonus as maintenance to Sharen, and thirty percent (30%) of his net salary and bonus as support for the benefit of the parties' two children. The parties disagreed concerning the definition of "net income" as used in the agreement. The trial court held that for purposes of the agreement:

> [n]et income shall mean the Petitioner's gross income as defined for Federal Income Tax purposes less Federal Tax, State Tax, FICA Tax, Medicare Tax, and any other payments **required** to be paid by the Petitioner to the state or federal governments. (**Emphasis in original**).

Based upon this definition, the trial court found that William owed a total arrearage through December 31, 1998 in the amount of $348,535.86. Although the trial court recognized that the agreement was valid and enforceable when it was signed, the court concluded that the arrearage would only be considered as a liquidated amount from the date of the judgment. Hence, the trial court denied Sharen's request to impose interest on the arrearage. Thereafter, William filed appeals from the judgments dated September 27, 1999 and January 14, 2000, and Sharen filed a cross-appeal from the trial court's judgment of January 14, 2000.

In Appeal No 1999-CA-002559, William argues that the trial court erred in finding that the agreement was not unconscionable. He points out that the agreement provides extremely generous provisions for maintenance and child support,

and that it requires him to pay for all of the childrens' college and graduate school expenses. Furthermore, the agreement gives Sharen a majority of the marital assets. He also notes that he was not represented by counsel during the negotiations, while Sharen was represented by attorney Greene. At the hearing, William alleged that Sharen coerced him into signing the agreement by using the children against him and by threatening to reveal his past episodes of misconduct. He also claimed that Sharen emotionally manipulated him into signing the agreement. Based upon this evidence, William contends that the terms of the agreement are unconscionable and that the trial court clearly erred in finding to the contrary.

KRS 403.180 permits parties to a dissolution of marriage action to enter into a separation agreement regarding the custody, visitation and support of children. Sections (2) and (3) of that statute 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 marital relationship and the ability of a strong and persistent spouse to unfairly 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.[3]

A separation agreement is unconscionable if it is "manifestly unfair and inequitable."[4] The provisions for modification of a separation agreement are fairly stringent.[5] As a result, the party challenging the agreement as unconscionable has the burden of proof.[6] What is required is a showing of fundamental unfairness as determined "after considering the economic circumstances of the parties and any other relevant evidence...."[7] On the other hand, an agreement could not be held unconscionable solely on the basis that it is a bad bargain.[8] The trial court is in the best position to make such

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[3] Shraberg v. Shraberg, Ky., 939 S.W.2d 330, 332-33 (1997).

[4] Wilhoit v. Wilhoit, Ky., 506 S.W.2d 511 (1974).

[5] McKenzie v. McKenzie, Ky., 502 S.W.2d 657 (1973).

[6] Peterson v. Peterson, Ky. App., 583 S.W.2d 707, 711 (1979).

[7] KRS 403.180(2).

[8] Peterson, 583 S.W.2d at 711-12.

an analysis and we will give broad deference to the trial court in this regard.[9]

William points out that in McGowan v. McGowan,[10] this Court affirmed a trial court's finding setting aside a separation agreement. The agreement in McGowan required the husband to pay the wife one-third of his income from his dentistry practice.[11] William contends that the agreement in this case, which requires him to pay a higher percentage of his future income as maintenance and child support, should be deemed unconscionable as a matter of law. However, the trial court in McGowan expressly found that the wife induced the husband to sign the agreement as a result of overreaching and undue influence. Evidence of fraud, duress and coercion are not prerequisites to finding a separation agreement unconscionable. Rather, fraud, duress, coercion, undue influence or overreaching are separate grounds for setting aside a separation agreement.[12] The trial court in this case expressly found that William did not sign the agreement due to fraud, overreaching or undue influence on the part of either Sharen or her attorney.

Where the parties to a settlement agreement are competent adults, they are bound by a signed settlement agreement. This is so even where one party has elected to

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[9] Shraberg, 939 S.W.2d at 333.

[10] Ky. App., 663 S.W.2d 219 (1983).

[11] Id. at 222.

[12] Shraberg, 939 S.W.2d at 333.

proceed without or against the advice of counsel.[13] The trial court noted that William is an experienced businessman and that he had the opportunity to negotiate with Sharen on the terms of the agreement over a three-week period. The court also found that William did not rely on any statements by attorney Greene during the negotiations. Furthermore, the trial court was not convinced that either Sharen or attorney Greene used fraud or undue influence to obtain William's acceptance of the agreement. Although there was evidence in the record which would have supported a finding that the agreement was procured through coercion or undue influence, we cannot say that the evidence was so overwhelming as to compel such a result.

Returning to the issue of unconscionability, William suggests that the entire agreement should be set aside as unconscionable. However, he does not seriously argue that terms of the agreement relating to distribution of the marital property are manifestly unfair. While the property settlement aspects of the agreement are quite favorable toward Sharen, we cannot say that they are unconscionable as written.

Unfortunately, we cannot say the same about the child support provisions. In particular, the terms of the agreement relating to child support are so excessive in amount and indefinite in duration as to render their enforcement unconscionable. Under the agreement, William must pay 30% of his annual net salary and bonuses as child support. On top of this, he must pay the childrens' medical insurance premiums and

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[13] Lydic v. Lydic, Ky. App., 664 S.W.2d 941, 943 (1983).

unreimbursed medical expenses. Furthermore, the agreement requires William to pay child support and the medical expenses during the period while he is also paying the expenses of college and graduate school. Finally, and in addition to his other obligations, William must pay the childrens' college and graduate school expenses at whatever institution they wish to attend and for however long they want to pursue their education.

We find a number of problems with these terms. First and foremost, the amount of child support set by the agreement has no relationship to the reasonable needs of the children. The child support guidelines set out in KRS 403.212 serve as a rebuttable presumption for the establishment of child support, and any deviation from the guidelines must be accompanied by specific findings.[14] The parties may, by agreement, stipulate to child support in an amount greater than the statutory guidelines.[15] Nevertheless, the trial court is not bound by the terms of an agreement with regard to child support.[16] Where the child support amount set by agreement greatly exceeds the statutory guidelines, the court must review the amount of child support to ensure that it is actually intended for the benefit of the children and not as additional support for a former spouse.

The Kentucky Child Support Guidelines are based on the "Income Shares Model." The basic premise of this model is that a child should receive the same proportion of parental income that

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[14] KRS 403.211(2).

[15] KRS 403.211(3)(f); Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616, 619 (1994).

[16] *See* KRS 403.180(2); Tilley v. Tilley, Ky. App., 947 S.W.2d 63, 65 (1997).

the child would have received if the parents had not divorced. This model further assumes that as parental income increases, the proportion of income spent on child support decreases.[17] By setting child support as a direct percentage of William's income, the agreement ignores this basic assumption of our child support guidelines.

We cannot say that individuals may never set child support as a percentage of income. Indeed, given the annual fluctuations in William's salary and bonuses, such a scheme could save the parties from future disputes over modification of child support. However, as shown on the table below,[18] setting child

[17] Downing v. Downing, Ky. App., 45 S.W.3d 449, 455 (2001).

[18]

Year	William's Monthly Gross Income*	William's Monthly Maintenance Obligation under Agreement	Sharen's Imputed Monthly Gross Income **	William's Monthly Child Support obligation under Guidelines***	William's Monthly Child Support under Agreement
1992	12,024.25	764.93	1,250.00	1,511.00	2,294.80
1993	19,412.92	1,215.77	1,250.00	1,844.00 ****	3,647.31
1994	13,225.92	979.87	1,250.00	1,581.58	2,939.61
1995	9,593.67	812.86	1,250.00	1,333.20	2,438.58
1996	32,207.00	2,153.80	1,250.00	1,844.00 ****	6,461.40
1997	42,969.42	2,722.49	1,250.00	1,844.00 ****	8,167.45
1998	30,747.25	2,093.37	1,250.00	1,844.00 ****	6,280.10

* *See* "Computation of Child Support and Maintenance Based Upon Gross Income Less Federal & State Taxes & FICA & Medicare" adopted by reference in the trial court's "Final Judgment as to Maintenance and Child Support Arrearages", January 14, 2000, (Record on Appeal [ROA] at pp. 142-47)
** The trial court imputed to Sharen, who chooses not to work, an earning capacity of $15,000.00 per year.
*** Source: KRS 403.212(7) (2000 child support table); and Commonwealth of Kentucky Worksheet for Monthly Child Support Obligation, Form CS-71(Rev. 7/00).
**** William's income in 1993, 1996, 1997 and 1998 exceeded the highest amount set by the child support guidelines. At the highest income on the child-support guidelines chart, $15,000.00 per month, the base child support for two children is $1,844.00. However, this amount is not the presumptively correct amount of support

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support at 30% of William's income is clearly not based upon needs of the children. Rather, it simply effects a transfer of income from William to Sharen. The inequity inherent in this arrangement is compounded by the fact that William must pay the childrens' medical insurance premiums and unreimbursed medical expenses in addition to child support. By contrast, under KRS 403.211, William would be entitled to a credit for the health insurance premiums which he paid on behalf of the children.

Even if the current level of child support were not clearly excessive, we would find that the terms of the agreement regarding future child support will become so unworkable and unjust as to render their future enforcement unconscionable. Most notably, the agreement does not provide for any adjustment of child support when each child reaches the age of majority or becomes otherwise ineligible. Rather, it appears that William must continue to pay the full amount of child support until both children are no longer eligible. Even if this Court were to uphold the child support provisions at this time, the trial court would be required to re-visit this issue in the future to provide for an adjustment.

Furthermore, child support continues past the age of majority for an indefinite period without regard to need. William must pay child support as long as the children are

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[18](...continued)
when the parents' combined incomes exceed the guidelines. Downing v. Downing, 45 S.W.3d at 456. Rather, a trial court has considerable discretion to determine child support in circumstances where combined adjusted parental gross income exceeds the uppermost level of the guidelines table. KRS 403.212(5). Nevertheless, any decision to set child support above the guidelines must be based primarily on the child's needs, as set out in specific supporting findings. Downing, at 456.

continuing their post-secondary studies. The agreement does not specify to whom must he pay this. William is required to continue these payments regardless of whether the children are living at home. Furthermore, he must pay child support, medical insurance premiums and unremibursed medical expenses on top of any post-secondary education expenses. This extension of child support bears no rational relationship to the children's needs.

The terms of the agreement regarding payment of post-secondary educational expenses are likewise troublesome. The trial court noted that agreements to pay college expenses of children are not rare. We agree. However, William's obligations under the agreement are so open-ended and undefined as to be unconscionable.

There is no limit on the amount of post-secondary educational expenses for which William may be liable. He is obligated to pay expenses for the children at whatever institution they choose to attend, and for as long as they choose to further their education. There is no requirement that they complete a program within a given time, that they maintain a certain grade-point average, or even that they work toward a degree.

Given the inherent ambiguities in the agreement, the parties will almost certainly need to return to court to resolve disputes. Certain matters, such as the reasonableness of the post-secondary educational expenses, could be dealt with when or if the issue arises. But there are patent ambiguities in other aspects of the agreement, such as the lack of an adjustment in

child support after one child is no longer eligible and the duration of child support after the children reach the age of majority. These issues are so significant as to call into question the sufficiency of the provisions as contractual terms.

Moreover, the fundamental inequity of the agreement's terms remains. We certainly recognize that many families sacrifice to send their children to college, and that parents sometimes support their children past the age of majority. We also note that William agreed to these terms, and we acknowledge the trial court's finding that his decision was not the result of coercion or overreaching. Nevertheless, the courts should not approve a separation agreement which is manifestly unjust or oppressive. The combined obligation set out in the agreement is so high, is of such a long duration, and is so one-sided in favor of Sharen as to render the enforcement of the child support provisions unconscionable.

The agreement also requires William to pay Sharen 10% of his annual net salary and bonuses as spousal maintenance. These payments shall continue until Sharen dies or remarries. Unlike the child support provisions, the trial court was bound by the agreement's terms relating to maintenance in the absence of a finding of unconscionablity.[19]

In considering the validity of a separation agreement, the court should look to the relative economic circumstances of

[19] KRS 403.180(2)

the parties, along with any other relevant evidence.[20] The parties were married for approximately eleven years when they separated in 1991. At that time, they were both 37 years old. The trial court found that Sharen has a Bachelor of Arts degree in Home Economics. Although she worked early on in the marriage, she left her employment to follow William to another job. During the marriage, she primarily stayed at home with the children. Since the separation, she has worked occasionally in various positions. However, the trial court found that Sharen suffers from back problems and is taking medication for depression.

William worked throughout the marriage, earning a substantial income as a marketing manager for bio-technology companies. As previously noted, his annual salary and bonuses since the parties separated have fluctuated from a low of $115,124.00 in 1995 to a high of $515,663.00 in 1997. The trial court noted that the parties were accustomed to a high standard of living during the marriage. Based upon this evidence, the trial court found that Sharen is unable to support herself at the level established during the marriage.

Given the trial court's findings, Sharen probably would be entitled to some amount of maintenance had the issue been decided under KRS 403.200. Indeed, we cannot say that the amount of maintenance under the agreement is manifestly unfair. Likewise, although we have serious reservations about the duration of maintenance, we cannot find that the terms of the

[20] KRS 403.180(2); Shraberg, 939 S.W.2d at 333

agreement which require William to pay Sharen maintenance until her death or remarriage are unconscionable.

There is no requirement that the duration of maintenance must directly correlate to the length of the marriage. Rather, this is but one factor which the trial court must consider in setting maintenance.[21] Furthermore, parties may agree to set maintenance without regard to need or the other provisions in KRS 403.200.[22]

The amount and duration of maintenance is a matter which is committed to the sound discretion of the trial court.[23] Moreover, William agreed to pay Sharen maintenance for life, and those terms are as binding and enforceable as any other contract.[24] While the duration of maintenance was most likely a "bad bargain" for William, the maintenance provision of the agreement is not manifestly unfair.[25]

In sum, the circumstances surrounding the execution of the agreement presented a significant opportunity for

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[21] Other factors include: (1) the financial circumstances of the party seeking mainteance, including marital property apportioned to her, and her ability to meet her needs independently, including the extent to which a provision for child support includes a sum for that party as a custodian; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the age, and the physical and emotional condition of the spouse seeking maintenance; and (5) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance. KRS 403.200(2).

[22] John v. John, Ky. App., 893 S.W.2d 373, 376 (1995).

[23] KRS 403.200. *See also* Leveridge v. Leveridge, Ky., 997 S.W.2d 1 (1999); Frost v. Frost, Ky. App., 581 S.W.2d 582 (1979).

[24] KRS 403.180(5); John v. John, 893 S.W.2d at 375.

[25] Peterson v. Peterson, 583 S.W.2d at 711.

overreaching. While an attorney may represent both parties in a dissolution proceeding under certain circumstances, the potential for conflict of interest is manifest.[26] However, based upon the facts as found by the trial court, William was not a victim of fraud, undue influence or overreaching. We are concerned by the conduct of the parties and Sharen's former counsel surrounding the entry of the first decree. Based upon the record, it appears that Sharen was not entirely honest with the trial court regarding the length of her residence in Kentucky. Be that as it may, this matter does not affect the ultimate question of whether the agreement was fair.

On this ultimate question, we conclude that the trial court did not clearly err in finding that the amount and duration of maintenance set by the agreement is not unconscionable. However, the provisions of the agreement relating to child support are manifestly unfair. By themselves, the latent and patent ambiguities in the agreement regarding payment of support, post-secondary educational expenses, and medical expenses after the children reach the age of majority would render those terms unenforceable. Moreover, we find that the amount and duration of child support under the agreement so greatly exceeds the children's reasonable needs as to render the terms unconscionable. Therefore, we must remand this matter to the trial court with instructions to set child support anew based upon the provisions of KRS 403.211 and 403.212.

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[26] *See* SCR 3.130, Rules of Professional Conduct 1.7. *See also* An Unnamed Attorney v. Kentucky Bar Association, Ky., 1 S.W.3d 474 (1999).

In Appeal No. 2000-CA-000532, William argues that the trial court's award of a judgment for maintenance and child support arrearages based upon the provisions of the agreement should be set aside because the agreement is unconscionable. To the extent which we have found the child support provisions of the agreement unconscionable, we also must set aside the trial court's judgment in favor of Sharen for the child support arrearage. But since we have found the maintenance provisions of the agreement to be conscionable, we affirm the trial court's judgment for the maintenance arrearage.

Consequently, we must address the remaining issues raised in William's second appeal and in Sharen's cross-appeal, at least insofar as they affect the maintenance judgment. William argues that the trial court abused its discretion when it made the support provisions of the agreement effective to its 1991 filing. We disagree.

As previously noted, once separation agreements are approved by the court, the terms set forth are enforceable as contract terms.[27] William and Sharen executed the agreement in August of 1991. Due to the jurisdictional defects in the original decree and other delays, the trial court did not make a valid finding that the agreement is enforceable until September of 1999. Because of this delay, the trial court had previously entered a temporary maintenance and child support order.[28] The

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[27] KRS 403.180(5).

[28] In May of 1995, the trial court, per Judge Fuqua, orally set maintenance and child support in the amount of $1,600.00 per month. The court reserved a ruling concerning whether (continued...)

court, having found the agreement enforceable, must determine maintenance according to its terms. Under these circumstances, we conclude that the trial court did not err in calculating the arrearage from the date the parties executed the agreement.

In her cross-appeal, Sharen argues that the trial court erred in denying her request for interest on sums due under the agreement from the original date of signature. We agree with Sharen that separation agreements become effective when they are executed by the parties, although they do not have the force of a judgment until approved and adopted by the court. Furthermore, in Hoskins v. Hoskins,[29] this Court recently held that a provision in a property settlement agreement which ordered the former husband to pay his former wife $7,500.00 within three years from the date of the agreement became an enforceable judgment when the payment became delinquent at the end of three years. Thus, the former wife was entitled to interest on the amount from the date the payment became delinquent.[30]

However in Hoskins, the separation agreement had been adopted by the court in a prior, valid decree. In contrast, the agreement in this case was not adopted by the trial court until September 16, 1999. The Decree of Dissolution entered by the trial court on November 15, 1991 was void *ab initio*. It had no

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[28](...continued)
any arrearage was owed as well as to future child support, maintenance, and medical payments. In his order of September 11, 1996, Judge Gill concluded that this order was intended to be temporary in nature.

[29] Ky. App., 15 S.W.3d 733 (2000).

[30] Id. at 735.

legal effect as a judgment. Until the decree was adopted by the court, it did not carry the force of a judgment. Thus, the trial court was not required to award prejudgment interest on the amounts due under the agreement.

Similarly, we agree with the trial court that Sharen was not entitled to contractual interest on the amounts due under the agreement. Prejudgment interest follows as a matter of course on liquidated damages.[31] However, the trial court recognized that provisions in the agreement regarding maintenance were ambiguous in certain key respects. Until the court interpreted those provisions, the amounts owed pursuant to the agreement could not be determined and therefore were not liquidated.[32] As such, the trial court acted within its discretion in denying Sharen's request for prejudgment interest.

Finally, Sharen argues that the trial court erred in its definition of net income for the purpose of calculating maintenance. She contends that, under the agreement, William's income for maintenance and child support purposes must be based upon his federal adjusted gross income, minus only the state income tax paid by William. She asserts that the trial court's interpretation, which allows William to deduct all of his federal tax withholding, was clearly erroneous.

Sharen points out that the term "net income" for tax purposes generally means gross income less specific deductions

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[31] Nucor Corp. v. General Electric Co., Ky., 812 S.W.2d 136, 141 (1991).

[32] Id. (*citing* Black's Law Dictionary, (6th ed.1990) p. 930.

authorized by statute.[33] The term "net income", in the case of taxpayers other than corporations, is defined for Kentucky tax purposes to mean adjusted gross income minus the standard deduction or most of the deductions allowed under Chapter 1 of the Internal Revenue Code.[34] The Internal Revenue Code does not define "net income." Rather, it only defines the terms "gross income", "adjusted gross income", and "taxable income".[35] Sharen contends that none of these definitions would allow William to subtract his federal tax withholding from the calculation of his net income.

However, the agreement does not expressly use the term "net income." Rather, Item Twelve of the agreement provides that William "agrees that 30% of all of his income from his salary and bonuses as evidenced by his federal income tax returns shall be payable as child support for the minor children of the parties." Likewise, Item Thirteen provides that William shall pay "10% of the net salary and bonuses as set forth above as maintenance ...." The parties clearly intended that William's income should be calculated based upon the amounts listed on his federal income tax returns. But it is not clear that the parties intended to adopt the definition of "net income" as used for state and federal income tax purposes.

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[33] 85 C.J.S. Taxation § 1096(a), p. 732.

[34] KRS 141.010(11).

[35] 26 U.S.C. §§ 61, 62, & 63.

Unless otherwise defined, terms used in a contract should be given their ordinary and accepted meaning.[36] Furthermore, any ambiguity in a contract should be interpreted against the party who drafted it.[37] There is no dispute that Sharen's attorney drafted the agreement. As previously discussed, Item Thirteen of the agreement is the only provision which uses the term "net", although it does refer back to Item Twelve. There was no indication that the term "net salary and bonuses" as used in the agreement was intended to mean "net income" as used for tax purposes. Rather, the parties only intended that William's federal income tax returns should be used to determine his total income from all sources for any given year.

As commonly used, the word "net" means "that which remains after all allowable deductions, such as charges, expenses, discounts, commissions, taxes, etc., are made."[38] The trial court apparently applied this definition. The trial court found that William was entitled to deduct any required tax payments from calculation of his income, but not any voluntary payments, such as 401(k) contributions. Given the circumstances and the evidence before the trial court we find that this interpretation of the agreement is reasonable and should not be disturbed.

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[36] City of Louisville v. McDonald, Ky. App., 819 S.W.2d 319, 320 (1991).

[37] Wolford v. Wolford, Ky., 662 S.W.2d 835, 838 (1984).

[38] Black's Law Dictionary (6th ed., 1990), p. 1040.

Accordingly, the judgment of the Logan Circuit Court is affirmed insofar as it upholds the terms of the agreement relating to disposition of marital property and maintenance, but is reversed insofar as it upholds the terms of the agreement relating to child support, payment of the children's post-secondary educational and medical expenses. This matter is remanded to the Logan Circuit Court with directions to set child support based upon the provisions of KRS 403.211 and 403.212.

JOHNSON, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

MILLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the majority opinion except I would also reverse that portion of the trial court's judgment upholding the terms of the agreement regarding spousal maintenance.

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