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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001171-MR and
NO. 2001-CA-001271-MR

CYNTHIA ANN FRANKLIN (now McWATERS) APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
CIVIL ACTION NO. 93-CI-00268

GREGORY LEN FRANKLIN APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING IN PART, REVERSING IN PART

AND REMANDING

** ** ** ** **

BEFORE: BARBER, HUDDLESTON and MILLER, Judges.

HUDDLESTON, Judge: Cynthia Ann Franklin appeals from a McCracken Circuit Court order finding that Gregory Len Franklin's "obligation to make one-half of [Cynthia's] mortgage payment ceased and terminated upon her remarriage and that [Gregory] is not in arrears in his payment of same." Gregory cross-appeals from that portion of the order denying his motion for a refund of the sums he paid

toward the mortgage pursuant to the parties' settlement agreement after Cynthia's remarriage.

Cynthia and Gregory were married on December 7, 1985, and separated on March 27, 1993. Kayla Ann Franklin, the couple's only child, was born on May 6, 1990. On April 14, 1993, the parties entered into a property settlement agreement disposing of all issues related to the impending dissolution of their marriage, including the division of marital property and debts, child custody and support, and maintenance. Concluding that it was not unconscionable,[1] the court incorporated the agreement into the decree of dissolution entered on June 22, 1993.

Under the ASSETS AND LIABILITIES section of the agreement, subsection 2 of which is entitled Marital Debts, "[Gregory] assumes and agrees to pay one-half of the mortgage payable to the Bank of Marshall County, . . . and [Gregory] agrees to indemnify and hold the wife harmless with respect thereto." That provision also describes the required method of payment and characterizes the obligation with the following language:

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[1] Although the conscionability of the agreement is not challenged here, "[g]iven the nature of our no-fault divorce statutes, coupled with the desirability of imparting some degree of finality to settlement agreements," the provisions for modification are fairly stringent. Peterson v. Peterson, Ky. App., 583 S.W.2d 707, 712 (1979). "Since the trial court is in the best position to judge the circumstances surrounding the agreement, its finding on the issue of conscionability should not be set aside" unless there is some evidence of "fraud, undue influence, overreaching, or evidence of change in circumstances since the execution of the original agreement." Id.

Here, there is no allegation of fraud, etc. . . . Accordingly, our guiding principle in resolving the issue presented will be to give effect to the literal terms of the parties' agreement.

In regard to the mortgage indebtedness to the Bank of Marshall County, [Gregory] agrees to pay one-half of the note payment each month directly to [Cynthia] on or before the date each such monthly payment is due to the bank.

The assumption of one-half of the mortgage payable to the Bank of Marshall County by [Gregory] shall be considered an obligation directly related to the maintenance of [Cynthia],[2] although payments of said debt shall not be considered deductible or taxable as alimony or maintenance for income tax purposes.[3] The parties further stipulate that they intend that said debt shall be non-dischargeable under Section 523(a)(5) of the Bankruptcy Code.

With respect to the mortgage indebtedness, the section labeled Maintenance provides that:

Each party is able to support himself or herself through appropriate employment. Neither party seeks maintenance and both parties waive any claim to maintenance, present or future, which he or she may otherwise have asserted. Except as expressly hereinabove provided in relation to the payment by [Gregory] of one-half of the mortgage

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[2] Pursuant to the parties' agreement, Cynthia is "the sole and absolute owner of the residence . . ." subject to the mortgage.

[3] Maintenance/alimony payments are ordinarily deductible by the payor and includable in the income of the payee. See 21 United States Code (U.S.C.) § 71. However, a transfer of cash that the parties desire to treat as not maintenance/alimony (i.e., as a property settlement) is not maintenance/alimony if the parties so designate. See 21 U.S.C. § 71(6)(1)(B).

> indebtedness to the Bank of Marshall County. Should [Gregory] default in the payment of one-half of the balance of said debt, the parties agree that the case may be reopened in the McCracken Circuit Court and that maintenance can be assessed against [Gregory] in an amount sufficient to compensate the wife for any expense which she has incurred as a result of [Gregory's] failure to pay his one-half of the said mortgage indebtedness. (Emphasis supplied.)

There is no stipulation in the agreement specifying what change in circumstances, if any, would result in the automatic termination of Gregory's obligation to pay one-half of the mortgage debt.

Cynthia remarried on November 14, 1998. Believing that her remarriage terminated his obligation to pay maintenance (i.e., half of the monthly mortgage payment) under Kentucky Revised Statutes (KRS) 403.250(2), Gregory ceased making said payments upon learning of her change in status. In November 2000, Gregory moved the court for the "issuance of a rule" against Cynthia, requiring her to show cause why she should not be held in contempt for failure to comply with the decree of dissolution relative to visitation with the parties' daughter. Shortly thereafter, Cynthia moved the court to "issue a rule" requiring Gregory to show cause why he should not be held in contempt for his failure to comply with the decree. Specifically, she alleged that he was $2,733.00 in arrears on his one-half of the mortgage payment.[4]

[4] Although Cynthia also alleged that Gregory was delinquent (continued...)

Following a hearing, the court agreed with Gregory's argument as to the mortgage/maintenance payments, analyzing the issue as follows:

> According to the parties' Property Settlement Agreement which was adopted by the Court, [Gregory] was to pay one-half of the mortgage payment as maintenance to [Cynthia]. The proof established that after learning of [Cynthia's] remarriage, [Gregory] ceased making such payments believing such payments to be terminated by the terms of KRS 403.250(2). [Cynthia] complains that said section is not applicable, claiming that the payments are in the nature of a lump sum maintenance award which are not subject to the provisions of KRS 403.250(2).[] The agreement specifically states the remedy available to [Cynthia] in the event [Gregory] ceases to make such one-half of the mortgage payment. The agreement provides that should he fail to make such payment, that [Cynthia] may then go to Court and seek to reopen the maintenance issue. If reopened, it would be clear under KRS 403.250(2) that her remarriage would, in fact, terminate any future obligation of maintenance. Therefore, the

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[4] (...continued)
on his child support by three months and "habitually delinquent" as to the payment of Kayla's health insurance, those issues were resolved by agreement prior to the hearing (as noted by the court in the "miscellaneous items" section of its February 2001 order) and are not raised on appeal. In her response and counter-motion, Cynthia also requested that Gregory's visitation with Kayla be supervised, or, in the alternative, that he be ordered to undergo counseling. Issues related to visitation were also resolved in the court's order and are not the subject of this appeal.

> Court hereby orders that [Gregory's] obligation to make one-half of [Cynthia's] mortgage payment ceased and terminated upon her remarriage and that [Gregory] is not in arrears in his payment of same.

Pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, Cynthia sought to have the court alter, amend or vacate that portion of its order which relieved Gregory of his obligation to pay one-half of the mortgage debt. In support of her motion, Cynthia submitted an affidavit in which she stated that Gregory discontinued the payments as of May 1, 1998, rather than upon her remarriage, also citing this Court's decision in John v. John.[5] In response, Gregory filed a counter-motion seeking reimbursement of "all sums paid by him on the mortgage after Cynthia's remarriage." On May 5, 2001, the court denied both motions, reaffirming its original decision.

In the instant case, the dispositive question is whether KRS 403.250(2), upon which Gregory and the circuit court rely, is applicable and, if so, what effect its application has on the facts presented. As the construction and application of statutes is a matter of law, our review is de novo.[6] Cynthia argues that the court misapplied the law to the facts; this has also been recognized as a matter which is reviewed de novo.[7]

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[5] Ky. App., 893 S.W.2d 373 (1995).

[6] Bob Hook Chev. Isuzu v. Transportation Cabinet, Ky., 983 S.W.2d 488, 490 (1998).

[7] Id. at 490-491.

Although the parties disagree as to how the mortgage payments at issue should be classified and whether such a determination is even necessary, the court correctly determined that Gregory's obligation qualified as maintenance according to the language of the agreement. By addressing the subject under both the marital debt and maintenance sections and using the terms interchangeably, the parties arguably confused the issue. However, any conflict is resolved by the explicit expression of their intent in the latter provision clarifying that both parties waive any claim to maintenance "Except as expressly hereinabove provided in relation to the payment by [Gregory] of one-half of the mortgage indebtedness . . . ."

Likewise, Gregory's assumption of one-half of the mortgage "shall be considered an obligation directly related to the maintenance of [Cynthia]." No credible argument can be made that the parties did not view Gregory's continuing obligation to pay one-half of the mortgage on the marital residence which was awarded to Cynthia by virtue of the same agreement as maintenance as evidenced by that unambiguous language. In fact, an arguably reasonable inference is that this arrangement was mutually agreeable because it enables Cynthia, the primary residential custodian of their minor child, to remain in the home, minimizing the disruption in Kayla's life as well as Cynthia's expenses. Admittedly, the provision dictating the tax/bankruptcy implications of Gregory's monthly payments to Cynthia is somewhat unusual but it further confirms the parties' intention as to the limited purpose of the maintenance and its priority.

Although we are not directed to nor is there any documentation in the record which specifies exactly what the total payoff of the mortgage is or the dollar value of the monthly payments that were divided equally between the parties, common sense tells us that both amounts are fixed as are the interest rate, term of the mortgage, etc. . . . Where, as here, "maintenance is in a fixed and determinable amount to be paid either in a lump sum or is for a specific amount to be paid over a definite term, unless the power to do so is expressly reserved by the court," it has the finality of a judgment and is not subject to modification on the basis of a change in circumstances.[8]

As observed in John v. John, Dame v. Dame "unequivocally holds, noting the purposes of KRS 403.110 and particularly the need for finality between divorcing parties, that lump-sum maintenance awards, paid in one installment or many installments, are not subject to modification."[9] To permit the circuit court to amend or modify an award of maintenance that is not open-ended would frustrate the purposes of KRS 403.110 and "do nothing toward finalizing distasteful litigation."[10] However, our analysis does not end there.

According to KRS 403.250(2): "Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay

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[8] Dame v. Dame, Ky., 628 S.W.2d 625, 627 (1982). Under Ky. Rev. Stat. 403.250(1), the provisions of a decree respecting maintenance "may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable."

[9] John, supra, n. 5, at 375.

[10] Dame, supra, n. 8, at 627.

future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." In John, this Court found that "[t]he word 'expressly' refers, not to the parties' agreement, but to a court's decree," rejecting the notion that a property settlement agreement voluntarily entered into between divorcing parties must expressly provide for continuation of maintenance upon the remarriage of the spouse receiving maintenance or the obligation terminates automatically.[11]

In so doing, we emphasized that parties "are allowed to reach their own agreements concerning all issues regarding their marital affairs," and the terms are binding except those providing for the custody, support and visitation of children, subject only to the court's scrutiny for conscionability.[12] Contracts entered into by divorcing parties are as binding and enforceable as any other contract under KRS 403.180(5).[13] Courts are not permitted to add terms or conditions not set forth in the agreement.[14] Accordingly, if any contractual obligation is conditioned on the other party's forbearance of the exercise of a particular act or right, i.e., remarrying, such stipulation must be clearly set forth in the agreement to be enforceable.[15]

As with the agreement interpreted in John, the one at issue here was meant to encompass the parties' entire understanding

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[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

which they clarified as follows: "The parties desire to settle all issues related to the dissolution of their marriage, . . . irrespective of whether or not a decree dissolving their marriage is entered." John is distinguishable factually, however, in that the contract provided for termination of the installment payments only upon the wife's death; no condition of any kind was imposed in the parties' agreement here. In both cases, the contract, i.e., "entire understanding," of the parties did not contemplate, either expressly or by implication, that the wife's remarriage would have any bearing on her right to receive the total maintenance sum, payable in installments.[16]

It is rarely appropriate for a court to order lump-sum maintenance as the court must award a sum sufficient to sustain the spouse at the standard of living obtained during the marriage.[17] Given the criteria that must be met to establish the requisite need warranting a maintenance award, it would also be unusual for maintenance to be awarded upon the death of either party or the receiving spouse's remarriage, as indicated by KRS 403.250(2).[18] Since there is a public policy that one should not have to provide financial support for a former spouse who has remarried, a trial court must expressly state its inclination to so provide in the decree.[19]

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[16] Id.

[17] Id. at 376.

[18] Id.

[19] Id.

As reiterated in John, parties can agree to terms that a court could not otherwise impose.[20] Noticeably lacking from the agreement in question is any reference to a condition which would excuse compliance with the directive regarding maintenance. However, the statute does not mandate that agreements "expressly" address the issue of death or remarriage. "Unlike a decree, it really makes no difference whether an agreement denominates an obligation as payment of property or maintenance. If it is a fixed sum, it is vested and subject only to the contingencies expressed or which can be gleaned from the language of the contract itself."[21] Consistent with the above reasoning, Gregory's lump-sum maintenance obligation was vested and was not terminated by Cynthia's remarriage as their agreement contained no such contingencies.

However, the circuit court went beyond that determination. In finding that Cynthia's remarriage terminated Gregory's maintenance obligation, the court implicitly interpreted the parties' language concerning Cynthia's options in the event that Gregory defaulted, i.e., "the case may be reopened" and maintenance can be assessed against Gregory, as providing an exclusive remedy despite the parties' use of the permissive term "may." Such an interpretation is inconsistent with the overall tone of the agreement as it enables Gregory to unilaterally convert the agreed upon lump-sum obligation which is not subject to modification into a periodic one, thereby triggering KRS 403.250(2)

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[20] Id.

[21] Id.

and relieving him of his responsibility. Given the parties' treatment of the issue throughout the agreement, that result is illogical as it serves to render the related terms of their agreement meaningless.

The provisions of an agreement must be construed in the context of the agreement in its entirety rather than in isolation, giving effect to the parties' intent. As with virtually any contract, either party is entitled to seek specific enforcement of the negotiated agreement. That is precisely what Cynthia has opted to do here, in lieu of the alternate remedy. With respect to default, the parties agreed that ". . . in the event either party defaults in or breaches any of his or her respective obligations and duties as contained in this agreement," the non-defaulting party may recover, "in addition to such other damages as any court may award, all of his or her attorney's fees, court costs, and other related expenses incurred to enforce the provisions contained herein against the defaulting party."

Although the agreement at issue is not a model of clarity, the parties negotiated binding terms, ultimately addressing each of the relevant issues in a manner deemed conscionable by the court. Applying the foregoing principles of interpretation and governing law to the facts presented, the necessary conclusion is that Gregory's unequivocal assumption of one-half of the mortgage indebtedness, a liquidated amount, can only be characterized as a lump-sum maintenance obligation which, by its very nature cannot be modified, let alone terminated.

In finding that the parties' stipulated remedy was Cynthia's sole avenue of relief and, by extension that KRS 403.250(2) would operate to discharge Gregory's maintenance obligation, the court erred. Accordingly, its order is reversed and this case is remanded to McCracken Circuit Court with directions to find Gregory in default and to require him to fulfill his obligation consistent with the terms of the settlement agreement as incorporated in the decree dissolving his marriage to Cynthia. In addition, the court shall award Cynthia court costs, attorney's fees and any other expenses incurred in enforcing the provision at issue here.

As Cynthia's remarriage did not terminate Gregory's maintenance obligation, that portion of the order denying his request for reimbursement of the payments he made in the interim is affirmed.

BARBER, Judge, CONCURS.

MILLER, Judge, DISSENTS.

MILLER, Judge, DISSENTING: I would affirm the circuit court on both appeal and cross-appeal.

As to the appeal, I agree that Greg's obligation to make one-half the mortgage payment constitutes maintenance. I am of the opinion, however, the obligation does not constitute a lump sum maintenance award. I believe Dame v. Dame, Ky., 628 S.W.2d 625 (1982), holding that a fixed amount to be paid over a definite period of time is not subject to modification, is inapposite.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

John T. Reed
Paducah, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT:

Charles W. Brien
PRINCE & BRIEN, PSC
Benton, Kentucky