RENDERED: JUNE 24, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001406-MR

MELINDA HUFF KELLY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 97-CI-03661

BRADFORD STEVEN KELLY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Melinda Huff Kelly appeals from two orders of the Fayette Circuit Court, Family Division, which reduced a maintenance award entered at the time of dissolution from $2,400 per month to $2,000 per month and ordered further review of the maintenance award twelve (12) months thereafter. We vacate and remand.

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The facts leading to this appeal, while not seriously in dispute, are unusual and present an issue not previously addressed by this Court. On October 17, 1997, Melinda filed a petition for dissolution of marriage from her husband, Bradford Stephen Kelly. The petition indicated that the parties had been married on September 10, 1983, and that a separation agreement had been entered. The petition indicated that the separation agreement resolved the marital issues relative to the dissolution and that it should be approved by the court. The signed separation agreement was filed with the petition. Bradford also signed a waiver of formal service that was filed on that date. Several months later, on March 16, 1998, Melinda filed a motion for an uncontested dissolution hearing date with a certification of service that was sent to Bradford. The dissolution hearing took place on April 3, 1998, before Fayette Circuit Court Judge, John R. Adams. Bradford was not represented and did not appear at the hearing.

Melinda testified under oath as to the requirements necessary to obtain dissolution. She further testified that a separation agreement had been entered into that resolved the issues of custody, child support, maintenance, and property division. Following Melinda's testimony, Judge Adams found the separation agreement to be conscionable and granted the dissolution. As to the separation agreement, the judge stated:

"The court finds that it has jurisdiction, that a decree should be entered dissolving the marriage between the parties, that the agreement entered December 17, 1997, is approved and made a part of this decree by reference and the court finds that it is not unconscionable." The court then added that Ms. Kelly is to have custody of the children and that Mr. Kelly is to pay child support in the sum of $1,000 per month and that Ms. Kelly is to receive maintenance as set forth in the agreement. No appeal was taken from the decree which was entered the same day as the hearing, April 3, 1998.

The next filing in the record is Melinda's "Memorandum in opposition to motion to set aside separation agreement" filed April 7, 2004. Unfortunately, the record does not contain Bradford's motion to set aside the separation agreement, which is the basis for this appeal. Although the motion is not in the record, a hearing was held before the Fayette Circuit Court Family Division, Judge Timothy N. Philpot, on April 12, 2004. The video recording of the hearing is included in the record and has been reviewed by this Court.

Following the April 12, 2004, hearing, the Family Court entered an order on May 13, 2004, which we set out in full:

> The Respondent (hereinafter Husband) has filed a Motion to set aside a portion of the Original Separation Agreement, which

requires him to pay $2,400 monthly in permanent maintenance. No Motion has been made to alter any other terms of the Agreement. The grounds for the Motion are essentially that the Agreement itself is "unconscionable" as defined by Kentucky Law. The Court conducted a hearing on April 12, 2004. Having heard the evidence and reviewed the record, the Court finds the following:

1. It is clear that "the law favors the stability in such settlements". *Peterson v Peterson* 583 S.W.2d 707. It is important to parties to these agreements and the Court itself be able to rely upon the finality of these decisions mutually agreed upon by the parties. Only in extreme circumstances should agreements be set aside.

2. KRS 403.180(2) is clear that an agreement is binding unless it is "unconscionable".

3. The definition of "unconscionable" is somewhat subjective, but help is found in *Wilhoit v Wilhoit*, 506 S.W.2d 707, which defines it as "manifestly unfair or inequitable". The Court was clear that just because one party enters into a bad bargain does not mean that the Agreement is "unconscionable".

4. *Sharberg v. Sharberg*, 939 S.W.2d 330, expounded upon this definition by stating that unconscionability requires "a showing of fundamental unfairness".

5. Several factors actually weigh in favor of this particular Agreement

not being found unconscionable. These factors include:

a) **Time to Review:** The amount of time that the Husband had to review the Agreement before approving it indicates that his decision was contemplated and deliberate, after adequate weighing of all the consequences of his action. Specifically, he had a total of seven months from the time of the initial handwritten Agreement until the Final Decree was issued by the Court. This provided the Husband with ample time to consider the Agreement, seek advice about its contents, and negotiate its provisions. In fact, several people, including his Wife's attorney, advised him to seek legal advice on the matter and he chose not to do so.

b) **Time Since Decree:** The Husband has been able to comply with the original Agreement for the past six years without defaulting a single payment. This indicates that the Agreement, although harsh, can be met. He has not "complained" until nearly seven years after the Agreement.

c) **The Husband is a professional, well-educated**

man: He works in Human Resources. He earns a professional salary. He was capable of recognizing the inherent inequity of this Agreement. The fact that he did not object in(sic)the time it was being created, when it was entered into, or in the following six years indicates that he believed he could live with it.

d) **Husband's Desire to Keep Family "As Is":** The Husband's testimony indicated that he wanted the circumstances to stay the same for his former wife and their daughters. In order for this to be accomplished, he would have to sacrifice greatly. He was willing to do that.

e) **Fraud, Deceit or Undue Influence:** There is nothing in the record or alleged by either party to indicate that fraud or undue influence was a factor in the decision to enter into the Agreement.

f) **Husband's Therapist:** The testimony of the Husband's current therapist had little weight in the decision of this Court. Dr. James Ross was able to provide little relevant insight into the Husband's state of mind at the time the Agreement was made. He stated only that the Husband suffered from severe guilt for his affair, and wanted to "atone for his sins".

g) **Later Events:** Finally, the Court also notes that the Husband only began contesting the conscionability of the Agreement after his financial situation worsened following his second divorce and award of support to his second wife. He is now required to pay over $500 per month for another child.

h) **$300 to Live On:** Husband has testified that he slept in his car, showered at the YMCA, and otherwise has lived destitute for most of the past 6 years. However, in the *Peterson* case, the agreement was found to not be unconscionable, even though the Husband's total income was $970 monthly and he had agreed to pay $700 monthly to the Wife.

i) **Judge Adams' Review:** The Court must further presume that Judge Adams reviewed the original Settlement Agreement and found it to be conscionable.

6. However, despite all the above, it is apparent to this Court that the Agreement is **more than a bad bargain**. The Husband in this case had an affair which ended his marriage. The Wife was devastated. Due to the strong moral and religious feelings of both parties, the Wife applied pressure on the Husband, and he agreed, to a settlement that was more than a bad bargain. The handwritten agreement even made

reference to the Husband's "affair". The agreement was "manifestly unfair". Agreements can only be set aside if extreme circumstances exist. It is an extreme circumstance when the Husband essentially agrees to give **virtually all** of his income and property to the Wife. **Temporary** maintenance was probably appropriate for a term of years, but permanent maintenance was probably not, in light of the Wife's abilities and the Husband's limitations.

7. The Wife is a CPA who has not worked since the children were born. The handwritten Agreement seems to indicate that the Wife anticipated returning to work at some point. The handwritten agreement clearly anticipated the possibility of the Wife going back to work. Paragraph 22 even seems to indicate she "does not need to be employed for 2 more years (until late fall of 1999, October 1999)..."

8. If the Wife is able to work, the payment of permanent maintenance would be "unconscionable". This Court should now consider the Wife's ability to maintain herself.

9. The Court will conduct a hearing to determine the duration and amount of maintenance, if any, that should be paid, said hearing to begin on June 7, 2004 and to be completed on June 8, 2004. The Respondent will continue to pay maintenance as agreed until further Orders of this Court.

Signed and dated this 11th day of May 2004.

Following the entry of this order, the court set another hearing date "to determine the duration and amount of maintenance, if any, that should be paid...." At that hearing, both parties testified and presented evidence relating to their income, expenses and medical, physical, mental and emotional well-being. After considering the testimony and evidence presented at the hearing, as well as the deposition of William D. Weitzel, M.D.,[2] the Family Court entered an order on June 21, 2004, setting maintenance at $2,000 per month. The order, in relevant part, states:

> The parties appeared before the Court, with counsel, on April 12, 2004, on the Respondent/[Husband's] Motion to Set Aside the Property Settlement Agreement. After hearing the testimony of the parties, and reviewing the record in its entirety, the Court entered an Order, dated May 13, 2004. Such Order stated that if the wife was able to maintain herself, the Property Settlement Agreement was in fact unconscionable and should be set aside on the issue of maintenance.
>
> The parties appeared before the Court, with counsel, on June 7 and June 8, 2004, to address the issue of the Petitioner/Wife's ability to provide for herself, and to determine if, and to what extent, the Court should stray from the Property Settlement Agreement on the issue of maintenance.

[2] At the hearing the parties indicated that they would take Dr. Weitzel's deposition and make that part of the record. Dr. Weitzel's deposition is not part of the record supplied to this Court, but the court order of June 21, 2004, does refer to the doctor's deposition.

FINDINGS OF FACT

1. The Husband/Respondent's annual income is $81,392, according to Husband/Respondent's Exhibits 1 and 2.

2. The Wife/Petitioner's annual income is $13,780, based on her hourly wage and the number of hours worked per week.

3. The Wife/Petitioner has several physical and emotional conditions, which cause her to be partially disabled. According to Dr. Weitzel's deposition, she has major depression, a generalized anxiety disorder, a personality disorder, and hypothyroidism. The Wife/Petitioner cannot independently maintain herself, which becomes evidence after examination of KRS 403.200(2)(e) allowing consideration of "the physical and emotional condition of the spouse seeking maintenance". Also per Dr. Weitzel's deposition, the Wife/Petitioner's disability could improve in the future with appropriate treatment. This would likely include "cognitive therapy" which the Court believes should be conducted under the supervision of Dr. Coleman.

4. The Wife/Petitioner's expenses of $4,491 per month are reasonable.

5. The Husband/Respondent's expenses of $3,717 per month are also reasonable.

6. There is not enough income generated to make either party whole.

7. Currently, the Husband/Respondent has $1,079 each month after meeting all obligations for child support and maintenance, including the $588 for the child from his second marriage.

CONCLUSIONS OF LAW AND ORDER

> The Husband/Respondent shall pay the Petitioner $2,000 each month in permanent maintenance. The $400 reduction from the previous order can be attributed to the Wife/Petitioner's employment and current income. The Court will review this matter in 12 months to determine if the situation has changed through successful treatment of the Petitioner, adjusted income of either party, or other considerations.

This appeal followed.

On appeal, the Court is presented with several issues which makes a meaningful review impossible. First, Melinda's introduction to her brief states that "[t]his is an appeal from the modification of a maintenance order." (Emphasis added). Yet, nowhere in her brief does she address KRS 403.250, the statute that addresses modification of maintenance and property division. On the other hand, Bradford claims that he filed a Motion for Modification of Maintenance (appellee's brief, page 4), but then argues that the trial court had authority to examine the conscionability of the separation agreement because Judge Adams made "no written finding as to conscionability of the Separation Agreement" (appellee's brief, page 6). (Emphasis added). However, this statement ignores the statement made by Judge Adams at the conclusion of the hearing on the dissolution on April 3, 1998, when he stated, "that the agreement entered

December 17, 1997, is approved and made a part of this decree by reference and the court finds that it is not unconscionable."

After a thorough review of the record, it is not clear whether the Family Court order in this matter was a modification of the original maintenance set forth in the separation agreement or a de novo determination that the separation agreement was unconscionable. If the order was based upon the finding that the separation agreement was unconscionable, the order does not indicate upon what basis the court had the legal authority to address the issue. A determination had been previously rendered by Judge Adams in 1998, which was not appealed. If the order was based upon the modification statute, it does not so state nor does it address the fact that the separation agreement is not subject to modification as was acknowledged by Bradford's attorney in his subsequent dissolution action.

While our review of this case clearly shows that the Family Court Judge attempted to resolve this matter in a fair, reasonable and equitable manner, we can find no legal basis upon which the court's intervention and order is based. As such, we must vacate the order entered by the Fayette Circuit Court, Family Division, and remand this matter for further proceedings. Upon remand, the Family Court shall determine if this is a modification of an existing maintenance order or a determination

of whether the original separation agreement is unconscionable. Once this determination is made, the court shall then state upon what legal basis its decision is based.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John Kevin West Lexington, KY	Linda W. Covington Lexington, KY