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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001534-MR

LONNIE C. JONES — APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 03-CI-00161

CAROLYN MAE JONES — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Lonnie C. Jones appeals from the judgment of the Carroll Circuit Court approving and adopting findings of fact and recommendations of the Domestic Relations Commissioner (DRC) in a divorce action. At the center of this dispute is whether the circuit court erred in adopting the DRC's recommendation that the language regarding maintenance contained in a proposed written property settlement agreement was consistent with the terms regarding maintenance upon which the parties agreed and had previously read into the court record on September 19, 2005. Lonnie also appeals

from an order entered by the circuit court in which the court denied his motion for reconciliation counseling for the parties' two minor children. Upon review, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Relevant to this appeal, the circuit court ordered Lonnie to pay his wife Carolyn temporary maintenance in the amount of $700.00 per month and subsequently entered a decree dissolving the parties' marriage. The court, however, reserved all remaining issues, including maintenance, for resolution at a later date. The parties have two minor children; however, other than the issue of reconciliation counseling noted *supra*, the children are not central to the issues at hand.

On September 19, 2005, Lonnie and Carolyn, each represented by the same counsel as they presently are, proceeded to a final hearing before the DRC. However, on the day prior to the hearing, they came to an oral agreement resolving all outstanding issues. Thereafter, Lonnie and Carolyn went before the DRC, and their attorneys dictated the terms of their agreement into the record. After that, the DRC placed both Carolyn and Lonnie under oath. Lonnie testified that he had heard the terms as dictated and testified that the terms were fair and reasonable and resolved all the remaining issues. Subsequently, Carolyn testified that she had heard the terms of the agreement and testified that she would abide by the agreement. At the end of the hearing, Carolyn's counsel volunteered to draft a formal property settlement agreement memorializing the oral agreement read into the record for the parties' signatures.

Subsequently, however, Lonnie disagreed with the terms drafted by Carolyn's attorney regarding maintenance. Refusing to sign the property settlement, Lonnie moved the circuit court to adopt as the parties' settlement agreement the oral agreement read into the record at the September 19, 2005 hearing. Lonnie also filed a motion to require the parties' minor children to attend reconciliation counseling.

Carolyn thereafter tendered the proposed property settlement agreement drafted by her counsel to the DRC. Carolyn had signed the document, but Lonnie had not because he believed it did not adequately reflect the parties' oral agreement previously read into the record regarding maintenance. The DRC made findings of fact and recommendations in which he determined that the language found in Carolyn's tendered property settlement agreement was consistent with the terms of the parties' agreement as memorialized in the transcript of the hearing. On May 1, 2006, the circuit court approved and adopted the DRC's findings of fact and recommendations; thus, adopting Carolyn's property settlement agreement as the parties' settlement agreement. On May 30, 2006, the circuit court denied Lonnie's motion for reconciliation counseling.

II. STANDARD OF REVIEW

It is well established in the Commonwealth that a property settlement agreement between the parties to a dissolution proceeding is an enforceable contract. *Pursley v. Pursley,* 144 S.W.3d 820, 826 (Ky. 2004). When the trial court adopted and approved the DRC's recommendation favoring Carolyn's property settlement agreement over the transcript of the hearing prepared by Lonnie, it engaged in the interpretation and

construction of both agreements. In general, the construction and interpretation of contracts constitute questions of law for the lower court. *Cinelli v. Ward,* 997 S.W.2d 474, 476 (Ky. App. 1998). We review questions of law *de novo* and are not required to defer to the trial court's decision. *Id*.

III. ANALYSIS

Kentucky Revised Statute (KRS) 403.180 allows the parties to a dissolution proceeding to enter into a written settlement agreement that resolves issues regarding maintenance, property, child custody, child support and visitation. An oral agreement between the parties to a dissolution proceeding satisfies the requirement found in KRS 403.180 that such an agreement be “written” where the oral agreement has been dictated to a court reporter, transcribed and made part of the record. *Calloway v. Calloway,* 707 S.W.2d 789, 791 (Ky. App. 1986).

In *Calloway*, the parties to a dissolution proceeding met, along with their attorneys, to take depositions. *Id*. at 790. Prior to the depositions, the parties came to an agreement regarding the outstanding issues. After the parties had been sworn to testify, one of the parties' attorneys dictated the terms of the agreement into the record before the court reporter. After the agreement was read into the record, one of the parties' attorneys asked the parties if they agreed to the terms, and both answered affirmatively. Later, the court reporter filed a transcript of the deposition proceeding with the court clerk, and a written property settlement agreement was drafted that conformed to the parties' prior agreement. However, the wife refused to sign the property settlement agreement. The

trial court determined that the oral settlement agreement that the parties had dictated into the record was not unconscionable, that it was enforceable and the parties were bound by it. *Id*.

The *Calloway* Court affirmed the trial court's decision and held

> [t]he trial court relied on *Peirick v. Peirick,* 641 S.W.2d 195 (Mo. App. 1982) and *In Re Marriage of Chambers,* Colo. App., 657 P.2d 458 (1982), which both involve statutes identical to KRS 403.180, in finding that an oral agreement which is dictated to a court reporter at a scheduled deposition, subsequently transcribed, and then in its transcribed form made a part of the clerk's record, satisfies the requirement of KRS 403.180 that property settlement agreements be "written." We fully agree with this proposition and with the rationale of the courts which have adopted it.
>
> KRS 403.180 merely states that parties "may enter into a written" agreement. The language of the statute does not, however, undertake to describe a permissible or acceptable form for such agreements. That being so, we fail to perceive that an oral agreement dictated to a court reporter, which is then subsequently transcribed and made a part of the clerk's record, does not satisfy the requirement of KRS 403.180 that the agreement be "written." As noted by the Missouri court in *Peirick*, supra at 196, quoting *Hansen v. Ryan,* 186 S.W.2d 595, 600 (Mo. 1945):
>
>> In the administration of justice and the prompt dispatch of business, courts must and do act upon the statements of counsel and upon the stipulations of parties to pending causes. Where the parties have voluntarily entered into a stipulation, which appears fair and reasonable for the compromise and settlement of the issues of a pending cause, and where the stipulation is spread upon the record with the consent and approval of the court, as here, the parties are bound thereby and the court may, thereafter, properly proceed to dispose of the case upon the

> basis of the pleadings, the stipulation and
> admitted facts.
>
> Further, contrary to appellant's suggestion, we find no basis for making a distinction in this case merely because the agreement happened to be dictated to a court reporter rather than stated in the presence of the judge, especially since there is no allegation of fraud or mistake in connection with the court reporter's transcription of the agreement.

Id. at 791.

Also relevant to the case at hand is *Jackson v. Jackson,* 734 S.W.2d 498 (Ky. App. 1987). In *Jackson*, the parties to a dissolution proceeding had reached a tentative agreement and dictated the terms into the record. However, after a dispute arose between the parties, the wife filed a brief and her version of the parties' agreement that she alone had signed. The trial court adopted the wife's version of the settlement agreement. The *Jackson* Court held, "[t]here was no settlement because KRS 403.180 states that 'parties to a marriage ... may enter into a *written* settlement agreement.' (Emphasis added.) [Husband] refused to sign the agreement; therefore, there was no written agreement herein." *Id.* at 498.

In the matter at hand, Lonnie avers that the language regarding maintenance found in Carolyn's property settlement agreement is not consistent with the language regarding maintenance found in the transcript of the hearing. Pursuant to the holding in *Calloway*, Lonnie argues that the transcript of the hearing, which he filed with the Clerk of the Carroll Circuit Court, satisfies the requirement found in KRS 403.180 that the settlement agreement be in writing. Therefore, he reasons that Carolyn's written property

settlement agreement is unnecessary and that the trial court should have adopted the transcript of the hearing, instead of adopting Carolyn's document. By implication, Lonnie suggests that the transcript of the hearing controls over Carolyn's subsequent document.

Lonnie points out that, on September 19, 2005, Carolyn's counsel stated on the record before the DRC that

> [t]he wife has been determined to be disabled by the Social Security Administration and has been receiving temporary maintenance. The parties are not in disagreement that she is not entitled to maintenance, but as a part of the settlement of the case, in lieu of the husband making maintenance payments directly to her, she will receive the children's social security benefits which they will receive as a result of her disability.

However, in the property settlement agreement, Carolyn's counsel included the following language:

> During the pendency of this action, the Wife was determined to be “disabled” under the guidelines of the Social Security Administration, and was awarded social security disability benefits beginning in October, 2002, retroactively. The Wife was previously awarded temporary maintenance paid by Husband of $325.58 every two weeks, which Husband has paid throughout these proceedings. <u>Wife shall continue to receive maintenance from the Husband</u>, but effective September 17, 2005, in lieu of Husband paying monthly maintenance to the Wife, Wife shall receive as her own, without claim or credit by the Husband toward the parties' respective child support obligation, the $301.00 per month social security disability benefits for each child for a total of $602.00 per month.

(Emphasis added).

Although the maintenance section of the written property agreement appears to obligate Lonnie to open-ended maintenance that is temporarily suspended while the children receive social security benefits, the agreement contains a release clause as follows:

> **<u>RELEASE</u>:** For consideration herein, each party hereby releases and forever discharges the other from any and all claims of every kind and character, including dower, curtesy, *and maintenance* whether it be past, present or future ....

(Emphasis added).

According to Lonnie, the legal effect of the maintenance section contained in the property settlement agreement is profoundly different from the legal effect of the language found in the transcript of the hearing. He contends that it cannot be disputed that at the hearing, the parties agreed that maintenance to Carolyn would be terminated.

Lonnie is technically correct that the language in the written property settlement agreement is different from the parties' oral agreement in form. One agreement provides that maintenance is terminated, while the other provides that Carolyn is entitled to maintenance, but she releases Lonnie from any obligation thereto other than the parties' agreement that she will receive the children's social security benefits in lieu of maintenance. The substance, however, is essentially the same: under either agreement, Lonnie is not required, now or any time in the future, to pay maintenance from his personal resources to Carolyn.

Thus, while the circuit court may have erred in determining that the two agreements were consistent with one another, there is no real harm coming from this.

However, the harm comes in accepting the written agreement over the oral agreement, because Lonnie never signed the written agreement; consequently, there was no agreement for the circuit court to accept. *See Jackson*, 734 S.W.2d 498.

Regarding Carolyn's argument in her brief before this Court that "[t]here was no dispute that Mrs. Jones was entitled to maintenance payments," according to the audio tape of the proceedings and the transcript of the hearing prepared by Lonnie's counsel, Carolyn's counsel stated clearly and unequivocally that, "The parties are not in disagreement that she is not entitled to maintenance[.]" In other words, Carolyn's counsel recognized on the record that Lonnie and Carolyn had agreed that Carolyn was not entitled to maintenance. In addition, Lonnie's counsel stated, on the record,

> [w]ith this agreement going into effect today, we need to, I guess, perform some sort of accounting which will indicate, compare her figures to our figures, to see if in fact there has been an underpayment or an overpayment or if we are dead-on with **what would be a maintenance termination order** as of September 19th, today.

(Emphasis added). Carolyn's counsel neither objected to this statement nor asked for a clarification on the issue of maintenance. Therefore, it is apparent that the parties' agreement included that Carolyn was not entitled to maintenance.

In regard to the validity of the oral agreement entered into by the parties on the record, we can find no meaningful difference between the facts in *Calloway* and the present case. As in *Calloway*, the parties herein reached an agreement regarding the outstanding issues and, through their attorneys, dictated the terms of their agreement into

the record. The audio recording of their agreement was subsequently transcribed and filed with the clerk, thus, becoming part of the record as well.

As in *Calloway*, the transcript of the hearing in the present case satisfies the requirement found in KRS 403.180 that the settlement agreement be in writing. And, applying the holding in *Jackson* to the case at hand, even if the language contained in Carolyn's property settlement agreement was consistent with the parties' actual agreement, the circuit court still erred when it adopted Carolyn's property settlement agreement because Lonnie never signed it. Accordingly, we reverse the circuit court's order adopting Carolyn's property settlement agreement and remand with instructions for the circuit court to adopt the transcript of the hearing as the parties' settlement agreement.

Regarding Lonnie's second assignment of error, he argues that the circuit court abused its discretion when it denied his motion for reconciliation counseling. In Carolyn's brief, she does not address this issue, thus, conceding it. We rule in Lonnie's favor and reverse the circuit court's order regarding reconciliation counseling and remand.

On another topic, we pause to note that Carolyn represents in her brief before this Court that the language in the written property settlement agreement regarding maintenance is consistent with the parties' agreement regarding maintenance as memorialized in the transcript of the hearing. The record clearly illustrates that this is not the case. While Carolyn's counsel made no similar representations before the circuit court or the DRC, before this Court, Carolyn's counsel *quotes* the transcript of the hearing

and avers that, during the September 19, 2005 hearing, she dictated the following into the record

> The wife has been determined to be disabled by the Social Security Administration and has been receiving temporary maintenance. **The parties are not in agreement that she is not entitled to maintenance**, but as a part of the settlement of the case, in lieu of the husband making maintenance payments directly to her, she will receive the children's social security benefits which they will receive as a result of her disability.

When we reviewed the transcript of the hearing, however, we found that Lonnie had accurately quoted the transcript of the hearing as follows:

> The wife has been determined to be disabled by the Social Security Administration and has been receiving temporary maintenance. **The parties are not in disagreement that she is not entitled to maintenance**, but as a part of the settlement of the case, in lieu of the husband making maintenance payments directly to her, she will receive the children's social security benefits which they will receive as a result of her disability.

(Emphasis added.) Nevertheless, out of an abundance of caution, we also carefully listened to the audiotape that memorialized the September 19th hearing. We discovered that the transcript accurately depicts what was stated in the record. Moreover, both the transcript and the audiotape state that near the end of the hearing, Lonnie's counsel sought an accounting to determine if Lonnie's maintenance obligation had been fulfilled to the date of *termination of maintenance,* i.e., the date of the hearing. We note that Carolyn's counsel made no objection to this, nor did she seek to clarify the record on this point. Consequently, the record speaks for itself; any objections thereto are waived.

This constitutes a misstatement of the record. Nonetheless, as noted *supra*, Carolyn's counsel made no such representations before the DRC or the circuit court, orally or in writing. This is significant because the transcript in this matter was filed, without objection, by Lonnie's counsel. Apparently neither the DRC nor the circuit court recognized that there was a distinction between the transcript containing the parties' oral agreement and the written agreement. Having condoned, on the record, Carolyn's attorney's view of Lonnie's maintenance obligation, the lower court and the DRC inadvertently buttressed Carolyn's attorney's version of the parties' agreement. Even this, however, does not explain the misquote of the transcript, noted *supra*, in Carolyn's brief. We take this opportunity to remind practitioners to take their obligations of candor before the Court seriously when citing to the record.

IV. CONCLUSION

For the foregoing reasons, we reverse the Carroll Circuit Court's order of May 1, 2006, and remand with instruction for the circuit court to adopt the transcript of the hearing as the parties' settlement agreement and to incorporate it into an amended decree. Furthermore, we reverse the circuit court order of May 30, 2006, and remand with instruction for the circuit court to order the parties' minor children to attend reconciliation counseling if it has not previously ordered so.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Mills Rouse
Walton, Kentucky

BRIEF FOR APPELLEE:

Ruth H. Baxter
Carrollton, Kentucky