

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000933-MR
AND
NO. 2007-CA-000992-MR

RONALD J. BAMBERGER, EXECUTOR
OF THE ESTATE OF JAMES T.
HINES, JR.

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM DAVIESS CIRCUIT COURT
v. HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 04-CI-00307

LESLIE K. HINES

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, WINE, AND CLAYTON, JUDGES.

CLAYTON, JUDGE: Ronald J. Bamberger, executor of the estate of James T.

Hines, Jr. (Jim) appeals from an order of the Daviess Circuit Court upholding the

Domestic Relations Commissioner's (DRC) recommendation to award Leslie K.

Hines (Leslie) *pendente lite* maintenance. Leslie has filed a cross-appeal

challenging the ruling that found the antenuptial agreement valid and enforceable and the ruling determining that the horse, Leslie's Lady, was Jim's property.

Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties met and began dating in 1992. At the time they met, Leslie was separated from her second husband and living with her two daughters. Jim had been married twice. After they began dating, Jim hired Leslie to be the manager of his property, the Athenian Racket and Fitness Center. Later, he sold the fitness center, constructed the Hines Wellness Center, which Leslie then supervised. She worked for Jim the entire time that they lived together and were married. During some periods, her actual work requirements were more symbolic than actual.

In April 1993, Leslie and Jim began living together with Leslie's two daughters. They became engaged in May 1994. After moving out of Jim's home so that it could be renovated, they lived together in another home. But when the original home was completed in October 1997, Leslie did not move back into the home with Jim. According to Leslie's testimony, she did not want to move into the home until they were married. Subsequently, after some apparent persuasion by friends, Jim did agree to marry Leslie, and they set the wedding date (December 7, 1997). Meanwhile, Jim contacted his attorney to prepare an antenuptial agreement, which was then sent to Leslie's attorney. Upon learning of the proposed antenuptial agreement, Leslie attempted through her attorney to negotiate the

terms. Jim was not willing to negotiate, and Leslie said she would not sign the agreement.

Leslie states that friends of the couple again intervened and encouraged her to sign the agreement on December 4, 1997. After listening to them and Jim, she did sign the agreement against the advice of her own attorney. Three days later, Leslie and Jim were married. The marriage experienced problems almost immediately. As early as February 1998, Jim filed his first petition for dissolution of the marriage. Ultimately, on February 27, 2004, Jim filed the petition for the dissolution that resulted in the parties' divorce. On February 7, 2005, the trial court entered a decree of dissolution of marriage, reserving all other issues.

Following the filing of the final petition, Leslie contested the validity of the antenuptial agreement. The DRC held an evidentiary hearing on December 2 and 9, 2004, to ascertain the validity of the agreement. Following the July 1, 2005, DRC's recommendations holding the agreement to be a valid contract and the trial court's adoption of the recommendations on August 22, 2005, Leslie and Jim appealed and cross-appealed the decision. Thereafter, our Court, on January 11, 2006, dismissed the action as interlocutory (2005-CA-001976).

Another disputed issue between the parties was the DRC's recommendation to award *pendente lite* maintenance to Leslie and the court's incorporation of the recommendation in an order, which required Jim to pay Leslie

\$6,000 per month in *pendente lite* maintenance. Jim believed that the antenuptial agreement waived all maintenance including temporary maintenance.

Finally, following a hearing May 23, 2006, to resolve additional issues related to the dissolution of the marriage, the DRC determined with regard to one of those issues that the horse, claimed by Leslie, was owned by Jim. Leslie asserted that the horse, named “Leslie’s Lady” and purchased prior to the marriage by Jim, had been a gift to her from Jim. As Jim died on February 20, 2006, during the pendency of the action, Bamberger, the executor of the estate, has no personal knowledge as to whether Jim gave Leslie the horse. The DRC outlined the known facts in his recommendation and noted that Leslie’s Lady was purchased on September 27, 1997, with two other animals from the Keeneland Association, Inc. The invoice was made out to James T. Hines, Jr. Leslie had no evidence that Jim ever transferred the horse to her. The DRC, based on the evidence, found that Jim was the owner of the horse. The circuit court upheld the DRC’s recommendation in its order of October 30, 2006.

This appeal and cross-appeal follow. In summary, the issues appealed are as follows: Jim’s executor is appealing the decision to award *pendente lite* maintenance, and Leslie is appealing the decisions that the antenuptial agreement was valid and that the horse, “Leslie’s Lady,” was Jim’s property.

ANALYSIS

1. Antenuptial Agreement

The unconscionability of a prenuptial agreement is a question of law to be determined by the court. 41 *C.J.S. Husband and Wife*, § 136 (2008).

Moreover, the fairness of antenuptial agreements must be considered on a case-by-case basis. *Edwardson v. Edwardson*, 798 S.W.2d 941, 946 (Ky. 1990).

Cognizant of the fact that “[t]he construction as well as the meaning and legal effect of a written instrument . . . is a matter of law for the court[,]” we will scrutinize it in light of this condition proviso. *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992).

Unquestionably, in Kentucky, it is well-settled that, upon dissolution of marriage, antenuptial agreements are permitted. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). Antenuptial agreements, however, may be invalid if certain legal criteria are not met. *Id.* To determine the validity of such an agreement, a court must consider whether: (1) the agreement was obtained through misrepresentation or nondisclosure of material facts; (2) the agreement was unconscionable when executed; and (3) the facts and circumstances have changed since the agreement was executed so as to make its enforcement unfair and unreasonable. *Id.* at 936.

In the case at hand, the DRC determined that the antenuptial agreement was not the result of fraud, duress, mistake or nondisclosure of material facts, that the agreement was not unconscionable when it was executed, and that the circumstances had not changed so as to make its enforcement unfair and unreasonable.

Leslie challenged the enforceability of the agreement because, according to her, the agreement was obtained by fraudulent inducement, duress, and misrepresentation. She based her claim on Jim's action in procuring the antenuptial agreement. The DRC, however, resolved that this was not the case. First, Leslie had a copy of the antenuptial agreement before the wedding and discussed it with her attorney. And, even though the attorney on two separate occasions advised Leslie not to sign it, she did sign it. Second, nothing exists on the record to show that she did not do so voluntarily and intelligently. Thus, with regard to the first criteria for analyzing the validity of an antenuptial agreement, the DRC found no fraud, duress, misrepresentation, nondisclosure or mistake.

The next criterion is whether the agreement was unconscionable when executed. Again, the Kentucky Supreme Court "has embraced the view that antenuptial agreements are not per se invalid as against public policy[,]” but “that courts retain the right to analyze such agreements for unconscionability at the time of enforcement.” *Lane v. Lane*, 202 S.W.3d 577, 579 (Ky. 2006) (internal citations omitted). Under the second prong of the *Gentry* analysis, an antenuptial agreement is void if its provisions were unconscionable at the time the agreement was executed.

Here, the antenuptial agreement applies to both Jim and Leslie and reflects that both parties made a full and complete disclosure of their respective financial situations. Further, in the agreement they acknowledge that they had the opportunity to consult independent counsel, and in addition, the agreement

represented all that they agreed to do. We simply can find nothing that suggests the agreement was unconscionable when executed. Therefore, we agree with the trial court that the agreement was not unconscionable at the time of its execution.

The final criterion of the *Gentry* analysis is whether the facts and circumstances of the parties when they entered into the agreement have changed so that enforcement of the agreement at this time would be unfair. The type of changed facts and circumstances contemplated under the third criterion are primarily those that are dependent upon the passage of time. Here, Leslie provided no evidence that the facts and circumstances have changed profoundly from the date of marriage to the date of the dissolution petition. As observed by the DRC, the only change in circumstance, as established by the proof, is that Jim's assets have declined and Leslie's assets have appreciated. And we would be remiss to not point out that Jim's health has declined in the years following the marriage. Therefore, no facts or circumstances have occurred since the execution of the antenuptial agreement that would now render it unfair. Thus, conclusively, the DRC found that the agreement was valid and enforceable after reviewing the three *Gentry* criteria for evaluation of an antenuptial agreement. The trial court adopted his recommendations, and we agree with the court.

Additional guidance in reviewing other issues concerning the validity of antenuptial agreements has been provided by *Blue v. Blue*, 60 S.W.3d 585 (Ky. App. 2001). Following that Court's reiteration of the three criteria, it elucidated additional standards for assessing the enforceability of antenuptial agreements. It

explained that an agreement is subject to review at the time enforcement is sought; it may be set aside if the court decides it is manifestly unfair and unreasonable; and, the party seeking to overturn the enforceability of the agreement has the burden of proof to demonstrate that the agreement is invalid or should be modified. *Id.* at 589. Leslie suggests that Jim did not meet his burden of proof. But, with regard to burden of proof, *Blue* states: “[t]he opponent of the agreement has the burden of proving the agreement is invalid or should be modified.” *Id.*

Furthermore, Leslie contends, based on a Florida case (*Lutgert v. Lutgert*, 338 So. 2d 1111(Fla. App. 1976)), that Jim had to exercise the “highest degree of good faith, candor and sincerity in all matters bearing on the terms and execution of the proposed agreemen[t].” *Id.* at 1115. Leslie maintains, based on *Lutgert* that the DRC erred in finding the antenuptial agreement enforceable as he neglected to make findings about Jim’s behavior in obtaining the antenuptial agreement. She asserts his behavior did not meet that standard, and therefore, the agreement is not enforceable. In fact, Leslie has provided no Kentucky jurisprudence that has this requirement nor has she established that Jim’s behavior did not meet the standard. In addition, the DRC correctly used the Kentucky cases of *Gentry* and *Blue* to analyze the enforceability of the agreement. We shall now specifically consider the maintenance provision of the antenuptial agreement. Was the provision denying maintenance in the agreement against public policy and, hence, unconscionable? Waiver of maintenance provisions have been recognized as enforceable. *Edwardson*, 798 S.W.2d at 945. Hence, a maintenance provision

in an antenuptial agreement is not void against public policy, and we find no rationale or evidence to support that the waiver of maintenance in the parties' antenuptial agreement is void. We concur in the analysis and hold that the antenuptial agreement was valid and enforceable.

2 *Pendente Lite* Maintenance

The purpose of temporary alimony is to provide for the support of a spouse, while living apart from the other spouse, pending a determination of the case, and maintain the status quo between the spouses. Such allowance is based on a spouse's obligation to support the other spouse until there is a divorce. *Coffee v. Coffee*, 247 S.W.2d 501 (Ky. 1952).

Turning to the case at hand, Jim contends that the antenuptial agreement prohibited temporary maintenance. Whereas, Leslie contends that Paragraphs G and H specify that the rights regarding maintenance will only be assessed “upon termination of their marriage” or “upon legal separation.” *Antenuptial Marital Property Agreement*, Page 2. She argues that because the parties were still married, Jim had a duty to support her during the pendency of the action.

Jim's response to her reliance on Paragraphs G and H of the agreement is that these paragraphs are preliminary paragraphs and should be ignored. And he argues that Paragraph Six of the agreement, titled “Waiver of Maintenance,” (*Id.* at Page 5) unambiguously states maintenance is waived. Yet, while the language of that paragraph definitely waives maintenance when the

marriage terminates, it never directly addresses temporary maintenance. Given that Paragraph Six of the agreement does not specifically mention *pendente lite* maintenance, we concur with the reasoning of the DRC. In other words, since the introductory paragraphs of the agreement designate that the agreement becomes operative upon the dissolution of the marriage and because Paragraph Six does not prohibit temporary maintenance, we concur that the agreement allows for an award of *pendente lite* maintenance.

Moreover, in determining the amount of the temporary support, the DRC did not abuse his discretion as he adequately reviewed Leslie's expenses, and concluded that \$6,000 per month rather than \$10,000 per month was an appropriate amount for *pendente lite* maintenance. As a matter of fact, Jim's brief even said "[h]e realized that Leslie may be entitled to maintenance for a period of time but for different reasons that the Commissioner determined." *Appellant's Brief*, Page 3. And his claim that the *pendente lite* maintenance order is not fair because the temporary support could last longer than was equitable is not persuasive.

Pendente lite maintenance is a temporary order and a motion to rescind or change it can be made. Indeed, such a motion was made and Leslie's temporary support was ordered terminated in May 2006.

3. Disposition of "Leslie's Lady"

Ownership of the horse, "Leslie's Lady," was an issue at the May 23, 2006, hearing. Leslie said she did not contest the ownership of the horse earlier because she was waiting until the validity of the antenuptial agreement was

decided. Nonetheless, with regard to her claim of ownership of the horse, Leslie was never able to prove the transfer of ownership of the horse from Jim to her. To support her claim of ownership, Leslie provided photos of her and Jim with the horse in the winners' circle at a couple of races. On the other hand, Jim established his ownership by providing a duplicate copy of the Certificate of Registration listing him as the owner. Likewise, he provided his 1997, 1998, 1999, and 2000 tax returns, which contained the information on them that he depreciated the horse, included the horse's race income and deducted the horse's expenses. Based on these factors, the DRC found that Jim was the owner of "Leslie's Lady," and the trial court adopted the finding. We find no abuse of discretion.

Accordingly, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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