RENDERED: OCTOBER 14, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001902-MR

PAM TAYLOR — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 07-CI-00344

GLEN TAYLOR, JR. — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Pam Taylor appeals from an order of the Knox Circuit Court, Family Division, denying her motions to set aside a settlement agreement reached with her ex-husband, Glen Taylor, in a marital dissolution

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

action. Appellant raised a number of grounds for this request in her motions, including fraud, mutual mistake, and unconscionability. She also challenges the circuit court's award of temporary maintenance. For reasons that follow, we are compelled to reverse.

FACTS AND PROCEDURAL HISTORY

Appellant filed for divorce from Appellee on July 16, 2007, seeking to end a marriage that had prevailed for nearly thirty years. Following extensive litigation, the parties signed a "Mediation Agreement"[2] on April 8, 2009, setting forth the terms of a negotiated settlement as to all issues regarding maintenance and property division. The Agreement provides, in relevant part, as follows:

> The parties, and their attorneys having met at the Mediation Center of Corbin on April 8, 2009, and having mediated in good faith the issues pending in this Knox Circuit Court case, and having reached the following agreement, now agree as follows:
>
> (1) Pam shall receive the home and lot, the body shop and lot, and the extra lot that adjoins the home, she shall assume all indebtedness thereon and indemnifies Glen therefrom, and she shall have Glen's name removed from the debt within 90 days from and after entry of the Decree of Dissolution herein, and Glen shall convey same to Pam by quitclaim deed contemporaneously therewith.
>
> (2) Pam shall receive the property received from Harold Baker, free and clear of any claims by Glen, and he shall convey same to Pam by quitclaim deed upon entry of the Decree herein.

[2] It is unclear why the document was labeled as a "Mediation Agreement" since a mediator was not involved in the settlement. In any event, the designation is not important to this appeal.

(3) From the remaining sums left in the joint CD at Commercial Bank, formerly UNB, Glen shall receive $20,000.00 and Pam shall receive the remainder.

(4) Pam shall receive her savings account, all the household goods and furnishings in her possession, the 1963 Corvair, all other vehicles or items located about the property or owned by the parties not otherwise listed below for Glen, free and clear of any claims by Glen.

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(8) Pam agrees in consideration for the above division of assets and debts that she will make no claim to maintenance.

(9) Both parties agree that this settles all issues between them and that they hereby waive any claim to dower or curtesy.

***

(12) Both parties agree that they have voluntarily entered into this agreement, after consulting with their counsel.

On June 24, 2009, Appellant moved to set aside the settlement agreement on the grounds that the parties had not reached a "meeting of the minds" or, in the alternative, that the agreement was based on a mutual mistake, fraud, or a material misrepresentation. In her motion, Appellant first set forth that as part of her award of "all other vehicles or items located about the property or owned by the parties not otherwise listed below for Glen, free and clear of any claims by Glen," she expected to receive the following items: (1) a 1956 Chevrolet pickup truck (or its parts) valued at $2,500.00; (2) a 1966 Chevrolet pickup truck (or its parts) valued at $1,500.00; (3) a 1975 GMC dump truck valued at $3,800.00; and

(4) a 2004 boat trailer, which had been converted into a car trailer, valued at $2,000.00. Appellant had previously produced evidence in her pretrial disclosure statements that these items were part of the parties' marital property. This evidence included copies of titles to the subject vehicles and photographs.

However, following the parties' signing of the settlement agreement, Appellee apparently informed Appellant that other people owned three of the items and that he did not know the whereabouts of the dump truck. In a supplemental filing, Appellant tendered an affidavit stating that prior to the settlement conference, she and Appellee had discussed the subject items. According to Appellant, Appellee represented to her that he still possessed the two pickup trucks. Appellant's affidavit also indicated that Appellee had been seen using the dump truck and the trailer prior to the settlement conference. Thus, his claim that he no longer owned or knew the whereabouts of the subject items was highly suspect.[3] Appellant argued that these developments merited rescission of the settlement agreement.

In further support of her motion, Appellant argued that her agreement to waive maintenance in exchange for a larger share of property was based largely upon Appellee's representation that his layoff from work was indefinite and most likely permanent. However, Appellant learned that Appellee was recalled to work not long after the settlement agreement was reached. Accordingly, she contended

[3] The tow truck and trailer were subsequently discovered on the properties of two of Appellee's friends. Photographs were taken and introduced into the record in a supplemental filing on July 23, 2009. However, this filing was apparently never formally entered into the record until February 11, 2010, as part of the record on appeal.

that this constituted a change in circumstances rendering the settlement agreement unconscionable and, thus, subject to rescission. Appellant ultimately asked the circuit court to set aside the settlement agreement and to allow the parties to further litigate the issues of property damage and maintenance.

Appellant's motion was summarily denied without an evidentiary hearing on July 24, 2009. The circuit court subsequently entered an order on August 6, 2009, setting forth only that the motion was denied. The order contained no findings of fact or conclusions of law. The case was also set for an uncontested final hearing.

At the final hearing, Appellant reiterated her claims for setting aside the settlement agreement. Just prior to the hearing, Appellant submitted another pleading in which she contended that further evidence was needed to determine whether fraud, misrepresentation, or mistake had occurred in the context of Appellee's return to employment and the parties' settlement agreement, *i.e.*, whether Appellee knew that he would be returning to work at the time of the settlement conference. Appellant also filed another motion to set aside the separation agreement as unconscionable pursuant to KRS 403.180 because of events that had happened after the signing of the agreement.

This time, the circuit court allowed Appellant to introduce testimony from herself and Appellee relating to the settlement agreement. However, the court again denied Appellant's request to set aside the agreement, stating only that the agreement was not unconscionable and that the other issues raised by Appellant

had been previously decided. Appellant then orally asked the circuit court for specific findings of fact regarding the issues of fraud, mutual mistake, misrepresentation, and unconscionability, but the court's written order denying the motion provided only that "Petitioner's Motion to Set Aside Separation Agreement is hereby OVERRULED as the Court has found the Agreement not to be unconscionable." No findings of fact or additional conclusions were provided in the order. Following entry of a final decree of dissolution, Appellant filed this appeal.

ANALYSIS

On appeal, Appellant again argues that the parties' settlement agreement should be set aside on various grounds, including unconscionability. It is well-established that Kentucky encourages the amicable resolution of divorce actions via settlement agreements. *See Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997). However, a settlement agreement is subject to judicial scrutiny and will not be enforced when procured by fraud, bad faith, or a material misrepresentation.

This scrutiny also extends to allegations that an agreement is unconscionable. KRS 403.180 provides that the terms of a marital 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 . . . that the separation agreement is unconscionable." KRS 403.180(2). In

McGowan v. McGowan, 663 S.W.2d 219 (Ky. App. 1983), we held that "a separation agreement is unconscionable and must be set aside if the court determines that it is manifestly unfair and unreasonable." *Id.* at 222; *see also Shraberg*, 939 S.W.2d at 333. This does not require a showing of fraud, deceit, mental instability, or the like. Instead, only a showing of fundamental unfairness is required. *Shraberg*, 939 S.W.2d at 333; *Rupley v. Rupley*, 776 S.W.2d 849, 852 (Ky. App. 1989).[4]

Unconscionability determinations, in particular, are inherently fact-sensitive and must be addressed on a case-by-case basis. *See Pursley v. Pursley*, 144 S.W.3d 820, 823 (Ky. 2004); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342 (Ky. App. 2001). Moreover, claims of fraudulent misrepresentation, fraud, or mistake inherently present questions of fact. Thus, how these questions of fact are resolved below is critical to any evaluation of the issues on appeal.

Here, however, the circuit court failed to make findings of fact on any of the issues raised by Appellant. As a result, this Court is left with its hands tied because we do not have the authority in situations such as this to weigh the evidence and to decide factual matters *de novo*. *See Transp. Cabinet v. Caudill*, 278 S.W.3d 643, 648 (Ky. App. 2009). The circuit court also failed to reach any conclusions of law beyond a general recitation that the settlement agreement was

[4] Moreover, even in instances where a settlement agreement is initially approved by the circuit court, it may subsequently be modified if the party challenging the agreement can demonstrate that it has become "unconscionable because of changed circumstances." *Money v. Money*, 297 S.W.3d 69, 72 (Ky. App. 2009); *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007).

not unconscionable. Without such findings and conclusions, we cannot discern the basis of the circuit court's decision and consequently cannot conduct a meaningful review of this case. *McKinney v. McKinney*, 257 S.W.3d 130, 134 (Ky. App. 2008).

In view of the foregoing, we reverse the trial court and remand for findings of fact, conclusions of law and entry of an appropriate order on two issues, (1) whether the settlement agreement, without regard to questions of fraud, etc., was unconscionable, and (2) whether Appellee engaged in fraud or material misrepresentation to induce Appellant to enter into the settlement. Unless the trial court determines that one or more of these circumstances prevail, the parties' settlement agreement should be treated as a binding agreement and enforced accordingly.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Marcia A. Smith
Corbin, Kentucky

BRIEF FOR APPELLEE:

Stacey L. Graus
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