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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001598-MR

ELIZABETH CAROL AUBREY — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JOHN P. SCHRADER, JUDGE
ACTION NO. 08-CI-02255

JOEL WALTER AUBREY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; HARRIS,[1] SENIOR JUDGE.

THOMPSON, JUDGE: This is an appeal in a dissolution of marriage action. The appellant, Elizabeth Carol Aubrey, argues the following: (1) the family court erred when it found that the parties' postnuptial agreement was unenforceable against the appellee, Joel Walter Aubrey; (2) whether Elizabeth was required to trace non-marital gifts; (3) the family court erred when it found that Elizabeth had not

[1] Judge William R. Harris concurred in part and dissented in part in this opinion prior to the expiration of his term of Senior Judge service. Release of this opinion was delayed by administrative handling.

sufficiently traced non-marital gifts into current marital assets; (4) the family court erred when it denied Elizabeth's request that Joel be required to pay for private school for one of the parties' children. We affirm.

Elizabeth and Joel married in 1992. They separated in May 2008, and Elizabeth filed her petition for dissolution of marriage. A mediated partial settlement agreement, subsequently approved by the Family Court, concluded many of the issues, including custody of the parties' two children, sale of the former marital residence and disposition of the proceeds, and disposition of the children's educational accounts and the parties' savings accounts.

All issues not resolved by the mediated partial settlement agreement were tried on April 6, 2009. On July 16, 2009, the family court rendered its well written and detailed findings of fact and conclusions of law and entered its decree of dissolution which incorporated the findings of fact and conclusions of law resolving all of the remaining issues.

The issues regarding the postnuptial agreement and the tracing of non-marital gifts arise from the following facts:

(1) In December 1991, shortly before Elizabeth and Joel married, Elizabeth's father, Carl Queener, made a $40,000 gift to Elizabeth. The record suggests that some of the gifts involved in this case were made by Mr. Queener, who died in 2008, and some by Mr. Queener and Carol Queener, his wife and Elizabeth's stepmother, whose marriage to Mr. Queener was dissolved in 1997. It also appears that some of the gifts were by instruments payable to Elizabeth, some

were by instruments payable to Joel, and some were made jointly payable. However, Joel does not dispute that all the gifts were non-marital and that it was the donors' intention that the gifts be to Elizabeth. Joel's position, essentially, is that Elizabeth had the burden of tracing all of the non-marital gifts into assets existing at the time the marital dissolution action was filed and that she failed to do so.

(2) Elizabeth and Joel married in May 1992 and in December 1992 a second gift of $40,000 was made.

(3) Elizabeth and Joel executed their postnuptial agreement in January 1993.

(4) In July 1993, a third $40,000 gift was made.

(5) Gifts totaling $39,600 were made in December, 1996.

(6) Gifts totaling $39,800 were made in May 1997. Joel stipulated that Elizabeth sufficiently traced the 1997 gifts to present non-marital assets and the family court so found. The 1997 gifts are not at issue on appeal.

(7) The final disputed gift was made in December 1998 in the amount of $39,800.

(8) The disputed non-marital gifts total $199,400.

(9) Joel concedes that it was the donors' intention that the gifts would be non-marital gifts to Elizabeth.

(10) All of the gifts were deposited into the parties' joint accounts and were comingled with marital funds, including Joel's substantial earnings from his successful law practice.

I – ENFORCEABILITY OF THE POSTNUPTIAL AGREEMENT

The parties agree that there is no factual dispute regarding the execution of the agreement. Thus, the issue presented is one of law and is subject to *de novo* review. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001).

The postnuptial agreement which the parties executed in January 1993, provides in pertinent part as follows:

> 1. Gifts Received by the Parties to Be the Separate Property of the Child of the Donor. The parties agree that all property which either party may receive or may have received as a gift from the family of the other party (hereinafter the "Gifted Property"), included any property received prior to the date of this agreement, whether inter vivos or as a result of the death of the family member, including, by way of illustration but not limitation, by inter vivos gift, testamentary bequest or devise beneficiary designation, by being the surviving joint owner, or by the laws of descent and distribution, shall be and remain the separate, non-marital property, as defined by KRS chapter 403, of the child of the donor of the Gifted Property, regardless of how the title to the property is held. Any appreciation, improvements to or income earned by the Gifted Property shall be separate property of the child of the donor of the property. Any purchase, exchange or acquisition of other property from the proceeds or exchange of the Gifted Property shall be deemed the separate property of the child of the donor of the property.
>
> 2. Mutual Release of Claims to the Gifted Property in the Event of Divorce. During the marriage subsequent to the date of this Agreement, each party shall be free to deal

with any Gifted Property which is held in the name of that party free of any claim by the other. This shall include, but not by way of limitation, the right to sell, encumber, and make lifetime gifts of all such separate property free of any claim by the other party or his or her assigns.

In the event the parties divorce, each party agrees that all of the Gifted Property, regardless of which party holds title to the property, shall be deemed non-marital property, as defined by the Kentucky Revised Statutes, Chapter 403, of the child donor of the property and all such Gifted Property shall be set aside to such child.

. . . .

4. Disclosure. Each party has made to the other a full, candid and truthful disclosure of his or her property interest, both real and personal, and the estimated value thereof. Both parties further acknowledge that:

(1) Each is fully acquainted with the business and resources of the other;

(2) Each has answered all the questions which have been asked about the other's income, assets and property;

(3) Each has carefully weighed all of the facts and circumstances, and desires to continue the marriage regardless of any financial arrangements made for his or her benefit;
(4) Each is entering into this Agreement freely, voluntarily and with full knowledge of the effects and conditions herein.

5. Independent Counsel. Each of the parties to this Agreement acknowledges that he or she has been independently and professionally advised by legal counsel with regard to his or her rights, liabilities and duties in relation to his or her property and financial affairs, or has had the opportunity to obtain such counsel. This Agreement has been freely and voluntarily entered into by each party without coercion, constraint or

> intimidation on the part of the other. Each party acknowledges that he or she has a full understanding of the provisions of this Agreement generally, and that this Agreement substantially alters the marital and property rights, claims or interests that he or she would have had but for the execution of this Agreement.
>
> . . . .

At trial, Joel maintained that he signed the postnuptial agreement under duress. The family court agreed, making a finding that ". . . the demand that this Agreement be signed [by Joel] as a condition precedent to continuing the marital relationship constitutes unconscionable duress and coercion violating the sanctity of the parties' marriage and should not be enforced."

Any uncertainty over whether an otherwise valid postnuptial agreement is enforceable in the context of a marriage terminated by dissolution was resolved by the Kentucky Supreme Court's opinions rendered in *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990), and *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990). The court expressly overruled its prior opinions which had declined to enforce antenuptial or postnuptial agreements but preserved the traditional defenses against enforcement of such agreements. In *Gentry*, quoting *Scherer v. Scherer,* 249 Ga. 635, 292 S.E.2d 662, 666 (1982), the court outlined the criteria for a trial court to employ in determining enforceability of an agreement:

> . . . the trial judge should employ basically three criteria in determining whether to enforce such an agreement in a particular case: (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material

> facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable?

Gentry, 798 S.W.2d at 936.

Similarly, in *Edwardson,* the court stressed that enforcement of agreements made in contemplation of divorce remains "subject to appropriate limitations," the first of which is "full disclosure" and the second of which is "unconscionability." *Edwardson*, 798 S.W.2d at 945.

In the case before us, Joel has not maintained that his execution of the postnuptial agreement resulted from physical force, threat of physical force, fraud, mistake, misrepresentation, or nondisclosure of material facts. He does not claim that the agreement itself was unconscionable, or that the enforcement of the agreement has been rendered unfair and unreasonable by any change in circumstances which occurred since the agreement was executed. Joel's claim is that he signed the agreement under duress because continuation of his marriage to Elizabeth was conditioned upon his signing the agreement and because he had acceded to a demand by an attorney acting on behalf of Mr. Queener that he vacate the marital residence and remain away until he signed the agreement.[2] It is undisputed that Joel did move from the marital residence for two weeks before he signed the agreement and then returned to the residence.

The concepts of duress and coercion are long-established and well defined in Kentucky law. Our highest court has defined "duress" to mean "such

[2] Whether making execution of a postnuptial agreement a condition precedent to continuation of marriage, per se, constitutes duress appears to be a question of first impression in Kentucky.

violence or threats made by the party or some person acting for or through him, or by his advice or counsel, as are calculated to produce on a person of ordinary intelligence a just fear of great injury to person." *Bond State Bank v. Vaughn*, 241 Ky. 524, 44 S.W.2d 527, 528 (1931). This Court has observed that duress is neither threatening to do what one has a legal right to do nor taking measures authorized by law and the circumstances. *Redmon v. McDaniel*, 540 S.W.2d 870, 872 (Ky.App. 1976).

Elizabeth had the legal right to seek a dissolution of her marriage to Joel if she deemed the marriage irretrievably broken, including the right to seek sole occupancy or award of the marital residence. Her rights included the right to forebear from seeking a dissolution of the marriage if Joel would sign the postnuptial agreement. Indeed, it seems logical to assume that any antenuptial or postnuptial agreement is the product of an express or implied threat that the marriage will not take place, or endure, unless the party requested to sign it does so. We decline to hold that such a threat constitutes duress *per se*.

Absent any evidence or claim that Elizabeth or anyone acting on her behalf did more than threaten Joel with a divorce action and demand that he move out of the house unless he signed the postnuptial agreement, Elizabeth's conduct and that of anyone acting on her behalf falls far short of duress as defined by Kentucky law. Therefore, after our *de novo* review we conclude that the postnuptial agreement should be enforced against Joel. The family court erred in ruling otherwise.

II - WHETHER TRACING IS REQUIRED UNDER THE POSTNUPTIAL AGREEMENT

Having concluded that the family court should have enforced the postnuptial agreement against Joel, we address whether the agreement required Elizabeth to trace the non-marital gifts to present assets. Because the issue requires interpretation of the agreement, our review is *de novo*. *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123, 125 (Ky. 2009).

We begin by noting that the postnuptial agreement, as quoted above, does not expressly provide whether tracing of gifted property is required. We also note that the agreement is not rendered ambiguous by its failure to specify whether the gifted property (cash) must exist at the time of the dissolution action in order to be set aside to the spouse whose family member made the gift. *Frear v. PTA Industries, Inc.*, 103 S.W.3d 99 (Ky. 2003). Interpreting the agreement according to its own terms as required in the absence of ambiguity, *id*. at 106, logic dictates that an asset must exist in some identifiable form at the time of marital dissolution in order for an asset to be set apart to one spouse over the other. Elizabeth cannot claim the full amounts of the disputed gifts from the marital estate ten to seventeen years after the gifts were made without tracing the assets to present marital assets.

We note Elizabeth's argument that we should apply the method suggested by Justice Vance in his concurring opinion in *Chenault v. Chenault*, 799 S.W.2d 575, 581 (Ky. 1990), and not require Elizabeth to trace her non-marital gifts because the value of the parties' marital assets always exceeded the total value

of the non-marital gifts. Suffice it to say, the majority opinion in *Chenault* expressly rejected Justice Vance's suggested method, and we are constrained to follow the law as stated by the majority opinion. *Fields v. Lexington-Fayette Urban County Government*, 91 S.W.3d 110, 112 (Ky.App. 2001).

Therefore, we agree with the family court's conclusion that Elizabeth was required to trace her non-marital gifts into present marital assets in order to have them set apart to her under the postnuptial agreement.

III - WHETHER ELIZABETH SUFFICIENTLY TRACED THE NON-MARITAL GIFTS

"[O]ur standard of review on issues relating to the family court's division and award of marital property is to determine whether the [family] court abused its discretion in making that award." *Kleet v. Kleet*, 264 S.W.3d 610, 618 (Ky.App. 2007).

The family court reviewed and discussed each of the disputed non-marital gifts. With respect to each gift, the family court found that the gifted money had been deposited into the parties' joint accounts, that it was comingled with marital funds, and that Elizabeth failed to present documentation by bank records or other means to substantiate her assertions that the non-marital gifts were traceable to present marital assets. The family court expressly declined to find that Joel had destroyed records which would have supported Elizabeth's assertions on the tracing issues and, thus, give rise to an inference favorable to Elizabeth. The

family court found that Elizabeth failed to meet her burden of tracing each of the disputed non-marital gifts to present marital assets. We review these findings under the "clearly erroneous" standard. *Id.* at 613.

Even under the "relaxed" standard of proof required for tracing non-marital property stated in *Chenault*, a party seeking to trace non-marital property into a present marital asset must show that "he or she has spent his or her non-marital assets in a traceable manner during the marriage." *Polley v. Allen*, 132 S.W.3d 223, 229 (Ky.App. 2004). Simply showing that he or she brought non-marital property into the marriage is not sufficient. *Id.*

Elizabeth failed to document her claims that the disputed non-marital gift funds were used to pay for marital property items or to reduce marital debts. A significant length of time which elapsed between the non-marital gifts and the marriage dissolution action and the non-marital funds were comingled with marital funds, including Joel's earnings, which greatly exceeded the total amount of the non-marital gifts. Under the circumstances, we cannot conclude that it was clearly erroneous for the family court to find that Elizabeth failed to trace the non-marital gifts into present marital assets.

IV. RESPONSIBILITY FOR THE COST OF PRIVATE SCHOOL

Although the parties reached an agreement on joint custody of the children, a dispute arose and was addressed at trial concerning the need for a private school for the older child. During the pendency of the litigation, Elizabeth requested that the family court authorize her to enroll the child in a private school

and require Joel to bear the costs. Joel argued that public school was available and sufficient for the child's needs. Thus, the family court had to resolve two issues. First, should Elizabeth be authorized to enroll the child in private school? Secondly, if so, should Joel be required to pay the costs of private school?

At oral argument, counsel for Elizabeth stipulated that there was no competent expert testimony provided to the family court which would allow the family court to determine that the child's emotional development would be significantly impaired if he were not allowed to remain in private school. Further, no competent expert testified as to a comparison between the opportunities offered at a public school as compared to the opportunities provided by the private school.

In its findings of fact and conclusions of law, the family court addressed these questions at length and determined that Elizabeth should have the exclusive custodial decision to enroll the child in a private school at her sole expense. The family court rendered this limited alteration of joint custody of the child to Elizabeth and based its decision on the fact that the child's best interest should allow Elizabeth the sole decision authority as to this child's educational enrollment.

Because no evidence was produced which would authorize the finding that this school was necessary as a special need of the child, the family court concluded that Joel was not required to pay any costs of the private school should Elizabeth decide that the child should attend. We observe that KRS.403.211(3)(b), authorizes deviation from the child support guidelines if the court makes a finding

that application of the guidelines would be unjust or inappropriate based on a child's extraordinary educational or special needs.

Based upon the evidence, the family court did not find that this child had an extraordinary or educational special need which compelled attendance at the private school. We agree with that finding and, therefore, are persuaded that the family court properly determined that there was not a special need within the meaning of KRS 403.211(3)(b), which would warrant a deviation from the child support guidelines. We further hold that the trial court did not abuse its discretion by granting Elizabeth the sole responsibility for determining the educational placement of the child at her expense as a modification of the joint custody between the parties.

KELLER, JUDGE, CONCURS.

HARRIS, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

HARRIS, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART. For the reasons stated herein, I respectfully dissent from that portion of the majority opinion which holds that the family court properly required Elizabeth to be responsible for all of the cost of private school for the parties' older child. I concur in all other aspects of the majority opinion.

As the majority opinion correctly notes, Elizabeth made two requests with regard to private school for the child. First, as a joint custodian, she sought authorization to enroll the child in private school over Joel's objection. Second,

she sought a deviation from the child support guidelines to require Joel to pay all or part of the private school expense.

In its findings of fact and conclusions of law, the family court addressed these questions at length and ultimately decided that Elizabeth should be authorized to enroll the child in private school, but at her sole expense. The family court based its decisions on its finding that the child's emotional development would be significantly impaired if he were not allowed to remain in private school, and that private school would be in the child's best interest, coupled with its belief that KRS 403.211(3), *Miller v. Miller*, 459 S.W.2d 81 (Ky.App. 1970), and *Smith v. Smith*, 845 S.W.2d 25 (Ky.App. 1992), compelled it to conclude that Joel should not have to pay any of the cost of private school. Elizabeth appeals only from the ruling which absolves Joel of responsibility for the cost of private school. Joel has not cross-appealed from the ruling that authorizes private school for the child.

As this Court recently noted in *Young v. Holmes*, 295 S.W.3d 144 (Ky.App. 2009), whether private school is in the best interest of a child whose parents have joint custody is separate from the question of how the cost of private school should be borne. *Id*. at 147. Only the second question is before us on this appeal, and since the issue turns on the interpretation of KRS 403.211(3)(b), the family court's ruling is reviewed *de novo*. *Smith*, 845 S.W.2d at 26.

I begin by observing that *Miller v. Miller*, 459 S.W.2d 81, predates the enactment of KRS 403.211(3). However, even without a statutory predicate the *Miller* opinion suggests that the Court would have been inclined to approve the

trial court's requirement that the father pay for private school for the minor child had there been proof of a "handicap that would make public schools unsuitable" for the child. *Miller*, 459 S.W.2d at 83. I next observe that KRS 403.211(3)(b) authorizes deviation from the child support guidelines if the court makes a finding that application of the guidelines would be unjust or inappropriate based on a child's "extraordinary educational . . . *or special needs."* (Emphasis supplied.) Finally, I observe that in *Smith v. Smith*, 845 S.W.2d 25, the Court did not address whether the proposed music lessons for the child were sought in response to a "special need" of the child as opposed to an "educational need."

I am persuaded that the family court erred by failing to utilize the "special needs" prong of the statute as a basis for deviating from the child support guidelines to require Joel to bear some or all of the expense of private school for the older child. It is clear from the family court's findings that the teenage child suffers from an eating disorder, has sustained significant weight loss and broken bones, and has expressed suicidal threats and ideations. The family court has also found that the child needs ongoing therapy and medications for his mental health disorders and that his continued enrollment in private school is in his best interest.

I do not climb the slippery slope of analyzing whether the child's needs are "extraordinary educational needs" because I am persuaded, and I would hold, that based upon the facts as found by the family court the child has "special needs" within the meaning of KRS 403.211(3)(b), warranting deviation from the child support guidelines. I believe the family court erred by concluding otherwise.

I would reverse the family court's denial of Elizabeth's request for a deviation from the child support guidelines and remand that issue to the family court with direction to conduct further proceedings and determine the extent to which deviation from the child support guidelines is warranted.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Mark A. Wohlander
Lexington, Kentucky

BRIEF FOR APPELLEE:

Tiffany Konwiczka
Eileen M. O'Brien
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Eileen M. O'Brien
Lexington, Kentucky