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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001065-MR

ANN J. MAIRE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 10-CI-503607

SCOTT FRANCIS MAIRE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER, JUDGES.

ACREE, CHIEF JUDGE: The issue presented is whether the Jefferson Circuit Court abused its discretion in refusing to set aside as unconscionable an "agreed order as to property, custody, and support." Finding no abuse, we affirm.

I. Facts and Procedure

Ann and Scott married on August 28, 1982. On October 5, 2010, Scott filed a dissolution petition in Jefferson Family Court. At that time, Ann and Scott had two adult children.

In 2010, Scott worked at Ashley Furniture earning over $100,000 per year, while Ann provided in-home childcare services earning approximately $4,800 per year. On December 3, 2010, Ashley Furniture eliminated Scott's position. Scott received severance benefits, which consisted of roughly three months of both severance pay and health insurance coverage.

On January 7, 2011, the parties participated in mediation. Ann's attorney was present during the mediation, and so was a financial planning consultant hired by Ann. No written agreement resulted from the mediation. However, approximately one week later, following further negotiations, Ann and Scott entered into an Agreed Order. The parties signed the Agreed Order and filed it with the family court; the family court entered it on January 31, 2011.

The primary assets of the marital estate included the marital residence, Scott's IRA, two vehicles, Scott's severance benefits, household goods and furnishings, and personal property. Under the terms of the Agreed Order, Ann received the marital residence plus the residence's equity estimated at approximately $50,000; $192,000 from Scott's IRA; her vehicle, not encumbered by a loan, worth approximately $11,325; and the parties' 2010 tax refund. Scott retained $122,000 of his IRA, and his vehicle worth $22,800 which was

encumbered by a secured loan with a balance of $23,500. Ann and Scott divided equally the household goods and personal effects, and Scott's severance benefits.

The Agreed Order also rendered Ann and Scott each responsible for her or his own debt, including credit card debt and attorney's fees. Additionally, despite the disparity in the parties' income, "[i]n consideration for receiving all the equity in the house, additional retirement, and greater share of the marital estate," Ann agreed to indefinitely waive her present and future claim to maintenance.

On March 15, 2010, Ann substituted counsel. The next day, Scott tendered a Decree of Dissolution of Marriage which incorporated the parties' Agreed Order. Shortly thereafter, Ann's new counsel moved to postpone entry of the dissolution decree and, on April 8, 2011, moved to set aside the Agreed Order as unconscionable. On April 28, 2011, the family court denied Ann's motion and, contemporaneously, entered the dissolution decree incorporating the Agreed Order and specifically finding the Agreed Order was not unconscionable.

On May 4, 2011, Ann filed several post-judgment motions, including a timely motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 to alter, amend, or vacate the family court's order denying her motion to set aside the Agreed Order, and a motion for additional findings of fact pursuant to CR 52.02. The family court denied Ann's motions. Ann promptly appealed.

II. Standard of Review

The family court is in the superior position to determine whether a separation agreement is unconscionable. *Shraberg v. Shraberg,* 939 S.W.2d 300,

333 (Ky. 1997). On appeal, we defer to the family court's sound judgment and will not disturb the family court's conscionability determination absent an abuse of discretion. *See id.*; *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky. App. 1979).

III. Analysis

Kentucky Revised Statute (KRS) 403.180(2)[1] requires the family court, prior to incorporating a separation agreement into the final divorce decree, to ascertain whether the separation agreement is unconscionable. *See Peterson*, 583 S.W.2d at 711 (indicating KRS 403.180 requires the "trial court [to] determine whether the settlement agreement is unconscionable prior to approval of that agreement"). If the family court finds the separation agreement not to be unconscionable, the agreement's terms shall be binding on the parties and the court. KRS 403.180(2).

A separation agreement may be set aside as unconscionable if it is "manifestly unfair or inequitable," *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974), or if it is the result of fraud, undue influence, or overreaching. *Peterson*, 583 S.W.2d at 712. Of course, "a bad bargain and unconsionability [are] not synonyms." *Shraberg*, 939 S.W.2d at 333. In ascertaining whether a separation agreement is unconscionable, the family court must consider "the economic circumstances of the parties and any other relevant evidence[.]" KRS 403.180(2).

[1] KRS 403.180(2) provides, in pertinent part: "the terms of the 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, on their own motion or on request of the court, that the separation agreement is unconscionable."

The party challenging the agreement bears the "definite and substantial" burden of proof. *Peterson*, 583 S.W.2d at 711.

Here, Ann contends the parties' separation agreement, and particularly the waiver of maintenance provision, is unconscionable because the "financial 'deal' for Ann in the Agreed Order in recovering a 'greater' share of the marital assets is *de minimus* as compared to the waiver of maintenance following a 28-year marriage and the great disparity in earnings and income potential of the parties." (Appellant's Brief at 6). Ann asserts, in order to satisfy her outstanding credit card debt and maintain the standard of living established during the marriage, she will have to systematically liquidate her share of Scott's IRA "at greatly reduced numbers due to the tax burden of doing so" as well as sell the marital home "in a depressed market with attendant commissions and fees." (Appellant's Brief at 10). Consequently, Ann advocates the Agreed Order's provision waiving maintenance in exchange for receiving a superior portion of the marital estate is unconscionable.

At the time negotiations ensued concerning the Agreed Order, Ann disclosed she had approximately $12,000 in credit card debt while, in fact, she had almost $23,000 in credit card debt. Since that time, Ann has steadily increased her credit card debt each month and, by April 2011, Ann's credit card debt had reached approximately $50,000. Ann asserts her failure to disclose the true amount of her credit card debt to her attorney, financial counselor, and Scott renders the Agreed Order manifestly unfair and inequitable.

In its order denying relief, the trial court noted Ann was solely responsible for incurring the credit card debt, and there was no evidence that the debt was for any marital purpose. Moreover, the record is void of any evidence that Ann was unaware of her financial obligations, including the amount of credit card debt owed, at the time of the agreement. At any rate, the circumstances alleged by Ann in her brief were not unforeseeable when she signed the Agreed Order. Ann knew or should have known the amount of debt owed and, despite that knowledge, Ann agreed to accept responsibility for her debts and waive maintenance. "In such a case, it is not manifestly unfair or inequitable to let a party lie in the bed he or she has freely made[.]" *Shraberg*, 939 S.W.2d at 334 (Cooper, J., concurring). Nor is it manifestly unfair or inequitable to require Ann to assume responsibility for her own debts, particularly those debts incurred after the parties separated.

Furthermore, we are unable to conclude the waiver of maintenance in exchange for a greater portion of the marital estate rendered the Agreed Order unconscionable. While Scott clearly generated the majority of the parties' income during the course of their marriage, there is no evidence Ann is unemployable. In fact, the record reveals Ann worked outside the home on several occasions throughout the parties' marriage. "[T]here is no [evidence that Ann] did not understand the economic consequences of [her] acts when the agreement was executed." *Peterson*, 583 S.W.2d at 712. That is, if Ann decided not to obtain gainful employment, she may have to utilize the additional marital assets received to satisfy her financial obligations. While Ann is clearly disappointed with the

results of her agreement, it cannot be found "unconscionable solely on the basis that it is a bad bargain." *Peterson*, 583 S.W.2d at 712.

Ann asserts credit card charges "to various contacts and purchases concerning celestial psychic advisors, healers, energy healing, astrological advisors, and so forth" indicates she was impaired at the time she entered into the Agreed Order and did not understand the consequences of her actions. The trial court rejected Ann's claim, and declined to consider such purchases as evidence of Ann's mental health at the time she signed the Agreed Order. As explained, "the trial court is in the best position to evaluate the circumstances surrounding such an agreement," and we defer to the family court's judgment in this regard. *Peterson*, 583 S.W.2d at 712.

Ann willingly entered into the Agreed Order with advice of competent counsel and a financial planner. In fact, Ann's counsel prepared the Agreed Order. *See Money v. Money*, 297 S.W.3d 69, 72-73 (Ky. App. 2009). There is no evidence Ann was unaware of her financial obligations and her income status at the time she signed the Agreed Order. In sum, we simply cannot say that the family court abused its discretion in concluding the Agreed Order was not manifestly unfair or unreasonable and, accordingly, not unconscionable.

IV. Conclusion

The Jefferson Family Court's April 28, 2011 order finding Ann and Scott's Agreed Order not to be unconscionable is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Michael Smither
Louisville, Kentucky

BRIEF FOR APPELLEE:

Catherine J. Kamenish
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