RENDERED: JULY 5, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000457-MR

MONTA GAIL NEWSOM — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DWIGHT S. MARSHALL, JUDGE
ACTION NO. 15-CI-00771

ARVIL NEWSOM — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, SPALDING AND L. THOMPSON, JUDGES.

L. THOMPSON, JUDGE: Monta Gail Newsom ("Appellant") appeals from findings of fact, conclusions of law and final decree of dissolution of marriage entered by the Floyd Circuit Court. She argues that the circuit court committed reversible error in setting aside the parties' joint agreement. For the reasons addressed below, we conclude that the circuit court improperly failed to enforce

the agreement and REVERSE that portion of the decree restoring to Arvil Newsom ("Appellee") title in a parcel of real property situated in Jenkins, Kentucky, and title to a camper.

In 2013, the Floyd Circuit Court entered a decree of dissolution[1] dissolving the parties' first marriage. The decree divided property and allocated debts. On August 15, 2014, the parties filed a pleading styled "Joint Agreement" stating that they were making good faith efforts for a period of one year to reconcile. The Agreement acknowledged that the parties were each owners of an undivided one-half interest in a house, lot and a camper situated in Jenkins, Kentucky, that Appellant "will control the property, and who may come on the property," and that any orders of the Floyd Circuit Court concerning property division should be vacated.[2] Finally, the Agreement stated that if reconciliation was not successful, all issues of property division and debt allocation would be re-addressed by the circuit court, with the exception of the one-half ownership interests of the Jenkins, Kentucky parcel. It appears from the record that Appellee entered into the Agreement as an inducement for Appellant to stay with him for one year.

[1] Case No. 13-CI-00335.
[2] The decree in Case No. 13-CI-00335 awarded the Jenkins, Kentucky parcel to Appellee as non-marital property.

Within one year of signing the Agreement, Appellant filed emergency protective orders against Appellee on January 28, 2015, and March 19, 2015, alleging domestic abuse. Each of these orders was later dismissed. Appellant contends, and the circuit court so agreed, that she vacated the residence on these occasions. Appellee asserts that Appellant "put him out of the house" on these occasions.

The parties remarried in Pigeon Forge, Tennessee on June 5, 2015, and separated on October 12, 2015. On October 26, 2015, Appellee filed a petition for dissolution of marriage in Floyd Circuit Court.[3] This second dissolution action continued into 2016, culminating in the entry of findings of fact, conclusions of law and final decree of dissolution of marriage which forms the basis of the instant appeal. In its decree, the circuit court referenced the Agreement entered in case No. 13-CI-00335 and found that Appellant left the marital premises prior to completing the one-year reconciliation period as set out in the Agreement. The court determined in relevant part that the Agreement was not enforceable because Appellant's consideration for the Agreement failed when she ended reconciliation efforts within one year of the Agreement. The Court then restored to Appellee full ownership of the Jenkins, Kentucky parcel and the camper, and disposed of other

[3] Case No. 15-CI-00771.

personal property. Appellant's subsequent motion to alter, amend or vacate the judgment was overruled, and this appeal followed.

Appellant now argues that the Floyd Circuit Court committed reversible error by setting aside the Agreement of the parties. She notes that the parties agreed to make a good faith effort to reconcile for a period of not less than one year, and that "[I]f the reconciliation does not meet with success, the parties agree that all issues of property and division will need to be readdressed by the Court, with the exception of the one half ownership interest of the parties in the property listed in paragraph #2 herein." Paragraph #2 provided that each party had a one-half interest in the house, lot and camper. Appellant contends that the circuit court made incorrect findings of fact which directly contradicted the Agreement of the parties. She maintains that the court improperly failed to give effect to Paragraph #2. Appellant also directs our attention to *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001), and Kentucky Revised Statutes ("KRS") 403.190(2) for the proposition that the placement of her name on the deed after their marriage rendered the property marital in nature, which the circuit court failed to address. In sum, Appellant argues that the Floyd Circuit Court improperly failed to enforce the terms of the Agreement as it relates to the parcel and camper at issue, and that she is entitled to an opinion reversing the judgment on appeal.

We must first note that Appellant has not complied with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v), which requires the appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12 and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985). Nevertheless, we will address the issue before us as it was raised and adjudicated by the Floyd Circuit Court.

A separation agreement may be set aside as unconscionable if the family court determines that it is manifestly unfair or unreasonable. *McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky. App. 1983). It may also "be set aside if it results from fraud, undue influence, or overreaching." *Id.*; *Money v. Money*, 297 S.W.3d 69, 72 (Ky. App. 2009). The party challenging the agreement must carry a "definite and substantial" burden of proof. *Peterson v. Peterson*, 583 S.W.2d 707, 711 (Ky. App. 1979). The circuit court is in the best position to weigh the evidence and determine if a separation agreement is unconscionable or if it resulted from duress, undue influence, or overreaching. *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997). We defer to the family court's broad discretion and may not

disturb its decision absent an abuse of its discretion. *Id.*; *Peterson,* 583 S.W.2d at 712.

The Agreement at issue provides that 1) the "parties agree that they will make good faith efforts to reconcile their marriage, for a period of no less than one year; 2) they are each owners of an undivided one-half interest in the house, lot and camper; 3) they agree to withdraw any objection to this in the dissolution proceeding; and, 4) that even if "the reconciliation does not meet with success," the parties shall still retain their respective one-half ownership interests in the house, lot and camper.

The enforceability of the Agreement is at issue. The question for our consideration, then, is whether the Floyd Circuit Court properly determined that the Agreement became unenforceable when Appellant ended attempts at reconciliation within one year of the Agreement. We must answer this question in the negative. The Agreement expressly contemplates that reconciliation could fail, and it addresses the disposition of the parcel and camper should that occur. Because the Agreement acknowledges the possibility of a failure to reconcile, we cannot conclude that such a failure renders the Agreement unenforceable. To the contrary, it was anticipated by the parties. The parties could have drafted the Agreement to be unenforceable unless reconciliation occurred, but they did not. Paragraph #6 states that each party was represented by counsel, who reviewed the

Agreement and advised their respective clients of its ramifications. In the absence of ambiguity, a written instrument will be enforced strictly according to its terms. *Mounts v. Roberts*, 388 S.W.2d 117, 119 (Ky. 1965). Because the Agreement expressly contemplated the possibility of reconciliation being unsuccessful and the ramifications thereof, the failure to reconcile did not render the Agreement unenforceable.

Having determined that the Agreement is enforceable, it follows that its express terms must be applied. The parties agree that the attempt at reconciliation failed, and Paragraph #5 expressly provides that in the event of a failed attempt at reconciliation the parties would still each retain a one-half interest in the parcel.

Complicating matters, Appellant directs our attention to trial record pp. 22 - 25, which reveal a general warranty deed dated September 22, 2011. This deed, which was executed during the parties' first marriage, conveys the Jenkins, Kentucky parcel from Appellee to Appellant and Appellee jointly. Appellant argues that this converted the parcel from Appellee's non-marital property to jointly-held marital property. She asserts that this further demonstrates the circuit court's error in awarding the parcel to Appellee in the decree now on appeal.

We may disturb the circuit court's ruling on this issue only if an abuse of discretion is found. *Peterson*, *supra*. In the context of a dissolution proceeding,

abuse of discretion occurs when a decision is rendered contrary to the facts and the law. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). The Agreement at issue is enforceable, and unambiguously provides that if reconciliation failed the parties would nevertheless retain an undivided one-half interest in the house, lot and camper. As such, the Floyd Circuit Court's ruling to the contrary constitutes an abuse of discretion and is reversible error.

For the foregoing reasons, we REVERSE that portion of the findings of fact, conclusions of law and final decree of dissolution of marriage entered by the Floyd Circuit Court which allocates to Appellee full ownership of the house, lot and camper. We remand with instructions to return to Appellant her one-half ownership interest in the property at issue. The decree is in all other respects AFFIRMED.

GOODWINE, JUDGE, CONCURS.

SPALDING, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SPALDING, JUDGE, DISSENTING: I would affirm the judgment of the Floyd Circuit Court in full. On September 22, 2011, Arvil Newsom, ("appellee") deeded to his wife, Monta Gail Newsom ("appellant"), a one-half interest in a parcel of property located in Pike County. In 2013, the parties were divorced leaving the property issues pending. Those issues were never resolved in that action. In

August 15, 2014, the parties entered into an agreement stating their desire to reconcile, including in it a provision regarding what would happen if the reconciliation was not successful. Paragraph #5 of that agreement states:

> If the reconciliation does not meet with success, the parties agree that all issues of property and debt division will need to be readdressed by the court, with the exception of the one-half ownership interest of the parties in the property listed in paragraph #2 herein.

Paragraph #2 states:

> The parties agree that they are each owners of an undivided one-half interest in the house and lot located at 2923 Dorton Jenkins Hwy, Jenkins, Kentucky, and the camper, both of which are titled in both parties' names. The parties both agree to withdraw any objection to this in the Divorce action.

On June 5, 2015, they remarried. On October 12, 2015, they separated again, and a new divorce was filed. In making the property division on the 2015 action, the circuit court found when consideration of this agreement failed, the agreement was no longer enforceable. Therefore, in its decree the court held that Arvil Newsom shall have restored to him the property located at 2923 Dorton Jenkins Highway, Jenkins, Kentucky, and the camper therewith. It also divided the other marital property. This appeal followed.

Firstly, as the majority opinion noted, the appellant has not complied with CR 76.12(4)(c)(v), which requires the appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. Not

only did it not do so in the beginning of the written argument, the brief did not do so at all. An appellant in its brief must include the statement identifying how the issue was preserved for appeal. *Somme v. Gronotte*, 357 S.W.3d 211, 215 (Ky. App. 2011). If that is not done, then the court's review if limited to manifest injustice. *Id*. at 216.

In the body of the argument, the appellant never cites to the record or point this Court to where it specifically made the argument herein that it erred. The reason that is problematic in this matter is that the appellant's argument does not address the seminal issue in this matter. Namely, that the Court below found that the consideration of this agreement failed. The appellant addresses it in a paragraph but does not argue why this Court's finding was clearly erroneous.

The appellant cites the case of *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001), for the proposition of how a court should divide a marital estate. However, the issue in this matter is what legal effect did the agreement reached in August of 2014 have to the nature of this property, especially in light of the parties' remarriage and later divorce.

The real issue in this case is whether the joint agreement was a binding contract on the parties in the new divorce. The opinion looks to the clause of Paragraph #5 which excepts the property in Paragraph #2. However, it does not give import to the second sentence of Paragraph #2: "The parties both agree to

withdraw any objection to this in the Divorce action." That divorce action was the 2013 action, not the one before this Court.

The parties remarried, and a new divorce was filed. This agreement pertained to the first divorce and was never put into effect. The court was at liberty to review the issue *de novo* in the pending divorce.

As the issue on appeal was not properly presented, the decision of the circuit court was not manifestly unjust and, therefore, should not be disturbed.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Timothy A. Parker Prestonsburg, Kentucky	Lawrence R. Webster Pikeville, Kentucky