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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001765-MR

MELISSA THOMAS APPELLANT

v.

APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 17-CI-00442

DONALD E. THOMAS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

MAZE, JUDGE: Melissa Thomas appeals from a post-decree order of the McCracken Family Court which denied her motion to set aside a property settlement agreement she executed as part of her divorce from Donald Thomas. She argues that the agreement was unconscionable because Donald failed to provide complete and accurate disclosures of his property and due to their unequal

bargaining positions. We conclude that the family court did not clearly err in finding that the agreement was not unconscionable. Hence, we affirm.

Donald and Melissa Thomas were married on December 24, 2013. They were divorced on May 15, 2015, but that decree was annulled on July 2, 2015. Thereafter, on May 10, 2017, Donald filed a petition for dissolution of the marriage. The petition was accompanied by a separation and marital property agreement which was executed by both parties on the same date. On May 16, Melissa filed a *pro se* affidavit and entry of appearance in which she stipulated to the allegations in Donald's petition. Melissa's affidavit specifically recited, "The Respondent understands that Petitioner's attorney does not represent Respondent in this action." Following a hearing, also on May 16, the family court entered findings of fact, conclusions of law and a decree of dissolution. The judgment formally adopted the parties' settlement agreement into the decree.

Approximately two and a half months later, Melissa filed a motion to set aside the settlement agreement pursuant to CR[1] 60.02. She alleged that she signed the agreement under duress and based on Donald's false representation that he was representing her. She also alleged that the agreement was unconscionable due to their unequal bargaining positions and Donald's failure to provide complete and accurate disclosures of marital property.

[1] Kentucky Rules of Civil Procedure.

The family court conducted an evidentiary hearing on December 8, 2017, at which both Donald and Melissa testified about the circumstances surrounding the execution of the settlement agreement. Both parties also submitted documentation supporting their respective positions. On May 30, 2018, the family court entered an order denying Melissa's motion to set aside the decree and settlement agreement. The court first rejected Melissa's assertion that the decree was void because the parties were not separated for sixty days prior to the filing of the petition. The court concluded that any such defect would not affect the validity of the decree.

The family court next found no evidence that Donald represented himself as Melissa's attorney or that Melissa was unaware of her right to separate counsel. Lastly, the court found no evidence of misconduct, misrepresentation, concealment or overreaching that would render the settlement agreement unconscionable. To the contrary, the family court found that Melissa was fully aware of her rights and of Donald's assets.

Melissa filed a motion to alter, amend or vacate the order, which the family court denied on November 5, 2018. This appeal followed. Additional facts will be set forth below as necessary.

As noted, Melissa brought her motion to set aside the decree incorporating the parties' settlement agreement pursuant to CR 60.02. CR 60.02 is

designed to provide relief where the reasons for the relief are of an extraordinary nature. *Ray v. Commonwealth*, 633 S.W.2d 71, 73 (Ky. App. 1982). The rule specifies that a motion for relief from a final judgment may be brought on the following grounds:

> (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

CR 60.02.

Because the law favors the finality of judgments, the rule "requires a very substantial showing to merit relief under its provisions." *Ringo v. Commonwealth*, 455 S.W.2d 49, 50 (Ky. 1970). Therefore, relief may be granted under CR 60.02 only where a clear showing of extraordinary and compelling equities is made. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App. 2002).

We review the family court's denial of a CR 60.02 motion for abuse of discretion. *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire &*

Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted). More specifically, a court abuses the discretion afforded it when "(1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision . . . cannot be located within the range of permissible decisions." *Miller v. Eldridge*, 146 S.W.3d 909, 915 n.11 (Ky. 2004) (cleaned up). We will affirm the family court's decision on appeal unless there is found a "flagrant miscarriage of justice[.]" *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Melissa argues that the settlement agreement should be set aside as unconscionable based upon Donald's failure to disclose assets and the unequal bargaining position of the parties. The provisions of a separation agreement 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[2] 403.180(2). "Unconscionable" means "manifestly unfair and unreasonable." *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997) (citation omitted). "[A]n agreement can also be set aside if it results from fraud, undue influence, or overreaching." *McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky. App. 1983). However, an agreement cannot be held unconscionable solely on the basis that it is a bad bargain. *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky. App. 1979). Finally, the

[2] Kentucky Revised Statutes.

opponent of the agreement has the burden of proving unconscionability. *Id.* at 711-12. *See also Blue v. Blue*, 60 S.W.3d 585, 589 (Ky. App. 2001).

Melissa contends that the unequal bargaining position should weigh against enforcement of the settlement agreement. Donald is an attorney, primarily practicing criminal law and personal injury law. He occasionally files uncontested dissolution actions but typically does not represent clients in contested family law cases. At the time this action was filed, Melissa was unemployed and filing for disability benefits. During the marriage she owned a salon and worked as a nail technician. She also worked in Donald's law office as the bookkeeper, managing the finances and performing various other duties.

Despite the difference in their stations in life, the family court found that Melissa was fully aware of her rights in the dissolution action. Melissa acknowledged in the agreement that Donald was not representing her. In addition, Melissa had experience filing uncontested divorces, both personally and through her work at Donald's law office. When the parties were divorced in 2015, Melissa spoke with numerous attorneys before signing the uncontested dissolution papers. Melissa offered no evidence that Donald discouraged her from seeking representation. The family court also noted that Melissa requested very specific financial documentation from Donald during the course of their negotiations.

Melissa contends that Donald failed to disclose the value of his contingent-fee contracts. At the time the parties executed the agreement, there was some question whether contingent-fee contracts constitute marital property. But subsequently, our Supreme Court has held that contingent-fee contracts are marital property and may be divided using the delayed-division method. *See Grasch v. Grasch*, 536 S.W.3d 191 (Ky. 2017). In light of this authority, Melissa argues that Donald was required to disclose the value of his firm's contingent-fee contracts prior to the execution of the agreement.

However, we do not find that this later clarification in the law renders the agreement inherently unconscionable. In particular, we agree with the family court that Melissa has failed to show that the terms of the settlement agreement were manifestly unreasonable in light of all of the circumstances. The parties were married for less than five years and there were no children born of the marriage. Donald assumed all of the marital debt, while Melissa received a boat plus a substantial cash payment for her equity in the marital property. And as noted, Melissa had access to the financial records of Donald's law firm. Thus, she would have been aware of Donald's contingent-fee contacts. Consequently, we find that the family court did not clearly err in finding no evidence of fraud or overreaching during the course of the parties' most-recent divorce action. Therefore, the family

court did not abuse its discretion in denying Melissa's motion to set aside the settlement agreement pursuant to CR 60.02.

Accordingly, we affirm the order of the McCracken Family Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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