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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000294-MR

MICHAEL EUGENE EDWARDS — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE LISA MORGAN, JUDGE
ACTION NO. 17-CI-00608

TERRI EDWARDS — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: This case involves the dissolution of the marriage of Michael Eugene Edwards and Terri Edwards. Michael appeals the findings of fact, conclusions of law, and decree of the Scott Family Court as amended on February 11, 2019. Michael argues that the family court erred by failing to enforce the

parties' agreements to divide between them the balance of two marital accounts. He also contends that the family court erred by awarding Terri maintenance in light of the evidence presented. After our review, we affirm in part. But because we agree in part with Michael, we vacate in part and remand for additional proceedings.

Michael and Terri married in College Station, Texas, in June 1997. They both have educational backgrounds in the biomedical field. Terri left the workforce when she became pregnant with the couple's first child shortly after they married. They now have two children -- both beyond the age of majority.

Michael's career required the family to relocate often. They lived in Singapore for several years. Their daughter was a competitive fencer, and for two years, the family traveled to European meets in support of her sporting career. Terri homeschooled the children.

The couple began living separate and apart in the marital home in May 2017. They were both unemployed, and they agreed to divide equally their liquid assets and to contribute equally to the household expenses from that time forward. Terri filed a petition for dissolution of the marriage in August 2017. Before mid-November 2017, they had divided between them a total of $185,839.66. Each party took $18,388.50 from a Washington Savings Bank account; $45,602.32 from the severance package given to Michael by his previous

employer; and $28,924 from two tax refunds. Each received approximately $92,915.

Nearly a year after their separation began, in April 2018, the couple executed a written agreement indicating that Terri would receive 50% of the marital funds held by Michael in a specifically identified Fidelity Investments account. In exchange, Terri agreed to make no claim to the remainder of the Fidelity account. In accordance with this agreement, Terri received $40,970 from the Fidelity Investments account.

In May 2018, Michael accepted an offer of employment as chief executive officer of Applikon Biotechnology, Inc., in Foster City, California, and he moved out of the marital home. Michael receives an annual salary of $285,000, plus expenses, including the costs of a vehicle. He anticipates an annual bonus of more than $85,000. Terri has continued to reside in the marital home. The parties remained under an order to continue contributing equally to the marital expenses.

The family court's final hearing was conducted in December 2018. It heard evidence concerning the division of marital property and Terri's claim for maintenance.

The family court ordered the equal division of two retirement accounts totalling approximately $444,000 at the time of trial. It divided the net proceeds of the sale of the marital home, which was expected to yield

approximately $225,000: 55% to Michael and 45% to Terri. It divided between them equally the balance of the Washington Savings account (then totalling $17,382.18) and the balance of the Fidelity Investments account (then totalling $61,171.04). The family court awarded to Terri a 2012 Audi vehicle (free of any lien) and assigned to her a nonmarital student loan debt and $20,000 in consumer loan debt, which was characterized by the court as marital debt.

Terri was fifty-seven (57) years of age at the time of the hearing and earned an average of $1,400 per month working as a fulfillment specialist at Quad/Graphics in Versailles. She had recently qualified as a realtor, but she had no prospects in the field. The family court found specifically that Terri lacked sufficient property, including marital property distributed to her, to provide for her reasonable needs and that she was unable to support herself through appropriate employment. The family court carefully considered: the length of the parties' marriage; the disparity in their earning capacities; Terri's age and state of health; Michael's ability to meet his needs while meeting a maintenance obligation; and the comfortable standard of living enjoyed by the parties during marriage. The family court awarded to Terri maintenance in the amount of $5,000 per month from January 2019 through March 2019 (the time it might take to sell the marital home) and in the amount of $3,000 per month for the sixty (60) months thereafter. After various motions were resolved, Michael filed this appeal.

Michael first argues that the family court erred by dividing the Fidelity Investments account for a second time -- effectively setting aside the parties' partial settlement agreement regarding the division of this account. We agree.

KRS[1] 403.180(1) addresses settlements as follows:

> To promote amicable settlement of disputes between parties to a marriage attendant upon . . . the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.

The statute requires the court to consider the conscionability of a separation agreement prior to incorporating it into the decree of dissolution. KRS 403.180(2); *Peterson v. Peterson*, 583 S.W.2d 707 (Ky. App. 1979). If the family court does not find the separation agreement to be unconscionable, the terms of the agreement shall generally be binding upon the parties and the court. KRS 403.180(2).

A separation agreement may be set aside as unconscionable where 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.* (citation omitted). The

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[1] Kentucky Revised Statutes.

party challenging the agreement must meet a substantial burden of proof. *Peterson*, *supra.*

The family court is in the best position to weigh the evidence and to 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 must defer to the broad discretion of the family court on that issue. *Peterson*, *supra.*

In the case before us, the parties' agreement, dated April 14, 2018, identifies the Fidelity Investments account specifically by number and provides, in relevant part, as follows:

> On April 13, 2018, the value of Fidelity Account [] was $81,940. On this day prior to final settlement, Terri Edwards approached Michael Edwards to withdraw her marital portion of the account, or 50% which was equivalent to $40,970. With this withdrawal, Terri acknowledges no further claim to this one account and agrees that the remaining 50% and any future gains on the remaining 50% belongs solely and exclusively to Michael. In addition, Michael acknowledges that if the remaining 50% declines in value, he will make no additional claim on the 50% transferred to Terri. The approximate taxable income on the $40,970 transferred to Terri that Michael will bear is approximately $6880. The tax at 15% capital gains rate is $1,032. Upon receipt of funds, Terri will revert to Michael $1,032 to cover the approximate tax burden he will incur.

In addition, Michael agreed to loan Terri $5,000 -- to be repaid to him within seven days of her receipt of the Fidelity Investments account disbursement. The agreement was signed and dated by the parties.

Michael contends that the agreement was entirely fair and equitable. He observes that neither party asserted that it was unconscionable and that the court did not find it to be so. The parties agreed that they were both represented by counsel at the time the agreement was negotiated and executed -- although neither sought the advice of counsel with respect to its provisions. They also agreed that the agreement between them had been fully performed. The court did not award Terri an additional share of the Fidelity Investments account in lieu of maintenance.

In order to establish duress, there must be "an actual or threatened violation or restraint on a man's person, contrary to law, to compel him to enter into a contract or to discharge one." *Boatwright v. Walker*, 715 S.W.2d 237, 243 (Ky. App. 1986) (citation omitted). Fraud "consists in successful deception intentionally practiced to induce another to part with property or some legal right. In other words, there must be some material misrepresentation made with the knowledge that it was false and with the intent that it be acted upon." *Id.* (citations omitted). And, undue influence generally "must be of sufficient force to destroy the free agency of the grantor and to constrain him to do, against his will,

that which he would otherwise have refused to do." *Mays v. Porter*, 398 S.W.3d 454, 458 (Ky. App. 2013) (citation omitted).

With respect to the circumstances leading to the creation of the agreement, Terri testified that Michael volunteered to divide the account. She testified that she felt she had no choice but to agree because she was "desperate" and "broke." However, this is not substantial evidence to support a finding that she entered into the separation agreement because of duress, fraud, or undue influence as they are defined by case law.

Terri did not ask for the agreement to be held invalid. She did not testify or introduce sufficient evidence to indicate that she had entered into the agreement absent her own free will or under duress or threat of harm. There was no basis upon which the agreement could be characterized as unconscionable. Consequently, we are compelled to agree that the family court erred by ordering a second division of this account. We vacate on this issue.

Similarly, Michael contends that the family court erred by ordering a second division of the Washington Savings account -- again, effectively setting aside the parties' partial settlement agreement regarding the division of this account. We agree.

In *Wagner v. Wagner*, 821 S.W.2d 819 (Ky. App. 1992), this Court enforced an oral agreement between spouses for which they bargained during the

negotiation process upon their separation. Their agreement provided for the division of specific marital property between them, and they abided by and observed the agreement for many years. We held that the trial court's baseless decision to terminate the parties' valid agreement could not be affirmed.

Terri and Michael testified that upon their separation, they orally agreed to divide their cash assets -- including the balance of their Washington Savings account. They were both unemployed at the time. They testified that the Washington Savings account funds were, in fact, equally divided between them in July 2017, sixteen months before the family court's hearing. Terri and Michael continued to perform the oral agreement when, in August 2017, Michael received a substantial severance payment from his former employer. One-half of that payment ($45,602.32) was transferred to Terri. Terri never sought to have the agreement set aside; she never made a claim for any portion of the Washington Savings account.

Nevertheless, without finding that the parties' agreement was invalid, the family court ordered that the remaining proceeds of the account -- $17,382.18 -- be divided again between the parties. Terri asserted that since the accounts existed at the time of trial, they were subject to division. However, her contention is not a valid basis for the court's decision to set aside the parties' executed agreement. Consequently, that portion of the family court's order to undo the

parties' agreement must be vacated as to the Washington Savings account as well as the Fidelity Investments account.

Next, Michael argues that the family court erred by finding that Terri's credit card debt was marital debt. Although the credit card debt was ultimately assigned to Terri, Michael argues that the family court erroneously offset the division of assets against it, thus making the valuation and characterization of the debt relevant to the division of marital property. We agree.

"Questions of whether property or debt is marital or nonmarital are left to the sound discretion of the trial court . . . ." *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011). An abuse of discretion occurs regarding debt assignment when the circuit court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (footnote omitted). Unlike assumptions regarding a couple's assets, there is no presumption that debt acquired during the marriage is marital. *Rice*, 336 S.W.3d at 68. "The burden of proving that a debt is marital is upon the party that incurred it and now claims it is marital." *Id.* (citation omitted).

Michael argues that the testimony of both parties showed that credit card debt accrued during the marriage was paid off on a regular basis; thus, it was reasonable to conclude that Terri's credit card debt was accrued post-separation without his knowledge. He contends that under these circumstances, Terri's failure

to produce any credit card statement reflecting the nature of the post-separation charges (despite the family court's expressed desire to review them) renders arbitrary the court's characterization of the debt as marital. In support of his argument, Michael cities *Bodie v. Bodie*, 590 S.W.2d 895 (Ky. App. 1979), and *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001), *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018).

In *Bodie*, the husband, who had incurred the disputed debts, declined to answer questions concerning the nature of the debt. Furthermore, he offered no canceled checks, bills, or receipts to support his claim that the debts were marital in nature. However, in this case, Terri indicated generally that the debts were marital, but she was unable to say how much credit card debt was outstanding. In support of her testimony, she presented only a credit report that indicated an aggregate balance of $20,239 in the "credit card or retail debt" category.

In *Neidlinger*, the Supreme Court of Kentucky affirmed a trial court's ruling that an indebtedness of $26,000 from a wife to her mother and two friends was the nonmarital debt of the wife. The Court noted that debts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation: whether the debt was incurred to purchase assets designated as marital property and whether the debt was necessary to provide for the maintenance and support of the family. The Court also observed

that if the debts were designated as marital in such a case, the effect would be to allow the wife to unilaterally increase a husband's maintenance and support obligations to a level substantially higher than that established by court order.

In this case, Michael was under a court order to contribute equally to the household expenses -- post-separation. In light of this fact and the testimony of both Terri and Michael that the credit cards were paid off on a regular basis during the course of the marriage, Terri's unsubstantiated assertion that the debt had been incurred for a marital purpose is insufficient to meet her burden to prove that the debt was marital. In *Rice*, 336 S.W.3d at 70, the Supreme Court of Kentucky held inequitable a decision to hold a spouse responsible for debt "[w]ithout some nexus to the debt other than being married to the person who made the debt, such as knowledge, consent, or receiving a direct benefit from the debt[.]" Because the family court lacked a sufficient basis upon which to base its finding that the debt was marital, its decision was arbitrary and must be vacated.

Finally, Michael contends that the family court erred by awarding maintenance to Terri in the absence of a request specifying an amount and duration and in the absence of sufficient evidence of her reasonable needs. We disagree.

A family court's decision as to the amount and duration of maintenance is reviewed for an abuse of discretion. *See Young v. Young*, 314 S.W.3d 306 (Ky. App. 2010); *McGregor v. McGregor*, 334 S.W.3d 113 (Ky. App.

2011). In order to constitute an abuse of discretion, a family court's decision must be regarded as "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). The family court's findings of fact will not be disturbed unless clearly erroneous. CR[2] 52.01. "Findings of fact are not clearly erroneous if supported by substantial evidence." *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999) (citation omitted). Substantial evidence is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable people. *Id.* A family court's conclusions of law are reviewed *de novo*. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky. App. 2009).

The provisions of KRS 403.200(1) direct, in relevant part, that the family court may grant maintenance only where it finds that the spouse seeking maintenance lacks sufficient property (including marital property apportioned to her) to provide for her reasonable needs and is unable to support herself through appropriate employment. The provisions of KRS 403.200(2) govern the amount and duration of spousal maintenance to be awarded by the family court. That statute provides that the following factors may be relevant in the family court's determination:

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[2] Kentucky Rules of Civil Procedure.

> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently[;]
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (c) The standard of living established during the marriage;
>
> (d) The duration of the marriage;
>
> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
>
> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

The record shows that the family court carefully considered the appropriate statutory factors in deciding that Terri was entitled to maintenance and in arriving at the amount and duration of its maintenance award. Its determinations were amply supported by the evidence.

Michael and Terri were married for 20 years. The court heard evidence concerning Terri's physical health and the limited value of her educational background; the agreeable standard of living that the couple enjoyed during the marriage; and the parties' financial resources and claimed expenses. It found that Terri's income was approximately $1,400 per month, and it accepted

testimony relevant to her expected expenses in conjunction with the standard of living to which she was accustomed.

The court found that Michael's net income was more than ten times that amount, excluding a significant annual bonus and the company's provision of a healthy vehicle allowance of another $700 per month. It duly discounted Michael's claimed expenses of $11,565 per month and found specifically that he could continue to meet his own needs while contributing to Terri's support for a limited time. Considering the evidence and the factors set forth in KRS 403.200, the family court awarded Terri maintenance in the amount of $5,000 per month for a few months to be reduced to $3,000 per month for the next sixty (60) months. In light of the broad discretion afforded to a family court in its maintenance decisions, we conclude that Michael has failed to show that the award of maintenance to Terri was arbitrary or that the amount and duration of the court's award was unjustified.

Nevertheless, in light of our decision to vacate the family court's determination with respect to the distribution of property and its assignment of debt, we are constrained to remand the matter to the family court for a re-calculation of maintenance as well. The family court shall re-evaluate its decision with respect to the amount and duration of maintenance based upon its re-calculation of the marital property apportioned to Terri and the nonmarital debt for which she is to be held solely responsible. In its broad discretion, the court shall

decide whether any adjustment is needed. We do not direct a result and defer to the discretion of the court.

We affirm in part and vacate in part the judgment of the Scott Family Court and remand for entry of appropriate orders.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Anita M. Britton
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BRIEF FOR APPELLEE:

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