[Cite as *Eyre v. Eyre*, 2004-Ohio-6685.]

6THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

MARGARET A. EYRE,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2003-P-0133**
- vs -	:	
CALVIN EYRE, JR.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 02 DR 0707.

Judgment: Affirmed.

Joseph Giulitto, Giulitto & Berger, 222 West Main Street, P.O. Box 350, Ravenna, OH 44266-0350 (For Plaintiff-Appellee).

Christopher M. VanDevere, 265 South Main Street, #109, Akron, OH 44308 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Calvin Eyre, Jr., appeals from the November 19, 2003 judgment entry of the Portage County Court of Common Pleas, Domestic Relations Division, which granted appellant and appellee, Margaret A. Eyre, a divorce as well as made certain orders regarding spousal support, division of property, and debt.

{¶2} On October 21, 2002, appellee filed a complaint for divorce against appellant, which included requests for temporary and permanent spousal support,

exclusive possession of the marital home, an equitable division of marital property and debts, a restraining order enjoining appellant from dissipating the assets, and for attorney fees and costs. Also, on October 21, 2002, appellee filed a motion for temporary orders against appellant, in which she requested that she be granted temporary and permanent spousal support, as well as a restraining order against appellant. On November 25, 2002, appellant filed an answer and counterclaim.[1] In his counterclaim, appellant requested that he be granted a divorce from appellee, that the trial court adopt the separation agreement, and that appellee be ordered to pay his attorney fees and costs. Appellee filed a reply to appellant's counterclaim on December 4, 2002.

{¶3} A hearing was held before the magistrate on December 17, 2002. Pursuant to his December 18, 2002 temporary order, the magistrate ordered appellant to pay temporary spousal support in the amount of $600 per month to appellee.

{¶4} On January 27, 2003, appellee filed a motion to modify spousal support. A hearing was held before the magistrate on February 6, 2003. On February 12, 2003, the magistrate issued a temporary order increasing temporary spousal support to $850 per month. On February 19, 2003, appellant filed a motion to set aside the magistrate's February 12, 2003 order. Pursuant to its February 26, 2003 judgment entry, the trial court denied appellant's motion and indicated that the issue of spousal support would be heard at the trial.

{¶5} A bench trial commenced on August 12, 2003.

1. A separation agreement, dated October 7, 2002 and signed by both appellant and appellee, was attached to appellant's answer and counterclaim as an exhibit.

{¶6} Appellant and appellee were married on February 15, 1984, and no children were born as issue of the marriage. During the trial, appellee was sixty-six years old and appellant was fifty years old. According to appellee, she is not gainfully employed and her only income is from social security in the amount of $123 per month. Appellant testified that he has yearly earnings of approximately $40,000. Appellee has only been educated through the eighth grade. Appellee has significant physical and mental health problems and is under a doctor's care. Appellee contends that the marriage began to disintegrate when appellant began an affair with a younger woman, which appellant did not deny.

{¶7} On October 7, 2002, appellant and appellee entered into a separation agreement which was prepared by an attorney selected by both parties and paid by appellant. The separation agreement failed to divide all of the assets of the marriage and made no provision for spousal support. Appellee testified that prior to signing the separation agreement, the attorney told her that she was not eligible for spousal support. Appellee indicated that the separation agreement was not fully prepared because the attorney was to make changes after she and appellant signed it. Also, appellee stated that the witnesses who signed the document were not actually present when she and appellant signed the separation agreement.

{¶8} Pursuant to its November 19, 2003 judgment entry, the trial court granted the parties a divorce due to incompatibility. Specifically, the trial court ordered appellant to pay $1,200 per month for eighty-four consecutive months or until appellee shall remarry or die as spousal support to appellee; awarded the marital residence to appellant and required him to pay appellee one-half of the equity in the amount of

$26,315; awarded appellee the mobile home (no value specified) and the 1980 van with a value of $50; awarded appellant the 1989 wagon with a value of $50 and the golf cart with a value of $700; ordered the John Deere tractor with a fair market value of $12,000 be sold and the proceeds divided equally, or appellant, at his option, may purchase appellee's interest for $6,000; and awarded appellee one-half of appellant's PERS pension and 401(k) account in the total amount of $2,850. It is from that judgment that appellant filed a timely notice of appeal and makes the following assignments of error:

{¶9} "[1.] The court committed reversable (sic) error in not (sic) setting aside the separation agreement executed by the parties and not incorporating same into its judgment entry.

{¶10} "[2.] The trial court erred in not adopting a separation agreement as part of its judgement (sic) entry because [appellee] impliedly waived her right under R.C. 3105.171."

{¶11} In his first assignment of error, appellant argues that the trial court erred by setting aside the separation agreement and presents four issues for review. In his first issue, appellant alleges that a separation agreement is properly viewed as a contract, and an appellate court may make a de novo review of the trial court's interpretation of such contract without deference to the trial court's decision. In his second issue, appellant contends that the trial court erred in not adopting the separation agreement since a court may adopt a separation agreement in the absence of fraud, duress, overreaching, or undue influence. In his third issue, appellant stresses that the trial court erred in looking to parol evidence to make findings in contradiction to provisions in the separation agreement where the trial court failed to find the separation

agreement ambiguous. In his fourth issue, appellant alleges that the trial court's determination to set aside the separation agreement constituted an abuse of discretion and should be reversed.

{¶12} This court stated that: "[p]rior to incorporation by the court, a separation agreement is a contract between the parties." *Gartland v. Gartland*, 11th Dist. No. 2001-T-0063, 2002-Ohio-5160, at ¶15. "A court's interpretation of a separation agreement is reviewed under an abuse of discretion standard." Id. at ¶17. "An abuse of discretion means more than an error of judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable." Id., citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶13} R.C. 3105.10(B)(2) provides that: "[a] separation agreement that was voluntarily entered into by the parties *may* be enforceable by the court of common pleas upon the motion of either party to the agreement, *if* the court determines that it would be in the interests of justice and equity to require enforcement of the separation agreement." (Emphasis added.)

{¶14} "Pursuant to R.C. 3105.10(B)(2), a trial court is not required to enforce a separation agreement simply because it was executed by the parties; instead, a trial court has the discretion to refuse to enforce the agreement if it determines that the agreement is not in the interests of justice and equity." *Swift v. Swift* (Sept. 1, 2000), 11th Dist. No. 99-T-0165, 2000 Ohio App. LEXIS 3985, at 12-13.

{¶15} "During a divorce proceeding, if one or both parties submit a separation agreement to the trial court that was voluntarily entered into, R.C. 3105.10(B)(2) allows the court discretion to choose one of several options. If the court finds the separation

agreement to be fair and equitable, it can be incorporated in full into the divorce decree; the court can incorporate portions of the agreement and rule separately on other issues; or the trial court can reject the entire agreement and make rulings on all issues." *Robinson v. Robinson* (Dec. 3, 1999), 2d Dist. No. 17562, 1999 Ohio App. LEXIS 5663, at 11-12, citing *Bourque v. Bourque* (1986), 34 Ohio App.3d 284, 287.

{¶16} In the case at bar, appellant is correct in his assertion that a separation agreement is a contract between the parties. However, pursuant to R.C. 3105.10(B)(2), a trial court is not bound by the terms of a separation agreement if it determines that it would not be in the interests of justice and equity to require enforcement of the separation agreement.

{¶17} In its November 19, 2003 judgment entry, the trial court stated that:

{¶18} "The separation agreement failed to divide all of the assets of the marriage and made no provision for spousal support despite the fact that [appellee] was in poor health and that the marriage was one of 18 plus years' duration.

{¶19} "The [c]ourt notes that [appellee] is 16 years older than [appellant] and the evidence suggests that [appellant] wished to set aside [appellee] for the companionship of a younger woman. The [c]ourt finds that the separation agreement is not fair and equitable and it is, accordingly, set aside and not accepted by the [c]ourt."

{¶20} Thus, based on R.C. 3105.10(B)(2) and *Swift* and *Bourque*, supra, because the trial court determined that it would not be in the interests of justice and equity to require enforcement of the separation agreement, it properly rejected it.

{¶21} Appellant's reliance on *Walther v. Walther* (1995), 102 Ohio App.3d 378, is misplaced. In that case, the First District held that a trial court *may* adopt an in-court

separation agreement absent fraud, duress, overreaching, or undue influence. In the instant matter, there was no in-court agreement reached. Appellee continually objected to the separation agreement. Although R.C. 3105.10(B)(2) and *Walther* provide that a trial court *may* adopt the terms of a separation agreement, neither *requires* that a trial court *must* adopt such an agreement. Therefore, appellant's first and second issues are without merit.

{¶22} In addition, appellant's third issue that the trial court erred in looking to parol evidence to interpret the parties' separation agreement is not well-taken. The trial court did not look elsewhere regarding the meaning of the contract involved, but instead considered other factors with respect to the contract being inequitable and unjust. Here, the trial court did not employ parol evidence to interpret specific terms in the separation agreement, but rather used the evidence presented at trial to reach an equitable decision to set it aside. As such, the trial court acted well within its discretion. Thus, pursuant to *Gartland* and *Blakemore*, supra, the trial court did not abuse its discretion by setting aside the separation agreement. Appellant's third and fourth issues are not well-taken. Therefore, appellant's first assignment of error is without merit.

{¶23} In his second assignment of error, appellant alleges that the trial court erred in not adopting the separation agreement as part of its judgment entry because appellee impliedly waived her right to a hearing under R.C. 3105.171. Appellant stresses that the trial court failed to properly consider R.C. 3105.171(F)(8) in making a determination of spousal support and a division of the parties' property.

{¶24} R.C. 3105.171 provides that:

{¶25} "(B) In divorce proceedings, the court shall, and in legal separation proceedings upon the request of either spouse, the court may, determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section. ***

{¶26} "(C)(1) *** If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section."

{¶27} It appears that R.C. 3105.171(F)(1), (2), (8), and (9), were earmarked by the trial court in the instant matter, which states that: "[i]n making a division of marital property and in determining whether to make and the amount of any distributive award under this section, the court shall consider all of the following factors:

{¶28} "(1) The duration of the marriage;

{¶29} "(2) The assets and liabilities of the spouses;

{¶30} "***

{¶31} "(8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;

{¶32} "(9) Any other factor that the court expressly finds to be relevant and equitable."

{¶33} In the case sub judice, appellant relies on *Booth v. Booth*, 11th Dist. No. 2002-P-0099, 2004-Ohio-524, for the proposition that a party to a divorce may impliedly

waive the right for the court to make determinations pursuant to R.C. 3105.171. However, appellant's reliance with respect to this matter is misplaced. In that case, the parties stipulated to their agreement on the record before the trial court. Here, on the other hand, appellee did not waive her right to have the trial court determine an appropriate distribution of property. Again, appellee objected to the separation agreement throughout this action and did not assent to its terms on the record.

{¶34} The trial court has broad discretion when fashioning its division of marital property. *Bisker v. Bisker* (1994), 69 Ohio St.3d 608, 609. Pursuant to its judgment entry, the trial court considered the requisite R.C. 3105.171(F) factors. The trial court specifically stated that:

{¶35} "[c]onsidering this is a marriage of more than 18 years and that [appellee] suffers from respiratory and heart problems and depression, considering [appellee's] inability to enter the labor market and [appellant's] ability to provide spousal support, considering [appellant's] involvement with another woman and [appellee's] living expenses, along with the other factors enumerated in [R.C.] 3105.18, it is further ORDERED, ADJUDGED and DECREED that [appellant] shall pay, as spousal support, the sum of [o]ne [t]housand [t]wo [h]undred [d]ollars ($1,200) a month for [e]ighty-[f]our (84) consecutive months or until [appellee] shall remarry or die."

{¶36} Contrary to appellant's argument, there is no requirement that the trial court should only consider the separation agreement. Here, the trial court considered all of the requisite R.C. 3105.171(F) factors. The trial court did not fail to consider the separation agreement, but rather properly decided not to enforce it because it found the

separation agreement to be patently unfair and inequitable. Thus, appellant's second assignment of error is without merit.

{¶37} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas, Domestic Relations Division, is affirmed.

CYNTHIA WESTCOTT RICE, J.,

ROBERT A. NADER, J., Ret.,
Eleventh Appellate District,
sitting by assignment.

concur.