

LUCINDA E. COLDSMITH, Plaintiff/Petitioner,
v. ARTHUR D. COLDSMITH, Defendant/Respondent
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 2002-2491, Divorce

Contract, Property and Separation Agreement

1. The interpretation of parties determines meaning of contract.
2. Effect is to be given to that intention if it can be done consistently with legal principles.
3. The course of the parties' performance under a contract is always relevant in interpreting that contract. It may be the strongest indication of the intention of the parties to the contract.
4. In construing a contract, the agreement must be interpreted as a whole, and the words given their ordinary meaning.

Appearances:

Max J. Smith Jr., Esq., *Counsel for Petitioner*

Janice M. Hawbaker, Esq., *Counsel for Respondent*

OPINION

Walsh, J., October 27, 2004

Procedural Background

On June 9, 2004, Lucinda E. Coldsmith ("Cindy") filed a Petition for Special Relief to Enforce Decree in Divorce ("Petition"). The named Respondent was Arthur D. Coldsmith ("Art"), Cindy's ex-husband. The Petition effectively seeks enforcement of a Property and Separation Agreement ("Agreement") executed by the parties on November 5, 2002. Pursuant to a Rule issued by the Court on June 14, 2004, Art filed an Answer to the Petition. Hearing on the matter took place on September 30, 2004. Evidence we received at the hearing caused us to make the following:

Findings of Fact

1. Cindy and Art were married on August 1, 1987.
2. They separated in 2002 and were finally divorced by Decree of this Court on September 9, 2003.
3. Prior to their divorce, they signed the Agreement on November 5, 2002.
4. One son, Eric, was born of the marriage on September 30, 1988. Eric is a special-needs child.
5. The parties' Agreement was prepared by George E. Wenger, Jr., Esq. and, among many other provisions, contains the following provisions which are in issue and which are helpful to the resolution of the parties' claims:

5. Real Estate: Husband and Wife hold title as Tenants by the Entireties or individually to the premises identified in Exhibit "B." The parties agree as follows with respect to the marital real estate.

...

F. Upon the death of Husband, if he still is the owner of the same real estate located in Gasburg, VA, he shall will the same for the benefit of Eric, either by a direct devise, if the same would not affect any governmental benefit received by Eric, or to the Special Needs Trust contemplated for Eric's benefit. This provision shall not affect Husband's ability to sell, mortgage or convey the said real estate in any manner he sees fit during his lifetime.

G. Husband agrees to permit Wife and Eric to use the Gaston Lake property exclusively certain times of the year in exchange for Wife doing work for Husband. Wife's time will be approximately four weeks total each year with dates to be mutually agreed, except that the dates shall not be in the winter.

...

23. Advice of Counsel: The implementation provisions of this Agreement, but not the legal consequences, have been fully explained to the parties by George E. Wenger, Jr., at their mutual request. The parties acknowledge that they have received or had the opportunity to receive legal independent advice from counsel of their selection and that they fully understand the fact and have been fully informed as to their rights and obligations and they acknowledge and accept that this Agreement is, under the circumstances, fair and equitable and that it is being entered into freely and voluntarily after having received such advice and with such knowledge and that execution of this Agreement is not the result of any duress or undue influence and that it is not the result of any collusion or improper or illegal agreement or agreements and the parties hereto state that he or she, in the procurement and execution of this Agreement, has not been subjected to any fraud, concealment, overreaching, imposition, coercion, or other unfair dealing on the party of the other, or on the part of the other's counsel.

24. Counsel Background: George E. Wenger, Jr., has provided legal advice for both parties throughout their marriage and business relationship. Upon their decision to divorce, each sought independent counsel with Wife filing for divorce. The parties, independent of counsel, discussed the issues contained in this Agreement and came to a resolution. Both parties together came to George E. Wenger, Jr., to reduce their agreement to writing. Both parties acknowledge that George E. Wenger, Jr., has informed them that he cannot and has not provided legal advice concerning the effect of their agreement.

25. Entry Into Agreement: The parties to this Agreement acknowledge and declare that they, respectively:

- A. Enter into this Agreement voluntarily;
- B. Has given careful and mature thought to the making of this Agreement;
- C. Has carefully read each provision of this Agreement; and
- D. Fully and completely understands each provision of this Agreement, both as to subject matter and legal effect.

It is the purpose and intent of this Agreement to settle forever and completely the interests and obligations of parties and all property that they own separately, and all property that would qualify as marital property under the Pennsylvania Divorce Code, 23 Pa. C.S.A. 3501, and that is referred to in this Agreement as "marital property," as between themselves, their heirs, and assigns. The parties have attempted to divide their marital property in a manner that conforms to a just and fair standard, with due regard to the rights of each party. Division of existing marital property is not intended by the parties to constitute in any way a sale or exchange of assets, and the division is being effected without introduction of outside funds or other property not constituting a part of the marital estate.

...

27. Counsel Fees and Expenses for Enforcement: Husband agrees that he will pay the reasonable counsel fees and costs incurred by Wife in the event that Wife shall bring any action against Husband to enforce the terms of this Agreement, and in the further event that Wife is successful in such action. Wife agrees that she will pay the reasonable counsel fees and costs incurred by Husband in the event that Husband shall bring any action against Wife to enforce the terms of this Agreement, and in the further event that Husband is successful in such action.

...

34. Whole Agreement: This Agreement constitutes the entire understanding of the parties. It supersedes any and all prior oral or written agreements between them. There are no representations, covenants, warranties or agreements other than those expressly herein set forth.

The parties agree that this Agreement shall continue in full force and effect after such time as a final decree in divorce may be entered with respect to the parties. Upon entry of the decree, the provisions of this Agreement may be incorporated by reference or in substance, but they shall not be deemed to merge in such decree. The Agreement shall survive any such decree in divorce, shall be independent thereof, and the parties intend that all obligations contained in this Agreement shall retain their contractual nature in any enforcement proceeding, whether enforcement is sought in an action on the contract itself at law or in equity, or in any enforcement action filed to the divorce caption, including Section 3502(e) and Section 3703 of the Divorce Code, 1990, December 9, P.L. 1240, N. 206.

The alimony and equitable distribution provisions herein shall not be subject to modification under any circumstances even if submitted to Court for the sole purpose of the convenience of enforcement. The parties acknowledge that, notwithstanding this provision, custody and child support remain modifiable for a change of circumstances as provided by applicable law.

...

38. Agreement Binding on Heirs: This Agreement shall be binding and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns. Further, the parties hereto covenant and agree that this Agreement shall extend to and be binding upon their heirs, devisees, executors, administrators and assigns, of both and each of the parties hereto.

6. In her Petition, Cindy alleges that Art has willfully breached the divorce decree by having breached paragraph 5(G) of the Agreement because Art "has denied Petitioner and their son (Eric) use of the Gaston Lake property during the summer, despite repeated requests by Petitioner." Petition, Paragraph 7(a).

7. Cindy testified that in the spring of 2004, she called Art twice to make plans to use the Gaston Lake property during the summer of 2004 but "didn't get any response."

8. Cindy and Eric spent no time at the Gaston Lake property during the summer of 2004.

9. Cindy had use of the Gaston Lake property for a total of two (2) non-consecutive weeks during the summer of 2003 during which time Art stayed with Eric at the parties' former marital residence in Shippensburg, which residence was awarded to Cindy as part of the marital Separation Agreement and which she has occupied with Eric since the time of the parties' separation.

10. Art is married again and his new wife is Sherry Coldsmith. In about June 2004, Art devised all of his right, title and interest in the Gaston Lake property to Sherry Coldsmith.

11. Sherry Coldsmith has sold her former home and has used the proceeds, or at least part of the proceeds, to make improvements to the Gaston Lake property.

12. For many years during the marriage of Cindy and Art, the Gaston Lake property was a summer vacation home. Since Art's remarriage and since Sherry's sale of her prior home, the Gaston Lake property has become Art and Sherry's sole and primary residence.

13. Cindy alleges that Art's conduct, apparently in transferring title to the property to Sherry as a result of which Cindy and Eric have not had an opportunity to spend time at the Gaston Lake property during the summer of 2004, "is in willful violation of the terms of the Decree in Divorce dated September 9, 2003." Petition, Item 9.

14. In reliance upon the provisions of 23 Pa. C.S.A. §3502(e), Cindy asks for the following relief:

- a. Order Art to comply with the terms of the Divorce Decree;
- b. Find Art in contempt of court;
- c. Order Art to pay Cindy's attorneys' fees, costs and expenses incurred in connection with the

enforcement of the Decree in Divorce;

d. Enter judgment against Art with interest; and

e. Order such other relief as the Court deems appropriate.

15. Art relies on the second sentence of Item 5(F) of the Agreement which he claims confers upon him the "ability to sell, mortgage or convey the said real estate in any manner he sees fit during his lifetime."

16. Cindy argued that notwithstanding the foregoing provision, there are no conditions to or exceptions from the provisions of Item 5(G) which she claims entitles her and Eric to use the Gaston Lake property at "certain times of the year" for "approximately four weeks" provided those weeks are "not in the winter." Agreement, Item 5(G).

17. Cindy testified, though not very credibly, that a fair rental value for the Gaston Lake property during the peak summer season (which she described as April through October) to be about \$1,000 per week. She further testified that the rental value for non-peak time during other periods of the year would be one-quarter to one-third less. Cindy provided no documentary or other evidence that would support an inference that the figures she quoted were reliable.

18. Art testified that because the Gaston Lake property is now his only and primary residence, he is unwilling to surrender it for the exclusive use of Cindy and Eric for 4 weeks per year.

19. Sherry Coldsmith, the now owner of the property, testified that she is unwilling to vacate the property for any length of time for the exclusive use of Cindy and Eric. Art testified credibly that when Cindy last occupied and used the property in the summer of 2003, she enjoyed its use with one Mike Shively, that Eric was not at the property with Cindy and Mike Shively, and that Art spent those weeks with Eric at the parties' former marital residence in Shippensburg.

20. Art testified credibly that Cindy will not permit him any longer to use the residence in Shippensburg during those periods of time she expects him to vacate the Gaston Lake property for her exclusive possession.

21. Cindy and Art both testified that Cindy and Mike Shively built a garage on the Gaston Lake property when they occupied it during the summer of 2003.

22. During her testimony, Cindy suggested a remedy acceptable to her: to permit and direct Art to pay the rental cost for a comparable home for Cindy and Eric's use for four weeks per year.

23. Art suggested that any cost to him should be offset by the value of Cindy's labor which she is required to provide under Item 5(G) of the Agreement (i.e. "in exchange for Wife doing work for Husband").

24. Sherry Coldsmith testified that prior to accepting a deed to the Gaston Lake property, she was aware of the existence and the contents of the Agreement.

Discussion

It is apparent that neither party obtained legal advice before entering into the Agreement. By its very terms, the Agreement is clear that Mr. Wenger served only as a scribe to reduce the parties' prior Agreement to writing. At the hearing, Art's counsel suggests that the net effect is a conflict between Items 5(G) and 5(F), the former of which appears to impose upon Art an obligation to allow Cindy exclusive use of the property and the former of which allows him to alienate the property "in any manner he sees fit during his lifetime." At the hearing, neither counsel could provide information helpful to the Court with regard to a fundamental precept of contract construction: against whom should this ambiguous Agreement be construed?[1]

Beyond that, upon closer examination of both the Agreement and the evidence suggesting how the parties have interpreted[2] the Agreement by virtue of their conduct[3] with respect to it, we conclude that there is no ambiguity. We believe that Item 5(F) of the Agreement confirms Art's "ability to sell, mortgage or convey the said real estate in any manner he sees fit during his lifetime." Neither party testified and neither counsel argued that Art's rights pursuant to that language are abridged in any manner.

Arguably, the language of Item 38 of the Agreement binds Sherry Coldsmith as a successor to Art as to his obligations with respect to the Gaston Lake property set forth in Item 5(G) of the Agreement. Were we to adopt the interpretation that Sherry Coldsmith, as owner of the property, is now subject to

Art's apparent obligation to provide it for the exclusive use of Cindy and Eric, we would be requiring the sole owner of the property to vacate for four weeks per year, something Sherry indicated she was unwilling to do; and it would cause us to decide that Sherry took a deed to the property at her peril. We don't think the law permits that interpretation.

A closer look at Item 5(G) suggests that Art's apparent obligations under that provision are not absolute, but are conditional. The condition is that Cindy do work for Art at the property. The parties' understanding of that provision is reflected in the evidence suggesting that when Cindy last used the property, she and Mike Shively built a garage on that property for the benefit of that property's owner. Reasonable construction of Item 5(G) allows us to conclude that if Art has no need for work on his property and does not ask Cindy to do work for him on the property, he has no obligation to make that property available for the exclusive use of Cindy and Eric.

Certainly, Art could argue that he has no obligation under the Agreement to allow Cindy and Eric's exclusive use of the property if Cindy refused to do work for Art while she was there. Similarly, Cindy has no right to insist that Art find work for her to do on the property simply so that she can acquire four weeks of exclusive use of the property during four weeks of the year excluding winter.

Given the conundrum with which Art is faced - that he is perfectly free to sell the property under Item 5(F) but has agreed to permit its exclusive use by Cindy in exchange for her performing work for him under Item 5(G) - the only rational way to construe the Agreement consistent with its language is that Art is entitled to determine if he needs Cindy to do work at the property.^[4] Such an interpretation is consistent with the language of the Agreement, is consistent with the rights and obligations of the parties, and is consistent with the conduct of the parties in interpreting the Agreement during the summer of 2003. That such interpretation may be contrary to what either of the parties expected when they entered the Agreement may well come as a result of neither of them having sought advice from any lawyer at all before they entered the Agreement.

Under our resolution of this matter, the parties' current thinking as to what the Agreement means and the parties' thinking as to what they intended at the time of execution of the Agreement are neither relevant nor admissible. See Agreement, Item 34. Moreover, because Cindy has not been successful in her effort to obtain enforcement of a provision against Art which she is no longer entitled to have enforced, she has not prevailed and is not entitled to an award of attorneys' fees, costs or expenses. Last, Cindy certainly is not entitled to a finding of contempt. Because Art was well within his rights to sell the property and because whether to ask Cindy to perform work for him at the property for up to four weeks per year is his choice under the Agreement, we will deny all of the relief sought by Cindy.

ORDER OF COURT

October 27, 2004, upon consideration of the Petition, the Answer, the evidence, the arguments of the parties and the law, it is ordered that the Petitioner's claims for relief are denied in their entirety.

[1] Williston on Contracts states the accepted principle: *contra proferentem*, meaning that ambiguities in contracts are construed against the drafter. 11 Williston on Contracts § 32:12 (4th ed. 2004). Here, the drafter is not a party to the case. He did not represent the interests of either party, but rather served as a mere scribe. The Court found no authority applying *contra proferentem* to a situation like that of the instant case.

[2] For the proposition that the interpretation of parties determines meaning of contract see Universal Film Exchanges, Inc. v. Viking Theatre Corp., 161 A.2d 610 (Pa. 1960), National Container Corp. of Pa. v. Regal Corrugated Box Co., 119 A.2d 270 (Pa. 1956), School District of Butler Tp. v. School Dist. Of City of Butler, 97 A.2d 360 (Pa. 1953), Byrne v. Bushkoff, 110 A.2d 813 (Pa.Super. 1955), Hardes v. Penn Charcoal & Chemical Co., 107 A.2d 176 (Pa.Super. 1954), Smith v. Marcus, 103 A.2d 277 (Pa.Super 1954), and Gately & Fitzgerald v. Saladoff, 98 A.2d 258 (Pa.Super. 1953).

For the proposition that effect is to be given to that intention if it can be done consistently with legal principles, see Percy A. Brown & Co. v. Raub, 54 A.2d 35 (Pa. 1947) and Warren v. Greenfield, 595 A.2d 1308 (Pa.Super. 1991) (quoting text).

[3] The course of the parties' performance under a contract is always relevant in interpreting that contract. Matthews v. Unisource Worldwide, Inc., 748 A.2d 219 (Pa.Super. 2000). The course of conduct of a party is

always relevant in interpreting a contract and may be the strongest indication of the intention of the parties to the contract." Atlantic Richfield Co. v Razumic, 390 A.2d 736 (Pa. 1978) and Sun Co., Inc. (R&M) v. Pennsylvania Turnpike Com'n., 708 A.2d 875 (Pa.Cmwlth. 1998).

[4] Williston on Contracts explains the "Four Corners" Rule. It says:

A contract will be read as a whole and every part will be read with reference to the whole. If possible, the contract will be so interpreted as to give effect to its general purpose as revealed within its four corners or in its entirety. This principle governing contract interpretation has been applied along with other similar rules.

To the extent possible, and except to the extent that the parties manifest a contrary intent, by stating,

for example, that recitals or headings are not to be considered or given effect in determining the meaning of their agreement, every word, phrase or term of a contract must be given effect. An interpretation which gives effect to all provisions of the contract is preferred to one which renders a portion of the writing superfluous, useless or inexplicable. A court will interpret a contract in a manner that gives reasonable meaning to all of its provisions, if possible.

See also Atlantic Richfield Co. v. Razumic, 390 A.2d 736 (Pa. 1976) and Diamond v. Drucker, 110 A.2d 820 (Pa.Super. 1955) (in construing a contract, the agreement must be interpreted as a whole, and the words given their ordinary meaning).