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DOMESTIC LAW WATCH FOR ALL CIVIL LITIGATORS

The doctrine of constructive trust, transfers to family limited partnerships and estate planning trusts, and equitable estoppel are some of the themes running through the most interesting new and pending Kentucky domestic cases. Just as good family law practitioners stay current in other fields of law, divorce cases can be important to trial attorneys with no family law practice. The status of the law regarding relocation of children, which so far is unique to family law, will be addressed at the end of this article.

Constructive Trust

One of the more important Kentucky family law cases decided this year involved imposition of a constructive trust on property titled in the name of the husband's parents. *Keeney v. Keeney*, 223 S.W.3d 843 (Ky. App. 2007). Barbara amended her divorce petition against Milton Keeney to add his parents, Winfred and Ruth Keeney, as additional defendants. Because Milton had a civil judgment against him that predated his marriage to Barbara, property was purchased in the name of his parents. Winfred made arrangements with Mutual Federal for a loan and pledged his real estate as collateral for Milton's promissory notes. A series of loans and mortgages occurred, designed to avoid public record that would identify Milton as a property owner. Barbara and Milton made all payments on the notes.

The Court of Appeals provides a helpful discussion of the law regarding constructive trusts. "Constructive trusts are created by the courts 'in respect of property that has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.' (citations omitted) The fraud may occur in *any form of unconscionable conduct*; taking advantage of one's weaknesses or necessities, or in any way violating equity in good conscience.' (citations omitted) ' In fact, a court exercising its equitable power may impress a constructive trust upon one who obtains legal title, 'not only by fraud or by violation of confidence or of fiduciary relationship, but *in any other unconscientious manner*, so that he cannot equitably retain the property which really belongs to another[.]" *Id.* at 849.

While Kentucky courts have required a party seeking imposition of a constructive trust to establish a "confidential relationship," "[t]he tendency of the court is to construe the term 'confidence' or 'confidential relationship' liberally in favor of the confider and against the confidant for the purpose of raising a constructive trust on a violation or betrayal thereof." *Id.* at 850. The Court of Appeals recognized that the efforts of Milton's parents to conceal beneficial ownership of the property from Milton's judgment creditor had "an obvious and even greater dispossessory effect on Barbara than it had on its target. Even if defrauding Barbara of her beneficial interest was not Winfred's and Ruth's original intention, it became so when she decided to divorce their son. Their retention of the property thus deprived Barbara of her beneficial ownership of the marital residence." *Id.* at 850.

One wonders what the result would have been had the judgment creditor intervened.

Family Limited Partnerships and Estate Planning Trusts

The Kentucky Supreme Court granted discretionary review and oral arguments were heard in *Gripshover v. Gripshover*, 2005 WL 1993603 on August 15, 2007. The intersection of estate planning and spousal rights upon divorce begs for clarification from our highest court. At the time of the marriage, George and his brother each owned an undivided one-half interest in a farming business which included 200 acres of land. During the marriage of George and Darlene the partnership real estate holdings increased to more than 600 acres valued at $3,125,500. In addition, the farming partnership owned equipment and livestock worth $1,128,170 and a promissory note in the principal amount of $1,221,500.

A few months prior to the parties' separation, the two brothers and their wives executed documents transferring nearly all of the assets into limited partnerships, making George and Charlie controlling partners. George and Charles then assigned the partnership's rights in the real property to an irrevocable trust, with each brother named trustee of the other's trust with complete control over the real estate.

The trial court ruled the land was no longer a marital asset subject to division, Darlene had not been fraudulently induced to sign the documents, and there was no evidence of "self-dealing" by George. The Court of Appeals found the evidence was undisputed that at the time the trust was created, a divorce was not contemplated and the parties intended to continue to enjoy the income generated by the property throughout their lives. The fact that legal title to the property was assigned to a family trust, however, did not eliminate Darlene's equitable share of the property. The Court of Appeals held that Darlene is entitled to her equitable share regardless how the property is titled, categorized or characterized. Therefore, the trial court erred in failing to fashion a remedy to award Darlene the portion of marital property to which she is entitled. There is no question that George has a nonmarital interest in some portion of the real estate, but the trial court is not required to terminate the trust in order to make an equitable division of marital property. The Kentucky Supreme Court ruling could be a landmark in this frequently occurring scenario.

Equitable Estoppel, Fraud and Paternity

A paternity and a divorce case were argued September 12, 2007 before the Kentucky Supreme Court at the UK College of Law and may result in a combined decision. In *Hinshaw v. Hinshaw*, 2006 WL 2519221 (Ky.App.), the Court of Appeals affirmed the trial court's ruling that a wife was equitably estopped to deny her husband's paternity of a child he raised from birth when his wife failed to disclose to him her belief that he may not be the biological father until after a divorce petition was filed four years later.

The procedural history of the paternity case is unusual, and thus there is neither a Westlaw cite nor an online opinion from which the appeal was taken. The Supreme Court granted an extraordinary stay of proceedings in the case of *Rhoades v. Ricketts*, which might have resulted in a determination of paternity to the biological father of a child born to a married woman. The petitioner, of course, was not her husband. The issue came before the Supreme Court in the matter of *J.N.R., et al. v. Hon. Joseph O'Reilly*, Judge, Jefferson Family Court, 2007-SC-000175-MR on appeal from an original action in the Court of Appeals, which had denied the writ and remanded the case for a determination of paternity, custody, visitation and child support. Presumably the underlying paternity rights of a bio-dad to an infant born during a marriage will be addressed. A novel, but disconcerting twist, is that the man claiming paternity maintains a blog about his plight, http://www.letmeseemyson.blogspot.com.

Justice Lisabeth Hughes Abramson, author of the Court of Appeals opinion in *Boone v. Ballinger*, 228 S.W.3d 1(Ky. App. 2007) was installed on the Kentucky Supreme Court as Justice McAnulty's replacement just days before this duo of paternity oral arguments were held. If one is looking to guess who on the court will lead on this issue, Justice Abramson is a good bet.

The pending cases follow on the heels of the civil case of *Denzik v. Denzik*, 197 S.W.3d 108 (Ky., 2006) and its progeny, *Wheat v. Com.*, 217 S.W.3d 266 (Ky. App. 2007).

Denzik permitted damages to recoup child support payments by a divorced husband who turned out not to be the biological father. As it was a civil action for damages, a jury trial no less, the biological father was not before the court to deal with the multiple levels of concern present in the pending cases. The Kentucky Supreme Court created an exception to the rule that past child support obligations, once accrued, may not be modified holding that in the event of fraud or misrepresentation, child support payments can be voided. The following factors must be shown to establish fraud or misrepresentation: 1) a material misrepresentation, 2) which is false, 3) known to be false or made recklessly, 4) made with inducement to be acted upon, and 5) acted in reliance thereon and causing injury. Justice Lambert's dissent focused on the policy involving the presumption of legitimacy of a child born during a marriage, which he believed to be of the utmost importance. He opined that the relationship between a parent and child should not come with a price tag and that some secrets should remain secret. Moreover, he feared that the majority's opinion would open the floodgates of litigation on the paternity of children in Kentucky and would provide incentive for the destruction of parent/child relationships.

In *Wheat*, the child's mother filed a paternity action in 1985 against Wheat who acknowledged paternity. He was ordered to pay child support, but defaulted on his obligation. DNA testing performed in 1997 pursuant to court order, proved that Wheat was not the father. Wheat then filed a CR 60.02 motion to set aside the paternity judgment, alleging misrepresentation on the mother's part in inducing him to sign the agreed judgment. He alleged that the mother swore to him that he was the father and then admitted years later that he was not. In 2001 the district court entered an order finding Wheat was not the biological father and set aside the 1985 order and all prospective child support obligations. The issue of arrearages was reserved for further proceedings. Neither party appealed.

In 2004 a judgment for arrearages was entered, and in 2005 the local child support office filed a motion to hold Wheat in contempt for failure to pay arrearages. Wheat filed a CR 60.02 motion to set aside the 2004 order for arrearages. The family court denied the CR 60.02 motion and found Wheat in contempt.

The Court of Appeals found that Wheat was not equitably estopped from asserting that he is not the legal father. Unlike the case of *S.R.D v. T.L.B.*, 174 S.W.3d 502 (Ky. App. 2005), there was no presumption of paternity since Wheat was never married to the mother, Wheat did not establish a bond with the child, he did not act as the "psychological father," and in fact had no relationship with the child at all. Therefore, there is no equitable reason to require Wheat to pay child support. Moreover, the district court had ruled that Wheat was not the legal father in 2001, and no party appealed.

The Court noted the *Denzik* exception to the rule that past child support obligations, once accrued, may not be modified. Suggesting that the *Denzik* factors may be satisfied in the instant case, it remanded the case back to the trial court for an evidentiary hearing and

findings of fact. The Court stated that if the trial court finds that the mother was guilty of fraud or misrepresentation, Wheat's motion should be granted and both the arrearage and the order of contempt should be set aside. If no fraud is found, then Wheat is legally responsible for the arrearages.

Relocation

1500 words fly when you are having fun, so this article will conclude simply by directing you to the pending relocation issues and cases. The area of law regarding the relocation of children of divorced parents has spawned a large number of cases over the last several years beginning with *Fenwick v. Fenwick*, 114 S.W. 3d 767 (Ky. 2003) which held that even in a joint custody arrangement, if a parent was designated "primary residential parent" he/she could move with the children over the objection of the other parent unless that parent proves the relocation would seriously endanger the children. Despite a long line of cases since, and a legislative amendment to KRS 403.340, the law is still in chaos.

In *Brockman v. Craig*, 205 S.W.3d 244 (Ky. App., 2006) the mother remarried and wanted to relocate across the Ohio River where her husband lived, which was only 45 minutes away from the father. She had also found much better employment. Furthermore, the mother was only seeking to modify the visitation time, not the custody arrangement. The court not only denied the move, but granted the father primary physical possession.

The Kentucky Supreme Court accepted discretionary review of *Pennington v. Marcum*, 2006 WL 2194903 and of *Frances v. Frances*, 2006 WL 3759659, both move away cases. Finally, on August 15, 2007 discretionary review was granted in *Rankin v. Coffman*, 2007 WL 1229022, still another case that arose from a disputed relocation.

Perhaps those cases can be heard together and the Court will give us a result that will last. However, in *Robinson v. Robinson*, 211 S.W.3d 63 (Ky.App.,2006) the Kentucky Court of Appeals practically begs the legislature to address the problem: "[t]he vast majority of state legislatures has passed a wide variety of laws directly addressing the relocation issue; nearly half require a relocating custodial parent to give advance notice of the move to the other parent, the court, or both. Kentucky is among the minority of states that have no specific statute. Therefore, until our legislature aligns with the majority of states, we are compelled to address relocation/custody issues by applying the general custodial modification statutes, KRS 403.340 and KRS 403.350." *Id.* At p 68.

The legislation committee of the American Academy of Matrimonial Lawyers Kentucky Chapter is seeking bi-partisan sponsorship and support of the AAML Model Relocation Act. At a minimum we would like to see a requirement that a parent intending to relocate children notify the other parent in advance and that the court be required to use the standard "best interest" of the children in deciding whether to permit a proposed relocation. We hope the KJA Domestic Section Legislation Committee will join us in this effort.

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