

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000347-MR

RICK MURRAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 05-CI-500656

KIMBERLY MURRAY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR
JUDGE.

VANMETER, JUDGE: Rick Murray appeals from orders entered by the Jefferson
Circuit Court, Family Division, denying his motion to set aside a mediated
settlement agreement, and adopting the settlement agreement as its own. We
affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Kim Murray and Rick married in 1997 and divorced in October 2006, reserving issues regarding the enforcement of their earlier settlement agreement. More specifically, the record shows that on June 27, 2006, the parties engaged in a mediated settlement agreement which resulted in a handwritten “Marital Settlement Agreement” signed by both parties, their counsel, and the mediator.

The settlement agreement indicated that the parties would share joint custody of their four-year-old son, and that they would make their own time-sharing arrangements. Rick agreed to pay Kim child support of \$500 per month, Kim agreed to provide the child’s medical insurance coverage, and the parties agreed to split the costs of the child’s unreimbursed medical care and work-related child care. Kim, who was awarded a vehicle and the marital residence, was to assume the mortgage and pay Rick \$50,000. Rick was awarded a leased vehicle, a show car, a motorcycle, and any ownership interest in another vehicle. Moreover, he was awarded all interests in his two businesses. Each party was awarded his or her own checking, retirement and insurance accounts. They agreed to divide personal property, to waive any claims for maintenance, and to pay their own debts and attorney’s fees.

Kim filed the signed settlement agreement with the court on June 29, 2006. On June 30, Rick moved to set aside the agreement, alleging in part:

During the mediation, [he] became very ill and became incompetent to make decisions of the magnitude contained in the settlement agreement. Specifically, [Rick] suffers from a psychiatric disorder [obsessive-compulsive disorder] which has been fairly well

controlled but which became symptomatic during the stress of the settlement negotiations. [Footnote omitted.]

[Rick] tried several times to withdraw from the mediation as he became more and more ill with the stress of the situation, but was not permitted to do so. Finally, [Rick] gave in to the pressure applied during the mediation to reach a conclusion, which he was incapable of doing, and signed an agreement which he has not even actually read it [sic] in its entirety.

Due to his symptoms, [Rick] departed the mediation immediately after signing the agreement. That evening, after [Rick] recovered somewhat from the stress of the situation and realized what had occurred, he contacted the mediator and disavowed his commitment and agreement to the terms of the settlement agreement. The mediator promised to contact [Rick's] counsel . . . to apprise him of that situation.

Rick alleged that the agreement was unfair, inequitable or unconscionable because Kim retained the marital residence while paying him only \$50,000 for his \$100,000 marital and nonmarital interest in the property. Further, Rick complained that the agreement required him to pay \$500 per month as child support, even though Kim allegedly had the higher income and the parties had agreed to an equal parenting schedule. In an attached affidavit Rick alleged that his obsessive-compulsive disorder (OCD) was diagnosed in 1995, that he had “been under treatment with Dr. Kanovitz for the disorder” and took Prozac when symptomatic, and that he “became symptomatic during the stress of the settlement negotiations.”

Kim opposed the motion to set aside the settlement agreement, claiming that it represented a compromise and that Rick appeared “extraordinarily

competent during the mediation and came prepared bringing with him numerous documents.” She asserted that her income was not significantly higher than Rick’s, that Rick had additional earnings from “side” jobs, and that Rick was awarded his chiropractic business and another marital business as part of the settlement. Kim stated that to her knowledge Rick saw Dr. Kanovitz only once or twice, following a physical altercation between the parties.

After an October 2006 hearing, the trial court permitted Rick to supplement the record with the deposition of psychiatrist Lee A. Coleman, M.D., whom Rick first saw several weeks after the agreement was signed. Noting that both parties were experienced business people who were represented by counsel throughout the settlement proceedings, the court concluded that Rick

failed to meet his burden of proof that at the time he entered into the mediated Marital Settlement Agreement he was incompetent or that he signed the Agreement under duress, as a result of overreaching, or the agreement was reached through some sort of fraud.

After reviewing the parties’ economic circumstances and finding the agreement to be reasonable, the court incorporated the agreement into its order of December 14, 2006.

Subsequently, Rick filed a timely motion requesting the court to alter, amend or vacate the December 14 order, and to provide additional time for submitting a transcript of Dr. Kanovitz’s deposition, which was scheduled to be taken on January 19. Rick alleged that Kanovitz was in private practice and was

difficult to contact, but that his depositional testimony was “sorely needed” as the court seemed to reject Rick’s OCD defense

at least in significant part because Dr. Coleman had not treated [Rick] prior to the mediation and had not witnessed [Rick] suffering from a panic attack and Dr. Kanovitz – [Rick’s] psychiatrist prior to that time who had initially diagnosed the disorder – had not testified.

Rick also asserted that even without Kanovitz’s testimony, he had met his burden of showing that the settlement agreement should be set aside. The trial court disagreed, denying Rick’s motions to alter and to submit Kanovitz’s deposition. This appeal followed.

Rick first contends that the trial court abused its discretion by excluding Kanovitz’s deposition from evidence. We disagree.

Although Rick refers to the court’s exclusion of the deposition, in fact this issue relates to the court’s refusal to hold open the record for an additional deposition which had not yet been taken. The videotaped record shows that during the October 2006 hearing, Rick and his attorney described the impact of OCD on his behavior during the settlement conference. Toward the end of the hearing, Rick’s attorney indicated they had nothing else to present unless the court wished to hear from Rick’s treating physicians. Subsequently, the attorney advised the court that Kanovitz had moved to Elizabethtown, that he was semi-retired and difficult to reach, and that probably the record would be supplemented with the deposition of Rick’s current psychiatrist, Dr. Coleman. The court requested Rick to file a submission form once the deposition transcript was filed.

Five weeks later, Rick filed a transcript of Dr. Coleman's deposition. However, he filed neither a submission form nor any notice of other depositions. On December 14, 2006, the court denied Rick's motion to set aside the settlement agreement. Rick filed a timely motion to alter, amend or vacate, advising the court for the first time that Kanovitz's deposition was scheduled for January 19, 2007, or six weeks after the court's denial of Rick's motion to set aside the agreement. The court denied the motion.

Contrary to Rick's contention, the trial court did not specifically rule during the October hearing that it would hold open the record pending the submission of Kanovitz's deposition. Indeed, Rick gave no indication during the hearing that he expected to depose Kanovitz, and the record shows that a deposition had not yet been scheduled with Kanovitz when the court declined to set aside the agreement. After reviewing the record, including the lack of clear and timely notice of an intention to provide additional evidence, as well as the absence of any real dispute that Rick had been diagnosed with OCD but had not seen Kanovitz for some two years prior to the settlement agreement, we cannot say that the trial court abused its discretion by failing to hold open the record for an unscheduled deposition which the parties did not timely and clearly advise the court would be taken.

Next, Rick contends that the trial court erred by refusing to allow him to submit Kanovitz's deposition as an offer of proof. We disagree.

KRE² 103(a) provides in pertinent part:

Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

....

(2) ***Offer of proof.*** If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. (emphases added).

Rick's motion seeking to submit Kanovitz's deposition as an offer of proof was filed on January 25, 2007, which was six days after the trial court denied Rick's motion to alter, amend or vacate the December 14 order. No grounds exist for using KRE 103 in a post-trial attempt to introduce evidence which was not timely tendered during an earlier proceeding. Rick is not entitled to relief on this claim.

Finally, Rick contends that the trial court abused its discretion by denying his motion to set aside the settlement agreement. We disagree.

Kentucky Revised Statutes (KRS) 403.180(1) permits spouses to enter into a written separation agreement addressing the "disposition of any property owned by either of them, and custody, support and visitation of their children." Except as to terms of child custody, support and visitation, the trial court is bound by the terms of the parties' agreement unless the court finds, after considering "the economic circumstances of the parties and any other relevant evidence produced by" them, that the agreement is unconscionable. KRS 403.180(2). The term "unconscionable" is defined as "manifestly unfair or inequitable." *Shraberg v.*

² Kentucky Rules of Evidence.

Shraberg, 939 S.W.2d 330, 333 (Ky. 1997) (quoting *McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky.App. 1983)); *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974).

Here, as noted above, Rick asserted that his OCD caused him to become incompetent to commit to the terms set out in the agreement. Further, he asserted that the agreement was “unfair, unconscionable and inequitable[,]” particularly in regard to child support and the division of the value of the marital residence. Rick adduced evidence regarding OCD and its impact on his decision-making abilities, and Coleman testified by deposition regarding both OCD and Rick’s subsequent description of the settlement hearing.

Both parties were represented by counsel during the settlement hearing when they agreed to share child custody, and to equally split the costs of child care and unreimbursed medical expenses. Rick complains that the agreement required him to pay child support of \$500 per month, even though Kim’s income exceeded his and the child was to split time between the parties. Further, he alleged that although his nonmarital and marital equity in the marital residence should be valued at \$100,000, the agreement required Kim to pay him only \$50,000 while she retained the residence.

Although the settlement agreement addressed the costs of medical insurance, child care and unreimbursed medical expenses, these costs obviously represent only a portion of the expense of raising a child. The argument contained no specific provisions regarding the apportionment of responsibility for the

payment of various other child-related expenses which were not tied to either parent's household expenses, such as clothing, school and activity expenses, but we surmise that the parties intended for Kim to pay such expenses using her own income and the child support provided by Rick. In any event, Rick made no showing that the terms of the settlement were manifestly unfair or inequitable so as to be unconscionable. Hence, the trial court did not err by failing to set aside the parties' agreement regarding child support.

Further, the parties' agreement as to the division of residential equity must be viewed in light of the division of other marital property. Although minimal evidence was provided as to property values, it appears from the parties' own disclosures and the statements made below that the agreement provided for Rick to receive substantial amounts of marital property, including two businesses, vehicles, and monetary accounts, in exchange for his nonmarital and marital interests in the residence. Again, we cannot say that the trial court erred by failing to set aside the settlement agreement as unconscionable.

The court's orders are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mary Janice Lintner
Louisville, Kentucky

BRIEF FOR APPELLEE:

Pamela M. Workhoven
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