RENDERED: MARCH 21, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000471-MR

PHYLLIS JEAN CARTER — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 98-CI-01704

DENNIS RAY CARTER — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND HUDDLESTON, JUDGES.

BAKER, JUDGE. Phyllis Jean Carter brings this appeal from a November 7, 2001, order of the Kenton Circuit Court. We affirm.

Appellant and appellee were married in 1976; the marriage was dissolved by decree of dissolution on December 7, 1994. They subsequently remarried in 1996 and separated in 1998; that marriage was dissolved by decree of dissolution entered February 15, 2000. A settlement agreement was incorporated into the decree.

On May 21, 2001, appellant filed a "Motion to Reopen Property Division Portion of Dissolution of Marriage." Therein, appellant sought to set aside the settlement agreement. By order entered November 7, 2001, the circuit court denied the motion, thus precipitating this appeal.

Appellant contends that the circuit court committed reversible error by failing to set aside the settlement agreement. Specifically, appellant argues that she lacked the necessary mental capacity to enter into the separation agreement. In support thereof, she asserts that she suffered from "bipolar syndrome" and, as a result, lacked the capacity to fully understand the separation agreement.

To demonstrate mental incapacity, it must be shown that appellant was incapable of understanding and of assenting to the agreement. See Hagemeyer v. First Nat. Bank & Trust Co., 306 Ky. 774, 209 S.W.2d 320 (1948). Moreover, the unsoundness of mind must directly relate to the precise time the agreement was entered into by the parties. See Jefferson Standard Life Ins. Co. v. Cheek's Adm'r, 258 Ky. 621, 80 S.W.2d 518 (1934).

We observe that the record is void of any medical evidence concerning appellant's mental illness and the effect of such mental illness upon her competency. The parties' adult daughter testified that appellant seemed relieved after signing the agreement and that appellant discussed the terms of the

agreement with her. The circuit court found that "[t]here is... an insufficiency of evidence to convince the Court that Mrs. Carter was suffering from such mental illness so as to preclude the voluntary or knowing nature of her acts." Upon review of the record, we are compelled to agree with the circuit court. We simply do not believe appellant demonstrated that she lacked the requisite mental capacity to enter into the separation agreement. See Hagemeyer, 209 S.W.2d 320.

Appellant also argues the circuit court erred by failing to set aside the separation agreement as unconscionable. Particularly, she complains that the separation agreement was enter into by "duress and coercion." In support thereof, she maintains that appellee told her to sign the separation agreement and that he would "take care of her." She states that she failed to consult an attorney concerning the separation agreement and failed to even read the separation agreement. She also believes the separation agreement to be manifestly unfair:

> She left with the clothes on her back and an old vehicle that needed work on it that she could not afford to have done – she was also left with the debt on this dilapidated car. She was also supposed to be awarded one-third of her husband's two pensions, one with the military and the other with the Post Office, neither of which Appellee has furnished her with a Qualified Domestic Relations Order! She was also to receive her "doll collection and figurines and "what nots"". On the other hand, in the Separation Agreement Appellee received all

> interest in the marital home, the balance of his two pensions, a 1992 Ford Ranger, hand tools, automotive tools, test equipment including all power and air tools. (citation omitted).

Appellant's Brief at 5.

It is well established that a party challenging a settlement agreement as unconscionable bears the burden of proof. See Peterson v. Peterson, Ky., 583 S.W.2d 707 (1979). On appeal, a finding of conscionablility will not be disturbed unless that finding is clearly erroneous. Id. In finding the settlement agreement conscionable, the circuit court concluded:

> [T]he Court finds and concludes that it was Mrs. Carter who initiated going to the notary on November 11, to sign the separation agreement. . . .
>
> . . . There is no evidence to show that Mrs. Carter was under any undue influence or coercion when she signed it. There is also an insufficiency of evidence to convince the Court that Mrs. Carter was suffering from such mental illness so as to preclude the voluntary or knowing nature of her acts.

Circuit Court's Order at 3.

Upon the whole of the case, we are unable to conclude the circuit court's finding of conscionablility was clearly erroneous. There was evidence that appellant told appellee she had consulted with an attorney and that it was appellant who prompted the meeting with the notary to sign the agreement. Although the settlement agreement may constitute a bad bargain

for appellant, the law is clear that the agreement will not be considered unconscionable solely on the basis that it was a bad bargain. Id. In sum, we are of the opinion that the circuit court's finding of conscionability was not clearly erroneous.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Sally J. Herald Cold Spring, KY	Kenneth Easterling Covington, KY