

RENDERED: NOVEMBER 4, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002631-ME

KIMBERLY ANN CHANDLER

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 02-CI-00918

JEFFERY CHANDLER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a decree of dissolution entered by the Laurel Circuit Court. Appellant Kimberly Ann Chandler contends that the trial court erred by failing to find that the parties' settlement agreement was unenforceable as to the terms of child custody and visitation. For the reasons stated hereafter, we affirm.

Kimberly and appellee Jeffery Chandler married in January 1999 and separated in August 2002. Their two sons were

born in June 1996 and November 1998. Although the evidence regarding the parties' living arrangements is conflicting, it is undisputed that Kimberly joined the Air Force and began basic training in February 2001.

In August 2002 the parties, without counsel, signed several documents which Kimberly downloaded from the Internet after allegedly receiving word that she was going to be deployed to Iraq. The pro se petition for dissolution included the parties' statements that there was no chance of reconciliation, and that they wished to incorporate by reference the attached marital settlement agreement which was "signed under no duress or force" and which "settled all of the issues relating to their marriage, including . . . custody, visitation, care and support of their children." The accompanying settlement agreement repeated the statement that there was "no possible chance for reconciliation," and it expressed the parties' desire to settle by agreement "all issues relating to our children including custody, visitation and child support." They stated that Jeffery would have "custody, care and control of the minor children," and that Kimberly would have visitation consisting of "[t]he first 8 weeks of their summer vacation and every other holiday." The agreement further stated that the parties

both desire that, in the event of our divorce or dissolution of marriage, this Marital Settlement Agreement be approved and

merged and incorporated into any subsequent decree or judgment for divorce or dissolution of marriage and that, by the terms of the judgment or decree, we both be ordered to comply with the terms of this agreement, but that this agreement shall survive.

. . . we each consider the terms of this agreement to be fair and reasonable. . . .

We agree that this document is intended to be the full and entire settlement and agreement between us regarding our marital rights and obligations and that this agreement should be interpreted and governed by the laws of the State of Kentucky.

The documents were filed in the Laurel Circuit Court in September 2002, and various related documents were thereafter submitted to the court.

In May 2003 Kimberly, now represented by counsel, filed a motion seeking temporary custody and leave to file an amended petition. In response, Jeffery asserted that the parties should share joint custody, that he should be named as the children's primary residential caregiver, and that the court should enforce the signed settlement agreement. Kimberly then filed a motion seeking to set aside the pro se separation agreement, stating that she "was unaware of the meaning" of many of its terms, that Jeffery misled her into signing it, and that she now believed it was manifestly unfair and unconscionable.

Alternatively, she sought a modification of the agreement to name her as the children's primary residential caregiver.

During the subsequent hearing before a domestic relations commissioner (DRC), the parties provided conflicting testimony regarding their marriage, their separations, and their provision of care for the children. Kimberly asserted that without a clear understanding of her rights, she executed the settlement agreement while under the duress caused by her belief that her deployment to Iraq was imminent, coupled with her understanding that military regulations required her to have written custodial arrangements in place for the children. She testified that the parties understood that the terms of the separation agreement were temporary, and that she "didn't think it was set in stone divorce." Kimberly later asserted that the DRC refused to conduct a hearing regarding the children's best interests, that the agreement was unconscionable in its limitation of her visitation rights, and that the agreement was unenforceable since she in fact was never deployed. Jeffery, on the other hand, denied that the separation agreement and its custodial arrangements were prompted by any fear of imminent deployment.

The DRC recommended, and the court found, that the separation agreement was neither unconscionable nor induced by duress or coercion. Finding that it was not clearly specified

in the agreement, the court ordered that the parties would share joint custody with Jeffery being designated as the primary residential custodian. The court ordered terms of visitation consistent with those set out in both the separation agreement and a later verbal agreement which allowed Kimberly an additional week of visitation during spring break. The court reprimanded Kimberly's counsel for asserting that the DRC had "refused to conduct a hearing as to the child custody and visitation issues," noting that the video record in fact showed that the hearing before the DRC addressed those issues and that the parties were not limited in their offer of proof. This appeal followed.<sup>1</sup>

Kimberly first contends that the trial court erred by failing to find that the settlement agreement is unenforceable as having been executed under duress and without a clear appreciation of her rights. We disagree.

Duress may be defined as "such violence or threats made by the party or some person acting for or through him, or by his advice or counsel, as are calculated to produce on a person of ordinary intelligence a just fear of great injury to person."<sup>2</sup> Similarly, duress may be found to exist "where one, by

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<sup>1</sup> Jeffery, who is no longer represented by counsel, did not file a brief on appeal.

<sup>2</sup> *Bond State Bank v. Vaughn*, 241 Ky. 524, 44 S.W.2d 527, 528 (1931). See also *Martin v. Ratliff Furniture Co.*, 264 S.W.2d 273, 275 (Ky. 1954); *Commonwealth*

the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of his free will."<sup>3</sup>

Here, as noted by the trial court, Kimberly was never deployed overseas and she produced no documentation to support her claim that she expected immediate deployment to Iraq at the time of the settlement agreement. However, even if that expectation was valid it is undisputed that Kimberly, who had completed at least two years of college work toward a nursing degree, was the party who downloaded the legal forms from the Internet. Further, she was the party who completed the forms for the parties' signatures and then filed them in the circuit court, thereby instituting the dissolution proceedings. Kimberly's contention that the separation agreement was not necessarily in contemplation of divorce, or that it was not intended to be a final document, is simply not credible in light of the language of the forms and the actions which she took regarding those forms. As noted by the circuit court, the alleged threat of immediate deployment to Iraq simply does not satisfy the definition of duress for purposes of this proceeding.

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*v. Reffitt*, 149 Ky. 300, 148 S.W. 48, 50 (1912); *Boatwright v. Walker*, 715 S.W.2d 237, 243 (Ky.App. 1986).

<sup>3</sup> *Fears v. United Loan & Deposit Bank*, 172 Ky. 255, 189 S.W. 226, 232 (1916).

We also are not persuaded by Kimberly's contention that the trial court erred by failing to find that the settlement agreement was unconscionable and not binding on the court. An unconscionable settlement agreement is one which is "manifestly unfair or inequitable."<sup>4</sup> The party challenging a settlement agreement as unconscionable bears the burden of proof.<sup>5</sup> As this court stated in *Peterson v. Peterson*,<sup>6</sup>

[s]ince the trial court is in the best position to judge the circumstances surrounding the agreement, its finding on the issue of conscionability should not be set aside on appeal unless there is some evidence of fraud, undue influence, overreaching, or evidence of a change of circumstances since the execution of the original agreement.

Again, the record shows that Kimberly is an educated woman who downloaded from the Internet, and completed for the parties' signatures, legal documents which clearly sought the dissolution of the parties' marriage and an agreed resolution of child custody and visitation issues. There is simply no evidence of unconscionability.

Finally, we are not persuaded by Kimberly's assertion that the court failed to address the best interests of the children and that, absent a finding of unconscionability, the

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<sup>4</sup> *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974).

<sup>5</sup> *Peterson v. Peterson*, 583 S.W.2d 707, 711 (Ky.App. 1979).

<sup>6</sup> *Id.* at 712.

court erred by treating the custody and visitation provisions of the parties' agreement as binding.

KRS 403.180(2) provides that in the absence of a finding of unconscionability, the trial court is bound by the terms of a separation agreement "except those providing for the custody, support, and visitation of children." Such child custody issues must be considered in light of all relevant factors including those set out in KRS 403.270(2). Contrary to Kimberly's contention, it is clear that she had the opportunity during the hearing before the DRC to present evidence which was relevant to the issue of custody, and that the trial court in fact considered such evidence when making several modifications in the custody and visitation terms of the parties' original settlement agreement. We cannot say that the trial court erred in this regard.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas G. Bengé  
London, Kentucky

BRIEF FOR APPELLEE:

No brief filed