

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000702-MR

BARBARA J. HEIFNER

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 05-CI-00423

TERRY L. HEIFNER

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, HOWARD, AND LAMBERT, JUDGES.

ACREE, JUDGE: Barbara J. Heifner appeals from an order of the Ohio Circuit Court denying her motion to alter, amend, or vacate her divorce decree and set aside her divorce settlement agreement. Finding no abuse of discretion on the part of the trial court, we affirm.

Barbara and Terry L. Heifner were married in 1988. They separated in September of 2005 and entered into a settlement agreement on December 2, 2005. At the time the settlement agreement was reached, Barbara was unrepresented by legal counsel.

On December 22, 2005, the Ohio Circuit Court entered a decree of dissolution of marriage, adopting by incorporation the terms and conditions of the settlement agreement.

On January 3, 2006, Barbara filed a motion to alter, amend or vacate the divorce decree, to set aside the divorce settlement agreement and, to refer the matter to the domestic relations commissioner for a final hearing. Barbara's motion asserted that the settlement agreement was unconscionable and was obtained by fraud, undue influence, and overreaching. The motion also asserted that at the time the settlement agreement was signed, she was under the care of a physician for depression and taking several prescription medications which impaired her ability to make informed decisions. She also asserted in her motion that she was never advised to retain private counsel, and that she was intimidated into signing the settlement agreement.

The trial court held a hearing on the matter. Barbara's attorney argued that she had been undergoing medical treatment for psychiatric and physical problems at the time the settlement agreement was negotiated and signed, and that she was also taking several prescription medications for her mental condition. However, no evidence of Barbara's medical problems was presented to the trial court or made a part of the record. The circuit court denied the motions, finding the settlement agreement divided the parties' properties and debts in an equitable manner and was not unconscionable. The trial court further found that there was no evidence to support Barbara's contention that

the settlement agreement was obtained by fraud, undue influence, overreaching, or that she lacked the mental capacity to sign the agreement. This appeal followed.

Barbara argues the trial court erred in failing to consider the unconscionability of the settlement agreement given her mental state when she signed the agreement. She asserts that there is clear evidence in the record to support her claim. We disagree.

The only suggestion in the record that Barbara suffered from an impaired mental state is in her counsel's argument, videotaped during the February 23, 2006, hearing. During the hearing, Barbara's counsel stated that because Barbara was having psychiatric problems at the time and was on several medications, the settlement agreement is unconscionable. He claimed to have proof of her medical history and even held up what we can only assume was a portion of her medical records. However, these records were never offered into evidence and are not part of the record. Barbara's inclusion of such evidence in the appendix to her brief is contrary to Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(vii) ("materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs") and will not be considered by this Court in reviewing the case.

Barbara's entire argument is premised on an allegation unsupported by evidence of record – that she was physically and mentally impaired when she executed the settlement agreement. Furthermore, her reliance on Kentucky case law addressing determinations of the conscionability of separation agreements does not support her

argument. In each of these cases, including *Shraberg v. Shraberg*, 939 S.W.2d 330 (Ky. 1997), the reviewing court “gave great deference to the view of the trial court [because] the trial court is in the best position to evaluate the circumstances surrounding the agreement.” *Shraberg* at 333 (citation and internal quotation marks omitted); *see also* *Rupley v. Rupley*, 776 S.W.2d 849, 852 (Ky.App. 1989) (“[W]e generally will not disturb a trial court's finding on that issue. . . .”). It is appropriate in this case that we defer to the trial court.

The record and the law do not support Barbara’s contentions. Consequently, we find no error in the trial court’s denial of Barbara's motion to alter, amend, or vacate the December 22, 2005, divorce decree.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Dan Jackson
Hartford, Kentucky

BRIEF FOR APPELLEE:

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