

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002338-MR

AMANDA LEIGH BOGGS

APPELLANT

v. APPEAL FROM CARTER FAMILY COURT
HONORABLE JOHN COX, JUDGE
ACTION NO. 08-CI-00426

LARRY JACKSON BOGGS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: Amanda Leigh Boggs (Amanda) appeals from the family court's order finding that she was not under duress when she entered into a

¹ Senior Judge Joseph E. Lambert 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.

separation agreement (the Agreement) with Larry Jackson Boggs (Jackie) and that the Agreement was supported by sufficient consideration. On appeal, Amanda argues that the family court did not consider evidence of Jackie's abuse when it determined the Agreement was not unconscionable and that the court did not make sufficient findings of fact to support its order. Jackie argues that Amanda failed to make a causal connection between any abuse and her signing the Agreement, and that the court made sufficient findings of fact. Having reviewed the record and the arguments of the parties, we affirm.

FACTS

Jackie and Amanda, who are the parents of two minor children, married on July 6, 1999, and separated on August 10, 2008. During the course of the marriage, Jackie made substantial improvements to a parcel of real estate that he owned,² expanding and improving an existing house and garage. He also purchased some equipment for Amanda, who planned to open a beauty salon.

Shortly after the separation, Amanda contacted an attorney, Jennifer Barker (Barker), who prepared the Agreement, which the parties signed on August 27, 2008. The Agreement provided for joint custody and equal parenting time; and that Jackie would: assume \$90,000.00 of marital debt; pay for the children's school, sports, and medical expenses; pay off Amanda's car loan; and pay Amanda's monthly bills, including car insurance, for "up to one year from the

² The evidence is somewhat unclear whether the real estate is solely in Jackie's name or jointly in Jackie's and his mother's names. However, it is uncontested that the real estate, absent any post-marriage improvements, is non-marital property.

execution of [the] agreement.” Under the Agreement, Amanda kept her car but was not entitled to any share of the value of improvements to the real estate or to any of the beauty salon equipment. However, she was absolved of liability for any marital debt. We note that the Agreement also provided that the parties understood its terms and those terms were fair and not unconscionable.

Amanda filed a petition for dissolution on September 2, 2008. On November 18, 2008, approximately ten weeks after she signed the Agreement, Amanda, through new counsel, moved to set aside the Agreement, stating that she had entered into it under duress. In support of her motion, Amanda filed an affidavit stating that Jackie had been both physically and verbally abusive to her during their marriage and after they had separated. At or near that time, Amanda also filed a domestic violence petition and the court entered an emergency protective order.³ In December 2009, the court granted Amanda's petition for dissolution but reserved all issues related to custody, visitation, property division, and the Agreement.

Following some ongoing disputes regarding custody and visitation, the court heard Amanda's motion to set aside the Agreement in September 2009. At the hearing and in her deposition, which is part of the record, Amanda testified that she met with Barker alone on one occasion and that both she and Jackie met with Barker on one occasion. During her initial meeting with Barker, Amanda

³ We note that neither the domestic violence petition nor the emergency protective order are part of the record before us; however, reference is made to those documents in the pleadings.

stated that she wanted the beauty salon equipment, her personal property, \$80,000.00, and for Jackie to pay all of her expenses for a year.

At the second meeting, Barker advised Amanda and Jackie that she believed she represented both of them and if they could not agree, she could not represent either. According to Amanda, Jackie stated that he was "broke" and could not pay her \$80,000.00. He then dictated the terms he thought would be acceptable. Barker drafted the Agreement and the parties returned to Barker's office and signed it. In addition to the Agreement, Amanda also signed an affidavit indicating that she understood that she might have a claim to more than what was contained in the Agreement, that she had been so advised, and that she entered into the Agreement knowingly and voluntarily.

Amanda testified that she was under duress when she signed the Agreement because of "the way [Jackie] would look at [her] and try to intimidate [her]" She also testified that she was "confused . . . scared and . . . didn't know what to do," and that she would "get yelled at" if she did not agree. She also testified that Jackie had not permitted her to make any decisions for herself during their marriage. However, after separating from Jackie, she began to make decisions for herself, realized that the Agreement was not fair, and contacted an attorney to have the Agreement set aside.

Barker testified that it appeared to her that Amanda might have a claim to more than what the Agreement provided. However, when she advised Amanda of that, Amanda stated that "she just wanted out." Because of her

concerns about the terms of the Agreement, Barker had Amanda sign an affidavit indicating that she had been advised that she had a right to claim additional property, that she chose not to do so, and that she entered the Agreement knowingly and voluntarily.

As to the issue of duress, Barker testified that she did not suspect there were any domestic violence issues. Barker agreed that Amanda was more animated when the two met alone than when all three met. However, she noted that, during the second meeting, Amanda and Jackie appeared to be "getting along" and were able to discuss and work through their differences. We note that this differs significantly from Amanda's description of that meeting.

Amanda also presented testimony at the hearing from a real estate appraiser who stated that the garage with the beauty salon had a value of \$33,104.00 and the residence had a value of \$92,395.00 to \$119,226.00.

Jackie testified at the hearing that he owed \$50,712.83 for both marital and non-marital loans related to the residence; \$18,211.59 on a loan secured by his truck; and \$29,843.63 for a loan related to the beauty salon improvements and equipment. Jackie also testified that some of the debt associated with the residence had been paid down during the marriage; however, because various loans had been consolidated, it was difficult to determine what portion was marital and what was non-marital.

Following the hearing, the court entered an order denying Amanda's petition to set aside the Agreement. In doing so, the court stated that the

Agreement was supported by valuable consideration in that it: relieved Amanda from liability for any of the marital debt; provided that Amanda could keep a 2003 Honda and that Jackie would pay any debt associated with that vehicle and the insurance premiums until that debt was paid; provided that Jackie would pay all of Amanda's monthly bills for a period of one year; and provided that Jackie would pay for the children's school, sports, and medical expenses. Furthermore, the court found that, based on the value of the property involved, the Agreement was not unconscionable and that Amanda did not enter into it under duress. In support of this later finding, the court noted that Amanda was represented by competent counsel; that counsel advised Amanda that she might be entitled to a greater portion of the marital estate; that counsel advised Amanda of the consequences of entering into the Agreement; that Amanda signed an affidavit stating that she had been so advised; and that Amanda's decision to enter into the Agreement was "knowing and voluntary."

Amanda then filed a motion asking the court to make additional findings of fact regarding the value of the marital property and debt, the economic circumstances of the parties, and the relative income of the parties. Jackie responded, arguing that the court's findings were sufficient. The court agreed with Jackie and denied Amanda's motion, although the court stated that the amount of debt exceeded the \$90,000.00 set forth in the Agreement. This appeal followed.

STANDARD OF REVIEW

"The doctrine of unconscionability is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or simply an old-fashioned bad bargain." *Louisville Bear Safety Service, Inc. v. South Central Bell Tel. Co.*, 571 S.W.2d 438 (Ky. App. 1978) (citing *Willie v. Southwestern Bell Telephone Co.*, 549 P.2d 903 (Kan. 1976)). Because the trial court is in the best position to judge the circumstances surrounding an agreement, we will not set aside its findings regarding conscionability absent "evidence of fraud, undue influence, overreaching or evidence of change of circumstances since the execution of the original agreement." *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky. App. 1979). Furthermore, we will not set aside the findings of fact by the trial court unless they are "clearly erroneous." Kentucky Rule of Civil Procedure 52.01; *see also Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky. App. 2009). With these standards in mind, we address the issues raised by Amanda on appeal.

ANALYSIS

Although Amanda only lists two issues in her brief – whether the family court made sufficient findings of fact and whether she entered into the Agreement under duress – we believe she actually raises three issues. Those issues are: (1) whether the Agreement was unconscionable on its face; (2) whether the Agreement is unconscionable because Amanda was under duress when she signed it; and (3) whether the court made sufficient findings of fact to support its

conclusion that the Agreement is not unconscionable. We address each issue in turn below.

1. Facial Unconscionability

Amanda argues that the Agreement so inequitably distributes the marital assets as to be facially unconscionable. At the outset of our analysis of this issue, we note that a separation agreement is binding on the parties and "the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, . . . that the separation agreement is unconscionable." KRS 403.180(2). Because the statute mandates that the court consider the economic circumstances of the parties in determining conscionability, we look first to the economics of the Agreement. In doing so, we note that a discrepancy in the amounts received by each party under a settlement agreement, in and of itself, is not enough to render the agreement unconscionable. *Money v. Money*, 297 S.W.3d 69, 73 (Ky. App. 2009).

We agree with Amanda that the Agreement does not equally divide the marital assets. However, we also agree with Jackie that, under the Agreement Amanda has no liability for any marital debt, which is significant, and Jackie undertook liability for Amanda's expenses for one year as well as her car payments and insurance. While Amanda may not have obtained the "best deal" she could, we cannot say that the deal she made is so out of proportion on its face as to be unconscionable. However, unconscionability also involves issues that are not

purely economic, such as fraud, undue influence, and overreaching. We address those factors below.

2. Duress

Amanda argues that the Agreement is unconscionable because she was under duress when she signed it. Although she does not specifically state as much, we presume that Amanda believes that duress falls within the purview of undue influence or overreaching and we address it as such.

In her brief Amanda states that she testified that Jackie had physically abused her during her marriage, that she had obtained a domestic violence order against Jackie, and that she signed the Agreement because she "thought [she] had to" At the outset, we note that we could find no testimony from Amanda that Jackie physically abused her. In the portion of the record to which Amanda cites, she testified that she feared she would be "yelled at" if she did not sign the Agreement and that Jackie liked to discipline through intimidation. However, she did not state that Jackie had touched her or otherwise physically abused her.

As to the domestic violence order, it appears from what we have in the record that the allegations supporting that order concerned Jackie's actions after the Agreement had been signed. Therefore, those actions could not have had an impact on Amanda's mental state at the time she signed the Agreement.

Having eliminated the preceding two assertions by Amanda, we are left with her claim that she felt under duress because Jackie would "yell at her" and try to intimidate her. The family court, having reviewed all of the preceding,

concluded that Amanda was not under duress when she signed the Agreement.

Granting the court its due deference regarding findings of fact, we cannot say that its conclusion that Amanda was not under duress was clearly erroneous.

Therefore, we must concur with the family court's finding that Amanda was not under duress when she signed the Agreement.

3. Sufficiency of Findings of Fact

Amanda argues that the family court should have made findings of fact regarding the extent of the parties' marital and non-marital property, as well as their marital and non-marital debt before making a determination regarding the conscionability of the Agreement. While Amanda is correct that the family court did not make specific findings regarding the preceding, the court did note the terms of the Agreement and, based on the evidence presented to it, found that those terms were not unconscionable. Because the evidence supported the family court's ultimate finding, the court was not required to make the specific findings requested by Amanda.

Furthermore, we disagree with Amanda's argument that the evidence did not support the family court's specific finding that there was more than \$90,000.00 in marital debt. Jackie testified that he had a mortgage on the residence of approximately \$67,000 when the parties married. He also testified that, at the time the parties separated, the mortgage on the residence amounted to a little more than \$50,000.00. However, according to Jackie, that amount included both pre-marital debt and debt incurred after the marriage that had been consolidated with

the pre-marital debt. Therefore, Amanda's argument that the \$50,000.00 of debt attributable to the residence is entirely pre-marital is not supported by the evidence. If that amount is added to the \$18,183.29 secured by Jackie's truck, the \$29,790.06 attributable to the beauty salon, and the \$2,291.15 attributable to Amanda's car, the amount of marital debt exceeds \$90,000.00. Thus, the family court's finding is not clearly erroneous.

CONCLUSION

Because the family court's findings were supported by sufficient evidence that Amanda knowingly and voluntarily entered into the Agreement, we affirm its finding that she did so free of duress. Furthermore, while the Agreement may not have contained the most favorable terms Amanda could have obtained, its terms are not so one-sided as to be unconscionable. Finally, while the family court could have made findings regarding the exact amount of the parties' marital debt and property, we discern no error in its failure to do so. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

MaLenda S. Haynes
Grayson, Kentucky

BRIEF FOR APPELLEE:

John Preston Thompson
Grayson, Kentucky