

Cite as 2010 Ark. App. 858

**ARKANSAS COURT OF APPEALS**

DIVISION I

No. CA10-272

ELIZABETH TOOMBS

APPELLANT

V.

TODD TOOMBS

APPELLEE

**Opinion Delivered** DECEMBER 15, 2010APPEAL FROM THE BENTON  
COUNTY CIRCUIT COURT  
[NO. DR-2009-248-6]HONORABLE R. DOUGLAS  
SCHRANTZ, JUDGE

AFFIRMED

**RAYMOND R. ABRAMSON, Judge**

Todd and Elizabeth Toombs were married on January 6, 1987, and lived together as husband and wife until they separated in October 2008. Mr. Toombs remained in Arkansas and Mrs. Toombs returned to Arizona. On February 23, 2009, Mr. Toombs filed for divorce. In an email to Mrs. Toombs informing her that he had filed for divorce, Mr. Toombs provided her with an overview of his proposed division of assets and offered to pay alimony for four years. Mrs. Toombs answered the divorce complaint and counterclaimed for divorce on March 23, 2009. In her answer and counterclaim, Mrs. Toombs alleged that she was financially dependent upon Mr. Toombs and requested that he be ordered to pay alimony both during the pendency of the divorce proceedings and permanently.

The parties subsequently agreed to mediate their property-division and alimony disputes.

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The mediation was held on April 14, 2009, with attorney Scott Smith acting as the agreed-upon mediator. Both parties were represented by counsel at the mediation. After approximately seven hours of mediation, the parties reached an agreement as to the division of property and debts and as to the amount and duration of alimony. A divorce decree incorporating the mediation agreement was filed on April 17, 2009.

On July 16, 2009, Mrs. Toombs filed a motion to vacate the divorce decree and to set aside the mediation agreement pursuant to Rule 60(c) of the Arkansas Rules of Civil Procedure, claiming (1) that the mediation agreement was procured through coercion, undue influence, overreaching and duress perpetrated by Mr. Toombs and (2) that, given her longstanding mental and physical health issues and the emotional stress of the divorce, she was of unsound mind at the time of the mediation—facts not before the court at the time the divorce decree was entered.

After a hearing on the motion to vacate was held on November 17, 2009, the trial court denied the motion, finding that Mrs. Toombs had failed in her burden of proof. This appeal followed.

#### *Unsound Mind*

Mrs. Toombs first argues that the trial court erred in denying her motion to vacate or set aside her divorce decree and mediation agreement pursuant to Rule 60(c)(5) of the Arkansas Rules of Civil Procedure on the basis that she was of unsound mind at the time the mediation agreement was signed. The decision whether to grant or deny a motion to vacate or set aside a judgment under Rule 60 lies within the trial court's discretion and will not be reversed unless the

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trial court has abused that discretion. *See Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004).

Arkansas Rule of Civil Procedure 60(c) provides

The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c) ] has been rendered or order made shall have the power, after the expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order.

However, in order to vacate or modify a judgment or order under Rule 60(c), the lower court must determine that at least one of an enumerated list of circumstances exists. Ark. R. Civ. P. 60(c). Rule 60(c)(5) states that the court may vacate a judgment or order for “erroneous proceedings against an infant or person of unsound mind where the condition of such defendant does not appear in the record, nor the error in the proceedings.” Ark. R. Civ. P. 60(c)(5). The credibility of the witnesses who testify at a hearing held in connection with a motion to set aside a judgment is a matter for the trial court to determine. *Fazeli v. Barnes*, 47 Ark. App. 99, 101, 885 S.W.2d 908 (1994).

Mrs. Toombs claims that the testimony and medical records presented at the hearing on her motion to vacate clearly established that she was of unsound mind at the time of the mediation and that she did not understand the finality of her signature on the mediation agreement and divorce decree. However, there is a presumption of law that every person is sane, fully competent, and capable of understanding the nature and effect of her contracts. *Union Nat’l Bank of Little Rock v. Smith*, 240 Ark. 354, 400 S.W.2d 652 (1966); *Ashton Trust v. Caraway*, 2009 Ark. App. 806, --- S.W.3d ----. The burden of proving incompetency rested with appellant. *Id.*

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In its letter opinion, the circuit court recognized that Mrs. Toombs had presented evidence that she suffered from, and had sought treatment for, a variety of mental, emotional and physical ailments and that there was evidence that those conditions limited her ability to function at times. However, the circuit court determined that Mrs. Toombs had failed to meet her burden of proving that she was of unsound mind at the time she entered into the mediation agreement. In its letter opinion, the circuit court indicated that, while Mrs. Toombs's judgment may have been limited on occasion, she had the presence of mind to discuss the possibility of divorce and its impact on her with her various counselors; she had engaged in ongoing discussions concerning the divorce with Mr. Toombs prior to the mediation; and that the testimony adduced at the hearing revealed that the mediation agreement was the result of a very deliberative process. Such findings are supported by the record before us.

We also note that there was testimony presented at the hearing that Mrs. Toombs actively participated in the mediation and expressed her concerns regarding the amount and duration of alimony. While the parties may have initially utilized the figures contained in a spreadsheet prepared by Mr. Toombs, the spreadsheet was not adopted wholesale as the final property distribution. Rather, the parties made adjustments to the spreadsheet prior to the final agreement. Moreover, aside from Mrs. Toombs, all the witnesses who were present at the mediation testified that she never appeared unable to comprehend the nature of the mediation. Even her therapist testified that she could not state whether Mrs. Toombs was incompetent or incapable of making a decision at the time of the mediation.

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Giving due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded their testimony, the circuit court did not abuse its discretion in finding that Mrs. Toombs failed to prove that she was of unsound mind at the time she signed the mediation agreement and divorce decree.

*Coercion, Misrepresentation, and Undue Influence*

Finally, Mrs. Toombs contends that the mediation agreement was procured through coercion, undue influence, overreaching, and duress perpetrated by her ex-husband. She asserts that the evidence presented at the hearing clearly showed that Mr. Toombs was the dominant party in the relationship and had complete control over their finances. This, coupled with her physical and psychological struggles, resulted in her agreeing to a clearly inequitable and unfair disposition of marital assets.

Once one spouse has shown that a confidential relationship existed with the other, and that the other was the dominant party in the relationship, it is presumed that a transfer of property from the former to the latter was invalid due to coercion and undue influence. *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999). In such a case, the spouse to whom the property was transferred bears the burden of rebutting the presumption by producing evidence showing that the transfers of property were freely and voluntarily executed. *Dunn v. Dunn*, 255 Ark. 764, 503 S.W.2d 168 (1973); *see also Lyons v. Lyons*, 13 Ark. App. 63, 679 S.W.2d 811 (1984); *Chrestman v. Chrestman*, 4 Ark. App. 281, 630 S.W.2d 60 (1982); *Marshall v. Marshall*, 271 Ark. 116, 607 S.W.2d 90 (Ark. App. 1980).

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However, before the presumption of invalidity can be invoked, the transferring party must not only claim that the receiving party was the dominant one, but must also establish that that party occupied such a superior position of dominance or advantage as would imply a dominating influence sufficient to amount to duress, coercion, or undue influence; once this has been established, the presumption of involuntariness on the part of the transferring party is invoked, and the burden then shifts to the donee to prove that the transfers were voluntary. *Myrick, supra*. In other words, the simple existence of a dominant party in the relationship does not, in and of itself, invoke the presumption of invalidity; rather, the party claiming duress or coercion must establish further sufficient evidence to invoke the presumption, after which the burden to prove otherwise rests with the dominant party. *Id.*

In the instant case, there was conflicting testimony as to whether Mr. Toombs was so dominating as to have exerted any undue influence over Mrs. Toombs. While Mrs. Toombs and her daughter Angela Williams testified that Mr. Toombs was the dominant party in the relationship, her other daughter Allison Schaier disagreed with their characterization. Instead, Allison testified that her mother was the more demanding parent and her father liked to avoid conflict and would try to please her mother when conflicts arose. Mr. Thompson, the attorney for Mr. Toombs at the mediation, testified that he has to counsel some of his clients to be reasonable; but he was afraid that Mr. Toombs would be too generous. Even Melissa Peck, Mrs. Toombs's therapist who testified about her emotional and psychological problems, stated that she never saw Mr. Toombs act domineering or exert any undue influence over Mrs. Toombs

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during their sessions. Nor did he ever make threats to Mrs. Toombs or attempt to control her in Ms. Peck's presence.

Finally, the trial court reviewed the evidence and found that Mrs. Toombs had failed to show that the values assigned to the parties' assets were unreasonable or unfair and noted that, not only had Mrs. Toombs been given substantially more property than Mr. Toombs under the property settlement agreement, she also received alimony of \$3700 a month over the next seven years.<sup>1</sup> Based on these facts, the court found that Mrs. Toombs had failed in her burden of proving that she was subject to duress, threats, undue influence, or overreaching by Mr. Toombs or that she was treated unfairly or inequitably. This court gives due deference to the trial court's superior ability to determine the credibility of the witnesses and the weight to be accorded their testimony. *Dalrymple v. Dalrymple*, 74 Ark. App. 372, 47 S.W.3d 920 (2001) (citing *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000)). While Mrs. Toombs takes issue with the trial court's finding that the agreement was equitable, on the record before us we cannot find that the trial court's finding in this regard was clearly erroneous.

Based on the foregoing, we cannot find that the trial court abused its discretion in denying the motion to set aside or vacate.

Affirmed.

PITTMAN and GLADWIN, JJ., agree.

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<sup>1</sup> The trial court incorrectly noted in its letter ruling that the alimony was awarded for a period of eight years.