RENDERED: November 12, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002156-MR

WILLA SHERWIN — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. McNEILL, JUDGE
ACTION NO. 02-CI-00126

ROBERT SHERWIN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; MILLER, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Willa Sherwin has appealed from a decree of dissolution of the Mason Circuit Court entered on August 19, 2003. Having concluded that Willa's claim that the decree of dissolution did not accurately reflect the terms of the parties' property settlement agreement was not preserved for appellate review, and that any error the trial court may have committed by

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

not conducting a hearing regarding Willa's motion to alter, amend, or vacate was harmless, we affirm.

The relevant facts of this case are simple and not in dispute. Willa and Robert Sherwin were married in Washington, Mason County, Kentucky on August 15, 1992.[2] On April 11, 2002, Willa filed a petition for dissolution of marriage in the Mason Circuit Court. In her petition, Willa requested the trial court to award her temporary and permanent spousal maintenance, to assign all non-marital property to the appropriate party, and to divide the marital property and debt "in just and fair proportions."

On January 7, 2003, after various motions were filed by both parties, the trial court entered an order scheduling a final hearing date for March 20, 2003. The order stated that the purpose of this hearing would be "to determine the matters of marital debts, division of marital property, assignment of non-marital property and assignment of spousal property[.]"

On the day of the scheduled hearing, Willa and Robert, along with their respective attorneys, spent several hours negotiating various issues related to the couple's divorce proceedings. After purportedly reaching an agreement, the attorneys appeared in open court with Willa and Robert and

[2] At the time of their marriage, Willa was 46 and Robert was 59 years of age. This marriage produced no children.

orally recited various terms of the agreement into the record. The attorneys indicated that Willa and Robert had agreed to the following: (1) an itemized division of personal property; (2) a sale of the marital home with the proceeds to be divided equally; and (3) an obligation by Robert to pay Willa $300.00 per month for 48 months in spousal maintenance. At that hearing, Willa testified that the parties had in fact agreed to such terms and that the terms were fair and equitable to both parties. At the conclusion of the hearing, counsel for Willa agreed to reduce the terms of the agreement to writing and to submit a copy to the trial court at a later date.

At some point following this hearing, Willa apparently became dissatisfied with the terms of the agreement, fired her attorney, and refused to submit a written agreement to the trial court. On August 6, 2003, Robert filed a motion requesting the trial court to enter findings of fact, conclusions of law, and a decree of dissolution conforming to the terms of the parties' property settlement agreement. Robert attached proposed findings of fact and conclusions of law to his motion. Importantly, no response was filed to this motion. On August 19, 2003, the trial court granted Robert's motion and entered a decree of dissolution. Among other things, the decree contained an itemized division of the couple's personal property, a

provision outlining Robert's spousal maintenance obligation,[3] and a provision requiring the sale of the marital home.[4]

On August 20, 2003, Willa filed a motion to alter, amend, or vacate the decree of dissolution. As grounds for her motion, Willa stated (1) that the parties' property settlement agreement was unenforceable since it had not been reduced to writing; (2) that the terms of the agreement were unconscionable; and (3) that she had not voluntarily agreed to the agreement as read into the record. On September 19, 2003, the trial court entered an order denying Willa's motion to alter, amend, or vacate after determining that the terms of the property settlement agreement were "not unconscionable." This appeal followed.

Willa raises two primary arguments on appeal. She first claims that the decree of dissolution entered by the trial court does not accurately reflect the terms of the property settlement agreement reached by the parties during the negotiations held prior to the March 20, 2003, hearing. However, we decline to reach the merits of this argument since Willa has not preserved this issue for appellate review.

[3] The provision stated that Robert "shall pay to [Willa] $300.00 per month for 48 months as maintenance beginning upon entry of the [f]inal [d]ecree."

[4] This provision stated that the home would first be listed with a realtor, but that if the property did not sell, a reserved auction would be conducted "at an agreed upon price."

As Robert points out in his brief, Willa has failed to comply with CR[5] 76.12(4)(c)(iv), which requires "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Furthermore, our review of the record shows that this issue, i.e., whether the terms in the trial court's decree of dissolution conformed to the terms of the parties' property settlement agreement, was never raised before the trial court. In her motion to alter, amend, or vacate, Willa merely argued (1) that the parties' property settlement agreement was unenforceable since it had not been reduced to writing;[6] (2) that the terms in the decree of dissolution were unconscionable; and (3) that she had not voluntarily agree to the agreement as read into the record. Accordingly, since Willa failed to raise this claim of error before the trial court, we decline to discuss it for the first time on appeal.[7]

[5] Kentucky Rules of Civil Procedure.

[6] For a discussion regarding how an oral property settlement agreement may satisfy the writing requirement of Kentucky Revised Statutes (KRS) 403.180, see Calloway v. Calloway, Ky.App., 707 S.W.2d 789, 791 (1986) (stating that "we fail to perceive that an oral agreement dictated to a court reporter, which is then subsequently transcribed and made a part of the clerk's record, does not satisfy the requirement of KRS 403.180 that the agreement be 'written'").

[7] See Abuzant v. Shelter Insurance Co., Ky.App., 977 S.W.2d 259, 262 (1998) (stating that certain issues would not be discussed for the first time on appeal "because the trial judge did not rule on these matters and the [appellants] made no request for specific findings on them").

Finally, Willa claims that the trial court clearly erred by determining that the parties' property settlement agreement was not unconscionable. As a basis for this argument, Willa contends that the trial court "failed to have a hearing or to permit [her] to put on any evidence as to the issue of fundamental fairness." Initially, we note that it is not clear from the record on appeal whether the trial court conducted a hearing regarding Willa's motion to alter, amend, or vacate.[8] Regardless, the appellant is required to ensure that the necessary record is provided on appeal.[9] In the case of a silent record, the appellate court must assume that the record below supported the trial court's ruling.[10] Furthermore, we hold that any error the trial court may have committed by not conducting a hearing was harmless.[11]

First, Willa has failed to point to any evidence whatsoever, in either her motion to alter, amend, or vacate, or in her brief to this Court, in support of her argument that the terms of the parties' property settlement agreement were unconscionable. Moreover, our review of the trial court's order

[8] In his brief to this Court, Robert stated that Willa "did not designate the hearing of this motion to be included in the record on appeal," which indicates that a hearing may have been conducted.

[9] Ventors v. Watts, Ky.App., 686 S.W.2d 833, 835 (1985).

[10] Id.

[11] In her brief, Willa has cited no authority indicating that she was entitled to a hearing under the circumstances.

denying Willa's motion to alter, amend, or vacate shows that the trial judge conducted a thorough review of the decree of dissolution, the terms of the property settlement agreement contained therein, and of the proceedings leading up to the entry of the decree. Simply stated, we cannot conclude the trial court clearly erred in determining that the terms of the property settlement agreement were not unconscionable.[12] The written terms of the decree, coupled with the statements that were read into the record on March 20, 2003, shows that the parties agreed to an itemized and equitable division of real and personal property, and to a reasonable amount of spousal maintenance. Indeed, Willa specifically testified at the March 20, 2003, hearing that the terms of the agreement were fair and equitable to both parties. Accordingly, without some basis for a claim of fraud or coercion, any error the trial court may have committed by not conducting a hearing regarding Willa's motion to alter, amend, or vacate was harmless.[13]

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[12] See Peterson v. Peterson, Ky., 583 S.W.2d 707, 712 (1979) (subjecting a trial court's determination regarding the conscionability of a property settlement agreement to the "clearly erroneous" standard of review).

[13] See CR 61.01 (providing that "[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). See also Davidson v. Moore, Ky., 340 S.W.2d 227, 229 - (1960)(stating that an appellate court "will not reverse or modify a judgment

Based on the foregoing reasons, the decree of dissolution of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Kathryn B. Hendrickson Maysville, Kentucky	Dale L. Horner, Jr. Maysville, Kentucky

except for error which prejudices the substantial rights of the complaining party").