

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001591-MR

SAJIDA ZUBI SHAHZAD

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANOR M. GARBER, JUDGE
ACTION NO. 10-CI-500969

MOHAMMAD F. SHAHZAD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

COMBS, JUDGE: Sajida “Zubi” Shahzad appeals from that part of the Jefferson Family Court’s decree dissolving her marriage to Mohammad F. Shahzad which incorporated by reference the parties’ written separation agreement. After our review, we affirm.

Zubi and Mohammad were married in April 1996; Zubi filed for divorce in March 2010. Three children were born of the marriage, and the couple amassed a

substantial marital estate. Each of the parties has a medical decree. The divorce proceedings were highly emotional and contentious.

On August 6, 2012, following a protracted negotiation session, Zubi and Mohammad executed a separation agreement that addressed all issues related to the distribution of their real property, personal property, and debts. The agreement also provided for the payment of child support, health insurance premiums, and school fees for their three minor children. Each party was represented by separate counsel throughout the negotiation session. The parties' parenting coordinator acted as mediator.

The decree of dissolution, which was entered on August 22, 2012, recited that the terms of the separation agreement were fair and reasonable, and it incorporated the terms of the agreement by reference.

On August 23, 2012, Zubi, *pro se*, filed a motion. In her motion, Zubi contended that she had been deceived with respect to the terms of the agreement; that she had been intimidated and harassed by the mediator; and that she had executed the separation agreement under duress. She also alleged that her former attorney had submitted the agreement to the court without her knowledge. In an affidavit submitted with her motion, Zubi indicated that she had been made aware that the court's final decree had been entered by the clerk.

On September 7, 2012, Zubi filed a motion through a newly hired attorney in which she requested the court to reject the terms of the parties' separation agreement as unconscionable. The parties agree that the separate motions were

summarily denied by the court without an evidentiary hearing on September 10, 2012. However, no written order appears of record. This appeal of the final decree followed.

On appeal, Zubi argues that the parties' separation agreement should not be enforced. She contends that the family court erred by concluding that it was bound by the agreement since the terms of the agreement are unconscionable. She also contends that the family court should have treated her *pro se*, post-decree motion as a motion to vacate pursuant to the provisions of Kentucky Rule(s) of Civil Procedure 59.05.

The Commonwealth actively encourages the amicable resolution of divorce actions through the use of separation agreements. *See Shraberg v. Shraberg*, 939 S.W.2d 330 (Ky. 1997). However, such agreements are subject to close judicial scrutiny and are never enforced if they were procured by fraud, bad faith, or material misrepresentation. Pursuant to statute, the agreements must be carefully examined for fairness. With respect to such agreements, Kentucky Revised Statute[s] (KRS) 403.180 provides that the agreement's terms:

except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

In *McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky.App. 1983), we held that "a separation agreement is unconscionable and must be set aside if the court

determines that it is manifestly unfair and unreasonable.” A finding of unconscionability under the provisions of KRS 403.180 does not require proof of fraud, duress, undue influence, or coercion. These are entirely different grounds for concluding that the parties’ agreement must be rejected. Instead, the court is required to scrutinize the agreement for fundamental fairness.

The family court was in the best position to assess the fairness of the agreement. The family court was able to review the economic circumstances of these parties (and any other relevant circumstance). It concluded that it was bound by the terms of their separation agreement and accordingly entered its final decree incorporating the agreement. It was not required to make independent findings of fact concerning the agreement unless an allegation was made or some proof was presented that it was unconscionable. Because no issue of unconscionability was raised, the trial court did not err in incorporating the separation agreement in its entirety into the final decree of dissolution.

Zubi also asks us to review her post-decree motions to alter, amend, or vacate that portion of the decree incorporating the separation agreement. However, we are unable to do so for several reasons. Zubi’s notice of appeal does not identify a specific ruling on her post-decree motions for our review. As noted above, the family court’s ruling on Zubi’s post-decree motions was never reduced to writing. The provisions of Kentucky Rule[s] of Civil Procedure (CR) 58(1) require that any order be signed by the judge before its entry in the docket by the clerk. No order may be entered by the clerk until it is signed. Therefore, it is

axiomatic that the order appealed must have been reduced to writing. There simply is no order from which an appeal can be taken.

Nor does Zubi's prehearing statement identify this issue for her appeal. The provisions of CR 76.03(4)(h) require the appellant to prepare a brief statement of the facts and issues proposed to be raised on appeal. A party is limited on appeal to issues identified in the prehearing statement "except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." CR 76.03(8). Zubi did not identify the ruling on her post-decree motions or their substantive contents as an issue for appeal in her prehearing statement.

Finally, although the family court made no findings of fact with respect to the issues that Zubi raised post-decree, these were issues that were within its province and fell within the ambit of its broad discretion. *Shraberg, supra*. The issues she presented were inherently fact sensitive. Nevertheless, Zubi failed to request that this matter be remanded to the family court for specific findings of fact as required by the provisions of CR 52. As an appellate court, we are not at liberty to weigh the evidence independently and decide factual matters *de novo*. Under these circumstances, we cannot conduct any meaningful review of the denial of the post-decree motions.

The order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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