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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000587-MR

KAREN KESTEL APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE JEFF MOSS, JUDGE
ACTION NO. 15-CI-00167

SHAWN KESTEL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT, AND J. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Karen Kestel ("Karen") appeals the decree entered by the Jessamine Family Court which dissolved her marriage to her husband, Shawn Kestel ("Shawn"). Though Karen and Shawn reached an agreement during their hearing which was read into the record, Karen alleges a host of errors and seeks

reversal of the trial court. Having carefully reviewed the record, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL HISTORY

Karen and Shawn divorced in 2016 after fourteen years of marriage. They had one child together. Karen had been gainfully employed during most of the marriage, but at the time of the hearing she was unemployed and receiving disability benefits. At all relevant times Shawn was employed by Lexmark. The couple separated one year prior to the entry of the decree, when Karen moved to North Carolina with a paramour. Karen later took their child to North Carolina and refused to return her to Kentucky, forcing Shawn to litigate custody in North Carolina. This interstate custody battle resulted in the entry of a temporary order by a North Carolina court granting Shawn sole custody of the child.

Later, the Jessamine Family Court conducted a lengthy hearing which was intended to address both marital property issues and child custody. Though Karen had been represented earlier in the Kentucky litigation, she was not represented at the time of the final hearing. During the hearing, prior to the close of Shawn's case-in-chief, the parties took a recess to negotiate a settlement. Following the negotiations, the parties reported to the court that they had reached an agreement. The agreement was read into the record by Shawn's counsel when

the recorded proceedings resumed. After the agreement was read into the record by Shawn's attorney, the following exchange took place:

> COURT: That's the offer. Do you understand the offer—
>
> KAREN: Just to get it over with, yes.
>
> COURT: …or have any questions with the offer, ma'am? Let me—just a second. Do you have any questions at all with regard to the offer?
>
> KAREN: No.
>
> COURT: Okay. Are you willing to accept the offer as dictated into the record by [Shawn's counsel]?
>
> KAREN: Yes.
>
> COURT: Okay. Now, let me make sure you understand a couple of things with regard to this agreement. Okay? [Shawn's counsel] will draft a document that will have a number of things, including the basic findings of facts that are required for the dissolution of the marriage. He will submit that document to the parties. [Shawn's counsel], I assume would be in the normal course of dealing. Okay?
>
> SHAWN'S COUNSEL: Sure.
>
> COURT: After that is submitted and contains your signature and [the child's guardian *ad litem*]'s signature, it will be forwarded to me and I will sign and enter the decree at that point. At that point, once the decree is signed, you're officially divorced.
>
> KAREN: Okay.

COURT: I am showing this, for the record, as a divorce by agreement, understanding we had a contested hearing for a while, but if you tell me now that you take this deal, then the deal is a final agreement. There are no appeals from this agreement, there are no appeals from any prior decisions of the court that you may disagree with. This is a one-time final agreement. Okay? Do you understand that?

KAREN: Yes.

COURT: And do you have any questions or concerns regarding that?

KAREN: I do have a small concern…

[The parties then discuss and resolve the issue of grandparent visitation with the court.]

COURT: Okay. All right. Now, ma'am, any other questions, concerns?

KAREN: No.

COURT: Okay. Are you willing to enter in—are you in agreement, then, that the agreement is you're willing to accept the agreement as read into the record by [Shawn's counsel]?

KAREN: Yes.

[…]

COURT: But at this point, from this point forward, going backwards from today backwards, nothing that had happened that you may have disagreed with can be appealed—

KAREN: I understand.

COURT: …if you enter into this agreement. And you understand that?

KAREN: Yes.

COURT: And you're willing to enter into this agreement with that understanding?

KAREN: Yes.

Later Shawn's counsel tendered the proposed order, along with a transcript of the portion of the hearing wherein the agreement was read into the record, and Karen accepted it. The trial court, finding the proposed pleading consistent with the agreement reached in open court, signed and entered the proposed order and decree. Among the findings of fact was that the agreement was not unconscionable as required by KRS 403.180.[1]

The trial court divided the couple's assets according to the terms of the agreement. Shawn received the following marital assets: the marital residence at 202 Weil Lane in Nicholasville (assuming sole responsibility for the two mortgages encumbering it); a 1997 Chevrolet truck; a 2006 Mazda automobile; the entirety of his pension and 401(k) accounts; and an equal share of the marital

[1] Kentucky Revised Statutes 403.180(2): "In a proceeding for dissolution of marriage . . . the terms of the separation agreement, 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 . . . that the separation agreement is unconscionable."

chattel. He also received the following non-marital property: a residence located at 300 Lake Street in Nicholasville; a 1975 Harley-Davidson motorcycle; and numerous items of personalty. Shawn also assumed all marital debts, including the mortgages, totaling over $13,000. In lieu of child support from Karen, Shawn agreed to seek only the disability benefit checks he was already receiving for their child. The approximate total net value of the marital property awarded to Shawn was $34,071.

Karen received the following marital assets: the BB&T bank accounts; their 2010 Toyota Venza automobile; and an equal share of the marital chattel. She also received the following non-marital property: a Ruger handgun, and a list of numerous items of household chattel. The trial court also ordered Karen to satisfy a judgment lien encumbering the marital residence which was personal to her. The approximate total net value of the marital assets awarded to Karen was $40,352. The trial court further ordered Karen to pay half of Shawn's attorney fees in the amount of $5,712.64. This was imposed as a sanction for non-compliance with prehearing disclosures, and for forcing Shawn to file an interstate custody action following her attempt to abscond to North Carolina with their child.

Following the entry of the decree and order, Karen moved to set it aside. She argued that the division of property according to the agreement was

manifestly unfair or unreasonable under the circumstances and was therefore unconscionable. The trial court denied the motion. This appeal followed.

Karen asserts four arguments on appeal. First, the trial court abused its discretion by excluding her witnesses from testifying at the hearing. Second, the trial court denied her due process by excluding her evidence, restricting her time at trial, and denying her request for a hearing. Third, the trial court erred in finding that an agreement between the parties existed. Finally, the trial court abused its discretion in denying her motion to set aside the allegedly unconscionable agreement.

Additional facts are discussed below as necessary.

II. ANALYSIS

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING KAREN'S WITNESSES FROM TESTIFYING AT THE HEARING

Evidentiary rulings by the trial courts are reviewed for abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). A trial court has the right to impose reasonable time limits on a trial, and that as long as those limits are reasonable, they should not be disturbed. *Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky. App. 1990) (citing *U.S. v. Reaves*, 636 F.Supp 1575, 1578 (E.D.Ky. 1986)).

In this case, the trial court initially set the deadline for pre-hearing witness disclosures for December 28, 2015. At Karen's request the trial court later extended that deadline to January 4, 2016. Shawn provided his disclosures to Karen on that date. Karen, on the other hand, failed to provide her disclosures to Shawn. Instead, on January 6, 2016, she moved to continue the hearing. The trial court denied that motion and ordered Karen to immediately provide the disclosures. It also ordered her to immediately respond to Shawn's outstanding requests for written discovery which were served in November of 2015. The record indicates that she only provided the names of the witnesses she intended to call. The record is devoid of any indication she ever responded to the other discovery requests. Karen's witness disclosure was deficient under CR 93.04[2] because it only included her witnesses' names, without any contact information or indication of the nature of their testimony.

On the morning of the hearing, Shawn filed a motion to suppress, seeking to exclude the entirety of Karen's evidence. The trial court granted the motion in part and denied it in part. It precluded Karen's proposed witnesses from

[2] Kentucky Rules of Civil Procedure 93.04(1)(a): "(1) Not later than ten (10) days prior to the pretrial conference each party shall disclose the following material to all other parties with a copy to the court: (a) Name, address and telephone number of any witness whom the party may call at trial together with a copy of any statement of such person or if there is not such statement, a summary of the testimony the person is expected to give."

testifying, but it allowed Karen to testify and introduce documentary evidence. Karen argues on appeal that this ruling was an abuse of the trial court's discretion.

An examination of the facts reveals that the trial court's order excluding Karen's witnesses had no appreciable practical effect in this case. The trial court recessed prior to Shawn having rested his case to allow the parties to attempt to settle. The parties then agreed to a settlement that the court properly accepted and entered. Karen willingly entered into that agreement in lieu of offering evidence of her own.

Further, we cannot conclude that the trial court abused its discretion in excluding Karen's witnesses. Though the ruling came as the result of Shawn's motion to suppress it, it is by its actual effect, a discovery sanction.

> It is, of course, within a trial court's discretion to impose sanctions, even severe ones, against a party for failing to comply with discovery orders…A trial court "has broad discretion in addressing a violation of its order[s]" regarding discovery, and this Court reviews the trial court's determination of the appropriate sanction for abuse of that discretion and this Court reviews the trial court's determination of the appropriate sanction for abuse of that discretion.

Turner v. Andrew, 413 S.W.3d 272, 279 (Ky. 2013) (quoting *Wilson v. Commonwealth*, 381 S.W.3d 180, 191 (Ky. 2012)).

The trial court's ruling was a sanction for Karen's violation of three of its orders: the discovery order and two separate orders to provide witness

disclosures in a timely manner. Karen was on notice of the critical need to provide requested discovery and witness disclosures. Thus, there was no abuse of discretion by the court in excluding her witnesses as a sanction for failing to do so.

B. APPELLANT'S DUE PROCESS CLAIM IS NOT REVIEWABLE AS IT IS NOT PRESERVED AND NOT CONTAINED IN THE PREHEARING STATEMENT

Karen raises three alleged due process violations for the first time in her brief to this court: (1) the trial court disallowed her witnesses at trial; (2) the trial court restricted her time to present evidence at trial; and (3) the trial court denied an evidentiary hearing after trial.

"We are a court of review. As such, when an issue has not been presented to the trial court, or a ruling on a specific issue has not been requested, we lack authority to review the claim." *J.K. v. N.J.A.*, 397 S.W.3d 916, 919 (Ky. App. 2013) (*see also Fischer v. Fischer*, 197 S.W.3d 98, 102 (Ky. 2006)).

In this case, Karen had three separate opportunities to preserve her due process arguments for appeal: in her first motion in the trial court to oppose the entry of the Decree; in her motion to alter, amend, or vacate and make additional findings following entry of the Decree; and in her Prehearing Statement

filed with this court in accordance with CR 76.03(4)(h).[3] She failed to raise her due process arguments in any of these documents. Therefore, her due process arguments are not properly preserved on appeal and we are without authority to review them.

We disagree with Karen's contention that this court has authority to review her due process arguments as palpable error under CR 61.02.[4] To support this argument she claims she was not afforded a reasonable opportunity to be heard at trial because the court indicated it needed to end the proceedings at 3 p.m. that day, and her motion to set aside the agreement was denied. However, because the proceedings ended with negotiations followed by a settlement agreement, this argument is unfounded. It is also significant that Karen could have requested to continue her own testimony on an additional day should there have been a need to go past the 3 p.m. deadline she claims the Judge imposed on the parties.

C. THE TRIAL COURT PROPERLY FOUND THAT AN AGREEMENT BETWEEN THE PARTIES EXISTED

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[3] CR 76.03(4)(h): "(4) Within twenty days after filing the notice of appeal or notice of cross-appeal in the circuit court, each appellant and cross-appellant shall file with the Clerk of the Court of Appeals . . . a prehearing statement . . . setting forth the following information: (h) A brief statement of the facts and issues proposed to be raised on appeal . . . ."

[4] CR 61.02: "A palpable error which affects the substantial rights of a party may be considered…by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

As discussed above, during the hearing the court allowed a recess for the parties to negotiate a settlement. Following the recess, the parties informed the court that they reached an agreement. After a colloquy in open court, Karen unequivocally accepted the offer, as the language quoted above reflects.

Karen argues that the appropriate law to address this issue is *Jackson v. Jackson*, 734 S.W.2d 498 (Ky. App. 1987). In *Jackson* after the divorce proceedings began the parties, Jo Ellen Jackson ("Jo Ellen") and James Jackson ("James"), began settlement conferences. *Id.* They came to a tentative agreement, which was dictated into the record during one of the hearings. *Id.* After a dispute arose, Jo Ellen tendered her own version of the agreement, which James refused to sign. *Id.* The trial court adopted the findings of fact contained in the proposed order submitted by Jo Ellen. *Id.* This Court reversed, holding that it was error for the trial court to have adopted the proposed findings of fact when the hearing was incomplete:

> Findings of fact presuppose a trial. A trial presupposes testimony heard under oath . . . . In the instant case, the circuit court made no findings of fact on its own and the case was not "tried," it was a proposed settlement . . . . There was no settlement because KRS 403.180 states that "parties to a marriage . . . may enter into a *written* settlement agreement." (Emphasis added.) [James] refused to sign the agreement; therefore, there was no written agreement herein.

Id.

In contrast, Shawn contends that the lack of a written agreement in the record was cured by the submission of the transcript to the trial court. To that end, he cites *Calloway v. Calloway*, 707 S.W.2d 789 (Ky. App. 1986). In *Calloway* the parties, Ruby Calloway ("Ruby") and Gerry Calloway ("Gerry") reached a settlement agreement regarding the contested issues involved in their divorce. *Id.* at 790. The agreement was read into the record by Gerry's attorney. *Id*. After the agreement was read into the record the court asked both parties if they agreed to the terms of the settlement. *Id*. Both parties agreed. *Id*. Thereafter, the oral agreement was reduced to a writing that Ruby refused to sign. *Id*. The trial court held that the oral agreement was enforceable, and the parties were bound by it. *Id*. On appeal Ruby argued that the settlement violated KRS 403.180[5] because it was not "written." *Id.* This Court disagreed and held that an oral agreement which had been dictated under oath to a court reporter, transcribed, and submitted to the trial court as part of the record, satisfied the statutory requirement for a written agreement. *Id*. at 791-92.

We find that *Calloway* is the applicable law in this case. The parties negotiated a settlement. Shawn's attorney subsequently dictated the agreement to

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[5] KRS 403.180: "(1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children."

the court reporter under oath and submitted the transcription to the court as part of the record. Further, during the colloquy that followed, Karen stated that she understood and agreed to the terms of the agreement. We therefore conclude that the trial court properly found that a written agreement existed.

D. THE TRIAL COURT DID NOT ERR IN FINDING THE AGREEMENT CONSCIONABLE

A reviewing court may set aside a settlement agreement if the agreement is manifestly unfair or unreasonable. *McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky. App. 1983) (citing *Wilhoit v. Wilhoit*, 506 S.W.2d 511 (Ky. 1974)). The doctrine of unconscionability is "directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences *per se* of uneven bargaining power or even a simple old-fashioned bad bargain." *Schnuerle v. Insight Comm. Co., L.P.*, 376 S.W.3d 561, 575 (Ky. 2012) (citing *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335 (Ky. App. 2001)).

Karen argues that this settlement agreement is unconscionable because it awards nearly all the marital property to Shawn despite the disparity in their incomes, severely limits her visitation with the parties' child, and awards Shawn attorney fees.

Regarding the division of property, the record shows that the net value of the assets awarded to Shawn is less than the net value of the assets awarded to Karen.

In addition, Shawn agreed to assume the entirety of the parties' marital debts. As this Court stated in *Smith v. Smith*, "a trial court is not obligated to divide marital property equally. Rather, a trial court need only divide the marital property 'in just proportions.'" 235 S.W.3d 1, 6 (Ky. App. 2006). In this case, Karen was awarded more of the martial assets, and Shawn assumed all the marital debt. Thus, there is no basis for a finding of unconscionability.

Regarding visitation rights it is noteworthy that the child's guardian *ad litem* took part in the settlement negotiations, and the terms of the agreement are consistent with the guardian's recommendations. The child will attend school in Kentucky, and the nine-hour travel time to Karen's home in North Carolina makes weekend visitation during the school year unfeasible. Further, Karen's past attempt to abscond with the child to North Carolina gave the trial court good cause to limit visitation. Finally, the trial court incorporated a restriction—requested by Karen—that Shawn's parents will have no unsupervised or overnight visitation. This certainly reflects the give-and-take inherent to negotiated settlements.

Finally, regarding the award of attorney fees to Shawn, we can find no abuse of discretion. The Kentucky Supreme Court has held that there is no abuse of discretion in ordering a party to bear the expenses of another party when that party's actions caused the expenditure. *Gentry v Gentry*, 798 S.W.2d 928, 938 (1990). Shawn offered proof at the hearing that he had incurred over $11,000 in

attorney fees directly due to Karen's actions. First, he was forced to file an interstate custody action in North Carolina when Karen wrongfully refused to bring the child back to Kentucky. Then, he had to file multiple motions and attend multiple hearings because of Karen's failure to make timely disclosures or provide responses to written discovery requests. The trial court did not abuse its discretion in ordering Karen to pay only half of Shawn's resulting attorney fees.

III. CONCLUSION

Having carefully reviewed the record, we conclude that the trial court committed no error in excluding Karen's witnesses, finding the agreement to exist, and finding the agreement to be enforceable. Therefore, we affirm the Jessamine County Family Court's ruling.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Charles Douglas Brown, Jr. Louisville, Kentucky	Bruce E. Smith Nicholasville, Kentucky