

2013 IL App (2d) 130152-U
Nos. 2-13-0152 & 2-13-0434 cons.
Order filed December 3, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
HARVEY FRASER,)	of Lake County.
)	
Petitioner-Appellee,)	
)	
and)	Nos. 10-D-1478
)	10-D-1497
)	
)	Honorable
CAROL L. FRASER,)	David P. Brodsky and
)	Charles D. Johnson,
Respondent-Appellant.)	Judges, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* This court has jurisdiction to review the trial court's denial of the wife's motion to vacate the parties' marital settlement agreement on the ground of unconscionability. The court did not err in denying the wife's motion to vacate. Additionally, the court did not err in awarding \$1,700 in attorney fees to the husband. However, the court erred in failing to adjudicate the distribution of personal property, and we remand for the resolution of that issue. Affirmed in part, vacated in part, and remanded.

¶ 2 On May 24, 2012, the trial court dissolved the marriage of Harvey and Carol Fraser, incorporating into its judgment the parties' marital settlement agreement. The agreement provided

that the parties had 30 days to resolve the personal property, or, upon petition, the court would adjudicate the matter. The parties could not agree and sought to have the matter adjudicated. During the inventory period, the trial court found Carol to have denied Harvey access to the personal property in the safe, and, therefore, awarded Harvey \$1,700 in attorney fees incurred in obtaining the relevant enforcement order. Later, at the hearing on personal property distribution, the court found that Carol did not exchange with Harvey a list of her desired items in a timely manner or in the proper format. Therefore, the court simply awarded Harvey everything on his list without taking any evidence. Carol appeals, arguing that the court erred in: (1) denying her motion to vacate the marital settlement agreement on the ground that it was unconscionable; (2) awarding Harvey \$1,700 in attorney fees; and (3) failing to make any sort of evidence-based determinations in distributing the personal property. Additionally, the parties dispute this court's jurisdiction to hear the first issue. For the reasons that follow, we conclude that we do have jurisdiction to consider the trial court's denial of the motion to vacate the agreement. We affirm the court's rulings on the first two issues and reverse and remand on the third issue.

¶ 3

I. BACKGROUND

¶ 4 Harvey and Carol Fraser married in September 1987. They had two children, Christopher (born in 1990) and Gregory (born in 1994). They moved from Canada to the Chicago area (Lake Forest), where Harvey worked for Bank of Montreal-Harris and Carol stayed at home with the children. The parties' marital estate grew to be worth over \$7 million. Harvey retired in his fifties. Then, in August 2010, Harvey petitioned for divorce, citing irreconcilable differences.

¶ 5 Following two years of contentious proceedings, the case was set to go to trial on May 22 through May 24, 2012. In the preceding months, the parties engaged in settlement negotiations.

According to Carol's counsel, Carlton Marcyan of Schiller, DuCanto & Fleck, Carol participated in and provided feedback on the negotiations. The trial court, Judge David Brodsky, also participated in the negotiation proceedings, indicating that it would recommend a 50/50 split of the estate.

¶ 6 On May 23, 2012, Marcyan provided Carol with a 27-page draft of a settlement agreement, representing the sum of the past months of negotiations. Marcyan advised Carol to sign the agreement, informing her that it was fair and that it would save her the expenses of trial. Marcyan knew Carol had already incurred approximately \$176,000 in fees with his firm,¹ and that she had incurred additional fees with three prior firms. On May 24, 2012, Marcyan presented Carol with a finalized version of the agreement, which she signed.

¶ 7 The agreement split the marital estate 52/48 in favor of Carol, leaving Carol with \$280,000 more than Harvey. The two provisions at the crux of this appeal concern the \$1.6 million marital residence in Lake Forest and the maintenance arrangement. Also relevant is the provision that the parties split the children's college expenses. The agreement reserved the issue of personal property.

¶ 8 As to the marital residence, the agreement provided that the outstanding real estate taxes would be split 50/50. Harvey agreed to convey by quitclaim deed "all his right, title[,] and interest in said property to [Carol]." As will become an issue on appeal, Carol agreed to refinance the existing mortgage in her name, remove Harvey's name from the existing mortgage, or pay off the existing mortgage within 30 months following the judgment's entry. From the date of judgment forward, Carol would be responsible for the \$1 million mortgage and other expenses associated with

¹ The \$176,000 in fees from Schiller, DuCanto & Fleck are the subject of a separate appeal before this court (No. 2-13-0509).

home ownership. If Carol failed to make the payments, she would pay the mortgage in full. Carol agreed to “buy out” Harvey’s interest in the residence, which amounted to \$244,224:

“Within 180 days of the entry of the [judgment], [Carol] shall pay [Harvey] a cash payment of \$244,224[,] representing [Harvey’s] agreed upon 48% interest in said property *as if the property had been sold*. Said buyout figure is calculated as follows:

Agreed House Value	\$1,640,000
Less[] Broker’s Commission (5%)	[-] \$82,000
Less[] Closing Costs []	[-] \$49,200

Less[] Mortgage	[-] \$1,000,000
Net Sale Proceeds	\$508,800
Husband’s 48% Interest	\$244,224” (Emphasis added.)

¶ 9 As to maintenance, the agreement stated in part:

“The Husband’s obligation to pay the Wife is hereby reserved for a period of [five] years ***, subject to ***:

- a. The Husband must have earned gross income from employment of \$60,000 or more in a given calendar year before the issue of maintenance can be presented to the [c]ourt;
- b. Notwithstanding how said income may be reported for income tax purposes, an award of maintenance in such an instance shall only be based on the Husband’s earned income from employment and services ***. This income shall specifically exclude any and all [investment income].”

By excluding investment income, paragraph (b) of the maintenance provision excluded Harvey's non-marital, Canadian oil royalties. Marcyan had retained an expert to determine the approximate value of the royalties, and, although an exact number was not presented to the trial court at the proveup on the settlement, the parties agreed at that time that it was relatively minimal. Harvey waived maintenance from Carol.

¶ 10 On May 24, 2012, the trial court conducted the proveup on the settlement. Carol testified regarding her reasons for entering into the agreement:

“MARCYAN: I have advised you that, *** [going] to trial, *** taking into account not only the ultimate distribution, but the amount of attorneys' fees and costs and time involved to get to a conclusion after trial, would yield you a result that would be less substantially than you're achieving here today ***; is that correct?

CAROL: Yes.”

Carol also testified as to her doubts about divorce in general:

“CAROL: *My problem is not about the money.* My problem is, when you take an oath of marriage, you are making a civil oath and then you are making an oath before your God—

CAROL: [A]nd I do not believe in divorce.

CAROL: [A]nd that *I'm being dragged through this against my will because I don't believe that you can possibly make an oath like that and then have children, have a family, and say, 'Oh, I changed my mind.'* It's not—

MARCYAN: Okay. [Carol], you realize that there is a biblical reference, render to Caesar what is Caesar's, and render to God what is God's. Do you recall that? And what we are here today—

MARCYAN: [W]e are here today dealing with civil law and dealing with Caesar. And, as a result, whether or not the religious precepts are different, that the Illinois law provides for a dissolution of marriage.

CAROL: Yes.

MARCYAN: Okay? And that has happened.” (Emphases added.)

Having gently established the inevitability of the divorce, Marcyan again turned to the financial practicalities of the agreement:

“MARCYNAN: *** [Y]ou and I have gone through many versions of this, and we've had lots of discussions over the past several days going through the changes to the agreement; is that correct?

CAROL: We've—yes. We've spent a lot of time.

MARCYNAN: And I have—you've asked me questions, and I've asked you questions. All the questions that you've had you have asked me and I've answered; is that correct?

CAROL: Yes.

MARCYAN: And I fully understand your disappointment that your marriage has ended. But, again, we are here to dissolve that marriage and to do this division of property. And this represents finality today. Do you understand that?

CAROL: You can't finalize something that's been done soul to soul, involving children.

MARCYAN: That I agree with, but—

CAROL: *But the civil finality, that, yes, I recognize.*" (Emphasis added.)

On cross-examination, the following exchange took place regarding Carol's understanding of and voluntary entry into the agreement:

"WARREN: [Carol], you understand all the terms and provisions of the marital settlement agreement?

CAROL: I believe I do. Yes.

WARREN: And do you understand that, once the [c]ourt approves this marital settlement agreement and it's incorporated into the judgment, it will be enforceable as a court order against both you and [Harvey]? Do you understand that?

CAROL: Yes.

WARREN: And no one has forced or coerced you to sign this against your will?

CAROL: I feel like I've been forced and coerced to sign this against my will.
I don't believe in divorce.

WARREN: Okay. *But notwithstanding your not believing in divorce, based on the terms and provisions of this agreement, you're doing this of your own free will and accord in contrast to going to trial.* Do you understand that?

CAROL: I'm doing this because the economic demise of our family would be so guaranteed by continuing this litigation.

WARREN: So the answer to my question is yes; correct?

CAROL: Yes.

WARREN: Okay. And you've had the opportunity to confer with your counsel regarding all the terms and provisions of this agreement?

CAROL: Yes, I have.

WARREN: And you're satisfied with the representation you've received from your counsel and [the] other members of his firm?

CAROL: *I'm satisfied within the context of what's occurring.*" (Emphases added.)

¶ 11 The trial court stated that, upon its review, it found nothing unconscionable in the agreement. The court incorporated the agreement into its judgment of dissolution, which left only the issue of personal property to be determined at a later date.

¶ 12 On June 25, 2012, Carol, through new counsel, moved to vacate the judgment, which she presented as a motion against a final judgment pursuant to section 2-1203. 735 ILCS 5/2-1203

(West 2012). She argued that the agreement was both substantively and procedurally unconscionable. Substantively, Carol alleged that she had assumed an unfair portion of the responsibilities pertaining to the marital residence in that she was required to buy out Harvey's interest and that she had to refinance and pay the mortgage. Carol also thought it unfair that income from Harvey's non-marital oil royalties would be excluded from the maintenance determination. Procedurally, Carol alleged that she did not have time to properly review the agreement and felt forced by her own attorney (Marcyan) to settle the case. For example, Carol did not have time to consider the ramifications of the refinancing clause, and she did not realize that it might be difficult to refinance a property as a sole owner without a job. Additionally, Carol was subject to great personal stressors at the time. Her mother had been diagnosed with stage IV liver cancer in May 2012 (and did in fact pass away within months), and her son, having missed many days of school due to migraine headaches, was struggling to meet his high school graduation requirements.

¶ 13 On January 25, 2013, the court conducted a hearing on the motion to vacate. Carol presented several e-mails between her and her attorneys, which she believed demonstrated that her input was not incorporated into the agreement. In the first e-mail, dated May 9, 2012, Carol instructed her attorneys to offer a 54/46 split of marital property. She suggested that the marital residence should be sold, with the proceeds split accordingly. In the second e-mail, dated May 16, 2012, Carol instructed a 53/47 split. Carol concluded: "I haven't figured out how I want to respond to the house or the personal property. I will think on it. One thin[g] we have to add in is that whoever gets the house has to take the pets too." Carol believed, in contrast to the plain language of the second e-mail, that these e-mails establish that she wanted the residence to be sold so that neither side would be "saddled" with the mortgage.

¶ 14 Carol also presented e-mails and letters that she believed demonstrated the hasty manner in which the agreement was contrived and that she would have preferred to go to trial. In the May 9, 2012, e-mail, she began: “We were moving so fast ***, so I thought it would be helpful to provide a summary.” On May 24, 2012, the day of signing, at 11:24 a.m., Carol sent Marcyan an e-mail, stating (without context): “Sorry to become so upset. The inequity manifest throughout the case rankles my sense of fairness. I would be equally displeased had this poor treatment been applied to any other person.” At 11:25 a.m., Carol sent co-counsel, Joshua Jackson, an e-mail pertaining to attorney fees, stating: “Since it looks like we will be going to trial, this doesn’t have to be dealt with today.” At 11:49 a.m., Marcyan replied to Carol’s 11:24 a.m. e-mail, stating: “I understand your reaction. You are an honest, true, and good person, and expect the same from others.” At 12:00 p.m., Marcyan signed a hard copy of a letter, which stated:

“Dear Carol:

As I have advised you repeatedly over the past several days leading up to the trial date, the most probable outcome of a trial of your case will yield far less than can be negotiated for a settlement. It is my opinion that taking this matter to trial is a mistake, and after the cost of attorney fees you will end up with far less than what we are able to achieve through a negotiated settlement.”

¶ 15 Carol testified to the personal stressors in her life during the time that she signed the agreement. She explained that her mother had just been diagnosed with stage IV liver cancer, and, in fact, her mother did pass away within months. She also explained that, because her son, Gregory, missed many days of school due to migraine headaches, he was struggling to meet his high school graduation requirements. She expended great amounts of energy to ensure that Gregory would

graduate from high school and keep his place at Colby College in the Fall. In fact, the night before the proveup, Gregory's physics teacher called Carol to let her know that Gregory would not pass if he did not submit a project due the next day. Carol then drove around town in her pajamas until she finally located Gregory at 11 p.m., bringing him home to finish his project. These stressors, combined with an unwanted divorce, led her to be sleep-deprived and "under duress." She was at "the lowest point in [her] life."

¶ 16 Carol also testified that, in her view, the agreement was so hastily contrived that she did not have time to think about the ramifications of various provisions. Particularly, she did not realize that it might be difficult for her to refinance the mortgage on the marital residence as a sole owner without a job. Carol stated that she fully expected to go to trial on May 24, 2012, and, instead, she arrived to the courthouse to find her attorney advising her to sign the settlement agreement. She first received a (substantially similar) copy of the 27-page agreement on May 23, 2012, but had difficulty processing the information. Her attorney went over the final document with her on May 24, 2012, but, again, she had difficulty processing the information. She felt "bullied" into signing the document by her own attorney, Marcyan. For example, Marcyan told her "she would not do better at trial and *** it was in her best interest to sign the agreement." She felt pressured by (implied) threats from Harvey that going to trial could mean "financial ruin" for the family.

¶ 17 When asked to point to specific aspects of the agreement that she considered unfair, Carol listed the mortgage requirements, the exclusion of the non-marital oil royalties in determining maintenance, and the 50/50 split for the children's college expenses. Carol complained that placing the mortgage debt entirely with one party was unfair. Carol tried to explain that she would have difficulty refinancing, but the trial court did not allow the testimony:

“CAROL’S ATTORNEY: The settlement agreement also provides that you [refinance] the mortgage on the home within 30 months; is that correct?

CAROL: Yes.

CAROL’S ATTORNEY: Do you believe that is possible?

CAROL: I have been told unequivocally—

HARVEY’S ATTORNEY: Objection.

THE COURT: Sustained.”

The attorneys and the trial court further discussed the objection. Harvey’s attorney argued that Carol’s attorney must first lay a foundation before Carol could testify regarding mortgage eligibility. The court reiterated that it would sustain the objection. Carol’s attorney did not submit an offer of proof.

¶ 18 Carol felt that excluding the non-marital oil royalties in determining maintenance was patently unfair. This testimony was also subject to limitation by the trial court:

“CAROL: [A]lthough they are inherited, the revenues from that still represent income. And when you put the 30 or 40 or \$50,000 a year that it looks like those oil wells will throw off—

HARVEY’S ATTORNEY: Judge, I’m going to object.

THE COURT: Sustained.”

Again, the attorneys and the court further discussed the objection. Harvey’s attorney stated: “There is nothing in the record that is even consistent with any of that testimony even from her own expert. And I object to her speculating off the top of her head as to what something is going to be. Particularly when her own expert has written a report to the contrary.” Carol’s attorney responded

that Carol was merely trying to express that the exclusion led to a disparity in each party's available resources. The court again sustained the objection, summarizing:

“[I]f he makes anything over \$60,000, she can come in here and ask that he pay her maintenance.

Whether that money comes from a non[]marital source such as oil well funds [or] whether it comes from working, ***, if he starts earning \$60,000 or more, she has the right to come in and move for maintenance.

*** There was *nothing presented at the prove up regarding *** the value or income [of the oil royalties].*

[Harvey] has been retired for some period of time and not earning any income except a few dollars here or there for consulting, ***. But in order to *** satisfy [Carol's] concerns that [Harvey] would start earning large sums of money, that maintenance was reserved.”

¶ 19 Carol also felt that the 50/50 split for the children's college expenses was unfair. Carol felt that she had fewer resources to pay for college because she was burdened with the mortgage debt and excluded from the oil royalties.

¶ 20 Carol's close friend of over 30 years, Danuta Malarski, had flown in from Vancouver to be with Carol during the time of the settlement. Danuta testified that, in May 2012, Carol was indeed stressed, anxious, and defensive. Danuta was present during many of the conversations between Carol and Marcyan. First, Danuta recalled that, although Carol did not specifically say she did not understand the agreement, she asked many questions. Then, later in her testimony, Danuta recalled that Carol *did* say she did not understand the agreement. Danuta recalled Carol telling Marcyan that she wanted to go to trial. Despite this, Carol entered into the settlement. After the proveup, Carol

began to express second thoughts to Danuta, stating she would lose (or had already lost) everything and that she was “ruined.”

¶ 21 Marcyan testified that the agreement was the product of several months of negotiation that culminated the week the case was set for trial. Again, the case had been set for trial May 22 through May 24, 2012. Marcyan spent the majority of those three days in conference with his client, opposing counsel, and even the court. Marcyan conferred with Carol more than 10 times regarding the terms of the settlement. All offers sent to opposing counsel had been approved by Carol. The agreement had originally been silent as to refinancing. Against his advice, Carol insisted that Marcyan add the refinancing requirement. Even though this placed a burden on Carol, Carol did not want any loose ends. Carol never expressly directed Marcyan to go to trial. Marcyan never told Carol that she must settle; rather, he told her it was in her best interest to avoid a costly trial. Marcyan spent two hours going over the final document with Carol. They read through each page three times. After the third reading, Carol signed the document.

¶ 22 The trial court denied the motion to vacate, stating that the agreement was not unfair, it was not hastily contrived or forced upon Carol, and that Carol’s stress did not rise to such a level as to cause her to be unable to freely enter into the agreement. The court wanted to “make sure the record [wa]s clear” that the settlement was not forced upon Carol at the last moment. The court stated that, at the first pretrial hearing, it had suggested a 50/50 division of the martial estate. It then held several pretrial hearings in the months prior to the trial dates at which the court and counsel discussed settlements that were substantially similar to what was ultimately done. The court noted that, throughout that time, Carol “continued to aggressively and shrewdly negotiate and receive a

disproportionate share of the marital estate and a reservation of maintenance even though [Harvey] had been retired for a number of years.”

¶ 23 Finally, the court quoted a large portion of Carol’s testimony from the proveup (as we have quoted in paragraph 10). The court wished to provide context for Carol’s statements that she was “being dragged through this against [her] will.” The court found that Carol’s statements reflected that she had “a very difficult time accepting the fact that her divorce was going to be finalized” and “a problem *** with the concept of divorce ***, once two people were joined before their God.” However, Carol made clear that her “problem” was not with “the money.” She recognized the civil finality of the divorce and entered into the terms of the agreement of her own free will.

¶ 24 As we have stated, the marital settlement agreement reserved the issue of personal property. It provided that, upon petition, the trial court would adjudicate the distribution of personal property if the parties could not reach agreement on the matter within 30 days. The parties did not reach agreement, and Harvey petitioned the trial court to adjudicate the distribution of personal property. On February 8, 2013, the court, now under Judge Charles Johnson, held a status hearing on the distribution of personal property. It advised that, as a starting point, the parties should each take inventory and make lists as to what he or she wanted. The court stated:

“THE COURT: Yeah. So we have three [lists]. Create a form listing all furniture, furnishings, *et cetera*. There will be three categories. One will say H, one will say C, and one will say NM, for Harvey, Carol, and nonmarital, and come back before the court for—

ATTORNEY: For a ruling on the division?

THE COURT: Yeah, I guess so.”

The court then entered a written order of similar, though not exact, effect:

“(a) Within 30 days each party shall prepare a list of personal property items they wish to retain as their sole and separate property. Further, each party shall prepare a list of any personal property they claim to be non[]marital personal property. Counsel for both parties shall exchange the aforesaid lists on or before March 15, 2013.”

¶ 25 The written order also informed Harvey’s access to the marital residence:

“(b) Upon 3 days written notice to Carol’s counsel of record, Harve[y] shall have *full access* to the Lake Forest residence at a time and date to be designated by Harve[y] for purposes of preparing an inventory. Harve[y]’s access shall be for a period of six hours.

(c) When Harve[y] has access to the Lake Forest residence pursuant to paragraph 6(b) of this [o]rder, he may bring a witness with him to the residence (including his counsel) and may further employ the use of photo and video (as recommended by the court).” (Emphasis added.)

On February 15, 2013, pursuant to the order, Harvey’s counsel sent written notice that he and Harvey would take inventory on February 21, 2013. When they arrived at the scheduled date, Carol denied them access to the locked safe. Harvey’s attorney, noting that the order instructed full access to the residence, called the Lake Forest police. Officer Wendy Dumont arrived at the residence and instructed Carol to open the safe. For reasons that the parties disputed in their various pleadings, Carol did not open the safe (per Carol, she followed her attorney’s direction not to open the safe and then, when he changed his mind, the batteries had died; per Harvey, Carol initially told him she did not remember the combination, later told the court the AA batteries had died, but, ultimately, simply disobeyed the court order).

¶ 26 On February 22, 2013, Harvey petitioned for rule to show cause, seeking an order from the trial court that Carol immediately open the safe. Harvey attached a signed (but not notarized) affidavit stating that Carol did not provide access to the safe, claiming to have forgotten the combination. The court heard the petition that day, as recorded in a bystanders' report. Carol was the only party to testify and attorneys presented argument. Harvey's attorney apparently stated in argument that the allegations in the pleading were "true." Presumably, Carol told the court that the safe was out of batteries, because the court entered an order instructing Carol to purchase batteries, meet Harvey's attorney at the residence, and allow for the contents of the safe to be inventoried that day. Harvey was ultimately granted full access. He provided Carol with his inventory list prior to the March 15, 2013, due date. Also prior to March 15, 2013, Carol's attorney withdrew.

¶ 27 On March 15, 2013, Harvey petitioned for attorney fees for the "safe incident" pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act), which mandates fees when a party's failure to comply with the court's order is without cause or justification. 750 ILCS 5/508(b) (West 2012). The trial court heard the petition that day, again as recorded in a bystanders' report. Neither Carol nor Harvey were present.² The court listened to argument from the attorneys, and it granted the petition, ordering Carol to pay \$1,700 for Harvey's attorney fees. Neither the court nor the parties addressed that portion of the February 8, 2013, order that had instructed the parties to exchange their inventory list by that day.

² Carol testified in a subsequent proceeding that she was not present because she went to the hospital for heart palpitations. The record does not show that her attorney moved for a continuance so that Carol could be present.

¶ 28 Meanwhile, that same day, Carol's *next* attorney moved to withdraw. Then, on March 21, 2013, Heather Nosko of Lake Toback filed an appearance as Carol's new counsel. This gave Nosko approximately three weeks to prepare for the upcoming hearing on personal property.

¶ 29 On April 5, 2013, the trial court conducted the hearing on personal property. The court acknowledged that it still had not granted the previous attorney's motion to withdraw; nevertheless, it allowed Nosko to represent Carol that day. The court asked the parties whether they had exchanged lists of marital and non-marital property that each wished to retain. Nosko stated that she did not yet represent Carol on March 15, 2013, when the lists were due. Nosko stated that, despite having just joined the case, she *had* received Harvey's list. She initially informed the court that, instead of (or, as it is not clear from the record, perhaps in addition to) compiling her own, independent list, Carol responded to Harvey's existing list. The court stated: "That's nice, but certainly not what the court ordered." Harvey's attorney then argued:

"[Harvey] complied with your order and exchanged a list. Your order was not to have [Carol] take the list, take a look at what he wants[,] and respond to that and object, but not put anything on her list. Your order was clear, unambiguous. He should get what is on his list."

Nosko responded:

"We *have* provided a list of items that she requested. I think that her responding to his list was a more efficient way of going [about] it instead of—if he didn't want the forks, there is no reason for [Carol] to put the forks on her list. I am assuming if he doesn't want it, she can keep it. So, instead of what—she provided a list in response to his nonmarital claim, in response to what he did want to take from the marital residence. *Then* she did

prepare a list as to what her nonmarital property items were *and* a list of the marital property she wanted to keep.” (Emphasis added.)

The court clarified that, still, this had not been done by March 15, 2013. Carol interjected as to why she did not submit her own list before March 15, 2013, as ordered:

“CAROL: I had [] heart palpitations, and I went to Lake Forest Hospital where they tested me for a heart attack.

THE COURT: This was on what date?

CAROL: I was going to bring with me the—I made photographs. I put them in a binder. I had my list.

THE COURT: When did this take place?

CAROL: It was the hearing on the 15th

THE COURT: There was no hearing on the 15th.³ They just needed to be—

THE COURT: Okay. And when you recovered from the medical condition, of course, then you sent the material on to [Harvey’s attorney]; is that correct?

CAROL: I didn’t send anything directly to [Harvey’s attorney].

CAROL: I had no attorney.”

The court heard nothing further, ruling:

³ There *was* a hearing on March 15, 2013. There, the trial court addressed attorney fees associated with the inventory of the personal property, not the distribution of the personal property.

“Good. All right. The [c]ourt, therefore, finds that the personal property contained on the list that was tendered [to the opposing party,] pursuant to the [c]ourt’s direction [*i.e.*, Harvey’s list] shall be *** the property of [Harvey]. Anything else shall be the property of [Carol].”

The court did not accept or consider Carol’s lists, and they are not a part of the record. The court took no testimony concerning whether Harvey’s listed items were accurately labeled as either marital or nonmarital, and it took no testimony concerning the nature of the items or approximate value. The court attached Harvey’s lists to its written order. The lists contained over 100 items, most of which have obvious value (original oil paintings, crystal stemware and chandeliers, silverware, furniture sets, rowing machines, *et cetera*). Other items were more sentimental in nature (an art project and a poem by one of the children). This appeal followed.

¶ 30

II. ANALYSIS

¶ 31 On appeal, Carol argues that the trial court erred in: (1) denying her motion to vacate the marital settlement agreement on the ground that it was unconscionable; (2) awarding Harvey \$1,700 in attorney fees to resolve the inventory incident; and (3) failing to make any sort of evidence-based determinations in distributing the personal property. The parties dispute this court’s jurisdiction to hear the first issue. For the reasons that follow, we find that we do have jurisdiction to consider the trial court’s denial of the motion to vacate the agreement. We affirm the court’s rulings on the first two issues and reverse and remand on the third issue.

¶ 32

A. Denial of the Motion to Vacate the Settlement Agreement

¶ 33

i. Jurisdiction

¶ 34 As a threshold matter, we address the question of jurisdiction. Harvey argues that this court does not have jurisdiction to review the trial court's denial of Carol's motion to vacate the settlement agreement, which Carol had labeled pursuant to section 2-1203. 735 ILCS 5/2-1203 (West 2012). The parties submitted supplemental briefing on this issue in advance of oral argument in this appeal. Harvey contends that the hearing on the motion to vacate was premature because the settlement agreement was not ripe for enforcement, and, therefore, not final, where the question of personal property remained open. Harvey posits that, in order to preserve her claim for review, Carol should have refiled her motion to vacate the settlement agreement after the trial court had resolved all pending matters. For the reasons that follow, we reject Harvey's argument.

¶ 35 The main case upon which Harvey relies, *In re Marriage of Lai*, 192 Ill. App. 3d 807 (1989), is off-point. In *Lai*, the court entered a default dissolution judgment resolving issues of property and support but reserving the issue of attorney fees. *Id.* at 809. The husband then filed an unlabeled petition to set aside the default judgment (which the appellate court deemed to fall under section 2-1301(e) ((735 ILCS 5/2-1301(e) (West 2012))). *Id.* at 810. The trial court denied the petition as untimely. The husband then filed a substantively similar section 2-1401 petition, which the trial court denied. *Id.* at 809. Later, after the attorney fee issue had been resolved, the husband timely filed a section 2-1203 petition to reconsider the substantive provisions of the dissolution judgment. *Id.* The trial court summarily denied the petition, reasoning that, because it had earlier denied the section 2-1401 petition, which had challenged the substantive provisions, any subsequent challenge to the substantive provisions would be barred according to the doctrine of *res judicata*. *Id.* at 809-10.

¶ 36 The appellate court reversed, holding that the doctrine of *res judicata* did not apply and directing the trial court to consider the section 2-1203 petition. *Id.* The doctrine of *res judicata* contemplates that a cause of action finally determined between the parties on the merits cannot again be litigated, except on appeal. *Id.* at 812-13. In *Lai*, the cause of action had not been finally determined—the pending attorney fee issue remained. *Id.* at 813. That attorney fee issue was interrelated to the previously ruled upon issues of property and custody because a court must consider the financial resources of the parties before awarding attorney fees. *Id.* at 812. In any case, the court explained, applying *res judicata* principles to the previously ruled upon issues of property and support would preclude a full and fair adjudication of all of the issues that may bear an interrelationship, if not an interdependency, to one another. *Id.* at 812. *Lai* simply does not stand for the proposition that a trial court cannot consider a motion to vacate an interlocutory order.

¶ 37 Here, the settlement agreement, at the date it was entered, had the *potential* to become final and appealable within 30 days. That is because the settlement agreement allowed for the parties to resolve the personal property issue between themselves within 30 days. If the parties had done so, the settlement agreement would have then been final and appealable. Carol at that time presented her motion to vacate as a section 2-1203 motion against a final (and appealable) judgment. However, as it turned out, the parties could *not* agree and moved the court to adjudicate that last remaining matter. This pending matter prevented the settlement agreement from being final and appealable. As far as our jurisdiction is concerned, it is enough to say that, at a minimum, the settlement agreement at that point was an interlocutory order, which the trial court has inherent authority to review, modify, or vacate at anytime until the judgment is final. *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 698 (2010). Thus, whether Carol

properly labeled her motion as a section 2-1203 motion against a final or final and appealable judgment is a discussion of form over substance where the trial court clearly had authority to consider the merits of the motion to vacate and where, as all pending matters have been resolved, we now have authority to review it.

¶ 38

ii. Merits

¶ 39 Carol argues that the trial court erred in denying her motion to vacate the settlement agreement because it was unconscionable and she was under duress. We will not disturb the trial court's decision on a motion to vacate unless it abused its discretion. *In re Marriage of King*, 336 Ill. App. 3d 83, 88 (2002). We defer to the trial court's factual determinations in assessing the conscionability of the agreement. See, e.g., *In re Marriage of Tabassum and Younis*, 377 Ill. App. 3d 761, 777 (2007).⁴

¶ 40 Carol organizes her arguments into two categories: unconscionability (both substantive and procedural) and duress. However, duress may be viewed as a component of procedural unconscionability, and, therefore, we structure Carol's argument accordingly. See, e.g., *In re Marriage of Richardson*, 237 Ill. App. 3d 1067, 1082 (1992) (duress may be sufficient to render an

⁴ Courts often state that the trial court's assessment of conscionability is reviewed *de novo*. *Id.* However, that rule applies when assessing the terms of the agreement itself. Here, Carol does not challenge the conscionability of the 52/48 split. Rather, she argues that the split was not accomplished, due to her assumption of the mortgage debt and the trial court's assessment of the non-marital oil royalties. She also argues that she was forced to sign the agreement and that she was under duress. Aside from a plain-language interpretation of the provision regarding the assumption of the mortgage debt, the trial court's assessment of these claims is entitled to deference.

agreement between spouses unconscionable). Looking to unconscionability, an agreement may be substantively unconscionable, procedurally unconscionable, or a combination of the two. *Kinkel v. Cingular Wireless*, 223 Ill. 2d 1, 21 (2006). For example, in *Richardson*, the court found the agreement both substantively and procedurally unconscionable. *Richardson*, 237 Ill. App. 3d at 1085 (where, substantively, the wife received, at most, just 7.55% of the marital estate, and where, procedurally, the husband chose the wife's attorney (who met the wife for the first time on the day she signed the agreement and who never showed the wife a draft of the agreement until the day it was signed), the husband enticed the wife with hopes of reconciliation, and the wife's father had just passed away the preceding week). Certainly, where an agreement is substantively unconscionable, it prompts the question as to why and under what circumstances a party might enter into such an agreement. Here, however, for the reasons that follow, the agreement was not substantively or procedurally unconscionable.

¶ 41 We begin by reviewing the trial court's finding of substantive conscionability. Substantive conscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. *Kinkel*, 223 Ill. 2d at 28. An agreement is substantively unconscionable when it is "improvident, totally one-sided[,] or oppressive." *In re Marriage of Carlson*, 101 Ill. App. 3d 924, 930 (1981).

¶ 42 Carol finds fault with provisions addressing the marital residence, the maintenance payments, and the children's college expenses. As to the marital residence, Carol contends that the agreement did not account for the \$1,000,000 mortgage debt, thereby undermining the agreed upon 52/48 split.

¶ 43 Contrary to Carol's assertion, the agreement *did* account for the \$1,000,000 mortgage debt. The agreement stated:

“Said buyout figure is calculated as follows:

Agreed House Value	\$1,640,000
Less[] Broker’s Commission (5%)	[-] \$82,000
Less[] Closing Costs []	[-] \$49,200

Less[] Mortgage	[-] \$1,000,000
Net Sale Proceeds	\$508,800
Husband’s 48% Interest	\$244,224”

If the agreement did *not* account for the \$1,000,000 mortgage debt, Harvey would have received \$724,224 ($\$1,640,000 - \$82,000 - \$49,200 = \$1,508,800$; $\$1,508,800 \times 0.48 = \$724,224$). This did not happen.

¶ 44 As to maintenance, Carol accepts the five-year term but contends that the exclusion of Harvey’s non-marital Canadian oil royalties in calculating the amount owed during that term is unduly one-sided. Carol notes that a providing spouse’s non-marital assets may be considered in determining maintenance. See *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 650, 658 (2008). And, although Carol does not expressly say so, her argument appears to be based on the premise that a goal of maintenance is to provide the receiving spouse with the resources to achieve a standard of living close to that enjoyed during the marriage. See *In re Marriage of Culp*, 341 Ill. App. 3d 390, 392 (2003). In this vein, Carol complains:

“Harvey is able to live off of his [income] from assets and investments, including income from his non-marital [Canadian oil royalties], for the next five years without being employed

or performing other services. Meanwhile Carol only has the assets she received in the judgment ***.”

¶ 45 We reject Carol’s argument because she has failed to establish that this exclusion created a significant disparity in each party’s respective lifestyle following the divorce. The trial judge made a factual determination that “[Harvey’s] non-marital estate is not that significant.” Carol’s attorney testified that he hired an expert to value the non-marital Canadian oil royalties and that the expert determined the value to be relatively minimal. In her brief, Carol points to *no* valuations, either general estimations or specific numbers, to contradict the court’s finding. Even if the valuations were as high as Carol threw out at trial (\$30,000 to \$50,000), which the trial court struck as having no basis in the evidence, any disadvantage Carol incurred during the five-year maintenance term would be more than negated by her \$280,000 advantage in the property distribution (\$50,000 x 5 years = \$250,000, split equally between Carol and Harvey is \$125,000 for Carol, which is less than her \$280,000 property advantage).

¶ 46 Carol argues that the trial court fundamentally misunderstood the maintenance provision when it stated:

“[I]f he makes anything over \$60,000, she can come in here and ask that he pay her maintenance.

Whether that money comes from a non[]marital source such as oil well funds [or] whether it comes from working, ***, if he starts earning \$60,000 or more, she has the right to come in and ask for maintenance.”

Carol posits that this quote shows that the court thought it could order Harvey to draw from his oil royalties to make maintenance payments. Because Carol does not provide further support in the

record for her interpretation of the court's isolated statement, we presume the trial court understood the agreement. Regardless, Carol's overall challenge to the maintenance provision fails because, as we have stated, she presented no evidence to support her premise that the exclusion of the oil royalties created a significant disparity in each party's respective lifestyle.

¶ 47 As to the children's college expenses, Carol contends that sharing the costs with Harvey 50/50 is unfair. Carol argues that she has fewer resources to pay for college because she was burdened with the mortgage debt and excluded from the oil royalties. This argument hinges on the success of the first two arguments. Because we have rejected the first two arguments, we reject this one too.

¶ 48 Having rejected Carol's arguments, we affirm the trial court's assessment that there was nothing substantively unconscionable about the agreement. The marital assets were split 52/48 in favor of Carol. Each party received over \$3 million dollars and each party has an opportunity to earn further income through the investment of assets.

¶ 49 We next address Carol's contention that the agreement was procedurally unconscionable because it was procured under duress, *i.e.*, circumstances that rendered her subject to oppression, undue influence, and undue disadvantage such that she did not enter into the agreement of her own free will. *Richardson*, 237 Ill. App. 3d at 1082. Carol complains that the trial court erred by primarily relying on her testimony at the proveup (as quoted in paragraph 10) and failed to consider whether those statements were a result of the "external conditions" of which she later complained. These external conditions include being: (1) "bullied" by her own counsel (who, in Carol's view, likely wanted to close out the case so he could secure his fee amount before withdrawing as counsel);

(2) confronted with a hastily contrived agreement, containing terms with which Carol was unfamiliar and did not understand; and (3) subject to great personal stress.

¶ 50 First, it is not true that the trial court relied “primarily” on Carol’s testimony at the proveup. Rather, the trial court quoted Carol’s testimony from the proveup to provide context for her statement that she was “being dragged through this against [her] will.”

¶ 51 Second, the trial court *did* consider the external conditions surrounding the agreement, and its assessment of the facts is entitled to deference. The court took great care to explain that the agreement was the culmination of months of negotiation and was substantially similar to everything presented at the pretrial hearings. The court acknowledged that Carol was under stress, but not so much that she was deprived of her ability to voluntarily enter into an agreement.

¶ 52 To the extent that Carol submitted argument at trial that Marcyan was motivated to finish the case and secure his fee, the trial court was right to dismiss it as speculative. Also falling flat are Carol’s claims that the agreement was full of new terms that she did not understand. Her second e-mail to Marcyan instructed a 53/47 property distribution, only 1% off the distribution set forth in the final agreement. Her second e-mail also belies that she insisted on selling the residence so that neither party would be “saddled” with the mortgage; rather, she stated she wasn’t sure what she wanted to do about the residence. According to Marcyan, who the court presumably found credible based on its ruling, Carol herself suggested the refinancing term of which she now complains. For all of these reasons, Carol has not convinced us that the trial court’s assessment of the situation was against the manifest weight of the evidence.

¶ 53 Finally, we address Carol’s argument that the court erred in excluding evidence concerning the feasibility of the refinancing provision. Carol points to her alleged difficulty in refinancing as

evidence that she was rushed into an agreement she did not understand. For this reason, although Carol places this argument in the substantive conscionability section of her brief, it really pertains more to procedural conscionability. Carol admits that she did not offer proof that she, with a net worth of over \$3 million but no employment income, would have difficulty refinancing the \$1 million mortgage, and she implicitly concedes that the failure to offer proof generally means forfeiture. *People v. Peebles*, 155 Ill. 2d 422, 458 (1993). However, she states that no formal offer of proof is required to preserve an error when the substance of the disallowed evidence is clear from the record. *In re A.M. v. Filemon M.*, 274 Ill. App. 3d 702. While this may be a fair statement of the law, we disagree that the substance of the disallowed evidence is clear from the record. The record shows that Carol stated amidst objection that she did not believe she would be able to refinance the loan and that she had been “told unequivocally—[.]” However, the record does *not* indicate what Carol’s foundation for such a statement would have been. This is not enough to preserve the alleged error.

¶ 54

B. Attorney Fees

¶ 55 Carol next argues that the trial court erred in awarding Harvey \$1,700 in attorney fees for the “safe incident” pursuant to section 508(b) of the Marriage Act. 750 ILCS 5/508(b) (West 2012). That provision states in pertinent part:

“In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding was brought to pay promptly the costs and reasonable attorney fees of the prevailing party.” *Id.*

The party that failed to comply with the order has the burden to produce evidence of his or her cause or justification. *In re Marriage of Baggett*, 281 Ill. App. 3d 34, 40 (1996). A court's decision as to whether there was adequate cause or justification is entitled to deference. *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984) (a court's finding of contempt is a question of fact not to be reversed unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion); *cf. In re Marriage of Barile*, 385 Ill. App. 3d 752, 759 n.3 (2008) (applying the *Logston* standard despite the supreme court's general advisement against an application of the abuse-of-discretion standard to findings of fact).

¶ 56 Carol states in her brief that she failed to open the safe for Harvey because it was out of batteries. However, while Carol sets forth the battery excuse in her pleadings, the record only hints that she ever testified to this before the trial court. At the February 22, 2013, hearing, the trial court ordered Carol to purchase batteries, the implication being that she told the court she did not have any. At the March 15, 2013, hearing for fees, Carol did not testify at all. The court might not have believed Carol's testimony, if it existed, that she lacked batteries, or the court may reasonably have found that the lack of batteries did not constitute cause or justification. After all, it is not as though AA batteries—the type specified by Carol—are rare or difficult to obtain. Carol or Harvey could have gone to the convenience store and purchased them during the taking of inventory. Although a slight delay, that certainly would have been a more reasonable and efficient tactic than calling a Lake Forest police officer to the residence. Certainly, the scant bystanders' report provides absolutely no basis to reverse the court's \$1,700 award. See, e.g., *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (appellant has the burden to provide a complete record on appeal, and any doubts that may arise from the incompleteness of the record will be resolved against the appellant).

¶ 57 Our above rationale is dispositive. However, we note that Carol’s tangential argument that Harvey’s attorney violated the professional rules of conduct by serving as both a witness and an advocate is misplaced. Ill. R. Prof. Conduct 3.7(a) (eff. Jan. 1, 2010). Harvey’s attorney may have been a “witness” in taking inventory, but he did not serve as a witness at the hearing for fees. The bystanders’ report plainly states that no witnesses testified, and the court’s ruling was based on attorney argument only.

¶ 58 C. Personal Property

¶ 59 Finally, Carol argues that the trial court erred when, rather than adjudicate the distribution of personal property as requested by the parties, the court simply adopted Harvey’s list of requested items. Again, the settlement agreement provided that, upon petition, the trial court would adjudicate the distribution of personal property if the parties could not reach agreement on the matter within 30 days. The parties did not reach agreement, and Harvey petitioned the court to adjudicate the distribution of personal property. For the reasons that follow, we agree with Carol that the trial court, when faced with the parties’ request to adjudicate the distribution of personal property, failed to heed statutory and common-law requirements that it characterize the property as marital or nonmarital and acquire enough evidence to fashion an equitable and reviewable distribution according to all relevant factors.

¶ 60 Before the court can dispose of property, including personal property, it must classify the property as marital or nonmarital. *In re Marriage of Didier*, 318 Ill. App. 3d 253, 258 (2000). The court is to consider the evidence in light of several factors set forth in section 503(d) of the Marriage Act, such as the contributions of each party, the dissipation by each party, the value of the property, the duration of the marriage, the relevant economic circumstances, any obligations or rights from a

prior marriage, the existence of an antenuptial agreement, the abilities and station of each party, the opportunity for future acquisition, custodial provisions, maintenance provisions, and tax consequences. 750 ILCS 5/503(d) (West 2012). The court is not to consider marital misconduct. *Id.* The court has broad discretion to distribute the personal property, and, while the distribution must be equitable, mathematical equality is not required. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 704 (2006); *Didier*, 318 Ill. App. 3d at 262 (personal property distribution must be equitable). The trial court must consider the value of the property apportioned to each spouse, and there must be sufficient evidence of value in the record to allow for a review of the trial court's distribution. *In re Marriage of McHenry*, 292 Ill. App. 3d 634, 638 (1997). The trial court's authority to distribute property is limited to the powers set forth in the Marriage Act and is not based upon general equity powers. *Stotlar v. Stotlar*, 50 Ill. App. 3d 790, 795 (1977). We will not disturb the trial court's characterization as marital or nonmarital unless it is against the manifest weight of the evidence. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009). We will not disturb the trial court's ultimate distribution of the marital property unless it abused its discretion. *In re Marriage Vancura*, 356 Ill. App. 3d 200, 205 (2005).

¶ 61 Although we understand the court's frustration with the numerous delays in this case, the court is still required to consider evidence and fashion an equitable distribution. Here, the court did not find or certify based on agreement which items were marital and which were nonmarital. As the parties represent in their briefs, Carol believes some of the china to be from her grandmother (and, therefore, nonmarital), whereas Harvey put it on his list (and, therefore, received it). Additionally, the court made no findings to support an equitable distribution. Rather, the court adopted Harvey's list without consideration. We do not suggest that the court was required to literally value each item,

but, here, the nature of the items was not considered at all. There are simply no findings to review. See *McHenry*, 292 Ill. App. 3d at 638. For these reasons, we find that the trial court abused its discretion.

¶ 62 We reject Harvey’s argument that Carol forfeited the opportunity for a true hearing on the distribution of personal property because she presented her lists in the improper format and too late. Harvey cites *Season Comfort Corp. v. Ben A. Borenstein Co.*, 281 Ill. App. 3d 648, 656 (1995), which is not a divorce case, for the proposition that a party cannot fail to assert her remedies under the law and then claim a right to redress by the court. This case does not apply. Carol *did* request at the hearing that the court adjudicate the distribution of personal property, albeit, in the trial court’s view, in the improper format and untimely submitted. She requested that the court consider her property claims, and the court refused. Carol never acquiesced to the court’s decision to give Harvey everything he listed.

¶ 63 Moreover, the trial court was not justified in giving Harvey everything he wanted based on Carol’s alleged violation of the court’s order regarding formatting and timing instructions. A divorce court is not permitted to consider a party’s misconduct when distributing property. *In re Marriage of Parker*, 216 Ill. App. 3d 672, 680 (1991) (the court could not consider the husband’s purposeful understatement of stock value).⁵ The question of a party’s failure to cooperate and/or fully

⁵ Section 503(d) specifies that the court may not consider *marital* misconduct. 750 ILCS 5/503(d) (West 2012). “Misconduct” in the statute refers to misconduct in the marriage leading up to the dissolution. *In re Marriage of Cihak*, 92 Ill. App. 3d 1123, 1125 (1981). However, it is clear from cases like *Parker* that common law disfavors the consideration of misconduct in the proceedings when distributing marital assets.

participate is a subject for contempt proceedings, or, perhaps, in more extreme circumstances, cause for a default judgment. *Cf. In re Marriage of Kopec*, 106 Ill. App. 3d 1060, 1061-62 (1982) (default judgment affirmed where the husband failed to attend any of the hearings and the wife was awarded just one-half the equity in the marital residence, which amounted to \$10,000).⁶ A party's failure to cooperate does not relieve a trial court from its duty to fashion an equitable distribution of the marital property based on available evidence.

¶ 64 For these reasons, we vacate the trial court's order concerning personal property distribution and remand for an evidentiary hearing on the issue of personal property. We trust that Carol will cooperate with court instructions in future proceedings.

¶ 65 III. CONCLUSION

¶ 66 For the aforementioned reasons, we affirm the trial court's denial of the petition to vacate the settlement agreement and the \$1,700 attorney fee award. However, we vacate the trial court's personal property distribution and remand for a hearing on the matter.

¶ 67 Affirmed in part and vacated in part; cause remanded.

⁶ We note that, even in a default context, the *Kopec* trial court remained mindful of its duty to fashion an equitable distribution based on available evidence. This was part of the reason the default was affirmed.