2012 IL App (1st) 112569-U

FOURTH DIVISION
January 26, 2012

No. 1-11-2569

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re CUSTODY OF:	)	Appeal from the
	)	Circuit Court of
B.E.W., K.H.W., M.K.W.	)	Cook County
	)	
(Robert Ward,	)	No. 07 D6 30886
	)	
Petitioner-Appellee,	)	Honorable
	)	Timothy P. Murphy,
v.	)	Judge Presiding.
	)	
Tammara Ward,	)	
	)	
Respondent-Appellant).	)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice LAVIN and Justice FITZGERALD SMITH concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying spouse's motion to vacate a parenting agreement and marital settlement agreement because she failed to present clear and convincing evidence supporting her claims of coercion, duress and unconscionability. Spouse's claim of ineffective assistance of counsel during the settlement negotiations and prove-up hearing lacks merit.

¶ 2 Respondent-appellant Tammara Ward appeals the trial court's denial of her post-trial

motion to vacate, modify or reconsider the parenting agreement and marital settlement agreement (hereinafter referred to collectively as "agreements") incorporated in the Judgement for the Dissolution of Marriage. Tammara claims that the agreements should be vacated because she executed the agreements when she was under duress, she was coerced into signing the agreements since her attorney threatened to walk out of the courtroom on the first day of trial and the terms are unconscionable because she lost sole custody of her three children and must pay child support to the children's father, Robert Ward. Tammara also claims that her attorney, retained for settlement purposes only, provided ineffective assistance. For the reasons that follow, we affirm the order of the trial court.

¶ 3 *Background*

¶ 4 Tammara and Robert were married on September 16, 2000. Robert filed a petition for dissolution of marriage (petition) on August 9, 2007. Tammara filed a counter-petition on August 13, 2007. During the marriage, three children were born: (1) Brett Edwards, born on August 9, 2001; (2) Katelyn Heather, born on December 22, 2002; and (3) Mark Kenneth, born on November 14, 2004.

¶ 5 On August 29, 2007, the trial court entered an order granting temporary custody of the minor children to Tammara. The trial court awarded Robert visitation with the children every Wednesday and every other weekend. The trial court ordered Robert to pay the mortgage and utilities for the residence where the children resided with Tammara and one half of the school tuition and fees until further court order.

¶ 6 The parties executed a sole parenting agreement, which was made an order of the court on

February 6, 2009. According to the sole parenting agreement, the parties agreed that Tammara would have residential custody of the children. Robert had visitation with the children every other weekend and every Wednesday from 4 p.m. to Sunday at 6 p.m. Also on February 6, 2009, the trial court awarded exclusive possession of the residence to Robert as his non-marital property and ordered Tammara to vacate the premises by February 15, 2009. The trial court entered a temporary uniform order for support ordering Robert, based on the parties' agreement, to pay to Tammara $1,228 a month as child support. Robert was also to procure health insurance for the children.

¶ 7 On January 19, 2010, Robert filed a petition to modify the sole parenting agreement alleging that Tammara's conduct deprives him of visitation time with the children and she continually violated the terms of the parenting agreement. Also on that day, Robert filed a petition for adjudication of indirect civil contempt regarding Tammara's violation of the parenting agreement because she allowed a third party to watch the children instead of contacting him to watch them.

¶ 8 On February 26, 2010, the trial court set May 3, 2010 as the pre-trial conference date. On May 3, 2010, the trial court set December 6, 2010 to December 13, 2010 as trial dates.

¶ 9 On June 17, 2010, the trial court entered an order appointing Dr. Kerry Smith as the custody interviewer pursuant to section 604(b) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/604(b)). Dr. Smith issued his 604(b) report on November 19, 2010 and recommended that Robert receive sole custody of the children. Dr. Smith opined that Robert "has the capacity to make good decisions for his children," but Tammara's testing indicated that

"her judgment and reasoning are impaired" and that her "decision-making is compromised." Tammara received this report on December 1, 2010.

¶ 10 On November 29, 2010, Tammara filed an emergency motion to strike the trial dates set for December 6-9 and 13-16, 2010 and to set the matter for status regarding her inability to retain an attorney due to her financial difficulties and health status. The trial court denied Tammara's motion on December 2, 2010. On December 3, 2010, Tammara retained Margaret Weging of Wakenight & Associates to represent her for "settlement purposes only."

¶ 11 On December 6, 2010, the trial court conducted a pre-trial conference with the parties' attorneys. Tammara and Robert executed the agreements on that day. The agreements provided the sole care, custody and control of the three minor children to Robert. During the prove-up hearing, Robert stated that he understood Tammara would pay child support in the amount of $1,000 a month to him, which was a downward departure from the guidelines. Also during the prove-up hearing, the following colloquy occurred between Tammara and her attorney:

"Q: You've read the Parenting Agreement?

A: Yes.

Q: And you've read the Marital Settlement Agreement?

A: Yes.

Q: You have read each? In fact, you've gone over each in detail, is that correct?

A: Yes.

Q: And no one has coerced you into signing those today, is that correct?

A: Correct.

Q: And you are satisfied with the representation that Marge Weging and Wakenight & Associates have given you on this matter?

A: Yes."

¶ 12 At the conclusion of the prove-up hearing on December 6, 2010, the trial court accepted the parties' agreements and entered a Judgment for the Dissolution of Marriage. On January 5, 2011, Tammara filed a motion to vacate, modify or reconsider the trial court's order entered on December 6, 2010 alleging duress, coercion, unconscionability and ineffective assistance of counsel. She filed an amended motion to vacate, modify or reconsider (motion to vacate) on February 14, 2011. The motion to vacate alleged that Tammara "walked into the marital settlement agreement having sole custody of her three children, receiving monthly child support of $1,188, and owed back child support payments of $34,617. She walked out of the agreement without custody of her children, paying monthly child support of $1,000 and $50 in medical coverage, and no child support owed to her." Tammara alleged that she did not know that the case would be settled on December 6, 2010 and that she believed settlement negotiations would occur throughout the two week period the case was set for trial. When Tammara's attorney arrived at the courthouse on December 6, 2010, she presented the proposed agreements to Tammara for her review. Tammara objected to the agreements, but her counsel told her that it was the best that she could do. Tammara also alleged that her counsel told her that if she did not agree to the proposed terms or sign the agreements, she would terminate representation. Tammara argued that the agreements should be vacated because she executed the agreements under duress and the terms are unconscionable. Tammara also argued that her counsel's

representation was ineffective because counsel did not accomplish anything in Tammara's favor. Tammara claimed that her counsel did not move for a continuance, never objected to the 604(b) report or obtain terms in the agreements favorable to her. The trial court denied Tammara's motion to vacate on August 9, 2011. Tammara timely filed this appeal.

¶ 13 *Analysis*

¶ 14 Tammara contends that the trial court erred in denying her motion to vacate the agreements. Tammara maintains that the agreements should be set aside because they were hastily contrived and she signed the agreements under duress. Tammara claims that she had less than 45 minutes to read the agreements and her counsel threatened to walk out of the courtroom right before the proceedings began if she did not sign the agreements. Tammara also claims that the agreements were unconscionable because she did not have a meaningful choice about whether to sign the agreements and the agreements' terms are favorable to Robert. Tammara further contends that the 604(b) report was not produced in a timely fashion and that she should have been given additional time to depose the examiner or obtain her own examination.

¶ 15 In the case at bar, Tammara seeks review of the trial court's ruling on her motion to vacate based on additional facts supporting her claims of duress, coercion and unconscionability. The applicable standard used to review a trial court's ruling on a motion to vacate is the abuse of discretion standard. *Compton v. Country Mutual Ins.*, 382 Ill. App. 3d 323, 330 (2008). An abuse of discretion "will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court."

People v. Hall, 195 Ill. 2d 1, 20 (2001)

¶ 16 The traditional grounds for setting aside a settlement agreement include “fraud, duress, coercion and violation of any rule of law, public policy or morals.” *In re the Marriage of Moran*, 136 Ill. App. 3d 331, 336 (1985). A settlement agreement is presumed to be valid. *In re Gibson-Terry & Terry*, 325 Ill. App. 3d 317, 325 (2001). A settlement agreement, however, will be deemed invalid “ 'if it is shown that the agreement was procured through coercion, duress or fraud, or if the agreement is unconscionable.' ” *Id.*, quoting *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 180 (1996).

¶ 17 We first address Tammara's claims of coercion and duress. The term "coercion" is defined as "the imposition, oppression, undue influence, or the taking of undue advantage of the stress of another, whereby that person is deprived of the exercise of her free will." *In re Gibson-Terry & Terry*, 325 Ill. App. 3d at 327. Similarly, the term "duress" is defined as "the imposition, oppression, undue influence of another whereby one is deprived of the exercise of free will." *In re Marriage of Riedy*, 130 Ill. App. 3d 311, 314 (1985). Since marriage dissolution proceedings are commonly stressful, experiencing and demonstrating stress alone is not sufficient to establish coercion. *In re Gibson-Terry & Terry*, 325 Ill. App. 3d at 327. Instead, evidence of coercion and duress must be clear and convincing and proved by the person making those allegations. *Id.*; *In re Marriage of Riedy*, 130 Ill. App. 3d at 314.

¶ 18 As evidence of coercion and duress, Tammara claims that she did not have sufficient time to read the agreements, her attorney threatened to end her representation on the first day of trial if she did not sign the agreements and she did not think that the matter would settle on December 6,

2010. Tammara contends that she only had 45 minutes to read the agreements before the prove-up proceedings began at 2 p.m. The report of proceedings for the December 6, 2010 hearing is included in the record and indicates that the hearing commenced at 4:00 p.m., and not at 2 p.m. as Tammara claims. Thus, instead of having 45 minutes to review the agreements as Tammara asserts, she had 2 hours and 45 minutes to review the agreements. The parenting agreement consists of 11 pages, including the signature page, and the marital settlement agreement consists of 27 pages, including the signature page. Tammara claims that she did not see the agreements prior to the prove-up hearing date. During the hearing on her motion to vacate, Tammara stated that she "had never seen a marital settlement, [she] had never seen a parenting agreement." During cross-examination, however, Tammara stated that she had previously seen drafted marital settlement or parenting agreements. In fact, the trial court noted that two of Tammara's prior counsels drafted the agreements on her behalf. Moreover, Tammara previously executed a sole parenting agreement, which further establishes that Tammara was familiar with the nature of parenting agreements.

¶ 19 As the trial court noted, during the three and one half years of the marriage dissolution proceedings, 52 orders were entered, Tammara retained five different attorneys and five different trial dates were set, which were: (1) November 17 and 18, 2008; (2) August 3 – 6, 2009; (3) September 15, 2009; (4) April 12, 2010; and (5) December 6-9 and 13-16, 2010. Also on December 2, 2010, the trial court denied Tammara's emergency motion to continue the trial. Faced with an impending trial date of December 6th, Tammara retained Weging as her counsel for settlement purposes only. Thus, prior to the prove-up hearing, Tammara knew that the trial

would commence on December 6, 2010 and by retaining Weging as her settlement counsel, Tammara intended to settle the matter.

¶ 20 Tammara further contends that she did not timely receive the 604(b) report, which precluded her from deposing the evaluator or obtaining a different evaluator to prepare another report. Tammara stated that she received the report on December 1, 2010, and brought the report with her when she met with Weging. Tammara also discussed this report with Weging during the four hours that she consulted with Weging on December 3, 2010. Thus, the length of time that Tammara received the report prior to December 6, 2010, does not support a claim that the agreements were hastily contrived as urged by Tammara.

¶ 21 During the prove-up hearing, Tammara was specifically asked whether she read, went over in detail and signed both the parenting and marital settlement agreements. Tammara responded "yes." Tammara also responded "correct" to the following question: "And no one has coerced you into signing those today, is that correct?" When asked whether she was satisfied with the representation provided by her counsel, Tammara responded "yes." At no time during the prove-up hearing did Tammara express that she did not read or understand the agreements, despite having been expressly and specifically questioned about whether she read the agreements. Unlike the spouse in *James v. James*, 14 Ill. 2d 295, 305-06 (1958), who expressed dissatisfaction with the property settlement agreement immediately before the hearing and even when the cause was heard, Tammara expressed no dissatisfaction during the prove-up hearing. See also *In re Marriage of Perry*, 96 Ill. App. 3d 370, 373 (1981) (spouse objected to the property settlement to her attorney and retained additional counsel after the prove-up but before

the entry of a supplemental judgment to set aside the oral settlement agreement). As stated previously, duress and coercion must be established with clear and convincing evidence. In the case at bar, the record clearly establishes that during the prove-up hearing, Tammara expressed no objection to the agreements, she read and understood both agreements and she was not coerced into signing the agreements. Accordingly, Tammara failed to present clear and convincing evidence of duress and coercion.

¶ 22 Tammara also contends that the agreements' terms were unconscionable. Tammara notes that the parenting agreement provided sole custody to Robert and that she was required to pay child support to him. Tammara also notes that the agreements were silent regarding the child support in arrears and that she did not retain the dependency exemptions for 2009 and 2010 despite having custody of the children during that time. Prior to the execution of the agreements, Tammara had sole custody and received child support from Robert. Tammara claims that these facts support her allegation that the agreements' terms were unconscionable, in addition to her allegation that the agreements were hastily contrived.

¶ 23 An agreement including terms that favor one party does not render the agreement unconscionable. *In re Gibson-Terry & Terry*, 325 Ill. App. 3d at 325. Unconscionability exists where there is " 'an absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' " *Id.*, quoting *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 709 (1996). An agreement is unconscionable if it is "improvident, totally one-sided or oppressive." *In re Gibson-Terry & Terry*, 325 Ill. App. 3d at 325, quoting *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 182 (1996).

¶ 24 The record reveals that the trial court conducted a pretrial conference with the parties' attorneys before the final agreements were reached. On cross-examination during the hearing on Tammara's motion to vacate, Tammara disagreed with Robert's attorney's statement that she and Tammara's attorney went back and forth between rooms for about two and one half hours discussing different changes to the agreements. Tammara, instead, stated that the attorneys went back and forth for about one half of an hour. Nonetheless, negotiations ensued between the attorneys prior to Tammara's execution of the agreements. See *In re Gibson-Terry & Terry*, 325 Ill. App. 3d at 325 (in determining unconscionability, significance "lies in the fact that the parties negotiated at arm's length with the aid of counsel.") Tammara also claims that the agreements were hastily contrived because she had only 45 minutes to review the agreements. As previously stated, the record reveals that Tammara had more than 45 minutes to review the agreements. The facts fail to support Tammara's claim that the agreements were hastily contrived or that she lacked a meaningful choice in executing the agreements.

¶ 25 Tammara's contention that the agreements' terms are unconscionable because they are unfavorable to Tammara is not persuasive. Tammara acknowledged during the hearing on her motion to vacate that she has extensive visitation with the children "more so than any other visitation parent." The trial court also suggested the reduced child support of $1,000 per month because of the significant amount of time that the children would be spending at Tammara's home and that she would be contributing to the payment of the children's medical premiums. The trial court also noted that Tammara's annual salary was $70,000, and the monthly child support payment was below suggested guidelines. The agreements do not address child support

in arrears, but during the course of the dissolution proceedings Tammara did not file a motion requesting the child support arrearage be paid. Thus, the exclusion of child support in arrears in the agreements does not render the agreements unconscionable. The agreements' terms in the instant case do not rise to the level of being "improvident, totally one-sided or oppressive." Thus, Tammara failed to establish that the agreements' terms were unconscionable. Since Tammara failed to present clear and convincing evidence of duress, coercion and unconscionability, we conclude that the trial court did not abuse its discretion in denying her motion to vacate.

¶ 26 Lastly, Tammara contends that the agreements must be set aside because her counsel provided ineffective representation. Tammara claims that her counsel's deficient representation was evidenced by her failure to object to the 604(b) report and to move for a continuance, in addition to Tammara losing custody of the children and having to pay child support and contribute to the payment of medical coverage premiums. Tammara maintains that the *Muscarello* doctrine (*Muscarello v. Peterson*, 20 Ill. 2d 548, 555 (1960), which provides that in an action involving a minor's interest, the trial court must ensure that the child's rights are adequately protected despite substantial irregularities of procedure, supports her contention that she received ineffective assistance of counsel. Tammara claims that removing the children from her sole custody and providing custody to Robert fails to protect the children's interests. Tammara also maintains that claims of ineffective assistance of counsel are not limited to criminal proceedings and may be raised in civil cases.

¶ 27 Before addressing the merits of Tammara's ineffective assistance of counsel claim, we

must first determine whether such a claim may be raised in a civil proceeding. Tammara relies on the Fourth District case of *Person v. Behnke*, 242 Ill. App. 3d 933, 940 (1993), as support for her position that ineffective assistance of counsel claims may be raised in civil cases. *Person*, however, discussed ineffective assistance of counsel in the context of a legal malpractice claim and the scope of the court's holding was limited only to the most egregious cases of legal malpractice. *Id.* Thus, *Person* is distinguishable because the case at bar does not entail a legal malpractice count. Tammara also relies on *In re D.M.*, 258 Ill. App. 3d 669, 673 (1994) to support her position regarding her ineffective assistance of counsel claim. In *D.M.*, this court recognized that because a parent and child have a statutory right to counsel under the Juvenile Court Act, they have a right to require that counsel to perform effectively. *Id.* at 673. *D.M.*, however, is also distinguishable because a statutory right to counsel is not implicated here.

¶ 28 This court in *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 830 (2010) held that a plaintiff's claim of ineffective assistance of counsel in a civil proceeding had no merit. The *Coleman* court acknowledged that the Fourth District extended the right to effective assistance of counsel to certain civil matters. *Id.* at 829. The *Coleman* court stated, however, that "this court is not bound to follow the decision of another district when our own district has made a determination contrary to that of another district or there is a split of authority among the districts." *Id. Coleman* was decided by the First District of our court. Adopting the holding of *Coleman*, we conclude that Tammara's ineffective assistance of counsel claim lacks merit.

¶ 29 We consider it necessary to state, however, that the trial court considered the children's best interests. During the course of the proceedings, the trial court appointed a 604(b) evaluator.

The 604(b) report recommended sole custody of the children to Robert and provided a recommended visitation schedule to Tammara. In this dissolution of marriage proceeding, the trial court considered and protected the children's interests. Moreover, the record does not support a conclusion that substantial irregularities during the course of the proceedings occurred and that the children's best interests were not protected.

¶ 30 Accordingly, the judgment of the trial court is affirmed.

¶ 31 Affirmed.