No. 3--10--0045

Order filed May 24, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

In re MARRIAGE OF MICHAEL R. MALOTT,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Petitioner-Appellee,	)	
and	)	No. 08--D--198
JANE CARWELL,	)	Honorable Jerelyn D. Maher,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

Held: The trial court did not err in finding that: (1) there was a meeting of the minds between the parties in arriving at the settlement agreement; and (2) the settlement agreement was not economically unconscionable.

The respondent-wife, Jane Carwell, appeals from the trial court's denial of her motion to set aside the terms of a marital settlement agreement, arguing that: (1) there was no meeting of the minds as to the terms; and (2) the agreement was economically unconscionable. We affirm.

FACTS

Prior to marrying on June 25, 1993, the petitioner-husband, Michael R. Malott, and the respondent entered into a prenuptial agreement. Under the agreement, if the marriage is dissolved, "neither party shall make any claim against the property of the other, and each party waives all rights to alimony and separate maintenance."

At the time of their marriage, the wife was employed as a teacher in Bloomington, Illinois. During their marriage, the husband became a shareholder and director of a funeral home in Washington, Illinois. The wife quit her teaching job to work in the funeral home. On August 16, 1997, the parties entered into a postnuptial agreement. The parties agreed that in addition to the terms of the prenuptial agreement, if they divorced the wife would receive up to 35% of the husband's share of the funeral home and "the difference in value between the net asset value of [the wife's] teachers retirement accounts *** as they are constituted at the time she resigns her teaching position *** versus what the increased values of those accounts w[ould] be had she continued to teach [there] *** twenty-five (25) years."

On April 23, 2008, after 15 years of marriage, the husband filed for divorce. The husband filed a financial affidavit indicating that he earned a gross income of $5,416 per month and had $1,000 in a personal checking account, $2,000 in an

investment account, $1,134 in a retirement account, and $80,202 in pension accounts.

On June 23, 2009, on the morning of trial, the wife submitted her financial affidavit and a "Proposal for all Remaining Issues." The wife's financial affidavit indicated that she earned a gross monthly income of $1,684 from wages, pension benefits, interest, and dividends. She had a pension account of $68,600, investments of $14,500, and nonmarital assets of $140,417. The wife's proposal suggested, among other things, that she receive (1) 35% of the husband's net equity share of the funeral home, pursuant to the postnuptial agreement (the husband's expert valued her interest at $85,225 and her expert valued it at $191,625); (2) the difference between a 25-year teacher pension versus her actual pension, as per the postnuptial agreement; and (3) $30,000 for repayment of a down payment she made on a property as indicated in a note from the husband.[1]

The trial judge met in chambers with the parties in an attempt to negotiate a settlement agreement. Motion practice filings by the wife in the lower court suggest that the trial judge had indicated in the meeting that she would likely find the

[1] The entirety of the unsigned note dated October 30, 1997, stated "I, Michael Mallott, guarantee to Jane Carwell, my wife, repayment of the down payment on purchase of 203 Windridge in Washington from the sale of 3207 Eagle Crest."

$30,000 promissory note was invalid and would agree with the husband's lower valuation of the funeral home.

After the meeting, the parties' settlement agreement was read into the record, indicating: (1) the wife waived any claim to the funeral home business and the husband would pay all debts related to the business; (2) the parties would equally split the net equity of the home; (3) the husband would be responsible for all costs of the home until the sale of the home; (4) the husband would pay two months of medical insurance for the wife; (5) each party would keep their own vehicle (the husband's vehicle was valued at $5,200 and the wife's vehicle was valued at $12,300); (6) the husband would keep and pay for the costs of the timeshare in Mexico, which had "only a limited period of time left on it"; (7) the wife was to keep the two cemetery plots; (8) each party would keep their own financial accounts; (9) the husband would pay the wife a $116,000 settlement; and (10) neither party would seek maintenance.

The court asked the parties if they understood that they were waiving their right to trial in exchange for the terms of the agreed settlement that had just been recited. The parties indicated that they understood. The wife indicated that she had missed "so many parts." The court said, "Okay, well let's go over them."

The wife indicated to the court that she understood that

each party had an expert determine the value of the funeral home and asked whether, in determining the value of her portion of the funeral home, the court had averaged the figures of each parties' expert. The trial judge said that the court had not determined a specific number in the settlement conference but had indicated to the attorneys that the parties' proposed estimates on the value of the funeral home were far apart and the parties could either spend $10,000 in attorney fees trying to persuade the court which number to choose or the parties could find a middle ground. The wife said, "I was wondering what the dollar number was on the middle ground." The court indicated that it had not specified a number and allowed the wife an opportunity to speak with her attorney in private.

After discussing the issue with her attorney, the wife indicated to the court, "I believe that answers my question." The wife agreed that the settlement agreement was fair and reasonable under the circumstances and that she wanted the court to accept the agreement as the parties' final and complete settlement. The court accepted the parties' settlement agreement.

On July 14, 2009, the wife indicated that she refused to sign the settlement agreement. On July 16, 2009, the husband filed a motion to enter the judgment of dissolution of marriage incorporating the terms of the settlement agreement. On July 23,

2009, the wife filed a motion to set aside the agreement and set the case for trial, arguing that there was not a meeting of the minds and that the settlement agreement was unconscionable.

On August 5, 2009, over the wife's objection, the trial court entered a judgment of dissolution of marriage incorporating the terms of the settlement agreement. The court noted that the wife's pending motions attacking the judgment were to be considered postjudgment motions.

On December 23, 2009, the trial court held an evidentiary hearing on the wife's allegations that the settlement agreement was unconscionable. The wife presented expert testimony that the difference in value between her pension after 14½ years of service as a teacher and 25 years of service was $109,209. The wife testified that she changed careers to assist with the development of the husband's funeral home business. She testified that she had understood that her expert valued her portion of the funeral home business at $191,625 and the husband's expert valued it at $85,225. She further testified that the husband had promised to repay her, in writing, $30,000 for a down payment she put on the parties' marital home in 1997. She testified that when she agreed to the settlement terms she believed that she would be receiving $116,000 for her pension in addition to the average of the two experts' values of the funeral home business. She claimed that she felt confused, rushed, and

intimidated because the judge had indicated that if she disputed the valuation of the business it would cost an extra $10,000. On cross-examination, she acknowledged that she had gone into the hallway to speak with her attorney, who had told her the terms of the proposed settlement.

The trial court found that the settlement agreement was not unconscionable and that the wife entered into the agreement voluntarily. The trial court denied the wife's motion to set aside the judgment.

ANALYSIS

I

The wife argues that the parties do not have an enforceable marriage settlement agreement because there was no meeting of the minds as to the terms of the settlement agreement. A settlement is in the nature of a contract and is governed by principles of contract law. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086 (2003). In order for a contract to be enforceable, its terms and provisions must enable the court to determine what the parties have agreed to do. *Mavrakis,* 343 Ill. App. 3d 1086. The parties' failure to agree upon an essential term of a contract indicates that the mutual assent required to make a contract is lacking. *Mavrakis,* 343 Ill. App. 3d 1086. An oral settlement agreement is formed when there is an offer, an acceptance, and a

meeting of the minds regarding the terms of the agreement. *Pritchett v. Asbestos Claims Management Corp.,* 332 Ill. App. 3d 890 (2002). A meeting of the minds occurs when there has been assent to the same things in the same sense on all essential terms and conditions. *Pritchett,* 332 Ill. App. 3d 890.

In this case, the terms of the settlement agreement were set forth in the record. The wife had a question regarding one of the terms, and the court allowed her to consult, in private, with her attorney. After speaking with her attorney, the wife acknowledged on the record that she understood and agreed to the terms of the agreement. Therefore, we conclude that there was a meeting of the minds and the settlement agreement reached by the parties constituted a valid contract.

II

The wife claims that the settlement contract was unconscionable. The determination of whether a contract is unconscionable is a question of law, which we review *de novo*. *Blum v. Koster,* 235 Ill. 2d 21 (2009).

"When a party seeks to vacate a property settlement incorporated into a judgment of dissolution of marriage, all presumptions are in favor of the validity of the settlement." *In re Marriage of Bielawski*, 328 Ill. App. 3d 243, 251 (2002). A marital settlement agreement is not usually subject to appellate review because an agreed order is a record of an agreement of the

parties, not a judicial determination of the parties' rights. *Bielawski*, 328 Ill. App. 3d 243. However, a settlement agreement may be set aside if the agreement is unconscionable. *Bielawski*, 328 Ill. App. 3d 243; see also 750 ILCS 5/502(b) (West 2008) (providing that "[t]he terms of the [marital settlement] agreement, except those providing for the support, custody and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable").

Unconscionability means that one party did not have a meaningful choice and the contract terms are unreasonably favorable to the other party. *In re Marriage of Gorman*, 284 Ill. App. 3d 171 (1996). A finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1 (2006); see also *Bielawski*, 328 Ill. App. 3d at 251 ("[t]o determine whether an agreement is unconscionable, we must consider two factors: (1) the conditions under which the agreement was made; and (2) the economic circumstances of the parties that result from the agreement").

Procedural unconscionability refers to some impropriety during the formation of the contract that deprives a party of a

meaningful choice. *Kinkel*, 223 Ill. 2d 1. Substantive unconscionability refers to the fairness of the contract terms. *Kinkel*, 223 Ill. 2d 1. An agreement that favors one party over the other is not necessarily unconscionable. *Gorman,* 284 Ill. App. 3d 171. To rise to the level of being unconscionable, the settlement must be improvident, totally one-sided or oppressive. *Gorman,* 284 Ill. App. 3d 171.

The wife argues that the settlement agreement was unconscionable because it was economically unfair. Initially, we note that the wife waived any maintenance in the prenuptial agreement. Thus, we must consider the parties' economic circumstances resulting from the settlement agreement in light of the fact that both parties had contractually waived any maintenance.[2]

Here, in addition to paying the wife a $116,000 settlement, the husband was required to pay the monthly household bills until the house sold and two months of health insurance premiums for the wife. Also, each party kept their own vehicles, with the wife's vehicle being worth $7,100 more than the husband's vehicle. The wife received one-half of the proceeds from the sale of the marital home and kept both of the burial plots. Although the husband's monthly income is substantially larger

[2] The terms of the prenuptial and postnuptial agreements are not contested.

than the wife's income, the wife has waived maintenance. In accordance with the postnuptial agreement, the wife was to receive a percentage of the funeral home business and a difference in pensions, which resulted in a $116,000 settlement. We do not know the concessions made by the parties in reaching the $116,000 settlement amount, but the record indicates that the parties negotiated and agreed upon that settlement amount. The settlement agreement is not unreasonably favorable to the husband and is not unconscionable.

CONCLUSION

The judgment of the circuit court of Tazewell County is affirmed.

Affirmed.