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Case and Comment

By Perry Itkin

“The Judge Did What?!?”

In *Stallworth v. Phinney*, 947 So.2d 1292 [Fla. 1st DCA 2007] the trial court modified the parties’ final judgment of dissolution to order, pursuant to the parties’ agreement, that the parties’ daughter would complete her elementary education at a particular school [no problems yet]. The Appellee former husband thereafter unilaterally elected to place the daughter in a different school [uh oh!]. As you might expect, the Appellant former wife then filed an emergency motion for contempt and requested that the motion be considered at an expedited evidentiary hearing.

The trial court declined to hold the requested hearing and entered an order denying the Appellant’s motion [now there’s a problem]. The judge then directed the parties to mediate the issue, and granted the Appellee the final authority to choose a school if mediation was unsuccessful [the problem is getting bigger!].

The appellate court reversed the trial judge and remanded the case to the trial court with directions that an evidentiary hearing be promptly held. The appellate court determined that:

In refusing to hold an evidentiary hearing, the trial court denied the former wife due process.

“I Was Just Going Along With The Program!”

COMMENT: That’s nice but it does not rise to the level of duress in an effort to set aside a mediated marital settlement agreement according to the Second District Court of Appeal! This is a good case which defines and illustrates what is and what is not “duress”. Remember, [*Florida Rules for Certified and Court-Appointed Mediators*](#), Rules 10.310(b) and 10.420(b)(4) provide:

Rule 10.310. Self-Determination

(b) Coercion Prohibited. A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.

Rule 10.420. Conduct of Mediation

(b) Adjournment or Termination. A mediator shall:

(4) terminate a mediation entailing fraud, duress, the absence of bargaining ability, or unconscionability [COMMENT: There's no wiggle room here!]

In *Williams v. Williams*, 939 So.2d 1154 [Fla. 2nd DCA 2006] the Wife appealed an order granting in part and denying in part her motion to enforce the parties' mediation agreement. The Husband cross-appealed and argued that the trial court should have set aside the agreement in its entirety.

At the court ordered mediation conference, the parties reached an agreement and executed a written mediation agreement, settling a number of issues. The agreement provided that the Wife shall be designated the primary residential parent for the parties' two minor children. Further, it provided as follows:

“4. *WIFE'S EQUITABLE DISTRIBUTION*: The Wife shall receive as an equitable distribution the following: a. The marital home located at [address specified]. The Husband shall convey to the Wife all his right, title, and interest in and to the marital home. The Wife shall be responsible for paying the mortgage and shall hold the Husband harmless for payment of same. The Husband shall vacate the marital home on or before April 1, 2005. The Wife agrees to make a good-faith effort to refinance the marital home within ninety (90) days after the entry of the Final Judgment.”

Eventually, the Wife filed a motion to enforce the mediation agreement, asserting that the Husband failed to comply with its terms.

At an evidentiary hearing on the motion to enforce, the Husband claimed that he signed the agreement without understanding it. He complained about the child support provision and stated that he would not agree to the Wife staying in the marital home. He did not provide any detail as to his financial situation but asserted that the provisions as to child support and the marital home would leave him without enough money for his own expenses. He added that he did not want a divorce and that he thought he and the Wife would “make up.” He testified that he signed the agreement because he “was going along with the program” but that “I didn't agree.” He also stated that he had not consulted with his attorney before signing the agreement.

The mediator told the court that each party was represented by counsel at the mediation conference. He explained the negotiations that took place and stated that the Husband asked and got answers to his questions. He added that the Husband did not appear to be confused in any way and that he had “no doubt” the Husband understood what he was signing. [COMMENT: This is the **first appellate opinion** containing a reference to the recently enacted Mediation Confidentiality and Privilege Act. The reference is in a footnote: “The mediator testified without objection and without any party asserting confidentiality as to the mediation communications. *See* [§ 44.405, Fla. Stat. \(2005\)](#).”]

The attorney who represented the Husband at the mediation conference testified that she discussed the details of the settlement proposals with the Husband to make sure there were no misunderstandings. The parties agreed to the wording in the agreement that the Wife would be responsible for making the mortgage payments and would make a good faith effort to refinance the home. The good faith language was used because the parties recognized refinancing might not be possible. The attorney added that she went through the agreement with the Husband “word-for-word” and had “no doubt” that he understood the agreement. [COMMENT: Just in case you were wondering, the Husband waived the

attorney-client privilege, enabling the attorney to testify at the hearing. That attorney did not represent the Husband at the hearing and did not represent him in the appeal.]

The trial court expressed concern about the refinancing language being unfair to the Husband and ordered the Wife to refinance the home and directed that if she did not obtain refinancing within ninety days after entry of the final judgment of dissolution, the home “shall be sold.” The Wife contended that the trial court erred by rewriting the agreement and by failing to enforce the parties’ agreement.

The appellate court held

Even if the court is correct that the refinancing provision is unfair to the Husband, this does not provide a legal basis for the court to rewrite the parties’ agreement or to set it aside. “Bad domestic bargains - meaning unfair or unreasonable property and monetary settlement agreements - are nevertheless enforceable so long as they are knowing, voluntary and not otherwise against public policy.”

Regarding duress, it “is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition.” Here, no evidence supports the conclusion that the Husband was under duress in executing the agreement or the refinancing provision. Rather, the evidence reflects that the Husband did not want to get divorced and that he had misgivings about the agreement and how it would impact him. As the trial court found, the Husband understood the agreement and what took place at the mediation conference.

Because the Husband failed to present any legal grounds [under [Florida Rule of Civil Procedure 1.540](#)] for relief from the mediation agreement, the trial court should have enforced it in its entirety and should not have modified its terms. Accordingly, we affirm the trial court’s order to the extent it grants the motion to enforce, but we reverse to the extent the order finds the Husband was under duress and revises the agreement to provide for sale of the marital home in the event the Wife is unable to refinance.

COMMENT: Other than the specific footnoted reference to the mediator’s testimony, this opinion also is illustrative of the *some* of the types of *permitted* disclosures the F.S. 44.405(4)(a), the Mediation Confidentiality and Privilege Act. The court cited *Florida Rule of Civil Procedure 1.540* as providing “the framework for challenging settlement agreements entered into after the commencement of litigation and utilization of discovery procedures.” See also *Macar v. Macar*, 803 So.2d 707, 713 (Fla. 2001) and [Fla. Fam. L.R. P. 12.540](#).

Rule 1.540(b) provides, in pertinent, part as follows:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.

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