BLOG POST
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WHY YOU SHOULD NEVER TELL YOUR CLIENT "I'LL BE RIGHT BACK" IN A MEDIATION

The hour was late and the mediation was moving slowly; the attorney needed to complete just one little errand before close of business. So, the attorney checks in the with mediator and the client (in her own room, separated from the opponents) informing the two of them: "I'll be right back; I really need to run a quick errand." Both consent, and as luck would have it, the errand took a bit longer than expected and the attorney was gone for over one hour.

More bad luck came the way of the busy attorney, when after he left, the opponents made a break-through offer and the mediator communicated this new offer to the client. The offer included some tax ramifications and finally it seemed the mediation had potential to settle. Once the attorney returned from the oh-such-bad-timing errand, the parties reached a potential deal and signed a draft "bullet-point agreement" which was to be finalized in a full Agreement later.

Such a full Agreement was never executed after the client learned the tax information conveyed by the mediator was inaccurate. The trial court enforced the "bullet-point agreement" and the client, now with a new attorney, appealed the decision. The Court of Appeals reversed with an opinion critical of the attorney and the mediator. The court wrote: "The actions of … counsel clearly do not represent the best practices for a mediation, and we hold that an attorney leaving during a mediation effectively must end the mediation." The agreement was unconscionable and not enforceable.

Moral of the story: One hour away from a client in the midst of a mediation is too long. While many attorneys may step out for a 5-minute phone call, and we all do our best to accommodate the realities of busy lawyers, the best practice is to halt all communication with any party who is temporarily without their counsel.

See Bass v Bass, Case NO. 2016-CA-000725-MR (Ky. Ct. App. 2018) (Issued April 13, 2018)

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Commonwealth of Kentucky Court of Appeals

NO. 2016-CA-000725-MR
ERIN EMILLIE[1] BAAS v.
EDWARD ARTHUR BAAS
ACTION NO. 14-CI-00800
OPINION REVERSING AND REMANDING
** ** ** ** **
BEFORE: COMBS, D. LAMBERT AND NICKELL, JUDGES.

LAMBERT, D. JUDGE: Erin Baas appeals an order of the Campbell Family Court which adopted a mediated agreement into the decree dissolving her marriage to Edward Baas. She raises several issues: whether attorney misconduct renders a mediated agreement unconscionable, whether mediator misconduct renders a mediated agreement unenforceable, whether a mediated agreement may be

[1] "Emillie" was misspelled on the notice of appeal. The Court is using the spelling as it appears in the record.

incorporated directly into a decree of dissolution, and whether, if the "bullet-point mediated agreement" is properly signed, it is unenforceable. Having reviewed the record, we find that the mediator impermissibly interfered in the negotiating process, and for that reason the trial court erred in finding the agreement enforceable.

I. FACTUAL AND PROCEDURAL HISTORY

After less than four years of marriage, Erin Baas, a business banker with no college education, sought a divorce from her husband, Edward Baas, a construction entrepreneur. The couple had one child together, but Edward had two other children from a previous marriage. The divorce proceedings were highly contentious, and the trial court ordered the parties to attend mediation.

The looming date for the final hearing necessitated the parties act quickly in finding a time and date for the mediation, which they set to begin in the late afternoon of January 20, 2016, nine days prior to the final hearing. The parties selected a mediator, a practicing attorney with substantial experience in domestic relations cases.

Upon selecting a mediator, the parties together with counsel and the mediator executed an "Agreement to Mediate," which set out the terms under which the mediation would be conducted. In enumerated section two of this agreement, the Agreement to Meditate specified both that "[t]he Mediator is responsible for managing the process of mediation[,]" and that "[t]he Mediator will

not make decisions for the participants nor advise them as to what should or should not be decided on any issue." Section four of the agreement permitted consultation with outside experts, such as accountants or actuaries, during the mediation. Section six explicitly provided that the mediator would not give legal advice.

The mediation took place at the office of Edward's counsel. The parties were never in the same room together; the mediator acted as the go- between, relaying communications between the parties. Ultimately, this mediation lasted for more than four hours, concluding after 8:00 P.M. It appears that the primary disagreement ultimately revolved around the valuation of Edward's business interests.

As part of the discovery process in the litigation, both parties retained and deposed experts to appraise Edward's business interests. Erin hired Lori Wilhelmy, MBA, a professional business appraiser, while Edward hired tax attorney, Joy L. Hall. Both experts noted that Edward owned a thirty percent, non- voting interest in American Façade Restoration, LLC ("AFR"). However, Hall explained that she was only retained to evaluate AFR and did not render an opinion as to the value of Edward's interest in another business, EML Properties, LLC ("EML"). Wilhelmy noted that Edward also owned a thirty percent non-voting interest in EML.

AFR is engaged in the business of restoring the brick and mortar facades of damaged or aging buildings. Both experts testified that Edward is the only active member of the business that tends to the daily operations, with Hall

going as far as to testify that "without Eddie, there is no business." Hall valued AFR at $638,517 on the date of separation. Notwithstanding that value and Edward's integral role in the business, Hall valued his thirty percent stake in the company at $77,419, heavily discounting the value due to Edward's lack of voting control. Wilhelmy valued AFR using two different valuation methods, reaching an average value of $3,790,000. Using that figure for the company, Wilhelmy valued Edward's share of AFR at $1,137,000, considering both Edward's lack of voting control and his integral role in the operation of the business.

EFL is a real estate holding company, whose sole asset is the warehouse which it leases to AFR, and the rent paid by AFR comprises its entire income. Wilhelmy valued EFL at its book value and determined that Edward's share was worth $114,000, though the parties stipulated its value at $120,000.

During the mediation, Erin's counsel left, apparently needing to run personal errands before her bank closed. This departure left Erin alone for more than an hour, though she could contact her attorney via text messaging. During her attorney's absence, Erin attempted to leave the mediation without reaching a settlement.

According to Erin, the mediator continued to move the mediation forward in the absence of her attorney. The record contains text messages Erin exchanged with her attorney at 6:48 P.M. regarding the mediator's suggestions. After Erin's attorney returned to the mediation, discussions continued but Erin still believed it was time to leave. After Erin had donned her coat, the mediator relayed

an offer from Edward that if Erin were to agree to Edward's valuation of his business interests, he would agree to allow her to claim their three-year-old daughter on her income taxes until the child turned 18. Erin alleges the mediator further stated that the value of the tax credit she would receive would range from $3,000-$5,000 annually, and the total value of this tax savings

would offset the difference in her valuation and Edward's valuation of his business interests. Based on these representations, Erin agreed to Edward's offer and valuation. An informal "bullet-point" written agreement resulted. Both parties and their respective attorneys signed this agreement, as well as the mediator. Edward's counsel was to prepare a formal separation agreement based on the mediated agreement.

The bullet-point mediated agreement contained several conditions related to the division of property. Erin waived her right to maintenance. Edward received the marital residence as well as another piece of real property the couple owned. Edward assumed the liability (if any) for amounts owing on the couple's 2014 Ohio state income taxes and waived entitlement to any refund. He also waived his right to reimbursement for their child's 2015 medical bills, and waived reimbursement for another attorney's fee. Both parties waived any marital interest in the retirement/pension accounts of the other. Erin received a Toyota vehicle.
As noted above, Edward agreed to allow Erin to claim their child on her tax returns until age 18. Most pertinent for this appeal, Erin agreed to accept, as her portion of Edward's business holdings, a one-time lump sum payment of $120,000, plus monthly payments of $1000 for five years.

In the days following the mediation, Edward circulated a proposed "Separation and Property Settlement Agreement" containing those terms, but Erin refused to execute it. Erin based her refusal on her learning that the mediator's assurances regarding the value of the tax exemption were not accurate, and that the separation agreement addressed issues not previously discussed or agreed upon. This refusal prompted Edward to move the trial court to enforce the mediated agreement.

Following a hearing, the trial court entered an order granting the motion. Within the order, the trial court made several findings of fact. The trial court made a finding that Edward had an annual salary of $149,080, and that he received distributions from his businesses in 2015 that totaled $115,593. Regarding Erin's income, the trial court found her salary was $63,900, and she received bonuses in 2015 totaling $32,351.28. The trial court also found the mediation agreement was not entered as the result of fraud or material misrepresentation by Edward, nor was it unconscionable. The trial court ordered the mediated agreement incorporated by reference into the decree.

Erin filed a motion to alter, amend, or vacate, which the trial court denied. This appeal ensued.

II. ANALYSIS

A. THE TRIAL COURT ERRED IN HOLDING THE AGREEMENT WAS ENFORCEABLE

Erin asserts that the mediated agreement was unenforceable. First, she argues that the misconduct of her attorney rendered the result of mediation unconscionable. Second, she argues that her reliance on inaccurate material representations by the mediator limited her ability to assent to the terms of the agreement, especially given the gross discrepancy between the valuations of Edward's business interests by the two experts.

Under normal circumstances, mediated settlements create legally binding contracts; however "[n]ot every agreement or understanding rises to the level of a legally enforceable contract." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997). "A fundamental rule of contract law holds that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms." *Schnuerle v.*

Insight Comm. Co., L.P., 376 S.W.3d 561, 575 (Ky. 2012) (quoting *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App 2001)).

Of course, every rule has its exceptions, and this case presents a potential exception to the general rule of enforceability of a contract in the form of unconscionability. *See Energy Home, Div. of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828 (Ky. 2013). Unconscionability manifests itself either in "the process by which an agreement is reached and the form of an agreement," (*Schnuerle* at 576) or where the terms of a contract are unreasonable or so grossly favorable to one side "and to which the disfavored party does not assent." *Energy Home* at 835 (citing *Schnuerle*). A reviewing court may set aside a settlement agreement if the agreement is manifestly unfair or unreasonable. *McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky. App. 1983) (citing *Wilhoit v. Wilhoit*, 506 S.W.2d 511 (Ky. 1974)); KRS 403.180.

1. **ATTORNEY MISCONDUCT RENDERED THE CONTRACT UNENFORCEABLE**

"Serious misconduct of counsel" justifies the setting aside of judgments to prevent manifest injustice under Civil Rule ("CR") 59. *Guillon v. Guillon*, 163 S.W.3d 888, 893 (Ky. 2005). Erin asks us to hold that attorney misconduct in this instance should result in setting aside the portion of the decree incorporated the settlement agreement, as the misbehavior of her counsel precipitated its creation.

Erin cites *Kentucky Bar Ass'n v. Parks*, 449 S.W.3d 763 (Ky. 2014), to stand for the proposition that an attorney who abandons a client during a mediation commits misconduct. Our reading of *Parks* finds no such rule. In *Parks*, the Supreme Court held that failing to make *any* appearances on behalf of a client *after collecting a fee* is misconduct; it makes no mention of mediation. This interpretation is consistent with other recent attorney discipline decisions rendered by the Supreme Court. *See e.g. Kentucky Bar Ass'n v. Venter*, 472 S.W.3d 179 (Ky. 2015); *Kentucky Bar Ass'n v. Osborne*, 463 S.W.3d 752 (Ky. 2015); *Kentucky Bar Ass'n v. Hoskins*, 454 S.W.3d 289 (Ky. 2015); *Masterson v. Kentucky Bar Ass'n*, 432 S.W.3d 167 (Ky. 2014).

The actions of Erin's counsel clearly do not represent the best practices for a mediation, and we hold that an attorney leaving during a mediation effectively must end the mediation. While we are aware of jurisdictions where parties are encouraged to mediate family cases before non-attorney mediators and that attorneys are discouraged from attending, this is a degradation of the legal processes and should not continue. Mediation, where it is anticipated a final and enforceable agreement is to be entered, is the equivalent of a final hearing and for a mediation to continue, after an attorney leaves, is not palatable to justice. The mediation was ordered to take place by the Court, and was thus, a Court proceeding, which would make a participant believe that they could not freely leave without being subject to contempt proceedings. In comparison, if counsel for a represented party, who is attending a court proceeding, must leave, for whatever reason, the court halts the proceeding. Likewise, the Mediator should have stopped the proceedings when the attorney left her client to fend for herself.

2. MISCONDUCT OF THE MEDIATOR PREVENTED THE PARTIES FROM REACHING A TRUE AND VOLUNTARY MEETING

OF THE MINDS

The mediator never testified before the trial court, relying on a confidentiality provision in the Agreement to Mediate. Erin, alongside her motion to alter, amend, or vacate, filed an affidavit

with the trial court detailing the mediation as it progressed that evening. That affidavit and Erin's similar subsequent testimony before the trial court comprise the only evidence of record

regarding the interactions between Erin and the mediator at the mediation.

The affidavit indicates the mediator violated the Agreement to Mediate in several respects. The mediator failed to maintain control over the mediation first by permitting Erin's counsel to leave. That the mediator continued to push the mediation along when one party had essentially become unrepresented also reflects a departure from the spirit of fairness, which not only permeated the entire agreement that unequivocally stated in the "General Principles" section of the Agreement to Mediate. The mediator, by preventing Erin from leaving during her counsel's absence, also violated the terms of the agreement, which allowed the parties to end the mediation without reaching a settlement.

Finally, and most egregiously, the mediator shifted from the position of third-party neutral and into the role of advocate by giving Erin legal advice regarding the value of the income tax exemption. This violation was further compounded by the fact that this advice was materially inaccurate, and, given the late hour, Erin could not have reached an outside expert to clarify and correct the mistake. Simply the fact that Erin's counsel acquiesced to the mediator's assertions does not cure the mistake. Instead, it worsens it, because that acquiescence highlights the fact that Erin could not possibly have learned of the mistake until after the agreement had been reached.

This situation shines a spotlight on a gap in Kentucky law: the lack of binding standardized rules governing mediation. When a court compels parties in a dispute to attempt to resolve that dispute through mediation, that court delegates

its judicial authority to a non-judge. Much as our sister court in Florida held in 10

Vitakis-Valchine v. Valchine, 793 So.2d 1094 (Fla. 4th Dist. Ct. App. 2001), we believe that such delegation transforms "the mediator [into] no ordinary third party, but... for all intents and purposes, an agent of the court carrying out a court- ordered function." *Id.* at 1099. Also, like the situation in *Vitakis*, the mediator continued contact with a represented party and provided legal advice that contained incorrect material information. The most operative difference between the situation in this appeal and *Vitakis* is the fact that Florida has its own codified set of rules governing the behavior of mediators. This case illustrates the need for Kentucky to adopt mediation rules to govern mediation, which has become a much used avenue for dispute resolution.

Under Kentucky law as it currently stands, when an individual mediator undertakes a quasi-judicial function as the third-party neutral in a court ordered mediation, though other sources may guide their actions, mediators, and non-lawyer mediators are only bound by the terms of an agreement which the mediator typically drafts. This practice can undermine the protections of due process. Some standard is necessary to fill this legal vacuum, and for that reason we hold that in quasi-judicial proceedings like court ordered mediation, the third- party neutral must observe and abide by the Kentucky Supreme Court Rules ("SCR") regarding professional responsibility for lawyers (SCR 3.130 *et seq.*), the Kentucky Code of Judicial Conduct (SCR 4.300 *et seq.*), the applicable provisions of the Kentucky Rules of Civil Procedure ("CR"), and the Kentucky Family Court

Rules of Procedure and Practice ("FCRPP").

This ruling is consistent with the 2009 Supreme Court Commentary No. 2 discussing SCR 3.130(2.4) regarding lawyers as third-party neutrals:

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court Rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

Examining the mediator's actions through the lens of these rules and standards reveals several departures from those standards. In continuing the mediation without Erin's counsel, the mediator may have violated SCR 3.130(4.2), which prohibits communication by a lawyer with a known represented party about the subject of the representation. The same behavior may have also violated SCR 3.130(4.3)'s similar prohibition relating to communication with unrepresented parties. Further, had this occurred during a court proceeding before a judge, due process would have demanded an immediate halt to any proceedings until counsel became available.

The mediator's dispensing of legal advice to Erin regarding the value[2] of the tax exemption also violated SCR 3.130(1.12)(a), which prohibits lawyers from representing a client in connection with a matter in which the lawyer participated "as a judge or other adjudicative officer... [such as a] mediator or other third-party neutral" absent a written agreement.

SCR 4.300(Canon 3) requires judges to perform the duties of judicial office with impartiality and diligence. Acting in a quasi-judicial role, court ordered mediators may not dispense legal advice any more than can a judge presiding over a dispute.

Finally, Standard IV(A)(5) of the American Bar Association's Standards of Conduct for mediators provides as follows: "The role of mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles...." Providing legal advice to a mediating party blurs, rather than distinguishes, between the roles of mediator and advocate, representing a departure from the standards of conduct espoused in the ABA standards. The fact that the mediator usurped the role of counsel, even in the absence of counsel, and offered advice to a party during the mediation cannot be tolerated by the courts.

[2] We are careful to distinguish here between a general statement of law regarding the existence of a tax exemption and the application of that law to a unique set of facts, such as advising a client as to that exemption's effect on his or her tax liability.

The issue here is not, as Edward contends, that Erin is attempting to undo a bad bargain she negotiated for herself. Rather, the issue is that the attorney abandoned her client at a critical stage of the legal process; the mediator breached the professional standards; and, in the circumstances of this case, Erin lacked any real opportunity to effectively negotiate a bargain at all.

Much like the *Vitakis* Court, "We believe it would be unconscionable for a court to enforce a settlement agreement reached through... improper tactics by a court-appointed mediator." *Vitakis* at 1099. Kentucky law does not entirely differ from Florida law in this respect. Settlement agreements in divorce actions may be "set aside if they are the result of fraud, undue influence, or overreaching." *Money v. Money*, 297 S.W.3d 69, 72 (Ky. App. 2009) (citing *McGowan v. McGowan*, 663 S.W.2d 219 (Ky. App. 1983)). Here, the trial court largely ignored the only evidence relating to the formation of the agreement (*i.e.,* its procedural unconscionability) because the material misrepresentations did not come from Edward. The trial court found it conscionable entirely based on its substance and the terms of the agreement indicating that Erin accepted Edward's valuation. The trial court's analysis is incomplete as it relates to unconscionability, and must be set aside and re-examined in light of this ruling.

B. THE TRIAL COURT'S INCORPORATION OF THE "BULLET- POINT" SETTLEMENT AGREEMENT INTO THE DIVORCE DECREE WAS PROPER, BUT IMMATERIAL IN THIS APPEAL

Erin argues that the trial court should not have adopted the signed "bullet-point" separation agreement into the decree. She insists that KRS 403.180 requires a formal written document.

However, this Court held just the opposite in *Calloway v. Calloway*, 707 S.W.2d 789 (Ky. App. 1986). "[T]he language of [KRS 403.180] does not... undertake to describe a permissible or acceptable form for such agreements," only that the parties "'may enter into a written agreement.'" *Id.* at 791 (quoting KRS 403.180). The *Calloway* Court held that an oral agreement which had been dictated under oath to a court reporter, transcribed, and submitted to the trial court as part of the record, did satisfy the statutory requirement for a written agreement.

Here, the parties executed a written agreement, and Edward submitted it to the trial court when Erin refused to sign the formalized version. Under *Calloway*, the formal agreement is not strictly required, and Erin's reading of the language of KRS 403.180 on its own is flawed. Thus, the trial court did not err in determining that bullet-point agreement satisfied KRS 403.180. Nevertheless, because the underlying process by which it was obtained was improper, our conclusion as to the propriety of the form of the agreement being incorporated into the record is of no consequence.

III. CONCLUSION

Having reviewed the record and the arguments advanced by the parties, we conclude that the trial court committed reversible error in finding the mediated settlement enforceable. We therefore reverse the portion of the trial court's judgment incorporating the mediated settlement and remand for further proceedings.

ALL CONCUR.