**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CIVIL ACTION**

**R L,**
**Petitioner & former husband,**

**vs.** **Case No. XX DR YYYY N**

**E L,**
**Respondent & former wife,**

## ORDER GRANTING THE FORMER WIFE'S MOTION TO SET ASIDE

This matter having come before the court on *Date omitted* /2015 on the former wife's "Motion to Set Aside Settlement Agreement, Etc.," filed *Date omitted* /2015, it is ordered:

1. Findings

The parties divorced in 2008 by a South Carolina judgment. They have two minor children, ages 11 and 9.

The judgment adopted the parties' settlement agreement, which required the former husband to pay the former wife child support of $1,057 a month, and it provided for the children to live with the former wife most of the overnights every month and "two forty-eight hour periods ... and four additional overnights ... per month" with the former husband. The agreement also provided that the parties "may reside in such place as he or she may desire within twenty miles of Estero, Florida."

Their settlement agreement provides that the parties shall have "*joint custody*" of their children, which is equivalent to "shared parental responsibility" under Florida law. The agreement also provides that the former wife has responsibility for "*daily and general welfare of the children, including but not limited to, their educational and medical needs*." The court interprets this provision to be equivalent to "shared parental responsibility" with "ultimate responsibility" to the former wife for "educational and medical" decisions in the event the parties do not agree on educational or medical decisions, under F.S. §61.13(2)(c)2.,a., which is how the court interpreted it in a previous order.

Both parties relocated to Estero, Lee County, Florida, and on *Date omitted* /2014 the former wife filed a supplemental petition to relocate the children to Polk County, Florida. The former wife had moved to Polk County in 1/2014.

After she moved, the children remained with the former husband in Lee County. He stopped paying child support to the former wife in 1/2014. In response to her petition to relocate the children, the former husband filed an answer. He did not request any substantive relief in a counter petition.

After a trial on *Date omitted* /2014 on the former wife's supplemental petition to relocate the court entered a final judgment that denied her petition on *Date omitted* /2014.

On *Date omitted* /2015 the former husband filed a supplemental petition to modify the time-sharing order and the child support order. Although the former husband requested a modified child support order, he did not file a financial affidavit or a certificate of compliance with the disclosure required by Rule 12.285.

The former wife was served and she filed an answer. She also filed a financial affidavit. It shows her gross monthly income is "$1,614.17." The former wife moved back to Lee County in 6/2015. After she returned to Lee County and obtained a different job, she filed an amended financial affidavit. Her amended affidavit shows her gross monthly income is "$780."

The court ordered the parties to mediate the issues in the former husband's supplemental petition, and on 7/10/2015 the parties attended a mediation session as ordered. The former husband was represented by counsel in the mediation and at all times material in this matter. The former wife was unrepresented in the mediation and at all times material in this matter.

The mediation session began at 1:00 PM and ended at 5:00 PM. When it ended the parties had not reached an agreement. They had a marked up draft of a document prepared by the mediator but they had no agreement.

After 5:00 PM the parties then went to the office of the former husband's lawyer where they remained for about three more hours. At the office of the former husband's lawyer the former wife and her spouse waited those three hours in the attorney's small waiting room, which was large enough for only two chairs.

From time to time, the former husband left the waiting room and entered his lawyer's inner offices while his lawyer and her staff prepared a written document. For some of time during the three hours, the former husband stood in the small waiting room and talked to the former wife and her spouse. He passed back and forth from the waiting room to his lawyer's inner offices. Eventually, he produced a written document that he had signed. He requested that the former wife sign the document in the waiting room. She signed it then and there. That document is the purported agreement the former wife now asks the court to set aside.

The document contains provisions about the incomes and finances of the parties. It attaches a child support calculation in which the former husband's income is stated as "$6,384" gross per month even though he never filed a financial affidavit or complied with disclosure after he filed his supplemental petition.

On the other hand, the former wife filed two financial affidavits, the second showing her income is "$780" gross per month for her job in Lee County. Nevertheless, the child support calculation states her income is "$1,614" gross per month, which is the amount shown in her first financial affidavit for the job she had in Polk County.

The document requires the former wife to secure health insurance for the children and that the former husband will reimburse her for "50%" of the expense after the former wife provides him with "proof of payment."

The document says the parties will "equally" share uncovered medical expenses on the

children, even though the ratio of their incomes is 74% for the former husband and 26% for the former wife, according to the calculation on the document, which also assumes her gross monthly income is $1,614.

The document says each parent will claim one child for a dependent's exemption and they will rotate the exemption for the younger child year to year after the older child "graduates from high school."

The document provides that "neither parent paid child support to the other for the period January, 2014 through the present. The father had the children for the majority of time and the mother owes the father child support from January, 2014 through June, 2015 (18 months) ... ," even though he did not file a supplemental petition requesting any affirmative relief in response to her petition to relocate and his present supplemental petition requesting a modification of the South Carolina child support order was filed on *Date omitted* /2015.

The document has a child support calculation attached and based on that calculation it calculates a "child support arrearage" owed by the former wife to the former husband for "18 months," even though there has never been a child support order requiring the former wife to pay the former husband child support. It provides that the child support the former husband owes to the former wife going forward according to the calculation attached will be reduced by "20%" each month until "the Mother's arrearage ... is extinguished."

The document has a complex time-sharing schedule. The former husband characterized it as an "equal" time-sharing schedule in his testimony at the hearing, but this is not obvious from the language of the document. It seems that because the former husband is a pilot with a variable schedule he cannot commit to any particular days every week for the children to be with him.

The document provides that the parties will "share parental responsibility" and that the "former husband's address shall be used for purposes of school choice."

The document provides that it is a purported agreement that resolves "all outstanding issues of the parties." It resolves the issues in the former husband's favor, not the former wife's.

At the hearing on her motion to set aside, the former wife claimed she was "coerced" and "pressured" to sign the document, but she did not testify to any threat of physical harm to her or to any threat by the former husband to do some act which he had no legal right to do. She testified that the door out of the lawyer's office was not locked and that she was free to walk out at any time and that she was accompanied by her spouse through the mediation and the post mediation hours in the waiting room of the former husband's lawyer's office.

She testified that she did not understand all of the provisions of the document and that after so many hours she was tired and felt she had no choice but to sign the document that was presented to her by the former husband in the waiting room of his lawyer.

The former husband's counsel filed the agreement on 7/13/2015, and the former wife moved to set it aside on 7/30/2015.

**2. <u>Ruling</u>**

## 2.1 The law that applies

"... There are, however, two separate grounds by which either spouse may challenge such an agreement [a post nuptial agreement entered during litigation] and have it vacated or modified.

First, a spouse may set aside or modify an agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching. *Masilotti v. Masilotti*, 158 Fla. 663, 29 So.2d 872 (1947); [*Hahn v. Hahn*, 465 So.2d 1352 (Fla. 5th DCA 1985); *O'Connor v. O'Connor*, 435 So.2d 344 (Fla. 1st DCA 1983).] *See also Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla.1962).

The second ground to vacate a settlement agreement contains multiple elements. Initially, the challenging spouse must establish that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties. *Del Vecchio*, 143 So.2d at 20. To establish that an agreement is unreasonable, the challenging spouse must present evidence of the parties' relative situations, including their respective ages, health, education, and financial status. With this basic information, a trial court may determine that the agreement, on its face, does not adequately provide for the challenging spouse and, consequently, is unreasonable. In making this determination, the trial court must find that the agreement is "disproportionate to the means" of the defending spouse. *Id.* This finding requires some evidence in the record to establish a defending spouse's financial means. Additional evidence other than the basic financial information may be necessary to establish the unreasonableness of the agreement.

Once the claiming spouse establishes that the agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached. The burden then shifts to the defending spouse, who may rebut these presumptions by showing that there was either (a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income of the parties, or (b) a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties. The test in this regard is the adequacy of the challenging spouse's knowledge at the time of the agreement and whether the challenging spouse is prejudiced by the lack of information. *Id. See Belcher v. Belcher*, 271 So.2d 7 (Fla.1972); *Del Vecchio*.*

As reflected by the above principles, the fact that one party to the agreement apparently made a bad bargain is not a sufficient ground, by itself, to vacate or modify a settlement agreement. The critical test in determining the validity of marital agreements is whether there was fraud or

overreaching on one side, or, assuming unreasonableness, whether the challenging spouse did not have adequate knowledge of the marital property and income of the parties at the time the agreement was reached. A bad fiscal bargain that appears unreasonable can be knowledgeably entered into for reasons other than insufficient knowledge of assets and income. There may be a desire to leave the marriage for reasons unrelated to the parties' fiscal position. If an agreement that is unreasonable is freely entered into, it is enforceable. Courts, however, must recognize that parties to a marriage are not dealing at arm's length, and, consequently, trial judges must carefully examine the circumstances to determine the validity of these agreements." *Casto v. Casto*, 508 So.2d 330, 333-334 (Fla. 1987).

## 2.2 The former wife's grounds for her motion: duress, overreaching, failure to disclose

### (A) Duress was not proven

Here, the former wife challenged the purported agreement first on the grounds of duress or coercion. However, "duress" is defined as "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." *Cooper v. Cooper*, 69 So.2d 881 (Fla. 1954). Further:

> "We agree that there can be no duress without there being a threat to do some act which the threatening party has no legal right to do - some illegal exaction or some fraud or deception." (*Citations omitted.*) *Paris v. Paris*, 412 So.2d 952, 953 (Fla. 1st DCA 1982)

Coercion and duress are not synonymous, but both require a finding of some act or conduct by a threatening person that overrides a party's voluntary assent to an agreement so that the assent given by that party is actually that of the threatening person.

There was no evidence at the hearing of any duress or coercion of the former wife, that the former husband made a threat of physical injury or a threat of some action that he had no legal right to make. Therefore, the former wife did not prove duress or coercion as a basis to set aside the purported agreement.

### (B) Overreaching was proven

On the other hand, she did prove the purported agreement was obtained by overreaching. *See, e.g., Tenneboe v. Tenneboe*, 558 So.2d 470, 472, 473 (Fla. 4th DCA 1990); *Moss-Jacober v. Moss*, 334 So.2d 89 (Fla. 3d DCA 1976).

At the end of the hours of mediation and waiting, she was presented with a purported agreement and she was asked to sign it then and there. She signed the document without the benefit of a lawyer's advice and without taking the time to consider its provisions. She moved to

set it aside 17 days after it was filed and 20 days after it was signed.

The parties were in very unequal bargaining positions on 7/10/2015. The former husband was represented by a lawyer and the former wife was not. She had disclosed her income, living expenses, assets and liabilities and he had not. His lawyer drafted a document that decided "all issues" in his favor and against the interests of the wife. In the circumstances during the hours of the mediation and in the waiting room of the office of the former husband's lawyer, the former husband was in a position to play on the weakness of the former wife's bargaining position to his advantage and he used it to secure her signature to the document. She may have signed it, but there was no agreement of the parties, no meeting of the minds. Her signature was obtained by overreaching.

It is significant that the purported agreement uses her income at her last job in Polk County as the basis for the child support calculation, even though:

> "Past average income, unless it reflects current reality, simply is meaningless in determining a present ability to pay. Past average income will not put bread on the table today. The uncontroverted testimony at trial is that the husband's income has been reduced ..."
>
> *Woodard v. Woodard*, 634 So.2d 782, 783 (Fla. 5th DCA 1994)

There was no evidence at the hearing on the motion to set aside that the mother's income is anything but "$780" gross per month. She did not understand what she was signing and she signed it in order to meet the request of the former husband.

**(C) <u>Former husband's failure to disclose, presumption of the former wife's inadequate knowledge not rebutted</u>**

The former wife also proved the second ground for setting aside an agreement under *Casto*, that is, the lack of full financial disclosure by the former husband. The agreement is favorable to the former husband and unfavorable to the former wife. So it is unreasonable to the former wife's interests. Therefore,

> "a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached." *Casto* at 334.

The former husband's proof did not rebut the presumption that the former wife did not know his current net monthly income, which is the critical information necessary for a child support calculation, and his current assets and liabilities and monthly living expenses. His proof did not solicit any testimony from her about whether she had any general knowledge of his current income, living expenses, assets and liabilities.

It is significant that the former husband did not file a financial affidavit as required by §61.30(14) with his supplemental petition to modify and he did not comply with the disclosure rule, 12.285, even though his supplemental petition requested financial relief, that is, a modification of the original South Carolina child support order.

Therefore, the former husband did not rebut the presumption that the purported agreement is unreasonable and unfair to the former wife. So, the purported agreement must be set aside.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
, Esq., and , Esq.