

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. 18-0478

IN RE THE MARRIAGE OF
MARK DUANE SHEEHAN,

Petitioner/Appellant,
vs.

SHELLI R. FRAZIER, f/k/a
SHELLI R. SHEEHAN,

Respondent/Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE
TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

Cause No, DR16-31

Honorable James A. Manley Presiding

Appearances:

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APPELLANT'S INITIAL BRIEF

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APPELLANT'S ISSUES

The issues in the case are:

1. Should the court set aside the October 23, 2017 settlement as unconscionable?
2. Was the appellant entitled to have the 10/23/2017 judgment set aside pursuant to Rule 60(b), M.R.Civ.P.?

STATEMENT OF THE CASE

Within a few years of beginning her cohabitation in 1999 and having a child with Mark Sheehan, appellee Shelli Sheehan [n.k.a Frazier] convinced Mark's parents Rose and Richard Sheehan to transfer to her (and in equal shares to the child) title to the family home place, a 20 acre parcel next to the Clark Fork River outside of Plains, Montana where Mark, Shelli, Rose and Richard were all living. The transfer was done in 2004. Mark and Shelli married in 2011, and in 2015 Shelli threatened to evict her father-in-law Richard Sheehan from the homeplace while Mark was serving prison time for a probation violation. Richard sued Shelli in 2015 to preserve his interest.

Richard's 2015 suit (see Complaint, Appendix Exhibit 2) against Shelli sought a constructive trust since Shelli had not contributed to the purchase of the land, while Richard had paid off a mortgage and paid taxes on the land after Shelli and the daughter took title to it.

When Shelli's effort to evict Mark's dad looked as though it would bear fruit, Mark brought this divorce case in 2016 from North Dakota, where he was serving time for a sex solicitation offense. Mark executed a power of attorney appointing his sister, Holly Sanders, to assist. Richard's constructive trust case and Mark's divorce were bound together by order of the District Court, and the District Court in July, 2017 set a trial date for October 23, 2017. A summary judgment motion by Shelli in Richard's case was pending in July, 2017

based on statutes of limitation.

On the day set for the trial Mark was still in prison in North Dakota, although his release date had been set in August for mid-December. Arrangements had been made for Mark to appear by teleconference, but those arrangements were cancelled.

On the day of the scheduled trial, October 23, 2017, the lawyers gathered in Thompson Falls and negotiated a settlement. They told Holly Sanders, Mark's sister to sign for Mark. The timing was the 59th minute of the 11th hour, since as of the previous day no settlement had been reached in Richard's case or Mark's divorce case. Mark was available to testify but teleconferencing had already been cancelled for his divorce trial. His attorney failed to set up either a continuance or a televised way to communicate at the trial.

Mark had told Holly Sanders by telephone not to settle the case. She was surprised to hear of a settlement on the morning of 10/23/2017 and came under terrific pressure to sign documents prepared by Shelli's counsel that she had no time to consider, no chance to discuss with Mark, and no real ability to evaluate on Mark's behalf.

Appellant contends that he had an interest in the marital real estate of which his fractional share was worth \$100,000 or more dollars, and that it was stripped away from him due to the actions of his counsel in the divorce case.

STANDARDS OF REVIEW

The standard of review for a district court's denial of a M. R. Civ. P. 60(b) motion not involving a default judgment is abuse of discretion. *Tanascu v. Tanascu*, 2014 MT 293, ¶ 9, 377 Mont. 1, 338 P.3d 47. A district court

abuses its discretion when "it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice."

The standard of review of a property settlement is set out in *Smith v. Smith*, 2015 MT 256, ¶ 10 381 Mont. 1, 358 P.3d 171 (2015) as follows:

¶ 10 We review a district court's distribution of marital property to determine whether the court's findings of fact are clearly erroneous. In re Williams, 2009 MT 282, ¶ 14, 352 Mont. 198, 217 P.3d 67. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if our review of the record convinces us that the district court made a mistake. Bock v. Smith, 2005 MT 40, ¶ 14, 326 Mont. 123, 107 P.3d 488. Absent clearly erroneous findings, we will affirm the district court unless we identify an abuse of discretion. Bock, ¶ 14. A district court abuses its discretion when it acts arbitrarily without conscientious judgment or so exceeds the bounds of reason as to work a substantial injustice. In re Marriage of Crilly, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.3d 1151. We review a district court's conclusions of law to determine whether those conclusions are correct. In re Marriage of Bartsch, 2007 MT 136, ¶ 9, 337 Mont. 386, 162 P.3d 72.

STATEMENT OF RELEVANT FACTS

1. In 2004, Rose and Richard Sheehan, Petitioner's parents, transferred title to the Sheehan property outside of Plains, Montana to Shelli Sheehan and her small child Deriyan Sheehan, without financial payment, to protect against a possible lien for Medicaid payments for Rose Sheehan, who was suffering from cancer. Mark, Shelli and their daughter Deriyan were all living on the Sheehan 20 acres, and Shelli occupied a position of trust in the family. See 7/31/2015 Complaint of Richard Sheehan, Appendix Exh. 2, pages 2-3, paragraphs 2-8.

2. Richard Sheehan continued to pay obligations connected with the property during the years following the transfer of title to Shelli Sheehan. See 7/31/2015 Complaint of Richard Sheehan, Appendix Exh. 2, page 4, paragraphs 9 - 10.

3. During the early years of their cohabitation, Mark Sheehan was employed in construction and was the primary support of Shelli and Deriyan Sheehan. See Docket Item No. 55, 5/17/2018 Affidavit of Mark Sheehan, Exhibit 1, with coversheet describing the earnings history for Mark Sheehan between 2005 and 2013.

4. While Mark Sheehan was in prison in 2015, Shelli threatened to evict Richard Sheehan. 7/31/2015 Complaint of Richard Sheehan, Appendix Exhibit 2, page 4, paragraph 11.

5. Richard Sheehan filed suit to protect his interest in the property. See Appendix Exhibit 2, 7/31/2015 Complaint, Richard Sheehan v. Shelli Sheehan.

6. Within a month before the 10/23/2017 scheduled divorce trial in this case, counsel sought authorization and arranged for Mark Sheehan to participate in his divorce trial by telecommunication; then in early October, approximately ten days before the divorce trial the teleconference arrangement was canceled, by counsel. See 9/27/2017 Combined Motion for Trial Appearance of Material Witness Mark Sheehan by Video Conference, Docket Entry No. 50, Richard Sheehan v. Shelli Sheehan, Appendix Exhibit 3; see also 10/13/2017 letter to Deputy Warden Joseph Joyce and Counselor Scott Haas at Missouri River Correctional Center, attached to Docket Entry 60 (Reply Brief) in this divorce case.

7. Mark Sheehan received no interest or buyout in the land, all of which went Shelli, subject to a life estate for Richard Sheehan on a small portion. See Marital Settlement Agreement, Docket Item No. 30 this divorce case; (same document with attached personal property division sheet is found at Appendix Exh. 4.)

8. Elder abuse investigation by Montana Department of Health and Human Services, complaint by Sanders County attorney. See Appendix Exhibit 5.

9. Work not done on behalf of Mark Sheehan continuance was invited by court order dated July 25, 2017. (Mark Sheehan dissolution of marriage docket sheet number 50; Richard Sheehan versus Shelli Sheehan docket sheet number 50.

10. No discovery questions were submitted by divorce counsel after the first set. See docket sheet for this divorce case between August 15, 2016 and October 23, 2017).

11. No evidence of Mark's earnings history and contribution to the family unit was established until the motion to set aside the settlement and judgment (Affidavit of Mark Sheehan, District Court Docket Item No. 55 Exhibit 1, this case.)

12. No continuance was sought for the trial until the actual date of the trial itself on October 23, 2017. See docket sheet for Richard Sheehan, appendix 3, docket number 53, "Motion for Postponement of Trial Witness", referring to Mark Sheehan.

13. Video teleconference was ordered by the court on September 27, 2017 but was canceled on October 13, 2017 by counsel. See docket sheet, Richard Sheehan case, Appendix Exhibit 3, docket entry 50; correspondence from Richard Sheehan attorney dated October 13, 2017 (attachment to reply brief of Mark Sheehan Motion to Set Aside Settlement, Docket Item No. 60).

14. Mark's counsel did not arrange a continuance (Holly Sanders affidavit, Docket Item 56, paragraph 10).

15. Reliance on the power of attorney was inappropriate and

under duress (Affidavit of Holly Sanders, Docket No. 56 (this case), Paragraph 15).

16. Mark Sheehan said instructed Holly not to settle. See Holly Sanders Affidavit paragraph 14.

17. The settlement was not presented to Holly Sanders until they the morning of the scheduled trial. See Affidavit of Holly Sanders, Docket No. 56 (this case), paragraphs 13, 14, 15.

18. A continuance was not sought until the day of the hearing, and was not pursued. See Richard Sheehan case, Appendix Exhibit 3, docket 53-54.

20. The parties and the court were caught by surprise and at the proposed settlement. 10/23/2017 Hearing Transcript, page 5, first paragraph; Holly Sanders affidavit paragraph 15.

SUMMARY OF ARGUMENT

In his first issue, Appellant argues that the settlement of his divorce was unconscionable because it provided him no share, either by way of a division of land or a buyout, of the only marital asset of substantial value, which was an undivided one-half interest in the Sheehan land on which the parties had resided and which the Appellant's employment income supported during the marriage and before it.

In his second issue, Appellant argues that the marital settlement agreement was reached at the last moment through undue pressure on Appellant's sister, who signed it against his wishes as his agent while under intense pressure, and the District Court erred in later failing to set the settlement aside on grounds of surprise under Rule 60 (b) (1), M.R.Civ.P. and inadequate representation by counsel, justifying relief under Rule 60 (b) (6), M.R.Civ.P.

ARGUMENT

ISSUE 1. WAS THE SETTLEMENT UNCONSCIONABLE?

A. THE SETTLEMENT TRANSFERRED SUBSTANTIALLY ALL OF THE VALUE OF THE MARITAL ESTATE TO THE RESPONDENT

The marital estate consisted of a variety of items of personal property, including vehicles and land with improvements. No market analysis was submitted in evidence. Shelli told the Court that the property should be valued at \$250,000. She did not provide any expert testimony to support this valuation nor did she have any other evidence to support it.

One-half of the property had been transferred to Mark and Shelli's young daughter in 2004, when Richard Sheehan and his wife Rose deeded the property to Shelli and to the child Deriyan in contemplation of Rose's illness and the possibility of a Medicaid lien for medical treatment.

Shelli became the owner but Richard continued to pay obligations on the land, including most of the taxes and a mortgage. At the time of the scheduled trial in 2017 there was no indebtedness secured by any of the land.

The land has a number of improvements, and Mark Sheehan is convinced that the value that the \$250,000 valuation given by Shelli for purposes of the divorce case is a serious underestimation of its value.

B. THE VALUE OF THE LAND WAS ENTIRELY PAID FOR BY THE SHEEHAN FAMILY, NOT BY SHELLI SHEEHAN FRAZIER

The land owned before 2004 by Richard and Rose Sheehan was acquired by them in the 1980s. The Sheehans raised their three children on the property. When Mark and Shelli began cohabiting in approximately 1999, Mark had made substantial valuable additions to a log home that he had already constructed before he met Shelli. The home was and is a valuable structure in and of itself.

Mark sought in his 5/17/2018 motion to set aside the settlement to show that he had provided substantial family support during the years of his cohabitation with Shelli. He had legal problems beginning in approximately 2010, but through the earlier years before that he was the sole support of his family. See Docket Item No. 55, Affidavit of Mark Sheehan. Even after his legal troubles took him away from his job, he had retirement benefits which went to the support of his family.

These facts would have impacted a determination of an appropriate division of the marital estate. As it was, this settlement was unconscionable.

C. THE ELDER ABUSE ALLEGATION

The difficulties that Richard Sheehan had with his daughter-in-law the years prior to the divorce in this case with the subject of an elder abuse case which was investigated by the Montana Department of Public Health and Human Services in which was turned over to the court in a to the court and the parties in this case. No elder abuse charges were filed criminally. Though the investigation was done in earlier years, no evidence of it was presented to the District Court before the 10/23/2017 settlement. The settlement in October, 2017, did give all the real property to the alleged perpetrator of the elder abuse.

D. PERSONAL PROPERTY

The property awarded to each of the parties is described in the settlement agreement. See Appendix Exhibit 4, and as to personal property, see the last two pages of Exhibit 4. The land goes entirely to Respondent Shelli Sheehan Frazier and the parties' minor daughter Deriyan. The personal property is not given a valuation. The land, valued by Shelli at \$250,000 (one-half of which is titled in the name of the parties' daughter, presently a teenager), coupled with the personal property items awarded to the Appellee Respondent, gives her

90 to 95% of the value of the estate of the marital estate. No basis for this is articulated, although the Court did make a finding that the settlement was not unconscionable.

**ISSUE 2. WAS THE APPELLANT ENTITLED
PURSUANT TO RULE 60 (b)(1) or (6), M.R.CIV.P
TO HAVE THE JUDGMENT SET ASIDE
ON GROUNDS OF SURPRISE AND/OR
GROUNDS OF INCOMPETENCE OF REPRESENTATION**

On 5/17/2018, Petitioner Mark Sheehan filed a motion with the District Court to obtain relief from the settlement and judgment in this case. He claims surprise under rule 60(b)(1), M.R.Civ.P., and dereliction of counsel under rule 60(b)(6), which allows relief from the operation of a judgment for any other reason the for any other reason that justifies such relief.

While the District Court concluded that relief should not be granted, the Court did not substantively address the issue of surprise.

In this case, surprise is an issue for the Petitioner/Appellant. As indicated in his 5/17/2018 brief (Docket Item No. 54), he expected the continuance or, alternatively, an opportunity to testify through teleconference arrangements, neither of which were ultimately made available. He was unaware of the fact that the case was resolved, and he had directed his sister not to settle it, and she agrees (Docket Item No. 56, Holly Sanders Affidavit, paragraph 12.

The District Court was likewise surprised. See trial transcript, page 5, first paragraph.

The settlement was reached in open court. It was presented to Holly Sanders, Mark's sister, in court. She has clarified that she was not prepared for this outcome and felt under duress in deciding what to do. (Docket Item No. 56, Holly Sanders Affidavit, paragraph 15).

Holly Sanders did not reside in Plains and had little ability to make

judgments on the final outcome in her brother's case. She was not trained in legal matters. She no practical ability to decide whether she should agree to a lopsided, comprehensive settlement of her brother's affairs. She was under the pressure of three attorneys and a judge, and she buckled.

This for a layperson is more than the law should countenance. The District Court had previously indicated to the lawyers, see 7/25/2017 order, Appendix Exhibit 3, Docket Item No. 42, Second Scheduling Order) the parties to advise if the schedule needed to be altered. Here, the scheduled was inconvenient not because of the unavailability of evidence but because divorce counsel had not requested a continuance or otherwise completed work that would enable him to put on a case.

While the circumstances of "surprise" which justify setting aside a judgment under Rule 60(b)(1) M.R.Civ.P. have not been described indicated in Montana extensively, there clearly is surprise here, and the result was an unconscionable settlement.

**2. WAS THE APPELLANT ENTITLED TO
HAVE THE JUDGMENT SET ASIDE
PURSUANT TO RULE 60(b)(6), M.R.CIV.P.?**

Under Rule 60(b)(6), Mr. Sheehan focused attention on the inadequacies of his representation in the divorce, alleging:

- (1) the case was settled without his consent;
- (2) the case was settled at the last minute with under high pressure extreme pressure and the agent;
- (3) counsel failed to communicate that he was he would use the power of attorney to force a settlement on the power of attorney using the power of attorney;
- (4) failed to obtain information about earnings history of the parties;
- (5) failed counsel failed to determine whether there was any merit to various's threats;

(6) counsel failed to obtain or prepare findings and conclusions (this was incorrect);

(7) failed to have witnesses ready;

(8) failed to communicate a request for continuance on timely basis;

(9) failed to arrange teleconferencing;

In discussing these allegations in his Rule 60(b) motion to the District Court, Mark Sheehan focused upon the failure of counsel to work with him when he could have done so to obtain instructions, and forcing a settlement through an agent who was put under duress at the last minute. It is uncontroverted that the settlement was not presented by counsel for the Petitioner to Holly Sanders, the holder of Mark Sheehan's power of attorney, until her arrival in open court, at which time she believes she was forced into the settlement with the Court on the bench and the lawyers presenting documents that had not adequately been discussed and not shown to Mark.

The issue of whether a power of attorney can be used in this manner is addressed in *McLaren Gold Mines Co. v. Martin* (1950), 124 Mont. 382, 390, 224 P.2d 975, 979; and *In the Matter of the Trust of Lillian P Jameison v. Polich*, 2000 Mont.190, 8 P.3d 83 (2000). While in *McLaren* a general power of attorney used for large land transactions was deemed adequate for that purpose, in *Lillian Jameison Trust* a general power of attorney was held insufficient to sustain an agent's action in creating a trust for the benefit of the agent and other heirs.

Here, both the agent and the principal were at odds with the forceful actions of counsel, carried out in open court. The forcefulness was inappropriate and vitiated consent. In view of the lopsidedness of the settlement, depriving Petitioner/Appellant Mark Sheehan of any interest in the property that

Respondent/Appellee Shelli Sheehan had acquired through persuasion and trickery more than 10 years earlier, the Court should have rejected the proposed settlement.

RULE 1.2 RPC AND ABUSE OF POWER OF ATTORNEY

Petitioner also focuses on Rule 1.2 of the Rules of Professional Conduct which specifically requires attorneys not to settle cases without their clients consent.

In this instance, relying on a power of attorney to develop a complete settlement and demanding its use by the holder when the power of attorney was contemplated to be used only to facilitate the development of the case, not the final settlement, was unconscionable and a violation of RPC 1.2.

CONCLUSION

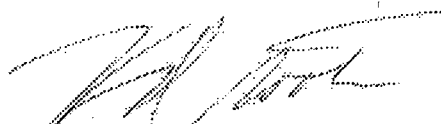
As Mark argued to the District Court, § 40-4-202, MCA, mandates consideration of a lengthy list of factors to consider in fashioning an equitable property division in a divorce. These factors cannot be considered for purposes of determining whether a settlement is unconscionable when the client does not know what is going on, is represented by counsel who is unprepared, and whose decisions are put onto an agent whose decision-making capability is inadequate.

These parties cohabited for many years before their marriage, and Mark supported his family. As argued to the District Court, under these circumstances a Montana court is encouraged to consider the circumstances of the cohabitation in deciding how to divide property and settle other issues in a divorce. *In Re Marriage of Rolf*, 2000 MT 361, ¶36, 16 P.3d 345 (2000).

The result in this case was an unconscionable settlement. Justice requires that this Court reopen the judgment granting a divorce and allow a reasonable period of discovery to prepare for trial in which the Petitioner will be

able to attend and give evidence.

RESPECTFULLY SUBMITTED this 26th day of
November, 2018.



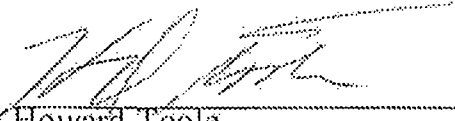
Howard Toole, Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is not more than 10,000 words, excluding certificate of service and certificate of compliance.

DATED this 26th day of November, 2018.

HOWARD TOOLE LAW OFFICES
Attorney for Appellant

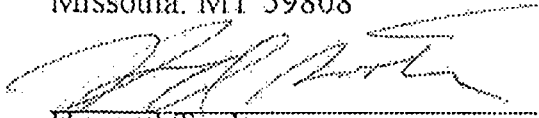


Howard Toole

CERTIFICATE OF MAILING

I, Howard Toole, do hereby certify that on the 26th day of November, 2018, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

Jane Cowley
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Howard Toole
Attorney for Appellant