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

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APPELLANT'S REPLY BRIEF

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INTRODUCTION

The factual realities in this case are:

1. Appellant Mark Sheehan and Respondent Shelli Sheehan lived together, had a child together, and were supported by Mark's income from approximately 1999 until Mark's incarceration began in 2014.

2. The property they resided in belonged to Mark's parents and grandparents from the 1980s until 2004, in which year Shelli Frazier convinced Mark's parents to transfer title to the property to her and to Mark and Shelli's very small child.

3. Mark's parents continued to live on the property, paid the property taxes and other obligations for the property, including a mortgage. Shelli did not contribute her own funds toward the payment of obligations on the land until virtually the present time. Mark's father continued to make tax and mortgage payments after his wife died in the early 2000's.

4. When Shelli threatened Richard Sheehan with eviction in 2015 while Mark was in prison, Richard Sheehan sued, and a year later Mark Sheehan filed for divorce. At that time, due to the transaction of 2004 and in complete disregard who had been paying the cost of maintaining the property in all the years up to the time of the divorce, Shelli began to assert a position of exclusive ownership and control of the land that Mark and his father had paid for and developed.

5. In the divorce case, Mark never met with his counsel face-to-face. His sister had had power of attorney for her father in the companion litigation, and it

was suggested that Mark do likewise. It was never the case that his sister was fully informed about Mark's life and in a position to make informed judgements about what Mark should receive in a property settlement, a child support allocation, and other matters relating to the finalization of the divorce.

6. While settlement discussions were had in 2017, Mark directed Shelli not to settle the case. He was not able to rescind her power of attorney in the week before the hearing, and he trusted her to follow his direction.

7. Holly Sanders was not presented with a demand to sign documents on Mark's behalf until the morning of the scheduled trial on October 23, 2017. On that date, when the lawyers and certain witnesses were all present in Thompson Falls for the divorce trial, Holly Sanders was put under severe pressure to sign for Mark. Arrangements that had been made for Mark's participation had been canceled by the lawyers several days previously. Contrary to the averments in Shelli's brief, Mark's participation had been arranged and was, as far as he was aware, scheduled for that trial day.

8. The settlement stripped Mark of his interest in the Sheehan family property. It also stripped any potential claims to that Sheehan property by his father. Shelli and the child, age 14 in October, 2017, became the sole owners of the 20 acre parcel of real property. Mark was "to be given" a very limited supply of tools and personal items.

9. Mark filed a motion to set aside the divorce settlement in May, 2018. He argued that the lawyer who had represented him abused the legal process

by relying on his sister's power of attorney to settle all issues in the case, and he claimed surprise based on the suddenness and last-minute character of the settlement and of the pressure that his sister was put under to sign it.

10. In one sentence, without discussion of any of the facts Mark presented, the District Court judge held (July 13, 2018 order) that the record did not support allegations under Rule 60(b), M.R.Civ.P. The court then indicated that there would be an award of attorney's fees. Since that time, the court has awarded attorneys fees against Richard Sheehan had in the companion case, and it would appear that both Mark Sheehan and Richard Sheehan are liable in their separate proceedings to pay some $10,000.00 in attorneys fees. A copy of the most recent order from the District Court is attached hereto.

The Appellant Mark Sheehan addresses the arguments of Respondent Shelli Frazier in the order in which Frazier played them in her response brief.

1. ADEQUACY OF PLEADING UNCONSCIONABILITY

Citing Catherine E.W. Hanson Trust, 2015 MT 131, ¶ 19, 379 Mont. 161, 349 P.3d 500, Shelli claims that Mark was "silent" on the claim of unconscionability, and that therefore that issue may not be reviewed.

To the contrary, Mark has based his entire case on a claim of unconscionability. He was the undisputed primary support of his family for many years, and he built the log home in which they resided. He indicated in his statement of the case to the District Court that he had done these things and was the primary support of his family, and on page four of his May 17, 2018 brief to the District

Court, he stated:

> (6) out of the marital estate that the Petitioner believed to be valued at over $400,000, just for the real estate parcel alone, this settlement granted Petitioner very little other than some items of personal property of low value. The settlement was unconscionable.

Shelli claims that the unconscionability of the settlement should have been more clearly raised as a "stand-alone issue". She claims that Mark should have sought relief from the District Court on the grounds that the settlement was unconscionable, citing § 40-4-208(3)(b), MCA. She says he did not do this and cannot now raise the issue.

On the contrary, Mark did raise this issue, and the unconscionability of the settlement, in which Mark was deprived of all the value of the real estate that he had built up both with his construction skills and his employment earnings, was the essence of his case. He did not fail to raise this issue for purposes of the appeal

2. THE DISTRICT COURT'S DETERMINATION THAT THE SETTLEMENT WAS NOT UNCONSCIONABLE IS NOT DETERMINATIVE

Shelli argues that Mark is barred from relief because of the principle that where a separation agreement is signed and unconscionability not raised when the agreement is presented to the trial court, the court "must conclude that the parties have determined the value of their assets.", citing *Miller v. Miller*, 189 Mont. 356, 363, 616 P.2d 313, 318 (1980). She goes on to claim that under *Miller*, the terms are binding unless the court, either sua sponte or upon motion, determines that the agreement is unconscionable, citing § 40-4-201(2) MCA. She claims that when a

District Court complies with this mandate, there can be no error.

In this case, the District Court did not, despite Mark's motion and supporting documents, address unconscionability. In its July 13, 2018 order denying relief the District Court addressed in a brief paragraph only the Rule 60(b) arguments made by Mark. The Court received Mark's information concerning his income and support of the family, supported by tax return information that had not been obtained by or submitted by his previous counsel. The Court failed to mention any of the facts set out in the affidavits and exhibits submitted by Mark and by Holly Sanders. Although the unconscionability of the settlement was implicit in Mark's arguments that he had been stripped of the only substantial asset of the marriage (the real estate), and that there was no evidence put forward on his behalf at any point in the documents or the settlement, the District Court did not address any property issues in its July 13, 2018 order. As Shelli noted, Mark alleged that estate valuation was not properly done, that there was no consideration of Mark's very substantial contribution to the value of the marital estate, that there was an investigation of abuse by Shelli of Mark's father Richard, and the allocation of substantially all of the estate to Shelli and to Shelli and Mark's daughter was unconscionably disproportionate. These matters relating directly to unconscionability were not addressed in the District Court's July 13, 2018 order.

The District Court did not have a duty to independently value the marital estate, but it did have the duty to review whether the settlement was "fair, equitable and not unconscionable." Shelli claims that the District Court fully

complied with that requirement and there can be no error of the District Court except upon a showing of abuse of discretion.

On 10/23/2017 the District Court did have a settlement before it. It was clear under the circumstances that the settlement had been struck by the lawyers between themselves on the morning of the scheduled trial, that it was presented not to the client but to the client's sister who had power by virtue of the power of attorney in her name, and she was instructed aggressively by counsel to sign on behalf of her brother. The Court did not, so far as the record shows, inquire about the power of attorney, its use in the context of a last-minute settlement, the amount of information given to the person expected to sign, the ability of Mark to endorse the settlement, the cancellation of Mark's telephonic participation in the trial, and the continuance request that Mark's attorney abandoned on the morning of the trial.

Shelli also argues that the fact that this settlement was hugely disproportionate between the parties is not grounds to overturn the settlement. The disproportionality was self-evident from the get-go. The judge was advised that there were a few items of personal property that Mark would get, but there were no lists ready, and the settlement was in fact not complete. 100% of the real property was allocated to Shelli and the child, and paragraph 16 of the settlement referenced that Mark would benefit by not having to pay child support. However, no child support determination had been made prior to the date of the trial, whether any previous child support was due was very questionable, and no effort was made in

advance of the last-minute settlement to determine an amount of child support for the future that could be looked to as consideration for the loss of Mark's interest in his land in the Sheehan land.

While the question of unconscionability was inadequately handled on 10/23/2017, that issue was much clearer when his motion was made in May, 2018. Mark was able to show that the unconscionability of the settlement was the result of failure to show that Mark had been the supporter of his family, the builder of improvements on the Sheehan property, and Shelli had no claim to doing these things. Shelli took title in her name but never claimed at any point that she had been the engine of support for her family.

While the issue of unconscionability of the settlement was raised in Mark's motion in May 2018, it was not addressed by the Court. Shelli offers no authority to support her argument that the unconscionability of the settlement must be a "standalone" issue and that it cannot be the core of a motion to set aside a settlement under rule 60 (b), M.R.Civ.P. Whereas here the unconscionability issue was the core of the pleading, it should be considered on the merits in this case in this appeal.

DENIAL OF MOTION UNDER RULE 60(B)(1) - SURPRISE

In this case, the District Court judge stated that he was "very surprised" that the case had settled. 10/23/2017 Transcript, page 5:1-8. The lawyers met with their clients on the night before the trial, and Shelli has not undisputed that there was no settlement as of then and the parties were anticipating going to court in the

morning.

When the parties got to court on 10/23/2017, the lawyers presented documents created for the settlement of the two companion cases, and the proposed settlement settlements were presented to Richard Sheehan and Holly Sanders. Holly had been assisting both her father and her brother in the litigation. She had a limited education and no sophistication in the law, and had not been given specific authority to make the settlement that she signed. As both she and Mark stated in their affidavits presented to the District Court, the two of them had discussed the case and Mark had told her not to sign any settlement documents.

As stated in her affidavit to the District Court, Holly believes she was under a huge amount of pressure from Mark's lawyer and Richard's lawyer to resolve the case. The two cases were presented as a unit: there was to be no settlement of one without the other.

In the brief in support of his motion to the District Court, Mark cited *Marriage of Steyh*, 305 P.3d 50, 2013 MT 175, 370 Mont. 494 for the proposition that a movant was entitled to relief under Rule 60(b)(1) on the grounds that he was surprised in his divorce case by a District Court's grant of relief that exceeded the relief sought by the opposing party.

Mark argued that he was surprised:

1. He expected a continuance so that he could personally appear at a trial, or

2. He expected that if a continuance was not granted, that he would be

participating by teleconference, for which arrangements had, he thought, been finalized;

3. He told his sister Holly not to settle the case without a trial;

4. He did not expect Holly to use the power of attorney to resolve all issues for him, intending it to be used to facilitate the preparation of the case for trial;

5. Mark was unable to be present to offer evidence of his support of his family and throw certain threats that had been made regarding child support and other issues

6. The "settlement" of the case without a division of the real property and without a clear specification of what Mark would receive as personal property, would be unconscionable.

Shelli relies on the fact that Holly had a power of attorney. But in this situation, the use of the power of attorney was abusive. Holly was not the client of either lawyer representing Mark and Richard. Holly was Mark's sibling and Richard's daughter, and she did not live in Sanders County and was not particularly knowledgeable of Mark's personal affairs prior to the divorce. Holly was chosen to assist Mark in his divorce litigation mainly because she was already doing that for her father in the companion case. Holly had telephone access to Mark, and as the trial approached Mark told her not to settle the case. But she was attempting to work with two lawyers, and Mark's lawyer did not contact him about the settlement that Holly was pressured to sign on the morning that the trial was begun.

The power of attorney in this case was a boilerplate document, not drafted in contemplation of the special requirements of a divorce. While the boilerplate language did encompass the types of transactions that a typical divorce would involve, it did not refer to an actual divorce settlement agreement, the primary document that Holly was directed to sign on October 23, 2017. As such, the rule of *Matter of the Trust of Lillian P Jameison v. Polich*, 2000 MT 190, 8 P.3d 83 (2000) is particularly applicable. In that case a power of attorney which generally authorized an agent to do the principal's business was held insufficient to sustain the agent's action in creating a trust for the benefit of herself and other heirs of the principal. Here as in *Trust of Lillian P Jameison,* the type of document that Holly was directed to sign was not mentioned in her power of attorney. The difference here is that she signed it under duress.

RELIEF UNDER RULE 60(b)(6), M.R.CIV.P.

Rule 60(b)(6), which allows a court to grant relief from the operation of a judgment for any other reason that justifies such relief, is available in cases of neglect or misconduct by the parties' counsel. Mark pointed out to the District Court that such neglect or misconduct is a basis for relief where it is shown: (1) extraordinary gross neglect or actual misconduct by counsel has occurred; (2) the party seeking relief has done so within a reasonable time; and (3) the moving party was not at fault for the alleged neglect or misconduct. *Folsom v. Montana Public Employees Assn*, 2017 MT 204 ¶ 60, 388 Mont. 307, 400 P.3d 706; *In re Marriage of Orcutt*, 2011 MT 107, ¶¶ 9-11, 360 Mont. 353, 253 P.3d 884; *Wagenman v.*

Wagenman, 2016 MT 176, ¶¶ 11-12, 384 Mont. 149, 376 P.3d 121, citing *Essex insurance Co. v. Moose's, Inc.*, 2007 MT 202, ¶ 25, 338 Mont. 423, 166 P.3d 451.

In arguing that such gross neglect or actual misconduct had occurred, Mark noted the following:

1. Mark's case was settled without authority direct from him, without telling him about the settlement in advance, without his knowledge, and when he was expecting the case to go to trial;

2. Holly Sanders was under extreme pressure to quickly settle both her father's case and her brother's case, with two lawyers leaning on her;

3. Counsel failed to tell the client that the power of attorney would be used to force a settlement;

4. Counsel failed to develop evidence of Petitioner's earnings and support for his family;

5. Counsel failed to determine whether there was any merit to threats about back child support and possible future child support;

6. Counsel failed to have witnesses available;

7. Counsel failed to pursue a continuance when the client was clearly going to be available beginning in mid-December, 2017, and the Court notified counsel in a minute entry in July, 2017 that changes in the schedule could be made upon proper notice;

8. Counsel failed to follow-up on the teleconferencing arrangement, and in fact that arrangement was set up and then canceled. There is no evidence that

there were the technical difficulties or scheduling difficulties precludes the teleconferencing from being finalized and implemented;

In his memorandum to the District Court, Mark argued that the failure to obtain a continuance, failure to finalize and implement the teleconferencing arrangement constituted a failure of of counsel's obligation to apply his efforts with reasonable diligence and promptness. The court rejected the arguments made under Rule 60(b)(6) in a single sentence. It appears now, however, that the cancellation of the teleconferencing arrangement occurred as much as a week before the settlement entered into, and the filing of the request for continuance was handled without any serious intent to pursue it.

The conclusion that the television cancellation and the failure to pursue a continuance suggests an intent on the part of counsel to force a settlement on a person holding a power of attorney who is not the client. The absence of direct communication with the client, relying on a sibling who is trying to be helpful, is an abuse of the attorney-client relationship. In this case, when the settlement occurs, not on the court house steps but inside the courtroom and the person whose is directed to make the settlement is not even the client, the requirements of Rule 60(b)(6) are met.

In this case, the District Court's order denying relief is, on the merits of Mark's arguments for surprise under rule 60(b)(1) and dereliction of counsel's responsibility under rule 60(b)(6) are strong.

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CONCLUSION

The circumstances in this case are unique. The failure to complete the settlement until the trial was set to begin, the unfinished personal property division, and the lopsidedness of the real property distribution failed to get the attention of the District Court, either on 10/23/2017 or in May-June 2018 when Mark's Rule 60(b) motion was filed. The trial court failed to appreciate just what was going on and abused its discretion in denying Mark's May, 2018 motion to set aside the settlement.

Now the Sheehan men are facing an order to pay some $10,000.00 in attorney fees for their efforts to pursue post-trial remedies. Mark's previous counsel failed to get the case ready and failed to make it possible for Mark to have his day in court and supply competent evidence in support of his position. For these reasons the July 13, 2018 order should be reversed and the case remanded for trial on all issues.

RESPECTFULLY SUBMITTED this 16th day of January, 2019.

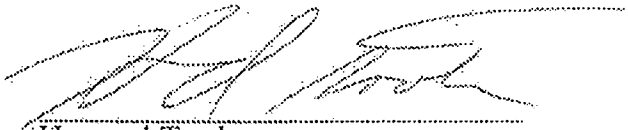
Howard Toole
Attorney for Appellant Mark Sheehan

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I certify that this Brief ifs printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is not more than 5,000 words, excluding certificate of service and certificate of compliance.

DATED this 16th 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 16th day of January, 2019, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

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