UNCONSCIONABILITY AND DIVORCE SETTLEMENT AGREEMENTS

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In 1986 Virginia adopted the Uniform Premarital Agreement Act, which “sort of” accomplished for Marital Settlement Agreements what the UCC did for commercial contracts, in codifying the law regarding marital settlement agreements and taking some of the uncertainty out of the law regarding the enforceability of marital and premarital contracts. Per Virginia’s common law, unconscionable contracts are ones generally so unfair to one party as to shock the conscience. Generally, unconscionability arises when the consideration paid is grossly disproportionate to the benefit received. The common law regarding unconscionability was modified/clarified to some extent when Virginia adopted certain uniform principles of the other states pursuant to the adoption of Section 20-151(B) of the Code of Virginia. “Whether a premarital agreement is unconscionable is to be determined as of the time of its execution, and the party alleging unconscionability bears the burden of proof. Code § 20-151(A)(2).” Chaplain v. Chaplain, 2011 Va. App. Lexis 15. The burden of proof requires a showing by “clear and convincing evidence” that the Agreement is unconscionable.

Virginia's Premarital Agreement Act (the Act) provides in relevant part as follows:

A. A premarital agreement is not enforceable if the person against whom enforcement is sought proves that:

1. That person did not execute the agreement voluntarily; or
2. The agreement was unconscionable when it was executed and, before execution of the agreement, that person (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.”

The unconscionable contract is like a disease. Like many diseases, in divorce cases the unconscionable contract has multiple symptoms: undue influence, duress, and “over reaching” or other manifestation of unequal bargaining. The presence of one or more of these “symptoms” has a direct effect on whether the Court finds unconscionability. But the existence of the “symptoms” absent gross disparity of consideration cannot render a contract unconscionable.

*Drewry v. Drewry*, 8 Va. App. 460 (1989) is a classic case discussing this principle. In *Drewry*, wife “sought to have the agreement set aside on the grounds that the contract was unfair, that she lacked mental capacity to contract and was coerced by her husband into executing the agreement. She contends that she lacked independent counsel at the time of the agreement, that the husband failed to make full disclosure to her of the value of the auto business and marital home, and that the husband took unfair advantage of her mental illness in order to manipulate her into signing an unconscionable separation agreement.” The trial court found that the wife failed to prove by clear and convincing evidence that she lacked the mental capacity to contract or that she was coerced into signing the agreement. Wife could not remember participating in negotiating
any of the terms of the Agreement but husband had a detailed recollection of the changes
she wanted to the original proposal and her rationale for the changes.

In *Drewry*, The Court of Appeals reiterated the principle stated in *Barnes v. Barnes*, 231 Va. 39, 340 S.E.2nd 803 (1986) that “a husband and wife who have
separated, employed independent counsel, and are negotiating a property settlement
agreement, stand at arms-length to one another in their negotiations.” However, the
Court went on to point out that the fiduciary relationship that existed between a couple
while together might not be severed and that each case needs to be examined on its own
facts.

Examining the facts in *Drewry*, the Court of Appeals observed that it was the wife
who i) requested the divorce, and ii) initiated settling the property issues. The wife knew
her husband had consulted counsel, and she went to that counsel’s office to sign the
Agreement. Affirming the general rule, the Appellate Court noted that “Generally, when
spouses separate with the intention to divorce and propose to divide or settle their
property interests, they have assumed adversarial roles and no longer occupy a position of
trust. See *Avriett v. Avriett*, 88 N.C. App. 506, 508, 363 S.E.2d 875, 877, aff’d, 322 N.C.
468, 368 S.E.2d 377 (1988); see also *Jeffries v. Jeffries*, 434 N.W.2d 585, 587 (S.D.
1988).” Based on the facts at hand, the Appellate Court did not find over reaching.

The Court then turned its attention to the issue of constructive fraud. Wife argued
that because an unimproved lot owned from the husband’s auto business sold for a lot
more than the tax assessed value that the parties had by agreement used to value the lot
(tax assessed values had been used for all of the properties the parties divided), that
constructive fraud should be inferred from the circumstances surrounding the sale of the
lot and the medical evidence showing her mental impairment, her lack of counsel, and the inadequate consideration. The Appellate Court agreed that the factors listed are relevant to constructive fraud but don’t prove that the Husband, at the time the parties contracted knew that a prospective purchaser existed who would pay a premium price for the lot. Absent some proof by the wife that, at the time she signed the contract, the fair market value was higher than the tax assessed value or that the Husband had the premium priced offer in hand when the agreement was signed, constructive fraud could not be proved.

The Appellate Court in Drewry unequivocally held that “[w]hen a court considers whether a contract is unconscionable, adequacy of price or quality of value transferred in the contract is of initial concern. If a "gross disparity in the value exchanged" exists then the court should consider "whether oppressive influences affected the agreement to the extent that the process was unfair and the terms of the resulting agreement unconscionable...... Absent evidence of "gross disparity in value exchanged" there exists no basis to claim unconscionability; thus in this context consideration whether one party was guilty of overreaching and the other susceptible thereto is unnecessary."

In the case of Derby v. Derby. 8 Va. App. 19 (1989), the trial court found the parties’ Separation Agreement to be unconscionable because it was obtained by constructive fraud or duress. The facts of Derby are peculiar and peculiar facts do not make for clear cut decisions. Mr. Derby met Ms. Derby in the early morning hours and without benefit of his counsel signed an Agreement he had not previously seen and had reviewed with his counsel. In the subject Agreement, the wife was to receive real estate valued at $260,000 ($423,000 if the real estate was converted to condominiums) and the husband was to receive the right to live in one of the condominium units if the property
was converted to condominiums. He waived his right to alimony while the wife retained her right to receive it. Unbeknownst to the husband, the wife was committing adultery. The husband harbored the fantasy (based on a message from God he thought he had received) that if he signed the agreement, the marriage would reconcile. The wife knew of this delusion, and played on it, leaving her answers to his questions about a reconciliation as a definite “maybe”. She directly denied having an affair. A psychiatrist testifying to Mr. Derby’s emotional condition said he was “suggestible”. The appellate court did not find fraud, but found the contract unconscionable (and definitely “bad form”) based on all the following factors taken as a piece:

The circumstances under which the agreement was prepared, negotiated and executed are significant. Neither party was represented by counsel during the final "negotiations." Indeed, there is no evidence that the parties discussed or negotiated the terms prior to Mrs. Derby confronting him with the agreement prepared by her lawyer; Mrs. Derby testified that "there wasn't much conversation before he signed it." Mrs. Derby, who initiated the signing, chose a day after her lawyer had drawn up an agreement but when Mr. Derby's lawyer had not reviewed it with him, and a time early in the morning on a day when she knew Mr. Derby would be alone. She insisted that the two transact their business in the parking lot and not in the shop next to Mr. Derby's lawyer's place of business. Her haste to obtain Mr. Derby's signature on the deed after obtaining it on the agreement is another attendant factor which the trial court could consider. The circumstances of Mrs. Derby's concealment and misrepresentation about her conduct and intentions were major considerations which induced Mr. Derby to sign the contract. Mr. Derby's emotional weakness, when viewed with the circumstances of the signing of the agreement and deed, are sufficient to support the court's finding. There being evidence to support the trial judge's conclusion that the
The separation agreement was invalid because it is unconscionable, we affirm the decision.

In 2005, in the case of *Galloway v. Galloway*, 47 Va.App. 83, 622 S.E.2nd 267 the Court of Appeals decided the issue of unconscionability without any of the usual symptoms other than gross disparity being present. In the Agreement signed by the parties, wife failed to receive any of the husband’s military retirement (marital share found not to be significant), waived her right to support (she earned $400 per week working for husband until divorce with health insurance benefits that would end when divorce finalized, husband earned $900 per week), and the wife waived her interest in the marital business and the marital home (total value about $320,000). Wife received her truck worth about $11,000. She signed the agreement which she had read and generally understood without benefit of counsel, because “it’s what he wanted”. Wife’s operatic gesture of self-sacrifice didn’t sit well over time and she moved to set the Agreement aside. The commissioner in chancery found the Agreement to contain a gross disparity of consideration and noted the husband never discussed his military retirement, never told wife the value of the marital property, and confirmed that there were no negotiations. The commissioner noted that the wife’s employment and benefits ended with divorce, her age and its effect on her employability after a 17 year marriage was certainly a factor to be considered, and found that to “waive spousal support after 17 years of marriage without apparent means to support oneself together with the gross disparity in the value of the property received by the parties creates a set of circumstances which become inequitable, unfair and causes enforcement of the agreement to be unconscionable.” Husband filed exceptions to the commissioner’s report and the trial court sustained those exceptions because none of the other “symptoms” of unconscionability were present. The trial court
found it to be an arms-length transaction with no circumstances of fraud, bad faith, duress, or that the wife suffered from some disability.

The Court of Appeals reiterated the historical rule that “a bargain is unconscionable in an action at law if was ‘such that no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other.’” The Court declined to find that the gross disparity of consideration in the Agreement, absent one of the other symptoms, would render the Agreement unconscionable but left open the door that had the Agreement left the Wife unable to support herself, a different outcome might have ensued.

In *Sims v. Sims*, 55 Va. App. 340 (2009) the Court seized the opportunity to add a new symptom to those issues that could transform gross disparity into an unconscionable contract. In *Sims*, Wife could not afford the attorney she initially consulted and represented herself in the negotiations. Her original position was that she was to receive one-half of everything including retirement and deferred compensation. Inexplicably, wife sent a message through the parties’ son that she wanted nothing other than “out of the marriage” and husband raced to his lawyer to have such an agreement drafted. The Agreement was sent to the wife by the attorney for her review. She arranged to come in and sign it. Husband received $200,000 in equity in the marital home and all of his retirement ($2400 per month) and deferred compensation ($128,000). Wife received a 1999 pickup truck and “yard sale” personal property in her possession. Wife waived her right to spousal support. Wife, after the divorce was filed and after signing an acceptance of service and waiver of notice, hired an attorney and filed an answer and a counterclaim
claiming the Agreement was unconscionable just as Husband submitted a Final Order of Divorce to the Court.

The trial court in Sims was clearly of two minds about the Agreement, and the state of the law.

Wife offered evidence that she was "totally disabled" due to numerous health conditions but that she did not receive disability. She said she applied for Medicaid but did not qualify because her name was on the title for a relatively new vehicle that husband had in his possession and she "couldn't get it out of [her] name to get the Medicaid back." She was receiving food stamps and borrowing money from family and friends "to try to get by." Regarding her disabilities, wife testified she suffered from depression, high blood pressure, rheumatoid arthritis, and diabetes and that she had had a foot fusion and dual hip, knee, and knuckle replacements. She said she took medication for her depression, insulin for her diabetes, and used morphine and Percocet for pain. Wife testified she had been using these medications for twenty years, including "at the time she signed th[e] agreement." She had health insurance at the time because she was still covered on husband's policy.

Wife denied reading the agreement before signing it and said she did not understand its legal impact other than that "it would let [her] get a divorce." She admitted, however, that she refused to sign the initial agreement because it did not provide her with a share of husband's retirement and deferred compensation benefits and that by _the time she signed the second agreement, she understood the "[h]ouse and car and truck and retirement and profit sharing" were the assets comprising the marital estate. She conceded she probably received a copy of the agreement in advance and that she just wanted a divorce. She admitted she
had a "seasonal business" picking boxwood and running pine for a florist in exchange for "a little spending money."

Wife offered testimony from her twin sister corroborating her testimony about her "severe" medical conditions and the fact that she routinely took morphine. Wife's sister also testified that wife "does [not] read . . . well," "doesn't comprehend hardly at all," "does [not] . . . exercise good judgment," and "is not always thinking clearly."

Husband admitted wife had mood swings, which he did not attribute to her medical conditions, and he conceded she had told him she took medication for pain and depression. He said he first learned that wife did not want anything from the marital estate when the parties' son called him and told him about wife's statements to that effect. Husband admitted he felt lucky when he learned wife did not want anything.

The parties' son conceded wife had "frequent" mood swings and that her decision to relinquish one hundred percent of the marital estate to husband was "not a good judgment." The son also said mother's medical conditions were "[a]s severe as she would like for them to be." When asked to explain, he indicated that as he was growing up, his mother's medical conditions did not seem to prevent her from doing what she wanted to do but that she always seemed to be "hurting, aching," "if she didn't want to clean the house or whatever."

Husband offered evidence from his attorney indicating that wife conveyed her understanding of the first agreement when she refused to sign it because it did not address husband's pension and profit sharing. The attorney also indicated he first learned wife had changed her mind about the property division when she contacted him directly, indicating that she wanted a divorce quickly and "[didn't] want anything from [husband]." The secretary in husband's attorney's office who notarized wife's signature
on the second agreement testified that she took wife to the law firm's conference room, gave her the document and asked her read it, after which wife appeared to be doing so. When wife said she was finished reading it, the secretary inquired whether wife had any questions. She also inquired whether wife understood everything, and wife indicated that she did. The secretary testified wife did not appear to be mentally impaired at any point during the encounter.

After hearing the evidence and argument of counsel, the trial court found the agreement was unconscionable "[o]n the basis of O'Bryan v. O'Bryan, No. 1912-91-4, 1992 Va. App. LEXIS 321 (Va. Ct. App. July 28, 1992)," which the court relied on as providing that a gross disparity in the division of marital assets, standing alone, "if . . . great [enough]," is sufficient to support a ruling that an agreement is unconscionable.

Husband filed a motion for reconsideration, which the trial court granted. The trial court found that "while hardly an exaggeration to say that this is about as grossly disparate a deal as probably anybody has ever seen, it's not entirely true that [wife] didn't get some value out of it. She got held harmless on loans and mortgages and things like that." The trial court concluded under Galloway v. Galloway, 47 Va. App. 83, 622 S.E.2d 267 (2005), that the agreement was valid and not unconscionable because wife proved only a gross disparity in the value of the division and failed, based on the testimony of husband's former attorney and the attorney's secretary, to meet her burden of proving husband engaged in overreaching and oppressive behavior.”

The Court of Appeals, citing Galloway, considered the usual issues about undue influences, over reaching, duress, and mental deficit explicitly, and resurrected a “symptom” not contained in the statutes and certainly not raised since 1986 in any Virginia case law:
We also recognized that in cases involving separation agreements, "unlike commercial contracts, the state itself has an interest in the terms and enforceability of [the] agreement" because, "[i]f either spouse is left in necessitous circumstances by a separation agreement, that spouse . . . might become [a] public charge".

The Court of Appeals found the Agreement in *Sims* to be unconscionable based on the following:

Although the evidence supported the trial court's finding that husband did not engage in any overt overreaching or oppressive conduct, his act of entering into a contract with wife in which she waived spousal support and relinquished to him almost 100% of the marital estate--including the marital residence, all retirement benefits and deferred compensation--literally left her penniless with no practical means for supporting herself. These facts stand in marked contrast to those in *Galloway*, in which the wife had been employed outside the home throughout the couple's 17-year marriage, and had numerous job skills, a $275,000 home she inherited, and assets of her own. 47 Va. App. at 89, 622 S.E.2d at 270. On those facts, the trial court held in *Galloway* "(t)here [was] no evidence . . . that wife suffered from any disability or necessity."

Id.; see also *Derby*, 8 Va. App. at 29, 378 S.E.2d at 79 (recognizing that in cases involving separation agreements, "unlike commercial contracts, the state itself has an interest in the terms and enforceability of [the] agreement" because, "[i]f either spouse is left in necessitous circumstances by a separation agreement, that spouse . . . might become [a] public charge"). Here, the evidence established that wife had in fact already become a public charge, receiving food stamps, despite husband's retention of substantial marital assets. Thus, the evidence established not only a gross disparity in the division of assets but also infirmity and
pecuniary necessities which, in combination, established unconscionability."

The fact that "pecuniary necessity" and the state’s interest in avoiding its citizens becoming a ward of the state is now a “stand-alone basis” for finding an Agreement unconscionable was underlined in the case of Guirgis v. Salib, 2013 Va. App. LEXIS 12. In Guirguis, the husband, a medical doctor had signed away most of the martial assets based on the Wife’s apparent willingness to attempt a reconciliation if the Agreement was signed. The court had no trouble distinguishing Sims and further expounded on when the “pecuniary necessity” factor would be applicable.

The facts of this case are distinguishable from Sims. We explained in Sims that in the absence of overreaching or oppressive influences, the state nevertheless retained an interest in the terms of separation agreements that might result in a spouse becoming a public charge, and we noted that Mrs. Sims "had in fact already become a public charge." Id. The separation agreement entered into by husband does not raise such concerns. Unlike Sims, husband was not left penniless and without means for supporting himself due to physical disability or lack of education. Husband is a licensed medical doctor who earns a significant annual salary. The separation agreement extracts significant monetary obligations from husband, and while it was arguably unwise for husband to sign the separation agreement, it does not permanently foreclose his capacity to support himself.

(See also Makoui v. Makoui, 2011 Va. App. Lexis 360 which considered premarital agreements and raised as a potential issue the length of the marriage when the Agreement was signed under Sims as a partial reason for finding the waiver of spousal support unconscionable.)
Clearly Marital Agreements under the current state of the law have a new participant, the state, and the state has an absolute interest in protecting itself from divorce creating indigence that results from unfair Agreement.

The Circuit Court for the City of Norfolk decided *McKoy v. McKoy*, 2017 Va.Cir. Lexis 1 on January 6, 2017, a case involving a close reliance on the holding in *Sims*. The couple in question married in 2008 following learning of the wife’s pregnancy. Prior to the marriage, husband lived in the United States and spoke English. Wife lived in the Dominican Republic and spoke Spanish. Husband presented to wife, prior to the marriage a pre-marital agreement written in English which was interpreted for her by the wife’s godmother who spoke imperfect English. There was no discussion of the specific terms of the Agreement between the parties but the husband told the wife he needed her to sign it to protect his business. Wife had the Agreement translated into Spanish and signed both copies, English and Spanish.

The parties’ testimony revealed that several of the Agreement’s assertions were false. Wife had no role in the preparation or negotiation of the Agreement, she had no independent counsel, no disclosure of assets as provided in the Agreement ever occurred, and wife had no idea what her legal rights were. At the time of the marriage, husband owned 18 income producing properties which he subsequently lost in bankruptcy. He was employed full time when the parties married earning over $200,000 per year. The court focused on the disparity in the parties’ earning capability at the time of the marriage pointing out the wife spoke little English and had an 8th grade education. She was expected to stay home with the parties’ child. The trial court looked to all of the
cases cited herein but relied heavily on *Sims* and the issue of the wife’s unemployability at the time the Agreement was signed. This case does not appear to have been appealed.