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2014 IL App (5th) 130547-U

NO. 5-13-0547

IN THE

APPELLATE COURT OF ILLINOIS

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
PATRICIA CHEATHAM,)	Madison County.
)	
Petitioner-Appellee,)	
)	
and)	No. 11-D-626
)	
)	
SEAN CHEATHAM,)	Honorable
)	Dean E. Sweet,
Respondent-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Welch and Justice Goldenhersh concurred in the judgment.

ORDER

- ¶ 1 *Held*: The circuit court did not err in denying the petition for relief from judgment seeking to vacate that portion of the judgment of dissolution approving the marital settlement agreement where the evidence did not establish that the marital settlement agreement was unconscionable.

- ¶ 2 The respondent, Sean Cheatham, appeals the order of the circuit court denying his petition for relief from judgment filed pursuant to the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)). On June 23, 2011, the circuit court of Madison County entered a judgment dissolving the marriage between the petitioner, Trish

Cheatham, and the respondent. The judgment of dissolution incorporated a marital settlement agreement that had been negotiated and signed by the parties which resolved the disposition of the parties' assets and debts, maintenance, and issues as to child custody, visitation, and support. On May 8, 2012, Sean filed a petition for relief from judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). In his petition, Sean sought to vacate that portion of the judgment of dissolution approving the marital settlement agreement, alleging that the agreement was unconscionable and procured by fraud. After a hearing on the petition, the circuit court entered an order denying Sean's petition for relief. Sean appeals from the circuit court's order. For the reasons set forth below, we affirm.

¶ 3

BACKGROUND

¶ 4 We set forth only those facts relevant to the issues on appeal. The parties were married on November 28, 1999. One child was born of the marriage on July 17, 2003. The parties initially separated on July 4, 2009. After a brief reconciliation, the parties separated permanently in the spring of 2010. When they separated, Sean moved into a rental home, and Trish remained in the marital residence with the parties' minor son. The record reveals that the marital residence had a first and second mortgage. Throughout the separation, Sean's salary supported both households. Trish paid the bills for both households from the parties' joint bank account.

¶ 5 Review of the record reveals that the parties negotiated the terms of their divorce via email. Printouts of email communications between the parties were admitted into evidence without objection. On May 21, 2010, Sean emailed Trish a proposal to divide

their assets and debts in a way that he described as "more than fair and in the best interest" of their son. He suggested that Trish have an attorney review the proposal. Trish did not respond to the email.

¶ 6 On October 25, 2010, Sean again emailed Trish. Sean stated: "Over the last few weeks it has become pretty clear to me that you have no interest in moving our divorce to a resolution so I wanted to make you aware of some actions I have taken to do so." He went on to inform Trish, among other things, that he had contacted an attorney to begin the divorce process. He also informed Trish that he had opened a separate checking account and would not be depositing his entire paycheck each pay period into their joint account.

¶ 7 On January 5, 2011, Sean emailed Trish to schedule a meeting with her to "go over what you want financially." At some point the parties met to negotiate. There were no attorneys present.

¶ 8 On March 10, 2011, Sean emailed Trish to go over some of the issues they discussed in their meeting. Sean stated:

"Next week, I would like to discuss the timing of changing the money distribution over to what we agreed to during our meeting...\$3,000 a month in maintenance plus 20 percent of my take home pay for child support which is \$1,626 for a total of \$4,626 a month."

¶ 9 On March 21, 2011, Sean stated in his email to Trish:

"I made the change to the direct deposit today. Based on our agreement, you will receive \$1,500 (maintenance) plus \$826.20 (20% child support) for a total

of \$2,326.20 per paycheck. *** Finally, if you send me the account information for the Second Mortgage, I will set up to pay online and start paying that out of my account. If there is any info I need to access it online so I can see the amounts and such, please send that as well. As we discussed we can just do this until, we get all the details figured out."

¶ 10 At some point Trish retained an attorney to prepare the necessary documents to effectuate the divorce. Although the attorney prepared the paperwork, there is no evidence that the attorney participated in the parties' negotiation of the terms of the marital settlement agreement.

¶ 11 On April 28, 2011, Trish sent a document via email to Sean for his review. Trish did not identify the title of this document; however, she informed Sean in the email that she would be providing the document to her attorney. After reviewing the document, Sean replied: "Most everything is ok but have some questions/comments about a few things." Sean went on to outline his suggested changes to the terms in the document. Regarding visitation, Sean stated that he would like to have the language revised to reflect that neither party could take their son out of state without the written consent of the other. He also stated that he was not comfortable with the language requiring him to pay for all of their son's extracurricular activities. Sean noted that he did not see language in the document reflecting their agreement that Trish would receive 30% of his pension. He asked: "[D]id you change your mind or just forget it? See how [I] am trying to be fair here?"

¶ 12 On May 31, 2011, Sean emailed Trish: "I will get you my changes to the divorce agreement tonight so you can take them to your lawyer tomorrow." On June 1, 2011, Sean forwarded to Trish his suggested revisions to the marital settlement agreement and the joint parenting agreement.

¶ 13 On June 2, 2011, Sean sent Trish an email outlining his suggested revisions to the marital settlement agreement that he had emailed to her the day before. The email reveals that the marital settlement agreement stated that Sean was to refinance the outstanding balance on the second mortgage or pay it off in full within 36 months of the date of the judgment of dissolution. Sean wanted it changed to 48 months. In addition, he suggested language stating that if Trish were to sell the marital residence for more than the amount on the first and second mortgage, that she be responsible to pay off the second mortgage and he would no longer be liable for that debt. Sean also negotiated for more favorable terms regarding reimbursement to Trish for expenses for their son.

¶ 14 On June 15, 2011, Trish forwarded to Sean the final divorce documents that she had received from her attorney. On June 16, 2011, Sean emailed Trish: "I have read them and don't see any issues."

¶ 15 The parties met at a notary's office on June 18, 2011, to sign the divorce documents, including the marital settlement agreement, a joint parenting agreement, and a uniform order for support. Sean also signed an affidavit of party not represented stating under oath that he had an opportunity to obtain an attorney to represent him with respect to the divorce, but that he declined to do so.

¶ 16 On June 22, 2011, Trish filed the petition for dissolution of marriage with the circuit court, along with the marital settlement agreement, joint parenting agreement, and uniform order for support. The following day the circuit court entered the judgment of dissolution of marriage. In its judgment the court noted that the parties had entered into a marital settlement agreement and joint parenting agreement providing for the settlement of matters relating to the support and maintenance of the parties, and for the settlement of their property and marital rights. The parties represented in their marital settlement agreement that they each had full and complete knowledge of the income, assets, and liabilities of the other party. They also represented that they each had carefully considered the terms of the marital settlement agreement and did not regard it to be unconscionable. The agreement reflected that Trish was represented by counsel but that Sean declined to obtain an attorney.

¶ 17 The marital settlement agreement signed by the parties provided that Trish would receive maintenance of \$3,000 per month for 60 months. During the 60 months, the maintenance would be nonmodifiable and would not terminate upon the death of either party, the remarriage of Trish, or Trish's cohabitation with another person on a residential, continuing, conjugal basis.

¶ 18 Pursuant to the terms of the marital settlement agreement, Trish was to receive the marital residence; one half of Sean's defined contribution retirement plan; one half of the marital portion of Sean's stock options; the entirety of her negligible IRA; the public relations and marketing business she started in 2009; her nonmarital 1999 Ford Mustang; and the 2004 Kia Optima. Likewise, Sean was to receive one half of his defined

contribution retirement plan; the entirety of his defined benefits retirement plan; one half of the marital portion of his stock options; and the 2006 Toyota Sienna. It should be noted that the marital settlement agreement did not reflect the value of the assets assigned to each of the parties.

¶ 19 The marital settlement agreement also provided that each party would be responsible for certain debts. Trish was responsible to pay the first mortgage with an approximate balance of \$212,000; a Capital One Mastercard; a Barclaycard Visa; and a Bank of America Visa. Under the terms of the marital settlement agreement, Sean was responsible to pay the second mortgage with an approximate balance of \$65,000; the First Financial Credit Union Loan; a Wells Fargo Visa; and outstanding debt on the 2006 Toyota Sienna. With the exception of the two mortgages, the marital settlement agreement did not state the outstanding balance of the debts assigned to the parties.

¶ 20 The parties agreed to joint custody of their son, with Trish having primary physical custody. Pursuant to the terms of the marital settlement agreement, in addition to the statutory child support payments, Sean would pay 100% of the child's uninsured medical expenses; 100% of the daycare expenses for the child to attend the YMCA Summer Camp each year and the YMCA yearly membership; 100% of all extracurricular activity expenses; 100% of his post-high school education expenses for four years; contribute up to \$7,500 towards the purchase of a vehicle for the child when he turns 16; and 100% of the vehicle insurance, license fees, and maintenance on the vehicle until the child turned 18 or graduated from high school. In addition, the parties were each to pay

50% of all additional expenses for the child, including clothing, shoes, and school expenses. Trish was allowed to claim their son as a tax exemption each year.

¶ 21 The marital settlement agreement was approved by the court and incorporated into the judgment of dissolution which was entered on June 23, 2011.

¶ 22 Almost 11 months later, on May 8, 2012, Sean, who was now represented by counsel, filed a petition for relief from judgment seeking to vacate that portion of the judgment of dissolution approving the marital settlement agreement. In his section 2-1401 petition, Sean alleged that the marital settlement agreement was unconscionable on its face and, had the court reviewed it, the court would not have approved it. The essence of Sean's claim of unconscionability was that under the terms of the marital settlement agreement, Trish received substantially more assets than he received, in addition to 60 months of nonmodifiable maintenance, child support, and additional financial benefits for the child. He also alleged that he was induced to sign the marital settlement agreement by Trish's fraudulent representations.

¶ 23 On September 12, 2013, a hearing was held on Sean's section 2-1401 petition for relief. The evidence revealed that throughout the parties' marriage, Sean was the primary wage earner. He had a college degree and one year of education towards his masters in business administration. Sean, a director of global marketing and business development for an international company, managed the Asian and European divisions of his employer's company. He stated that he had been involved in international business since 2009. As part of his job duties, Sean was involved in contract negotiations and dealt with the company's attorneys. Sean's gross yearly income for 2011 was \$216,978 in addition

to a yearly bonus and stock options. Trish's social security earnings statement, which was admitted into evidence, indicated that her total income from 1999 through 2009 was \$7,071. In 2009, Trish started a public relations and marketing business. Trish's income tax return from 2011 established that she earned \$20,000 in salary from the public relations business the year the parties divorced. That same year the public relations business showed a profit of \$16,564.

¶ 24 Sean testified that when the parties separated in July 2009, they discussed divorce. However, it was not until October 2010 that Sean consulted an attorney regarding a divorce. He stated that the attorney did not advise him on obtaining a divorce but merely advised him to seek mediation.

¶ 25 Sean acknowledged emailing Trish a spreadsheet outlining the distribution of assets and debts on May 21, 2010. He stated that he did not receive a response from Trish on the proposal. He testified that after Trish retained an attorney in January or February 2011, serious negotiations began.

¶ 26 Sean testified that at some point he met with Trish at her office and that she verbally presented to him the terms she wanted in the divorce. He testified that the first time he saw a settlement proposal was in April or May 2011. He stated that he and Trish continued negotiating the terms of the divorce via email.

¶ 27 Sean testified that during the negotiation process, Trish told him that he did not have any parental rights until a judge said he did. He claimed that Trish threatened that if he obtained a lawyer, he would not be able to see their son until a judge said he could. According to Sean, Trish made the threat on more than one occasion. Sean testified that

when the negotiations became difficult, he was denied access to his son or that he was denied the opportunity to do the things he wanted to do with him.

¶ 28 Sean testified that he was able to negotiate better terms in the marital settlement agreement than the ones proposed by Trish. Sean testified that the original terms required him to pay off the second mortgage in three years, but he was able to increase the period to four years. He also testified that the original terms of the marital settlement agreement required him to contribute \$15,000 towards his son's vehicle, but he "cut it in half" to \$7,500. He also testified that the original terms required him to pay for all of his son's clothing, but he was able to change the percentage to one half.

¶ 29 Sean testified that at some point he received a revised marital settlement agreement from Trish. The proposal from Trish did not reflect all of his suggested revisions. He testified that he understood that the terms of the marital settlement agreement required him to pay Trish \$3,000 a month in nonmodifiable maintenance for 60 months, but nevertheless he signed it. He testified, however, that he did not understand that under the terms he agreed to he would still have to pay maintenance if he or Trish died. Sean testified that under the marital settlement agreement, he received the minivan with the outstanding loan and Trish received the 1999 Ford Mustang convertible and the 2004 Kia, both of which were paid off.

¶ 30 Sean testified that although Trish had knowledge of all of his earnings, finances, and expenses, she refused to give him access to her public relations business records. He testified that he had no knowledge or access to the income, revenues, or expenses of the

business. He testified that Trish represented to him that the business was not making money and, therefore, he was surprised when he saw her 2011 tax return.

¶ 31 Sean testified that he signed the marital settlement agreement without consulting an attorney because every time he wanted to talk to an attorney, Trish would use his son against him as "leverage." He testified that he did not think he was getting a good deal. When asked why he signed the marital settlement agreement if he thought it was a bad deal, he replied: "Because I thought if I made [Trish] happy, I could see my son."

¶ 32 Sean testified that Trish brought the final documents to the notary's office and that he did not have an opportunity to read them before he signed them. He testified that after he signed them, Trish took the documents with her. He stated that he received copies of the signed documents two or three weeks later and that, to his knowledge, no changes had been made to the documents. According to Sean, within one or two pay periods after the judgment of dissolution was entered, he received an email from Trish stating that the child support had been calculated incorrectly and that he needed to increase it, which he did.

¶ 33 Sean testified that approximately two months after the judgment of dissolution was entered, he had concerns about the "deal" he had gotten himself into. He stated that Trish presented him with a bill in the amount of \$708 for his half of the clothing for their son. Sean did not think that was a reasonable amount for clothing for an eight-year-old child, and he stated that he sent Trish an email to that effect. He stated that the other bill that caused him concern was his half of the lawyer fee in the amount of \$1,000. He

testified that he realized at that point that he did not actually have the money to pay his financial obligations under the marital settlement agreement.

¶ 34 Sean testified that he did not seek legal advice regarding the marital settlement agreement until September 2011 when he returned to see the attorney he had initially contacted regarding the divorce. He stated that he wanted to change the financial aspects of the marital settlement agreement because he could not carry the financial burden. Sean testified that although he retained the attorney, she did not file any pleadings on his behalf. He testified that he fired the attorney in March 2012 when he became fed up with her lack of action, and he sought a different attorney.

¶ 35 On cross-examination, Sean acknowledged that the property valuation report admitted into evidence showed that the value of the marital residence one month before the parties divorced was \$218,661, even though the parties owed \$277,000 on the first and second mortgages. Sean conceded that according to the property valuation report the parties were "upside down" on the loan by approximately \$60,000.

¶ 36 Sean admitted on cross-examination that in 2012 he went on vacations with his fiancée to Cancun, San Francisco, and Phoenix. Sean acknowledged that, contrary to the terms of the marital settlement agreement, he did not pay for his son's summer camp or for his extracurricular activities. He also acknowledged that he had not paid his share of his son's school clothes and at some point he stopped paying his son's cell phone bill.

¶ 37 At the hearing, Trish testified that even before the parties entered into the marital settlement agreement, Sean had been depositing directly into her account each month \$3,000 for maintenance as well as the child support payment. According to Trish, Sean

started the financial negotiations on May 21, 2010, when he sent her a spreadsheet of what he was willing to give her. Trish testified that the spreadsheet listed the parties' bills, Sean's income, and what each party would pay over a five-year period. Trish testified that the document provided by Sean was used as a starting point in the negotiation process. She also testified that the parties negotiated the terms of the marital settlement agreement over the course of 14 months.

¶ 38 Trish testified that she and Sean created the marital settlement agreement together. Pursuant to its terms, Trish was to keep the marital residence along with the mortgage. She testified that prior to the divorce, the parties had refinanced the marital residence and that there was no equity at the time of the entry of judgment of dissolution. Trish testified that the second mortgage was in Sean's name only. She explained that it was a bridge loan because they had purchased the marital residence before they sold their other home. According to Trish, the second mortgage was to have been paid off when they closed on the sale of their other home, but Sean chose not to pay it off.

¶ 39 Under the agreement, Trish was to receive the public relations business she started in 2009. The parties filed a joint tax return in 2010, that was admitted into evidence, which reflected a joint income of \$170,000. The same tax return reflected a business loss of \$22,468. Trish testified that she did not receive a salary in 2010. She stated that she first started taking a paycheck from the public relations business one month before the divorce on May 15, 2011. She testified that she paid herself \$1,250 every two weeks from the business. Trish testified that during the negotiations, Sean never asked to see

her business's books or checking account. She testified that Sean agreed not to take any money or equity in the business.

¶ 40 Trish admitted that on one occasion she threatened to keep their son away from Sean. According to Trish, Sean was drunk when he drove their son home on Memorial Day weekend. She said that when Sean came to the back door, she could smell alcohol, and he appeared inebriated. She stated that she sent Sean a text telling him that he could not see their son until the divorce was final. She testified, however, that even after she made the threat, Sean did in fact have parenting time with their son and that Sean's allegation that she withheld their son from him was completely false.

¶ 41 Trish testified that she had no idea if Sean had an attorney review the marital settlement agreement before he signed it on June 18, 2011. Trish testified, however, that Sean was very meticulous in reading every page of the marital settlement agreement before he signed it.

¶ 42 On November 4, 2013, the circuit court entered an order denying Sean's section 2-1401 petition for relief. In its order, the circuit court noted that Sean was a well-educated businessman who negotiated contracts and worked with attorneys as part of his job duties. The circuit court made a finding that Sean's "entire testimony lacked credibility." The court found that the marital settlement agreement was neither substantively nor procedurally unconscionable. The circuit court found no fraud, duress, or coercion, and found that Sean did not exercise due diligence in the original proceeding or in bringing his section 2-1401 petition for relief. Finally, the circuit court awarded Trish \$9,000 in attorney fees. This appeal followed.

¶ 43

ANALYSIS

¶ 44 Sean's argument on appeal is that the marital settlement agreement was unconscionable, and, therefore, the circuit court erred in denying his section 2-1401 petition for relief.

¶ 45 Initially, we note that our supreme court has not directly addressed the standard of review in cases involving either the grant or denial of relief of a section 2-1401 petition after an evidentiary hearing. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 34. However, in *People v. Vincent*, 226 Ill. 2d 1 (2007), the supreme court in *dicta* indicated that the abuse of discretion standard of review "does not match up with" disposition of a section 2-1401 petition following an evidentiary hearing. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 34. As an evidentiary hearing was held in the case at bar, we will review the circuit court's order under the manifest weight of the evidence standard. "A decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident." *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 35.

¶ 46 "Section 2-1401 provides a comprehensive scheme for obtaining relief from a final judgment when 30 days or more have elapsed since its entry." *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 14; 735 ILCS 5/2-1401 (West 2010). It is the petitioner who bears the burden of establishing his right to relief under section 2-1401. *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 15. "The purpose of a section 2-1401 petition is for a party to bring to the court's attention facts that, if known to it at the

time it rendered its judgment, would have changed the court's determination." *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 29.

¶ 47 To receive relief under section 2-1401, a petitioner must affirmatively allege specific facts supporting the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim in the original action; and (3) due diligence in filing the section 2-1401 petition. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 17. "The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence." *In re Marriage of Bielawski*, 328 Ill. App. 3d 243, 252 (2002).

¶ 48 To promote the amicable settlement of disputes between parties in a divorce action, the Illinois Marriage and Dissolution of Marriage Act (the Act) provides that parties may enter into an agreement containing provisions for disposition of their property, maintenance, child support, custody and visitation. 750 ILCS 5/502(a) (West 2010). "If the parties decide to settle their property rights by mutual agreement rather than by statute, they are bound to the terms of their agreement." *In re Marriage of McLauchlan*, 2012 IL App (1st) 102114, ¶ 21. "When such agreements are made a part of the divorce decree, they become merged in such decree and are regarded as contracts between the parties, which, if fairly made and in good faith, will be accepted and enforced by the courts." *In re Marriage of Bolte*, 2012 IL App (3d) 110791, ¶ 17. A marital settlement agreement is not typically subject to appellate review because an agreed order is a record of the parties' agreement and not a judicial determination of the parties' rights. *In re Marriage of Bielawski*, 328 Ill. App. 3d at 251. "When a party

seeks to vacate a property settlement agreement incorporated into a judgment of dissolution of marriage, all presumptions are in favor of the validity of the settlement."

Id. Even so, "[r]elief is available under section 2-1401 to set aside a settlement agreement that is unconscionable or entered into as a result of duress, coercion, or fraud."

In re Marriage of Callahan, 2013 IL App (1st) 113751, ¶ 17.

¶ 49 "There are two types of unconscionability: procedural and substantive." *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 30. "A finding of unconscionability can be based on either procedural or substantive unconscionability, or a combination of both." *Id.*

¶ 50 Procedural Unconscionability

¶ 51 In its order denying relief, the circuit court found that the marital settlement agreement was not procedurally unconscionable. "Procedural unconscionability involves 'impropriety during the process of forming a contract that deprives a party of [a] meaningful choice.'" *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 30 (quoting *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 20).

¶ 52 Review of the record reveals that Sean initiated and actively drove the settlement negotiations. The record further reveals that the marital settlement agreement was the product of 14 months of negotiations between the parties. It was Sean who proposed to meet with Trish to "go over what [she] want[ed] financially." In a March 10, 2011, email to Trish, Sean stated that he wanted to discuss "the timing of changing the money distribution over to *what we agreed to during our meeting*." In a March 21, 2011, email, Sean informed Trish of the amount of maintenance and child support she would receive

based on their agreement. Sean even reminded Trish that the written agreement she sent to him did not reflect their oral agreement that Trish would receive a percentage of his pension, which prompted him to ask: "[D]id you change your mind or just forget it? See how [I] am trying to be fair here?" It is clear from the record that Sean was actively involved in the negotiation process. Moreover, his testimony at the hearing revealed that he was successful in negotiating more favorable terms for himself on a number of issues.

¶ 53 It is also clear that Sean believed that while Trish needed an attorney to review his proposed settlement agreement, he did not believe that he needed to hire an attorney. Although Sean initially met with an attorney, he testified at the hearing that he did not hire the attorney; rather, he merely consulted with the attorney who advised him regarding mediation. Furthermore, although Sean knew that Trish had obtained an attorney at some point during the negotiation process, he continued to negotiate the terms of the marital settlement agreement without the aid of counsel.

¶ 54 Sean insists that he did not obtain an attorney prior to the entry of the judgment of dissolution because Trish threatened to prevent Sean from having visitation with their son. Although Trish admitted that she threatened to discontinue Sean's parenting time on the one occasion after Sean returned intoxicated from a weekend visit with their son, Trish denied that she withheld their son from him. The circuit court judge, who heard and evaluated the evidence, found that Sean's entire testimony lacked credibility. "The trial court is in the best position to judge the credibility of the witnesses and resolve conflicts in the evidence." *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 35. Assuming *arguendo* that Sean was concerned that Trish might deny him access to his

son, this factor did not deprive him of the ability to make a meaningful choice when the record reflects that he was well educated, negotiated contracts and worked with attorneys as part of his job, initiated and actively participated in the negotiations, and agreed to the terms that he negotiated when he signed the marital settlement agreement.

¶ 55 The record reveals no evidence of impropriety during the process of forming the marital settlement agreement; rather, the record provides ample support for the circuit court's finding of no procedural unconscionability.

¶ 56 Substantive Unconscionability

¶ 57 The circuit court likewise found that the marital settlement agreement was not substantively unconscionable. "Substantive unconscionability involves a situation in which a clause or term in the contract is totally one-sided or harsh." *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 30. "The determination of unconscionability focuses on the parties' relative economic positions immediately following the making of the agreement." *In re Marriage of Richardson*, 237 Ill. App. 3d 1067, 1080 (1992).

¶ 58 According to Sean, Trish realized a total revenue of \$142,799 in the year the parties divorced. Sean claims that the evidence established that in 2011 Trish received the following income: \$20,000 in wages from the public relations business; \$16,564 in business profits; \$36,000 in maintenance; \$21,912 in child support; \$30,000 in wages diverted from the business through her live-in boyfriend who was employed by her business; and \$18,323 in business deductions that represented paper losses as to income actually received. In contrast, Sean asserts that his real net income for 2011, which consisted of his net wages less payments on the second mortgage, maintenance, and child

support, was \$87,714.45. He argues that these figures render the settlement agreement economically unconscionable. Even assuming *arguendo* that Sean correctly set forth the parties' 2011 income, we disagree. See *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 31 ("The fact that an agreement merely favors one party over the other does not render the agreement unconscionable.").

¶ 59 On appeal, Sean urges this court to impute certain funds as income to Trish in 2011. Sean asserts that the \$30,000 in wages paid to Trish's live-in boyfriend employed by her business should be imputed to Trish as income; however, Sean presented no evidence at the hearing on this issue. Additionally, Sean presented no evidence that the business deductions claimed by Trish were improper such that they should have been imputed to Trish as income. Sean's failure to present evidence of these issues at the hearing results in a forfeiture of those issues on review. See *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85 ("issues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal").

¶ 60 Sean complains that he had no direct knowledge of Trish's earnings and was not aware of the income as disclosed by her 2011 income tax record. However, there is no evidence that the parties engaged in discovery prior to entering into the marital settlement agreement. Furthermore, Trish testified that Sean never asked to see her business's books or checking account. "When a divorce party elects to forego formal discovery in favor of accepting a representation and warranty of full and complete disclosure, the party does so at his or her own peril." *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 47.

¶ 61 Sean next maintains that the evidence presented at the hearing established that the division of assets and imposition of financial responsibilities in the marital settlement agreement were totally one-sided, oppressive, and unconscionable. In support of his argument, Sean points to numerous economic provisions that he characterizes as "unconscionable."

¶ 62 Sean asserts that it was unconscionable that Trish received 100% interest in the public relations business she formed during the marriage with no offsetting award of equity to him; that Trish received two vehicles, both of which had no debt, while Sean received the vehicle which had an outstanding loan obligation; and that Trish received 100% of her retirement accounts and 50% of his retirement account and stock options. Although Sean had the burden of establishing his right to relief under section 2-1401, with the exception of the parties' first and second mortgages, he presented no evidence as to the value of the assets received by each party under the terms of the agreement. Without this information, there is no evidence in the record that the marital settlement agreement was unconscionable as to the division of assets.

¶ 63 Sean claims that it was unconscionable that Trish received the marital residence with no offsetting award of equity to him and that he was required to pay the second mortgage on the marital residence despite being awarded no equity. However, contrary to Sean's contention on appeal, the record reveals that there was no equity in the marital residence. Sean acknowledged on cross-examination that according to the property valuation report, the parties were "upside down" on the home loan by approximately \$60,000. With regard to the second mortgage, Trish testified, and Sean did not dispute,

that it was a bridge loan taken out when the parties purchased the marital residence before their other home had sold. According to Trish's unchallenged testimony, the loan was in Sean's name only. Trish testified that Sean was to have paid off the second mortgage after they sold their other home, but Sean opted not to pay it off. To the contrary, it appears from the record that Sean agreed to pay the second mortgage. In an email Sean informed Trish that if she sent him the account information for the second mortgage, he would set up online payments to be taken from his account.

¶ 64 Sean next asserts that it was unconscionable that the maintenance was nonmodifiable and that it would not terminate upon the death of either party, upon Trish's remarriage, or upon Trish's cohabitation with another person on a residential, continuing conjugal basis. As the Act expressly provides that the parties may agree for continuation of maintenance upon the occurrence of death of either party or cohabitation, these terms do not make the marital settlement agreement unconscionable. 750 ILCS 5/510(c) (West 2010).

¶ 65 Sean next asserts that the marital settlement agreement was unconscionable given that in addition to the statutory child support, the agreement required him to pay a number of financial obligations on behalf of his son. He complains that despite these additional financial obligations, Trish was allowed to claim their son as a tax exemption each year.

¶ 66 Where the parties have agreed on the issues of child custody, support, and visitation, the court is not bound by those terms in their settlement agreement since the court must consider the best interests of the child in deciding whether to approve the

settlement. *In re Marriage of Sheetz*, 254 Ill. App. 3d 695, 698 (1993). "It is well settled that while a parent may not by contract defeat his legal duties owed to his children, he may contract to do more than the law requires of him." *Gaddis v. Gaddis*, 20 Ill. App. 3d 267, 272 (1974).

¶ 67 Here, Sean agreed to provide financial support to the child over and above what was required by statute. Sean argues on appeal, however, that after Trish began submitting what he believed to be "excessive financial demands," he realized that he did not have the money to pay his financial obligations under the marital settlement agreement. Sean testified that he sought relief from the judgment because he could not carry the financial burden. He acknowledged that he had not paid his share of his son's school clothes and had stopped paying his son's cell phone bill. While Sean also failed to pay for his son's summer camp or extracurricular activities, he was able to pay for vacations with his fiancée to Cancun, San Francisco, and Phoenix that same year. "A child is not expected to have to live at a minimal level of comfort while the noncustodial parent is living a life of luxury." *In re Marriage of Bussey*, 108 Ill. 2d 286, 297 (1985). A section 2-1401 proceeding is not intended to relieve the petitioner of the consequences of his mistake or negligence. *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 14. "A court should not set aside a settlement agreement merely because one party has second thoughts." *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 214 (1994).

¶ 68 The circuit court considered the evidence after an evidentiary hearing on Sean's section 2-1401 petition and found that the economic positions of the parties following the dissolution of their marriage was not so inequitable that the settlement agreement must be

set aside as unconscionable. Having thoroughly examined the record, we cannot find that the circuit court's denial of Sean's request for relief from judgment was against the manifest weight of the evidence.

¶ 69

CONCLUSION

¶ 70 For the reasons stated, we affirm the judgment of the circuit court.

¶ 71 Affirmed.