IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

REBECCA G. CONNELLY, *Petitioner/Appellant*,

v.

R. BRIAN CONNELLY, *Respondent/Appellee*.

No. 1 CA-CV 15-0290 FC
FILED 12-8-2016

Appeal from the Superior Court in Maricopa County
No. FC2012-004808
The Honorable Susan M. Brnovich, Judge

AFFIRMED

COUNSEL

John L. Popilek PC, Scottsdale
By John L. Popilek
Counsel for Petitioner/Appellant

Dickinson Wright, PLLC, Phoenix
By Leonce A. Richard, III
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

T H O M P S O N, Judge:

¶1 Rebecca G. Connelly (Wife) appeals from the superior court's decree interpreting her agreement with R. Brian Connelly (Husband) regarding division of retirement accounts. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Wife petitioned for dissolution of marriage and served Husband on June 6, 2012. The parties' proposed resolution statements listed various retirement accounts as community property.

¶3 After mediation in which the parties agreed to resolve all disputed issues, the parties signed an agreement made pursuant to Arizona Rule of Family Law Procedure (Rule) 69,[1] which stated in relevant part that "[t]he retirement accounts of the parties existing as of date of service shall be equalized." The agreement further stated that the parties "intend that these agreements be binding."

¶4 The parties lodged proposed decrees with differing views of the division of the retirement accounts. Although neither proposed decree is in the record, Wife's version apparently set forth values for the retirement accounts as of the date of service and proposed division of the accounts according to that value. In contrast, Husband proposed that the retirement accounts existing as of the date of service should be equalized and that whomever the parties use to prepare a qualified domestic relations order (QDRO) would determine the community interest and how to equalize the various accounts.

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[1] Rule 69 provides that written agreements between the parties in family court proceedings are valid and binding. Ariz. R. Family Law P. 69(A)(1).

¶5 The superior court held oral argument on the parties' respective objections to the Rule 69 agreement, during which the superior court stated:

> . . . [t]hat single statement is clear that it'll be established at the date of service. But it's vague and it leaves out who bene --- I mean, because one party doesn't get to suck up all the increase or decrease in these accounts. . . . I guess you can both interpret the word equalized your way and your way.

¶6 The superior court then held an evidentiary hearing as to the parties' intent regarding their Rule 69 retirement agreement.

¶7 Wife testified as to her understanding of the Rule 69 retirement agreement:

> My understanding was very clear, they had put down what Brian had and what I had, added it up, they equalized it and they said you will be paying Brian this much money. I said, okay, and that was that.

¶8 Wife testified she agreed at mediation to equalize the retirement accounts according to the values of those accounts as of the date of service.

¶9 Husband testified the Rule 69 retirement agreement meant "that the retirement accounts that existed at the date of service would be equalized." Husband testified that the accounts would be equalized "whenever they get equalized, today, tomorrow, next week," essentially whenever "a quarter was done or when the parties actually got around to dividing it."

¶10 Ultimately, the superior court issued a decree, which stated as to division of the retirement accounts:

> The parties dispute how to divide the retirement. [Wife] argues that the parties[']Rule 69 agreement intended that the retirement accounts be split according to the value at the time of service, June 6, 2012. [Husband] argues that the provision in the Rule 69 agreement intended to identify which accounts would be divided but not to identify dollar amounts. The court agrees with [Husband]. Therefore, the Parties shall equalize their retirement accounts that existed as of the date of service, June 6, 2012. In equitably dividing the property,

> the parties shall arrange to have any necessary qualified domestic relations orders (QDRO) prepared.

¶11 Wife timely appealed.[2] We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2016).[3]

DISCUSSION

¶12 Wife argues that the agreement unambiguously states the retirement accounts were to be valued as of the date of service and the court erred in not interpreting the agreement accordingly. Wife requests we hold that the Rule 69 retirement agreement "contemplates valuation as of the date of service" or, alternatively, set aside the entire Rule 69 agreement as unenforceable.

¶13 We review de novo the superior court's interpretation of a contract or agreement. *See In re Marriage of Pownall*, 197 Ariz. 577, 580, ¶ 7, 5 P.3d 911, 914 (App. 2000). Because the "intent of the parties is a question of fact left to the fact finder," we accept the superior court's factual findings as to the parties' intent in entering an agreement unless those findings are clearly erroneous. *Chopin v. Chopin*, 224 Ariz. 425, 428, ¶ 7, 232 P.3d 99, 102 (App. 2010); *McNeil v. Hoskyns*, 236 Ariz. 173, 176, ¶ 13, 337 P.3d 46, 49 (App. 2014).

¶14 Agreements between parties "are to be read in light of the parties' intentions as reflected by their language and in view of all circumstances; if the intention of the parties is clear from such a reading, there is no ambiguity." *Harris v. Harris*, 195 Ariz. 559, 562, ¶ 15, 991 P.2d 262, 265 (App. 1999); *see Beaugureau v. Beaugureau*, 11 Ariz. App. 234, 237, 463 P.2d 540, 543 (1970). If the agreement can be reasonably construed in more than one manner, the terms are ambiguous and subject to a determination by the trier of fact about the intent of the parties, based on extrinsic evidence. *Leikvold v. Valley View Cmty. Hosp.*, 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984), *superseded by statute on other grounds,* A.R.S. § 23-1501 *et seq.*; *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 258, 260, 681

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[2] Wife filed a motion for new trial, which she withdrew before filing the notice of appeal.

[3] We cite the current version of applicable statutes when no revisions material to this decision have occurred.

P.2d 390, 410, 412 (App. 1983). Whether a contract is ambiguous is a question of law that we may decide independently on review. *Abrams v. Horizon Corp*., 137 Ariz. 73, 78, 669 P.2d 51, 56 (1983). "We have long held that we will give effect to a contract as written where the terms of the contract are clear and unambiguous." *Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, 639, ¶ 16, 177 P.3d 1207, 1211 (App. 2008).

¶15 We find there is no ambiguity in the agreement as to the parties' intent in dividing the accounts equally.[4] The plain language of the Rule 69 agreement shows the intent of the parties was to equalize the retirement accounts, which is exactly what the superior court ordered in the decree. Although the date of service is included in the Rule 69 agreement, the provision merely refers to accounts that were existing as of that date.

¶16 Wife argues the superior court's ruling set the date of mediation as the date of valuation and in so doing, the superior court improperly reformulated the Rule 69 agreement. Wife misreads the decree. The decree does not specify a valuation date for use in preparing a QDRO. Therefore, we reject Wife's argument that the superior court reformulated the Rule 69 agreement.

¶17 We likewise reject Wife's argument that the Rule 69 agreement is unenforceable because there was no mutual assent. Specifically, Wife argues that she intended to equitably divide the retirement accounts valued as of the date of service and that Husband intended to value the retirement accounts "at the time that they would eventually be valued and split." Wife argues that because the parties "were

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[4] We recognize that the agreement's failure to specify *how* the accounts would be equalized (cash payment upon dissolution or division pursuant to QDRO, for example) or *when* the accounts would be valued (date of service or date of dissolution, for example) could be construed as ambiguous, which is perhaps why the superior court held an evidentiary hearing. Although Wife's testimony at the evidentiary hearing suggests that Wife sought an order directing a lump sum equalization payment at the time of dissolution, on appeal Wife is not challenging the superior court's order directing preparation of the QDRO. It is not an abuse of discretion for the superior court to order that a retirement plan be divided by a domestic relations order rather than a lump sum in the absence of evidence of the present cash value of a retirement plan as of the date of service of the petition for dissolution. *Hetherington v. Hetherington*, 220 Ariz. 16, 20, ¶ 15, 202 P.3d 481, 485 (App. 2008).

not even negotiating about the same items there was no meeting of the minds."

¶18 It is true that "before a binding contract is formed, the parties must mutually consent to all material terms. A distinct intent common to both parties must exist without doubt or difference, and until all understand alike there can be no assent." *Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 473, 799 P.2d 810, 814 (1990). A court may find lack of mutual assent where the "misunderstandings of the parties are reasonable under the specific circumstances of the case." *Id*. at 475, 799 P.2d at 816. However, "mutual assent is based on objective evidence, not on the hidden intent of the parties. In other words, what is operative is the objective manifestations of assent by the parties." *Id*. at 474, 799 P.2d at 815 (internal citations omitted). Moreover, any "misunderstandings of the parties must be reasonable before a court may properly find a lack of mutual assent." *Hartford v. Indus. Comm'n of Ariz.*, 178 Ariz. 106, 112, 870 P.2d 1202, 1208 (App. 1994). Generally, a party who signs a written agreement "is bound to know and assent to its provisions in the absence of fraud, misrepresentation, or other wrongful acts by the other party." *Teran v. Citicorp Person-to-Person Fin. Center*, 146 Ariz. 370, 372, 706 P.2d 382, 384 (App. 1985).

¶19 Here, nothing in the agreement suggested that the valuation date was a material term of the agreement. Wife's argument that the provision unambiguously contains a valuation date is not reasonable. The retirement agreement does not contain the term "value" or "valuation." Wife signed the agreement while represented by counsel and the agreement stated the parties' intent to be bound, thus objectively manifesting assent to be bound. Wife does not argue fraud, misrepresentation, or other wrongful act by Husband.

¶20 We agree with Husband that this is not a case of lack of mutual assent, but rather a unilateral mistake. A unilateral mistake is one where only one party to an agreement is mistaken as to the subject matter or the agreement's expression. *Hartford*, 178 Ariz. at 111, 870 P.2d at 1207. A unilateral mistake does not affect the agreement's binding force and relief is provided "only if the other party knew of and unfairly took advantage of the other party's error." *Id*. We find Wife made a unilateral mistake by thinking the agreement contained a valuation date when, in actuality, that term was omitted from the agreement.

¶21 Finally, we reject Wife's argument that the parties did not reach an agreement that could be enforced under Rule 69 because the

superior court held an evidentiary hearing to resolve a factual dispute.[5] Wife did not oppose the evidentiary hearing. Rule 69 provides that written agreements between the parties in family court proceedings are valid and binding. Ariz. R. Fam. Law P. 69(A)(1). A Rule 69 agreement is "presumed to be valid and binding, and it shall be the burden of the party challenging the validity of the agreement to prove any defect in the agreement." Ariz. R. Fam. Law P. 69(B). Cases involving Arizona Rule of Civil Procedure (Civil Rule) 80(d), from which Rule 69 was adapted, instruct that Civil Rule 80(d) applies where the parties dispute the existence and terms of an agreement. *Robertson v. Alling*, 237 Ariz. 345, 348, ¶ 13, 351 P.3d 352, 355 (2015); Ariz. R. Fam. Law P. 69, comm. cmt. Because we may look to cases interpreting Civil Rule 80(d) for guidance in construing Rule 69, we find that Wife's dispute over the terms of the agreement mandates that Rule 69 applies and the agreement is valid and binding. Ariz. R. Fam. Law P. 1, comm. cmt; *see also* Ariz. R. Civ. P. 80(d). Wife does not meet her burden in proving any defect in the agreement.

CONCLUSION

¶22 For the foregoing reasons, we affirm. In our discretion, we deny Husband's request for attorneys' fees. We award Husband costs

[5] Husband asks us to strike section two of Wife's reply brief, where she argues that the trial court erred by holding an evidentiary hearing to determine the parties' intent. We have considered the motion to strike and Wife's response, and we deny the motion to strike. Wife's argument that the trial court should not have held an evidentiary hearing was the corollary to the arguments she asserted in the trial court and her opening brief and not a novel argument.

upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA