

[Cite as *Clark v. Clark*, 2009-Ohio-2803.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JEFF SCOTT CLARK, :
 :
 Plaintiff-Appellant, : CASE NO. CA2008-10-244
 :
 - vs - : OPINION
 : 6/15/2009
 :
 DIANE MICHELLE CLARK, :
 :
 Defendant-Appellee. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS,
DOMESTIC RELATIONS DIVISION
Case No. DR2007-06-0709

Lisa M. Wenzel, Robert L. Raper, 300 Madison Avenue, Suite 200, Covington, KY 41011, for plaintiff-appellant

Michael P. Masana, 220 South Monument Avenue, Hamilton, OH 45011, for defendant-appellee

POWELL, J.

{¶1} Plaintiff-appellant, Jeff Scott Clark (Jeff), appeals the Butler County Court of Common Pleas Domestic Relations Division's decision regarding division of the marital home.¹ We affirm, but modify the trial court's decision.

{¶2} Jeff and defendant-appellee, Diane Michelle Clark (Diane), were married

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

on September 2, 2000. During the marriage, the parties had two children and acquired a home in Hamilton, Ohio. In April, 2007, Diane and the children moved to Michigan. Diane filed for divorce in Michigan on May 18, 2007. Jeff, in turn, filed for divorce in Ohio on June 7, 2007. The trial court retained jurisdiction over the divorce, but found it was in the best interest of the children to have custody, child support, visitation, and all other child-related issues handled in the Michigan courts.

{¶3} On April 14, 2008, the parties appeared before the trial court with a separation agreement. Although not completely formalized, Diane's counsel read the agreement into the record. The agreement included a disposition of the marital home in Hamilton. The trial court specifically asked both Jeff and Diane whether they understood and accepted the terms of the agreement, and whether they each wanted the trial court to accept the agreement. Both parties answered affirmatively to each of the trial court's queries. The trial court ordered the parties to forward signed paperwork to the court by May 22, 2008.

{¶4} On April 17, 2008, the trial court issued an order to the parties to appear on May 22, 2008 to show cause for failure to file a decree. Jeff moved for a continuance on May 22, 2008 explaining that it was taking longer than anticipated to obtain signatures on the decree and the separation agreement. On July 22, 2008, Jeff moved to enforce the separation agreement read into the record before the trial court on April 17, 2008. Two days later, at the show cause hearing, the parties indicated that they had reached an impasse regarding division of the marital home based on divergent opinions of how the agreement in the record should be interpreted, and requested intervention by the trial court. The trial court indicated it would review both interpretations and the transcript of the April 17, 2008 hearing, and issue a decision.

{¶15} The trial court issued its decision on July 30, 2008, which included a division of marital home equity substantially mirroring the language at the April 17, 2008 hearing. Two additional sentences were included at the end of the disposition addressing the possibility of the sale price not covering the home's mortgages.

{¶16} On September 4, 2008, the trial court held another hearing at which it demanded to know why neither party had filed a decree with the court. Both parties complained that they had each tried to obtain signatures from the other party, but had been unsuccessful. The trial court took copies of both parties' decrees and stated that it would file one of them, or change both of them. The trial court filed a decree the following day which included a disposition of the marital home in language which differed from that read into the record at the April 17, 2008 hearing. Jeff filed an appeal raising a single assignment of error.

{¶17} "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT MODIFIED THE TERMS OF THE SETTLEMENT AGREEMENT."

{¶18} Jeff argues that the trial court erred when it changed the terms of the settlement agreement read into the record regarding division of the marital home, and failed to include another term later agreed upon by the parties.

{¶19} "A trial court has broad discretion in making divisions of property in domestic cases." *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318. Thus, "[a] trial court's decision will be upheld absent an abuse of discretion." *Id.*, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128; *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295. "'Abuse of discretion' is more than an error of law or judgment; it implies that the court acted in an unreasonable, arbitrary, or unconscionable fashion." *Id.*, citing *Blakemore v. Blakemore* (1983), 5 Ohio

St.3d 217, 219. However, because "a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation' * * * the construction of a written contract is a question of law, which we review de novo." *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶28, citing *Continental West Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 1996-Ohio-158; *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214; *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus.

{¶10} "The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation." *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36, 38, quoting 15 American Jurisprudence 2d 938, Compromise and Settlement, Section 4. "Thus, settlement and compromise are highly favored by the law." *Seng v. Seng*, Clermont App. No. CA2007-12-120, 2008-Ohio-6758, ¶8, citing *State ex rel. Wright v. Weyandt* (1977), 50 Ohio St.2d 194, 197.

{¶11} "Where a settlement agreement is voluntarily entered into in the presence of the trial court, and made a part of the record, it may not be repudiated by either party, and will be summarily enforced." *Seng*, 2008-Ohio-6758 at ¶9. See, also, *Zigmont v. Toto* (1988), 47 Ohio App.3d 181, 185. The trial court may then "enter a judgment which accurately reflects an agreement they made in open court and read into the record." *Zigmont* at 185, citing *Bolen v. Young* (1982), 8 Ohio App.3d 36, 37.

{¶12} Because a separation agreement is a contract, it is subject to the same rules of construction as other contracts and its interpretation is a matter of law. *Forstner v. Forstner* (1990), 68 Ohio App. 3d 367, 372. "The primary principle which courts must follow is that the contract must be interpreted 'so as to carry out the intent of the parties

* * *." Id., quoting *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, paragraph one of the syllabus.

{¶13} "To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear." *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 1997-Ohio-380. When the terms of an agreement are unambiguous, they must be given their "plain, ordinary and common meaning." *Forstner* at 372. "Where no ambiguity exists, the trial court may not construe, clarify or interpret the parties' agreement to mean anything outside of that which it specifically states." *Blazic v. Blazic*, Hamilton App. Nos. C-040414, C-040440, 2005-Ohio-4417, ¶14, quoting *Pavlich v. Pavlich*, Summit App. No. 22357, 2005-Ohio-3305, ¶7; *Renicker v. Wardell*, Tuscarawas App. No.2002AP110094, 2003-Ohio-4804, ¶20. See, also, *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, syllabus; *Keil v. Keil* (May 9, 1991), Ottawa App. No. 90-OT-043, 1991 WL 253925, at *3.

{¶14} However, "courts should be particularly reluctant to enforce ambiguous or incomplete contracts that aim to memorialize a settlement agreement between adversarial litigants. Though we encourage the resolution of disputes through means other than litigation, parties are bound when a settlement is reduced to final judgment. Since a settlement upon which final judgment has been entered eliminates the right to adjudication by trial, judges should make certain the terms of the agreement are clear, and that the parties agree on the meaning of those terms." *Rulli* at 376.

{¶15} "Contract terms are ambiguous where the language is susceptible to two or more reasonable interpretations." *Wittelstein v. Wittlestein*, Madison App. No. CA2006-03-013, 2006-Ohio-6707, appeal not allowed, 113 Ohio St.3d 1512, 2007-Ohio-2208, citing *U.S. Fidelity & Guaranty Co. v. St. Elizabeth Med. Ctr.* (1998), 129 Ohio

App.3d 45. "Where there is confusion over the interpretation to be given a particular clause in a separation agreement, the trial court in enforcing the agreement has the power to hear the matter, clarify the confusion, and resolve the dispute." *Uram v. Uram* (1989), 65 Ohio App.3d 96, 98. Nevertheless, this does not mean that a trial court may read language or terms into a contract that otherwise do not exist. *Id.* at 99; *Key v. Key* (July 3, 2000), Madison App. CA99-08-020, at 4.

{¶16} "A trial court must conduct an evidentiary hearing prior to entering judgment" when "the meaning of terms of a settlement agreement [are] disputed." *Rulli* at 377. See, also, *Zigmont*, 47 Ohio App.3d at 185. To do otherwise "would be to deny the parties' right to control the litigation, and to implicitly [or explicitly] adopt * * * the interpretation of one party, rather than enter judgment based upon a mutual agreement." *Id.*

{¶17} In this case, the following part of the settlement agreement relating to this case was read into the record at the April 14, 2008 hearing:

{¶18} "MR. MASANA [Diane's attorney]: The parties own real estate on Choctaw which is currently under a lease option to purchase. Uh, at such time as that residence is sold and the mortgages are paid off, uh, Mr. Clark is going to receive [the] first \$60,000.00 in equity to counter balance \$60,000.00 that Mrs. Clark had previously applied to her property in Michigan. In the event that there is insufficient equity to pay Mr. Clark his share of that \$60,000.00, then Mrs. Clark will pay him that – that difference at that time. In the event that there's additional monies over and above the \$60,000.00, then the parties would divide that money equally. * * * Uh, we're going to attach a document to the Decree that is – that outlines the entire agreement * * * and we'll call that Exhibit A."

{¶19} Both parties testified that they wanted the trial court "to accept the agreement and order that it be the terms of [their] divorce." The trial court also stated, on the record, that it would approve their agreement. The trial court then explained that the parties had until May 22, 2008 to file the final signed paperwork with the court in order to enable it to grant the parties a divorce.

{¶20} At the July 24, 2008 show cause hearing to determine why the parties had failed to file their necessary paperwork, the parties expressed their inability to agree as to the interpretation of the statement regarding the marital home.

{¶21} "MR. EMERSON [Jeff's attorney]: However, there is a major issue that the parties with regard to the separation of the equity in the marital residence that is essentially – the sides have taken a diversion [sic] opinion of what their agreement read into – what the agreement read into the record should – how that should be interpreted. And I really, in my opinion, and reading this over and speaking with Ms. Wenzel [Jeff's attorney], and briefly with Mr. Masana, I don't see a way that that – the parties understanding of that agreement can be reconciled without some kind of intervention by [the] Court. * * * Mr. Masana and Ms. Wenzel have gone back and forth in trying to reconcile that issue; however, I think it's more or less reached an impasse."

{¶22} The trial court obtained both parties' permission to intervene in this matter; took evidence in the form of each party's interpretation of the agreement; and stated that it would review both, as well as the April 14, 2008 hearing transcript, and issue a decision. It should be noted that by requesting assistance, and giving the trial court evidence of their interpretations, the parties waived their right to the evidentiary hearing required by *Rulli*. Id., 79 Ohio St.3d at 377; *Zigmont*, 47 Ohio App.3d at 185.

{¶23} The trial court issued a decision on July 30, 2008, which contained the

following paragraph:

{¶24} "The real estate located at 5597 Choctaw Lane, Fairfield Township, Ohio shall be sold. The first \$60,000.00 of the proceeds is to be paid to Mr. Clark. This will counterbalance \$60,000.00 that Mrs. Clark previously applied to her property in Michigan. If there is insufficient equity to pay Mr. Clark his \$60,000.00, Mrs. Clark shall be responsible for payment of any difference at the time of the sale of the house. If there are any monies received over \$60,000.00, then that money will be divided equally between the parties. The parties did not have any agreement in the event that the sale of the house does not cover the current mortgages on the property. Thus, any deficiency shall be paid equally by the parties per my order."

{¶25} Despite the trial court's decision, the parties failed to file the necessary paperwork with the trial court. On September 4, 2008, the trial court held another show cause hearing to determine why the parties had still not filed the required paperwork. When asked about the delay, each side blamed the other party for failing to forward and/or sign the paperwork. The trial court requested proposed decrees from each party and stated that it would file one or the other and/or make amendments as necessary. The following day the trial court filed a judgment entry and decree of divorce which contained the following paragraph:

{¶26} "The residence located at 5597 Choctaw Lane, Hamilton, Ohio shall be sold. Upon sale of said property the first \$60,000 of proceeds shall be paid to Jeff Scott Clark to counter-balance the \$60,000 that Diane Michelle Clark had previously applied to her property in Michigan. It being the intention of the parties that the total equity in the property shall be equally divided. If there are any monies over and above the equity already discussed, then these proceeds shall be divided equally between the parties. In

the event there is a deficiency, then this shall also be divided equally between the parties."

{¶27} In addition, attached to the decree was an exhibit which contained the following typed and written statements regarding disposition of the marital home:

{¶28} "Choctaw – Equity already paid/taken out by DC \$(59,882.77)."

{¶29} "Choctaw (Lease to own): Put both names on 5/3 account, JC to make Online pytms from deposited funds from lessee for house note and taxes."

{¶30} "Choctaw: split sale proceeds at 50% He get 1st \$60,000."

{¶31} "DC to pay off her balance of EQ line and pay JC the difference of 50%."

{¶32} Jeff argues that the oral agreement read into the record before the trial court is completely unambiguous. We disagree. Not only is there an ambiguity within the language, the record clearly shows that the parties disagreed for months about what was meant by the language with regard to the property disposition. As we review the interpretation of a settlement agreement de novo, we find that it was the parties' intent, through their April 14, 2008 oral agreement, to equalize the assets and liabilities regarding the marital home. Because the language in the trial court's decree does not clarify this intent, we have chosen to explain exactly how the disposition was intended to be made.

{¶33} Because Diane received \$60,000 in advance of the sale of the marital home, the first \$60,000 of the proceeds of the sale, after the mortgages have been paid and other fees associated with the sale have been deducted, will be paid to Jeff. If there are proceeds remaining after the first \$60,000 is paid to Jeff, they will be equally divided between the parties. If the sale of the marital home is not enough to pay off the mortgage(s), any remaining debt on the mortgage(s) will be paid equally by both parties.

Also, in order to equalize the \$60,000 advance, Diane shall tender \$30,000 to Jeff. If the sale of the home results in enough money to pay off the mortgage(s), but not enough money to pay Jeff the \$60,000 owed to him because of Diane's advance, Diane shall tender half of the difference between the amount Jeff receives and the amount he is owed in order to equalize the advance between the parties. Therefore, if after the mortgage(s) and any fees associated with the sale are paid there is \$50,000 remaining, Jeff will receive that \$50,000 and Diane will tender \$5,000 to Jeff, leaving each party with \$55,000.

{¶34} As to the other part of Jeff's argument regarding the failure of the trial court to include the additional requirement of Diane paying her half of the equity, and paying Jeff the difference of 50 percent, we find that the trial court was not made aware of this additional "agreement" when it rendered its decision or decree. Although, it was attached to the decree, it was not incorporated into the trial court's judgment by reference, nor was there any testimony from either party requesting the language be included. Because the disposition of the marital home necessarily includes the requirement that the mortgages be paid before any payments are made to either party, the payment of the home equity loan shall be equally borne by the parties. This is consistent with the language of paragraph 2.1 of the trial courts' July 30, 2008 decision (see paragraph 24 above). This language was left out of the decree contrary to the trial courts' specific instructions. It would be inconsistent to give each party half of an asset, without assigning each party half of the asset's debt, without proof that the debt belonged solely to one party.

{¶35} In conclusion, we overrule Jeff's assignment of error, but hold that the last sentence of the above-referenced paragraph of the divorce decree shall be modified as

follows:

{¶36} "If the sale of the marital home is not enough to pay off the mortgage(s), any remaining debt on the mortgage(s) will be paid equally by both parties; and in order to equalize the \$60,000 advance, Diane shall tender \$30,000 to Jeff. If the sale of the home results in enough money to pay off the mortgage(s), but not enough money to pay Jeff the \$60,000 owed to him because of Diane's advance, Diane shall tender half of the difference between the amount of proceeds Jeff is paid and the amount he is owed pursuant to the advance in order to equalize the property division between the parties."

{¶37} Judgment affirmed as modified.

BRESSLER, P.J., and YOUNG, J., concur.