COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00278-CV

S.P., III — APPELLANT

V.

N.P. — APPELLEE

FROM THE 16TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-07953-16

MEMORANDUM OPINION[1]

This appeal concerns an "Agreed Final Decree of Divorce" that the trial court signed after appellant S.P., III and appellee N.P. entered into a mediated settlement agreement (MSA). In five issues, appellant contends that the final decree is erroneous because it contains material terms additional to and contrary to the MSA, that the trial court erred by not requiring the parties to arbitrate

[1]*See* Tex. R. App. P. 47.4.

disputes about the MSA's terms before signing the final decree, that the trial court reversibly erred by "effectively emancipating the minor child," and that certain findings made by the trial court are erroneous. We conclude that the trial court erred by not ordering arbitration under the MSA, and we therefore reverse the trial court's judgment.

Background Facts

Appellant and appellee married in 1993. They had two children during their marriage. In September 2015, appellee filed a petition for divorce. In her petition, she alleged, among other facts, that the parties had a child who was born in September 1998 and was therefore still a minor, and she asked the trial court to enter temporary orders concerning the child and concerning the parties' property. Appellant filed a counterpetition for divorce and likewise requested temporary orders. The parties signed a letter agreement that established temporary joint managing conservatorship of the child along with agreements concerning access to the child, child support, marital property, and spousal support.

The trial court referred the parties to mediation and appointed a mediator. In December 2015, the parties signed the MSA, which they agreed was comprehensive, binding, and irrevocable. The MSA contained the following provisions:

- the parties would be joint managing conservators of the child, and the decision to visit "either parent [was] left to the discretion of the . . . child";

- appellant would "carry health insurance for the child and [would] pay 100% of uninsured medical expenses";

- appellee would be awarded certain furniture and furnishings along with certain accounts;

- appellant would pay $55,000 in cash to appellee on the date of the divorce;

- appellee would be awarded a 2013 Lexus, for which appellant agreed to make monthly lease payments and a balloon payment at the end of the lease;

- neither party would pay child support;

- appellant would be awarded two residences, two automobiles, and several accounts;

- the parties would "partition income and liabilities for the tax year 2015";

- appellant would pay attorney's fees of $5,000 to appellee, and otherwise, each party would be responsible for its own attorney's fees;

- the parties would agree to mutual injunctions in accordance with a Denton County standing order;

- appellant would pay appellee contractual alimony of $5,000 per month for thirty-six months, and such payments would be included in appellee's taxable income and would be tax deductible by appellant;

- all claims between the parties not governed by the MSA or by the "order to be entered pursuant to" the MSA were released;

- any disputes concerning the interpretation, effect, or implementation of the MSA would be arbitrated by the mediator; and

- appellant's attorney would draft a final decree of divorce, and appellee's attorney would have an opportunity to respond to the draft.

Following the signing of the MSA, the parties exchanged drafts of a final divorce decree but did not agree about the language to include in the decree. Appellant changed counsel after signing the MSA.

In March 2016, appellee sought an injunction concerning matters related to the Lexus and concerning appellant's presence near her physical locations, residences, or places of employment. In the motion for an injunction, appellee represented that the final divorce decree was "pending discussion between counsel for both parties." In a supporting affidavit, appellee swore that appellant had harassed her in various ways, including by refusing to surrender possession of the Lexus.

The trial court held a hearing on March 17, 2016. During the hearing, the court recognized that a dispute had arisen concerning the MSA that could require arbitration. The court stated, "I have told counsel that the Court is going to make the following rulings *pending you-all filing a notice of arbitration* I believe as to the mediated settlement agreement *and pursuing your remedies under the arbitration clause* of your settlement agreement." [Emphasis added.] The court further explained,

> You-all have some issues clearly that should have maybe been covered in the mediated settlement agreement that weren't. No surprise that sometimes in all the rush that sometimes little details get overlooked. *So it's my understanding that some of those issues are going to be dealt with during arbitration.* But what you-all need is something from me to keep things on level until you get to that point. [Emphasis added.]

At the end of the hearing, the trial court found that appellant had done "something boneheaded" that had led to appellee seeking the injunction and ordered him to pay $2,000 in attorney's fees. The trial court signed a temporary restraining order that prohibited appellant from committing certain acts.

On April 29, 2016, appellee filed a motion for the trial court to enter a final decree of divorce. She attached a proposed final decree and represented that the decree incorporated the MSA's provisions. That same day, the trial court set a hearing on appellee's motion for May 6, 2016 and provided notice of the hearing to appellant.

Two days before the hearing, on May 4, 2016, appellant filed a motion asking the trial court to deny entry of the final decree and to compel arbitration. Appellant argued that the parties disputed the language of provisions to be included in the final decree, and he invoked the MSA's arbitration provision to resolve those disputes. He asserted that "all such disputes" were outlined in an attached letter that he had sent to the mediator.

On May 6, 2016, the trial court held a hearing on appellee's motion to enter the final decree. Appellee briefly testified. She stated that the MSA's provisions were reflected in the divorce decree that she had presented to the court, and she asked the court to sign that decree. A docket entry from the hearing states, "Proveup of divorce by [appellee]; [appellant] disagrees claiming arbitration should be held . . . ."

Following the hearing, the trial court signed the final divorce decree. Even though appellant had informed the trial court that he had not agreed to the language of the decree, the decree stated that it was agreed to by both parties as to form and substance. The decree also stated that it represented a "merger of a [MSA] between the parties." Neither party signed the decree.

Appellant filed a motion for new trial. He argued, among other contentions, that in "accordance with the terms of the MSA, the proper procedure was to refer the parties to the mediator to arbitrate any of the disputes in accordance with the terms of the MSA." The trial court held a hearing on appellant's motion for new trial and denied it. Appellant brought this appeal.

The Parties' Contractual Agreement to Arbitrate

In his first and third issues, appellant contends that the trial court reversibly erred by signing the final decree because the decree resolved ambiguities within the MSA and disputes about the application of the MSA when those ambiguities and disputes should have been arbitrated. Appellant proposes that the "major question in this case is [whether] a trial court [should] honor the parties' MSA as to the decision maker for disputes over the MSA and language to be in the form of an agreed decree." Appellee contends that appellant "waived error by not timely and properly invoking arbitration" under the MSA and that the trial court's judgment is not reversible even if arbitration was properly invoked.

The law concerning mediated settlement agreements

As the Texas Supreme Court has recently explained,

> Under the Texas Family Code, "a mediated settlement agreement, meeting certain statutory formalities, is binding on the parties and requires the rendition of a divorce decree that adopts the parties' agreement." *Milner v. Milner*, 361 S.W.3d 615, 618 (Tex. 2012); Tex. Fam. Code § 6.602. Because an MSA is a contract, we look to general contract-interpretation principles to determine its meaning. *See* Tex. Civ. Prac. & Rem. Code § 154.071(a) ("If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."). When construing a contract, "a court must ascertain the true intentions of the parties as expressed in the writing itself." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). "We give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

Loya v. Loya, No. 15-0763, 2017 WL 1968033, at *3 (Tex. May 12, 2017); *see Brooks v. Brooks*, 257 S.W.3d 418, 421 (Tex. App.—Fort Worth 2008, pet. denied) ("Mediated settlement agreements are binding in suits affecting the parent-child relationship, as well as suits involving only marital property."); *see also* Tex. Fam. Code Ann. § 153.0071(d), (e) (West 2014) (establishing that an MSA may resolve matters in a suit affecting the parent-child relationship).

Denial of arbitration

Appellant contends that the trial court erred "by refusing to return the parties to arbitration in accordance with the MSA and instead by choosing to be the decision maker." He contends that we should remand to the trial court for arbitration. He relies on *Milner*, in which the supreme court concluded that under

the terms of an MSA, a mediator, rather than the trial court, should have resolved a dispute between the parties. *See* 361 S.W.3d at 622 ("The MSA provided that the parties were to return to the mediator in the event of a dispute . . . . This provision would appear to apply to ambiguities in the MSA itself, making the mediator, rather than the trial court, the appropriate authority to resolve this fact issue."); *see also In re L.T.H.*, 502 S.W.3d 338, 347 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (holding that a trial court erred by resolving disputes concerning an MSA rather than referring the parties to arbitration). Appellant asserts that during the hearing on appellee's motion for an injunction, the trial court "recognized issues needed to be addressed in arbitration . . . but then chose to make the decisions itself."

Appellee argues that appellant waived error by "not timely and properly invoking arbitration." She contends that appellant's May 4, 2016 letter to the mediator "identifies areas of dispute that are not the same areas of dispute that [a]ppellant puts forth in his appeal for which he seeks to compel arbitration." Thus, she contends that appellant has not preserved his complaint that the trial court denied his right to arbitrate the issues about which he complains on appeal. Alternatively, she asserts that if appellant properly invoked arbitration, the trial court did not err by refusing to refer the parties to arbitration because the complaints made in appellant's letter to the mediator were "all satisfied and unambiguous in the MSA and [in] the Final Decree of Divorce."

With respect to arbitration, the MSA states,

> The parties agree that they hereby appoint Vicki Isaacks to arbitrate any disputes which may hereafter arise with regard to the meaning, effect or implementation of this agreement including, but not limited to: the meaning of the terms and provisions contained herein; their legal effect; the form and applicability of any closing documents; the implementation of this agreement (such things as turn-over of property, inspections, execution and tender of closing documents, etc.); and, the language of the decree to be drawn and presented to the Court pursuant to this agreement. *It is the express intention of the parties and their attorneys that any dispute which may hereafter arise with regard to the meaning, effect or implementation of this agreement (specifically including any claims that this agreement should be set aside, in whole or in part for any reason as well as any claims that this agreement is incomplete or inadequate in any way) shall be submitted to arbitration by MEDIATOR*. . . . Either party may request arbitration hereunder by written request to the mediator, copied to every other party. Each such request shall briefly state the background and facts of the dispute, what relief is being sought, what has been done to attempt an amicable resolution, and why arbitration is deemed necessary. Any other party may respond to that request, in writing, within a reasonable time thereafter. No issue will be arbitrated unless it shall have first been raised in a written request for arbitration. [Emphasis added.]

In appellant's May 4, 2016 letter to the mediator, which he filed with the trial court before the trial court held a hearing on appellee's motion to enter judgment, appellant stated that he had "some disagreements as to construction of the Decree based on the [MSA] reached . . . and believe[d] that some items . . . were not addressed sufficiently in said MSA. Attempts to reach agreements on these points [was] unsuccessful . . . ." More specifically, appellant wrote that the following issues required arbitration:

> 1. Division and Distribution of Personal Property – The MSA is silent as to which party should receive certain personal property. It awards all furniture and furnishings to the party possessing same

with the exception of a handful of items in the possession of Petitioner and awarded to Respondent, but does not mention any other personal property. Specifically, Petitioner removed every photo of the children and other family photos from the home during the pendency of the divorce and cleared out most, if not all, of the personal property items contained in the home from appliances to toothbrush chargers and everything in between in Respondent's absence. A just and right division of these items must be reached. Additionally, Petitioner is still in possession of the furnishings awarded to Respondent and all attempts to retrieve same have been denied or ignored. Respondent would ask the arbitrator to specifically arrange a time, date and location for him to retrieve said furnishings.

2. Division of Bank Accounts – Petitioner has . . . bank accounts at Well[s] Fargo Bank and Chase Bank into which she has deposited funds. It is clear the Wells Fargo Bank account was in existence prior to the mediation, but it is unclear whether the Chase Bank account was in existence at the time of the mediation. Respondent requests the arbitrator require Petitioner to produce statements dating back to January 1, 2015, for each account listed and any other non-disclosed accounts, and in the event statements do not exist for a particular account for that period due to the date the account was opened, to produce proof of the date the account was opened. In the event these accounts contained funds at the time of mediation and were in existence, they were undisclosed and undivided. An arbitration is necessary to divide those accounts in an equitable manner.

3. Taxes for 2016 – The MSA provides that the parties agree "to partition income and liabilities for the tax year 2015," but the MSA is silent as to how the parties should treat their income for 2016. A material dispute exists as to whether it is proper to partition income in 2015 based on the circumstances of the parties. Additionally, the parties must come to an agreement as to how to address income in 2016, and there is no agreement for same in the MSA.

4. 2013 Lexus – In the MSA Respondent agreed to make the remaining monthly payments on the lease for this automobile and to pay off the final balance owed at the end of said lease. However, the MSA is silent as to who should pay for insurance, toll tag costs and/or other costs related to this vehicle during this time period. The vehicle is licensed and registered in Respondent's name and the

> lease is in Respondent's name. There exist reimbursement claims and charges relating to Petitioner's wanton disregard for Respondent's obligations related to this vehicle and Respondent requests arbitration to clarify these duties and to seek potential reimbursement.
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> 5. Health Insurance and Reimbursements for the Child – The MSA contains language ordering Respondent to obtain and maintain health insurance on the child. However, it does not include any language relating to the possibility of Respondent paying for coverage through Petitioner's employer in the event that said coverage could be obtained in that manner in a more economical way or in the event that coverage exceeds that available to Respondent. Additionally, the MSA provides that Respondent will cover 100% of uninsured medical expenses, but it is silent as to whom would be responsible for payment of a medical bill that was not covered by insurance because it was either an elective procedure or performed by a non-covered entity. It is far outside the reach of an agreement to pay uninsured expenses to assume that Petitioner could take the child to a non-covered doctor or for an elective procedure and that Respondent would be left with a responsibility to pay for 100% of said procedure.
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> 6. Health Insurance for Petitioner – The MSA contains a provision for Respondent to pay the sum of $ 1,500.00 to Petitioner on or before January 1, 2016, for the purposes of Petitioner obtaining health insurance coverage for January 2016 and February 2016. Petitioner is to refund any remainder to Respondent, but to date Petitioner has not refunded any funds nor has she provided Respondent with confirmation of coverage and the costs thereof for the month of January. Respondent request[s] the arbitrator require Petitioner to turn over proof of same and/or refund Respondent's funds.

Comporting with these requests for arbitration in the trial court, on appeal, appellant challenges, among other aspects of the final decree that are unrelated to the arbitration requests, (1) language within the decree concerning the child's health insurance, (2) the trial court's resolution of how the parties should partition taxes, (3) matters related to toll charges and insurance on the Lexus, and (4) the

just and right division of assets that appellee had allegedly not disclosed at mediation. We therefore reject appellee's argument that appellant waived his right to arbitration on the ground that "issues complained of in [a]ppellant's [request for arbitration in the trial court] are wholly different than those presented in this appeal."

"The essence of arbitration is a contractual commitment to have someone—other than a judge—decide a dispute." *In re M.W.M.*, No. 05-16-00797-CV, 2017 WL 1245422, at *4 (Tex. App.—Dallas Apr. 5, 2017, orig. proceeding); *see In re Lauriette*, No. 05-15-00518-CV, 2015 WL 4967233, at *4 (Tex. App.—Dallas Aug. 20, 2015, orig. proceeding [mand. denied]) (mem. op.) ("When parties enter into a valid agreement to arbitrate, the parties have agreed that the arbitrator and not the trial court or a jury will be the trier of fact for the disputed issue subject to the arbitration provision. In that situation, the trial court has no authority to decide the issue that is subject to the arbitration provision." (citation omitted)). A strong presumption favors arbitration, and courts resolve any doubts about an agreement's "scope, waiver, and other issues unrelated to its validity[2] in favor of arbitration. Unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, a court should not deny arbitration." *BBVA Compass Inv. Sols. v. Brooks*, 456 S.W.3d 711, 718 (Tex. App.—Fort Worth 2015, no pet.)

[2]Appellee does not contest the validity of the MSA or of the MSA's arbitration provision.

(citation omitted). If an arbitration agreement encompasses a dispute and the party opposing arbitration does not prove a defense, the trial court has "no discretion but to compel arbitration and stay its own proceedings." *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001) (orig. proceeding); *see Diggs v. Diggs*, No. 14-11-00854-CV, 2013 WL 3580424, at *11 (Tex. App.—Houston [14th Dist.] July 11, 2013, no pet.) (mem. op.) (enforcing the terms of an MSA by returning the parties for arbitration before a mediator); *see also Brand FX, LLC v. Rhine*, 458 S.W.3d 195, 204 (Tex. App.—Fort Worth 2015, no pet.) ("[A] trial court that refuses to compel arbitration under a valid and enforceable arbitration agreement has abused its discretion."). When an arbitration provision states that "any dispute" is subject to arbitration, the provision "is considered to be broad and capable of expansive reach." *Terrell v. Price*, No. 01-16-00376-CV, 2017 WL 2980166, at *5 (Tex. App.—Houston [1st Dist.] July 13, 2017, no pet. h.) (mem. op.).

The arbitration provision in this case is sweeping in scope and includes the subjects discussed in appellant's letter to the mediator. The provision expresses the parties' agreement to arbitrate "any disputes" concerning the "meaning, effect[,] or implementation" of the MSA, including the form and substance of the final decree and any "claim" that the MSA is "incomplete or inadequate in any way." The six subjects included by appellant in his letter fit under this expansive reach; the letter asserted that the MSA was "silent" concerning certain matters, that the parties disputed matters, and that appellant desired clarification on

certain terms. Furthermore, appellant followed the required procedure by submitting a written request for arbitration to the mediator, by copying appellee with the request, and by expressing why arbitration was necessary. In the March 2016 hearing, the trial court recognized the need for arbitration, stating that some issues "should have maybe been covered in the [MSA] that weren't." We conclude that appellant's letter was sufficient to invoke arbitration under the MSA.

Appellee appears to argue that appellant's request for arbitration was waived as untimely because it was filed (and was sent to the mediator) less than three days before the hearing on appellee's motion for the trial court to enter a final decree. We cannot agree.[3]

"A presumption exists against waiving a contractual right to arbitration. Merely delaying one's demand for arbitration is not a waiver of the right to make that demand; the inquiry is whether the delay resulted in prejudice to the other party." *D. Wilson Constr. Co. v. McAllen ISD*, 848 S.W.2d 226, 230 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.) (citations omitted); *see Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011) ("[C]ourts should resolve any doubts as to the agreement's scope, waiver, and other issues unrelated to its validity in favor of arbitration."). The record shows that the parties exchanged drafts of a potential decree but were unable to agree on certain language. Appellant then asserted

[3]We note that the trial court did not expressly find that appellant had waived arbitration.

his entitlement to arbitration at an appropriate time: after appellee's motion for entry of the decree and before the trial court's ruling on that motion and rendition of judgment. The trial court's May 6, 2016 docket entry indicates the court's awareness that appellant had requested arbitration. Appellee cites no authority establishing that appellant's request for arbitration was untimely because it was made less than three days before the hearing on appellee's motion for entry of a judgment, nor does appellee explain how she was prejudiced by any delay. In accordance with the presumption against waiver, we conclude that appellant did not waive his contractual right to arbitration.

Next, appellee argues that even if appellant properly invoked arbitration, the trial court did not abuse its discretion by rendering judgment because provisions within the final decree are consistent with the terms of the MSA. Again, we cannot agree. When an agreement requires arbitration, the trial court must stay its proceedings. *FirstMerit Bank*, 52 S.W.3d at 754; *Wee Tots Pediatrics, P.A. v. Morohunfola*, 268 S.W.3d 784, 790 (Tex. App.—Fort Worth 2008, orig. proceeding). The trial court had "no authority" to proceed and to decide issues subject to the arbitration agreement. *Lauriette*, 2015 WL 4967233, at *4.

In summary, we hold that the trial court reversibly erred by not enforcing the parties' clear and binding agreement to arbitrate disputes arising from the MSA. *See Milner*, 361 S.W.3d at 622; *FirstMerit Bank*, 52 S.W.3d at 754; *Wee Tots Pediatrics*, 268 S.W.3d at 790. We sustain appellant's first and third issues.

Because sustaining appellant's first and third issues requires us to reverse the trial court's judgment and to remand the case for arbitration, we decline to analyze appellant's second, fourth, and fifth issues. *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

Conclusion

Having sustained appellant's first and third issues, we reverse the trial court's judgment and remand this case to the trial court for further proceedings consistent with this opinion.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and SUDDERTH, JJ.

DELIVERED: August 31, 2017