NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DARBY ELIZABETH SUESS,

Appellant,

v.

JOHN FRANCIS SUESS, III,

Appellee.

Case No. 2D18-2521

Opinion filed December 20, 2019.

Appeal from the Circuit Court for Hillsborough County; Nick Nazaretian, Judge.

S. David Anton of Anton Legal Group, Tampa, for Appellant.

Rebecca A. Guthrie and Mark D. Shelnutt of The Law Office of Mark D. Shelnutt, Ocala, for Appellee.

SMITH, Judge.

Darby Elizabeth Suess (Former Wife) seeks review of the trial court's post-dissolution order on her motion to enforce final judgment of dissolution of marriage, which incorporated her marital settlement agreement (MSA) with the Former Husband, John Francis Suess, III. The Former Wife also appeals the trial court's denial of her

request for attorney's fees. Because we find the trial court erred in its interpretation of the MSA by limiting the Former Wife's entitlement to the Former Husband's retirement benefits and in its statutory interpretation determining she could not be designated the death beneficiary under chapter 121, Florida Statutes—the Florida Retirement System Act (Act)—we reverse. We affirm without comment all other aspects of the trial court's March 5, 2018, order, including the denial of the Former Wife's motion for attorney's fees.

I

The parties had a long-term marriage of twenty-nine years. The divorce proceedings were uncontested and wrapped up in less than sixty days. On the same day the divorce proceedings commenced, on July 30, 2009, the parties, who were both college-educated, entered into the MSA.[1] On September 15, 2009, the trial court entered a Final Judgment of Dissolution of Marriage incorporating the MSA. Pursuant to the MSA, the parties agreed the Former Wife would receive fifty percent of the Former Husband's three specified retirement accounts and would remain the death beneficiary on these same accounts. The relevant provision of the MSA provides:

> Wife will receive 50% of all retirement benefits from husband (City of Ocala, Ocala Police, and State of Florida).[2]

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[1]The parties prepared the MSA using the Florida Supreme Court approved Family Law Form 12.902(f)(2).

[2]The two retirement accounts that are the subject of this appeal include the Ocala Police account and the State of Florida retirement account. These accounts were merged after the final judgment and are administered by the Florida Retirement System (FRS). These two retirement accounts will collectively be referred to as "the FRS Pension." The City of Ocala retirement account had vested and was in pay status at the time of the dissolution proceedings; the parties agreed under the MSA the Former Wife would receive a specific sum equal to one-half of the payment. The Former Wife's share of the City of Ocala retirement account is not the subject of this appeal.

> Additionally, she will remain the death beneficiary on each of these retirement accounts.

A Qualified Domestic Relations Order (QDRO) recognizing the Former Wife's entitled share in the retirement accounts was never issued by the trial court, likely because neither of the parties were represented by counsel from the time they entered into the MSA until the entry of the final judgment.

In June 2016, after the Former Husband remarried, a disagreement arose regarding the parties' rights and obligations under the MSA with respect to the Former Husband's retirement accounts. The Former Wife filed a motion seeking to enforce the MSA and seeking entry of a QDRO to formalize the division of the Former Husband's FRS Pension. In the motion, the Former Wife argued that under the terms of the MSA she was entitled to: (1) "50% of *all* retirement benefits from [the Former Husband]" that accrued during and after the parties' marriage (emphasis added); and (2) she should "remain the death beneficiary on each of [the Former Husband's] retirement accounts." The Former Wife requested that the trial court issue a QDRO consistent with the terms of the MSA, as prepared by her pension expert. The Former Husband responded to the Former Wife's motion disagreeing with her interpretation of the terms of the MSA and arguing the Former Wife is only entitled to fifty percent of the retirement benefits that accrued during the marriage. The Former Husband also claimed the Former Wife could not be named the death beneficiary of the FRS Pension because the Act does not recognize a "death beneficiary," and only allows for the designation of a "survivor beneficiary;" further, the Act specifically provides that only a current spouse may be designated a survivor beneficiary.

During a three-day evidentiary hearing, the Former Wife offered expert testimony from her pension expert, who opined that the clear and unambiguous language of the MSA requires a fifty percent division of *all* the Former Husband's retirement accounts, including fifty percent of *all* retirement benefits accruing during and after the MSA. This is because the parties explicitly used the term "all" when referring to the Former Husband's retirement benefits and chose not to include a cut-off date. The expert witness testified that a QDRO could be, and was, prepared consistently with the "all retirement accounts" language in the MSA. He also testified that the Former Wife's proposed QDRO had been "preapproved" by the FRS plan administrator with this language.

No competing expert testimony was offered by the Former Husband, although he rebutted the Former Wife's expert's testimony by testifying himself that the FRS does not preapprove QDROs. The Former Husband based his opinion upon his personal knowledge regarding the division of FRS pensions following divorce, which he garnered through his employment as Chief Deputy Clerk of the Marion County Clerk of Court, as well as his own independent research. The Former Husband also testified that the Former Wife could not be named beneficiary of the FRS Pension because she does not "qualify as the surviving spouse" under the Act. During the Former Husband's testimony, the Former Wife objected to the Former Husband's attempts to introduce parole evidence in contradiction of the clear and unambiguous language of the MSA. The trial court reserved ruling on these objections.

Following the evidentiary hearing, the trial court entered its order denying the Former Wife's requested relief. The trial court found the MSA clear and

unambiguous and sustained the Former Wife's objections to the parole evidence presented by the Former Husband at the hearing. Notwithstanding, the trial court found the Former Wife was only entitled to the marital portion of the Former Husband's FRS Pension as defined in section 61.075(7), Florida Statutes (2009). In other words, the trial court determined the Former Wife was only entitled to fifty percent of the FRS benefits "earned during the time the parties were married." The trial court reasoned:

> [T]here is no credible evidence to support that the Former Wife's interpretation would be a reasonable interpretation of the MSA, or that the parties intended such an agreement. The Former Wife's FRS benefits are those that accrued between the date of the marriage and the date of filing of the dissolution of marriage. This is a reasonable, practical interpretation of the MSA, which is consistent with Florida law.[3] [FN3: See § 61.075, Fla. Stat., which states that material [sic] assets are defined and measured from the date of the marriage, to the date of filing the divorce petition. The Former Wife's interpretation of the parties' Marital Settlement Agreement, requiring the Former Husband to pay retirement benefits to her until he retires, regardless of his age, defied common sense and logic.].

As to the "death beneficiary" designation, the trial court found:

> [T]here exists no such designation as a "death" beneficiary in the FRS plan—there only exists a designation as a "survivor beneficiary." Pursuant to the terms and regulations of the FRS plan, a "survivor beneficiary" is an employee's current spouse. The Former Husband has remarried, which in and of itself precludes anyone other than the Former Husband's new spouse from being the designated survivor beneficiary. Therefore, the Court finds the Former Wife is not eligible as a survivor beneficiary of the FRS plan.[2] [FN2: See § 121.091(6) and (8), Fla. Stat., Florida Retirement System (FRS), and Benefit payable under the system: As an FRS Pension Plan member, your surviving spouse is automatically your beneficiary unless you designate someone else after our [sic] most recent marriage. . . .] This Court is without the jurisdiction to change the terms and regulations of the FRS plan. Pursuant to regulations under the FRS retirement system, the Former Husband is entitled

> to have his current spouse. . . be designated as survivor beneficiary under the terms of this [sic] retirement benefits with the State of Florida.

Finally, the trial court ordered both parties responsible for their own attorney's fees.

II

We agree with the Former Wife that the trial court's interpretation of the MSA—and its reliance on section 61.075(7)[3] to limit her entitlement to only fifty percent of the FRS Pension benefits that accrued during the marriage—was error.

We review the trial court's interpretation of the MSA de novo. See Pipitone v. Pipitone, 23 So. 3d 131, 134 (Fla. 2d DCA 2009). Marital settlement agreements are construed the same as any other contract. Taylor v. Lutz, 134 So. 3d 1146, 1148 (Fla. 1st DCA 2014). It is well-settled that parties to a dissolution of marriage proceeding "may enter into settlement agreements imposing obligations the trial court could not otherwise impose under the applicable statutes." Herbst v. Herbst, 153 So. 3d 290, 292 (Fla. 2d DCA 2014) (citing Taylor, 134 So. 3d at 1148)). "[And it is the] well-established policy in Florida that settlement agreements are highly favored in the law." Chovan v. Chovan, 90 So. 3d 898, 900-01 (Fla. 4th DCA 2012) (alteration in original) (quoting Griffith v. Griffith, 860 So. 2d 1069, 1073 (Fla. 1st DCA 2003)).

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[3]Section 61.075 governs the equitable distribution of marital assets and liabilities. Section 61.075(7) provides, in pertinent part:

> The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage.

"Where an agreement's terms are unambiguous, a court must treat the written instrument as evidence of the agreement's meaning and the parties' intention." Avellone v. Avellone, 951 So. 2d 80, 83 (Fla. 1st DCA 2007) (citing Delissio v. Delissio, 821 So. 2d 350, 353 (Fla. 1st DCA 2002)). It follows that "the contracting parties are bound by those terms, and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties." Emergency Assocs. of Tampa, P.A. v. Sassano, 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995); see also Bay Mgmt., Inc. v. Beau Monde, Inc., 366 So. 2d 788, 791 (Fla. 2d DCA 1978) ("When a contract is clear and unambiguous . . . the court cannot give it any meaning beyond that expressed.").

In Herbst, we reviewed a former wife's appeal of the trial court's interpretation of an alimony provision in the parties' MSA, which was incorporated into the final judgment of dissolution. Herbst, 153 So. 3d at 291. Pursuant to the alimony provision, the former husband was obligated to pay the former wife alimony for the rest of her life. The MSA did not expressly address termination of the alimony obligation. When the former wife later remarried, the former husband stopped paying alimony. In construing the alimony provision, the trial court found the provision akin to permanent alimony governed by section 61.08(8). Id. at 291-92. The trial court held that because the parties' MSA did not expressly address the termination of the former husband's alimony obligation and because section 61.08(8) provides for the termination of permanent alimony upon remarriage of the alimony recipient, the former husband's alimony obligation terminated upon the former wife's remarriage. This court reversed the trial court's decision and held that the terms of the alimony provision unambiguously

obligated the former husband to pay alimony until the death of the former wife and therefore controls over the statutory provision relied on by the trial court. Id. at 293. We also rejected the former husband's argument that the parties' failure to expressly address remarriage in the alimony provision made the MSA ambiguous. Id. Herbst controls our analysis here. As in Herbst, the trial court in this case reached outside the MSA to inject the statutory cut-off date for marital assets under section 61.075(7) when there was simply no cut-off date incorporated or contemplated by the parties.

Applying the above principles to the case at hand, we find that the subject provision of the MSA is clear and unambiguous. While it may seem axiomatic, the term "all" means "the whole amount, quantity, or extent of." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/all (last visited December 5, 2019). This term, used in conjunction with "retirement benefits of husband," is clear and intelligible and means just that: "all retirement benefits of husband." There is no language, express or otherwise, in the MSA indicating that the parties intended for the Former Wife to only receive fifty percent of the Former Husband's retirement benefits that accrued during the marriage. See Ferguson v. Ferguson, 54 So. 3d 553, 556-57 (Fla. 3d DCA 2011) ("[T]he former husband cannot sidestep the consequence of his failure to include such a provision with the argument that the lack of such provision renders this otherwise unambiguous agreement ambiguous.") (citing Life Ins. Co. of N. Am. v. Cichowlas, 659 So. 2d 1333, 1338 (Fla. 4th DCA 1995) ("[W]here a contract is simply silent as to a particular matter, that is, its language neither expressly nor by reasonable implication indicates that the parties intended to contract with respect to the matter, the court should not, under the guise of construction, impose contractual rights

and duties on the parties which they themselves omitted.")). To the contrary, the sentence immediately following—"Additionally, she will remain the death beneficiary on each of these retirement accounts"—further evidences the parties' intention to not limit the Former Wife's entitlement to the Former Husband's retirement accounts. For reasons only known by the parties, whose intentions are the only ones that matter, they agreed that the Former Wife would *remain*, after they divorced, as the "death beneficiary" under all of the Former Husband's retirement accounts. The language in the retirement benefit provision can only be read to entitle the Former Wife to fifty percent of *all* the Former Husband's retirement accounts, including those accrued during and after the marriage.

Applying the sound reasoning in Herbst, we hold in this case that the parties entered into a clear and unambiguous MSA and the language of the MSA controls over section 61.075(7), which would otherwise limit a trial court's authority in equitably distributing the parties' marital assets. Accordingly, the trial court erred in rewriting the parties' MSA to include the "marital asset" cut-off date provided in section 61.075(7) to comport with the trial court's notions of reasonableness, equity, or common sense. See Casto v. Casto, 508 So. 2d 330, 334 (Fla. 1987) ("[T]he fact that one party to the agreement apparently made a bad bargain is not a sufficient ground, by itself, to vacate or modify a settlement agreement."); Ferguson, 54 So. 3d at 554 (noting "the bedrock principle of contract law—applicable as well to marital settlement agreements—that bad deals are as enforceable in the law as good deals); McCutcheon v. Tracy, 928 So. 2d 364, 364 (Fla. 3d DCA 2006) ("[A] court may not deviate from the terms of a voluntary contract either to achieve what it might think is a more appropriate

result or 'to relieve the parties from the apparent hardship of an improvident bargain.' " (quoting Beach Resort Hotel Corp. v. Wieder, 79 So. 2d 659, 663 (Fla. 1955))).

III

We next address the trial court's interpretation of the Act, which the trial court cited as barring the Former Wife from remaining the "death beneficiary" on the Former Husband's retirement accounts as required by the terms of the MSA. The trial court determined that because the Act only provides for a "survivor beneficiary," which can only be the Former Husband's current spouse, the Former Wife is not entitled to remain as "death beneficiary" under the FRS Pension. The Former Wife contends the trial court erred in failing to give effect to the plain and clear language of the MSA and erred in its interpretation of the Act. We agree.

We begin our analysis with a careful review of the Act, which governs the FRS. To be sure, neither the Act, nor the corresponding administrative code rules under chapter 60S of the Florida Administrative Code define either "death beneficiary" or "survivor beneficiary." However, both the Act and chapter 60S recognize the designation of a "beneficiary." See Section 121.021(46), Fla. Stat. (2016) (" 'Beneficiary' means the joint annuitant or any other person, organization, estate, or trust fund designated by the member to receive a retirement benefit, if any, which may be payable upon the member's death"); Fla. Admin. Code R. 60S-6.001(8) ("BENEFICIARY -- Means the joint annuitant or any other person, organization, estate, or trust fund designated by the member or other qualified person to receive the benefits, if any, which may be payable pursuant to these rules, in the event of the death of the member or other beneficiary."). And while the Act does not use the terms "death

beneficiary" or "survivor beneficiary," the Act expressly provides for both "death benefits" and "survivor benefits." See § 121.091(7)(a) (titled "Death benefits"); § 121.091(12) (providing special provisions for payment of certain "survivor benefits").

Section 121.091(8)(a) specifically governs the designation of beneficiaries under the FRS and provides that each member may

> designate a choice of one or more persons. . . as his or her beneficiary who shall receive the benefits, if any, which may be payable in the event of the member's death pursuant to the provisions of this chapter. If no beneficiary is named . . . the beneficiary shall be the spouse of the deceased, if living.

§ 121.091(8)(a); see also Eaves v. Div. of Ret., 704 So. 2d 140,141 (Fla. 1st DCA 1997) (noting where a member does not attempt to name a beneficiary, the surviving spouse is entitled to certain death benefits). Further reading of this section also provides: "[F]or a member who dies prior to his or her effective date of retirement on or after January 1, 1999, the spouse at the time of death shall be the member's beneficiary *unless such member designates a different beneficiary* as provided herein subsequent to the member's most recent marriage." Section 121.091(8)(a) (emphasis added). Similarly, rule 60S-4.011(4) regulates the designation of a beneficiary under the Act and states "a member may designate as a beneficiary any person, organization, trust, or his or her estate. . . " Fla. Admin. Code R. 60S-4.011(4)(b). The rule also provides if a member dies before his or her effective date of retirement, "the member's spouse at the time of death shall be the member's beneficiary *unless the deceased member had designated a different beneficiary after his or her most recent marriage*. . . " Fla. Admin. Code R. 60S-4.011(4)(e) (emphasis added). Contrary to the trial court's finding, the Act and its

corresponding rules expressly allow for someone other than the member's current spouse to be named the beneficiary of the member's retirement account.

Moreover, such designations, including those designations of former spouses as beneficiaries, have been upheld even to the preclusion of a member's current spouse. See Austin v. Austin, 350 So. 2d 102 (Fla. 1st DCA 1977) (affirming trial court's award of state retirement benefits to former wife and their two children rather than to the decedent's wife at the time of his death); Rogers v. Rogers, 152 So. 2d 183 (Fla. 1st DCA 1963) (holding former wife whom member designated as his beneficiary, not his wife at the time of his death, was entitled to receive accumulated contributions); Griffith v. Div. of Ret., No. 96-5806, 1997 WL 1052871, at *3-4 (Fla. Div. Admin. Hrgs. July 11, 1997) (finding current spouse not entitled to pension benefits after member's death where former wife was designated beneficiary).

The trial court improperly considered the Former Husband's current marital status in deciding the beneficiary issue and went so far as to authorize the Former Husband's designation of his current spouse as "survivor beneficiary" of the FRS Pension. The Former Husband's current marital status was a fact that occurred well after the parties entered into the MSA and was clearly irrelevant to the trial court's interpretation of the MSA. See Heiny v. Heiny, 113 So. 3d 897, 900 (Fla. 2d DCA 2013) (holding trial court erroneously considered the appreciation of wife's premarital home, husband and wife did not contemplate appreciation at the time of entering antenuptial agreement); Jones v. Treasure, 984 So. 2d 634, 639 (Fla. 4th DCA 2008) ("A trial court should consider the "circumstances in which the parties found themselves at the time the contract was entered into.") (quoting Miller v. Kase, 789 So. 2d 1095, 1099 (Fla. 4th

DCA 2001))); Raticoff v. Raticoff, 507 So. 2d 798, 799 (Fla. 4th DCA 1987) (holding trial court erred in considering facts discovered after the parties entered property settlement agreement in awarding former wife certain property rights never contemplated by the parties at the time of the settlement agreement).

When interpreting a contract, we are reminded that it is the substance and not the form that controls. Underwood v. Underwood, 64 So. 2d 281, 288 (Fla. 1953). Here, the MSA provided for the Former Wife to "remain the death beneficiary on each of [the Former Husband's] retirement accounts." Undeniably, the parties intended by this clear and unambiguous language for the Former Wife to indeed *remain* as the beneficiary on all the Former Husband's retirement accounts and to collect such available benefits upon his death. To find the Former Wife is not entitled to be named beneficiary under the FRS Pension merely because the pro se parties used their own terminology in the MSA would impermissibly place form over substance in the interpretation of an unambiguous provision. Therefore, it was error for the trial court to not enforce the terms of the MSA and require the Former Husband to designate the Former Wife as beneficiary under the FRS Pension.

IV

Accordingly, because we find that the terms of the MSA entitle the Former Wife to fifty percent of the Former Husband's FRS Pension, which share includes all benefits accrued during and after the marriage, and further entitle the Former Wife to remain as the designated beneficiary under the FRS Pension, we reverse and remand with instructions for the trial court to enter an order requiring the Former Husband to name the Former Wife as the beneficiary under the FRS Pension and to enter a QDRO

consistent with this opinion. We affirm the trial court's order, in all other respects without further comment, including the denial of the Former Wife's motion for attorney's fees.

Affirmed in part, reversed in part, and remanded with instructions.

KHOUZAM, C.J. and KELLY, J., Concur.