STATE OF MICHIGAN

COURT OF APPEALS

RENEE J. SCHAFER,

Plaintiff-Appellee,

v

DUANE W. SCHAFER,

Defendant-Appellant.

UNPUBLISHED
January 20, 2009

No. 287435
Clinton Circuit Court
LC No. 06-019283-DM

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from the divorce judgment issued by the circuit court. The circuit court based the judgment of divorce on a mediation agreement signed by both parties and their attorneys. We affirm.

I. Facts

This divorce action was commenced in November 2006. Mediation took place on April 28, 2008, and the parties came to an agreement regarding the terms of the divorce, which was reduced to a four-page writing and signed by both parties, as well as their respective counsel. The parties agreed, among other things, that defendant would pay plaintiff $750 in spousal support per month for four years and $350 per month for support of their youngest child.

After mediation, plaintiff's counsel prepared a judgment of divorce that comported with the agreement reached at mediation and scheduled the matter for a pro confesso hearing. However, in the interim, the Friend of the Court issued a recommendation suggested that defendant pay a lesser amount per month for both child support and spousal support than that agreed to at mediation. The Friend of the Court based its recommendation on its imputation of income to plaintiff in the amount of $14.50 per hour, which was far more than the minimum wage used at mediation. Therefore, defendant attempted to disavow the mediation agreement, asserting mutual mistake.

The pro confesso hearing was held on June 2, 2008. After hearing oral arguments regarding defendant's objections to entry of the judgment, the circuit court concluded that there was no mutual mistake because both parties understood that plaintiff was imputed income of minimum wage for 40 hours a week for the purposes of the mediation agreement. The trial court then gave defendant an opportunity to review the mediation agreement and compare it to the

proposed judgment of divorce to ensure that they were consistent with each other and proofs were taken from plaintiff. When defendant refused to sign the judgment of divorce, the trial court recommended that plaintiff file it under the "seven-day rule," MCR 2.602(B)(3), and noted that defendant may object to provisions of the judgment and provide an alternative proposed judgment as provided by the court rule. Plaintiff submitted the judgment under the seven-day rule, and defendant objected, asserting that that the mediation agreement is voidable due to misrepresentation, fraud, and mistake, that there was no trial or settlement agreement placed on the record, and that provisions about taxation, when child support begins, and health insurance were not consistent with the mediation agreement .

On August 13, 2008, a hearing was held on defendant's objections. The circuit court refused to permit defendant to testify. After hearing arguments, the court overruled defendant's objections to the proposed judgment and signed the judgment of divorce. The court held that it must follow court rules and case law that mandate that the mediation agreement be upheld and the judgment entered.[1] The court continued on to state that pleadings must be filed based on reasonable inquiry, well founded in fact, and warranted by existing law.[2] The court found that defendant's pleadings did not meet this standard and sanctioned defendant $1,000 for protracting the litigation. Defendant now appeals.

II. Judgment of Divorce

Defendant first argues that the circuit court erred in using the disputed mediation agreement as a basis for the judgment of divorce. We disagree.

A judgment of divorce is reviewed in light of the trial court's findings of fact and conclusions of law. *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008). A trial court's factual findings are reviewed for clear error, which occurs when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. at 204. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). The trial court's findings concerning the validity of the parties' consent to a settlement agreement are reviewed for an abuse of discretion. *Keyser v Keyser*, 182 Mich App 268, 270; 451 NW2d 587 (1990). Generally, a trial court does not abuse its discretion if it selects a reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The parties participated in domestic relations mediation as governed by MCR 3.216 *et seq*. The mediation procedure provisions provide, in part:

---

[1] The court referred to MCR 3.216(H)(7) and *Wyskowski v Wyskowski*, 211 Mich App 699; 536 NW2d 603 (1995), in support of its ruling.

[2] MCR 2.114(D)(2).

> If a settlement is reached as a result of the mediation, to be binding, the terms of that settlement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio or video recording. After a settlement has been reached, the parties shall take steps necessary to enter judgment as in the case of other settlements. [MCR 3.216(H)(7).]

The court heard testimony from plaintiff that the mediation resulted in an agreement regarding custody, parenting time, personal property, child support, and alimony. Plaintiff further testified that both parties and their attorneys signed the agreement. Defendant's attorney even informed the court that she and defendant signed the agreement. The circuit court found that there was a successful mediation that was signed by both parties and their attorneys on all pages and this was not disputed. This finding was not clear error, and according to MCR 3.216(H)(7), the mediation agreement became binding when it was signed.

Until defendant or his attorney signed the agreement or the settlement was established in open court, they were free to disavow their oral agreement. *Gojcaj v Moser*, 140 Mich App 828, 835; 366 NW2d 54 (1985). Any claim that defendant retained the option of breaching the agreement up until the time it was placed on the record is without merit. *Thomas v Michigan Mut Ins Co*, 138 Mich App 117, 120; 358 NW2d 902 (1984). Courts must uphold divorce property settlements reached through negotiation and agreement of the parties because modifications of property settlements in divorce judgments are disfavored. *Baker v Baker*, 268 Mich App 578, 586; 710 NW2d 555 (2005). This rule applies even when the settlement had not yet been formally entered as part of the divorce judgment. *Keyser*, *supra* at 270.

MCR 2.507 pertains to the conduct of trials. It addresses agreements between parties as follows:

> Agreements to be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney. [MCR 2.507(G).]

This rule applies to settlement agreements and requires a writing agreed to by defendant or his attorney for agreements made outside of an open court. *Metro Life Ins Co v Goolsby*, 165 Mich App 126, 128-129; 418 NW2d 700 (1987). In the instant case, the mediation agreement was enforceable when it was signed and the parties were bound to take steps to enter it in a judgment. See MCR 3.216(H)(7).

In *Wyskowski v Wyskowski*, 211 Mich App 699; 536 NW2d 603 (1995), the defendant refused to consent to a judgment of divorce that was based on a mediated settlement that was written and signed by both parties and their attorneys. *Id.* at 700. The defendant came to believe that the agreement was unfair and challenged its validity because the signatures were not notarized and the court rules at that time required that the settlement agreement be "acknowledged by the parties." *Id.* at 701-702. This Court determined that the court rule did not demand notarized signatures and upheld the trial court's grant of summary disposition to plaintiff enforcing the agreement in the judgment of divorce despite defendant's disavowing the

mediation agreement. *Id.* at 700-702. The facts are similar to the instant case, except that no mistake or fraud was alleged.

However, divorce settlement agreements reached through negotiation by the parties do not have to be upheld if they were the product of fraud, duress, or mutual mistake. *Keyser*, *supra* at 269-270. Here, defendant initially alleged mutual mistake and also fraud in determining the amount of income to impute to plaintiff. This figure was entered into a formula to arrive at a recommended level of child and spousal support. During a hearing, defendant said the mutual mistake was that both parties thought that plaintiff was making the minimum wage and did not realize what the other party made. The circuit court found there was no mutual mistake because the parties agreed to impute income to plaintiff at the minimum wage for 40 hours a week for the purposes of the mediation and this figure was not a mistake. In the absence of an actual income figure for plaintiff, the parties and their attorneys agreed to ascribe her some income. It was not clear error for the circuit court to find an absence of mutual mistake in this circumstance.

A settlement agreement cannot be set aside because defendant had a "change of heart." See *Metro Life Ins Co*, *supra* at 128; *Thomas*, *supra* at 119-120. Rather, the question for this Court is whether defendant "freely, voluntarily and understandingly entered into and signed the agreement." *Keyser*, *supra* at 271. Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiation and agreement of the parties. *Calo v Calo*, 143 Mich App 749, 753-754; 373 NW2d 207 (1985). Having made a valid agreement, it was the responsibility of the parties to "take steps necessary to enter judgment as in the case of other settlements." MCR 3.216(H)(7). The circuit court's use of the mediation agreement as a basis for the divorce judgment was not clearly erroneous.

III. Defendant's Due Process Rights

Next, defendant argues that his right to be heard was violated because the circuit court refused to hear his testimony about the mediation agreement. Again, we disagree. The determination whether a party has been afforded due process is a question of law subject to de novo review. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

No person may be deprived of life, liberty or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). The essence of the right of due process is the principle of fundamental fairness. *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003). "'Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker.'" *Hinky Dinky Supermarket, Inc, v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004) (citation omitted). The concept is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993).

Due process demands some form of hearing before the deprivation of a property interest. *Brandon Twp v Tomkow*, 211 Mich App 275, 282-283; 535 NW2d 268 (1995). However, due process does not always require a prior hearing or an adversarial proceeding. *Westland Convalescent Ctr v Blue Cross Blue Shield of Michigan*, 414 Mich 247, 269; 324 NW2d 851 (1982) (Fitzgerald, J.). The opportunity to be heard does not require a full trial-like proceeding,

but requires a hearing to the extent that a party has a chance to know and address the evidence. *Id.* at 270-271; *Hinky Dinky Supermarket, supra* at 606. Defendant was able to present his arguments regarding the mediation agreement to the judge in chambers and in his objection, and argued the issue in two hearings. Defendant was heard on the issue, and defendant's testimony was unnecessary to the court's determination.

Defendant argues that the circuit court made a one-sided determination of events because only plaintiff was permitted to testify. However, defendant refused an invitation to question plaintiff at that time. Further, plaintiff testified to the proofs required to establish a divorce and that there was a signed mediation agreement—facts that are not contested. She did not testify about the amount of income imputed to her at the mediation.

A trial court is obligated to conduct an evidentiary hearing to resolve an ambiguity or a factual dispute that arises in a proceeding related to a divorce when a party specifically asks for an evidentiary hearing. *Mitchell v Mitchell*, 198 Mich App 393, 399; 499 NW2d 386 (1993). When the parties agree to a standard version of mediation, the case will proceed to trial only if both parties do not accept the mediator's recommendation. *Marvin v Marvin*, 203 Mich App 154, 157; 511 NW2d 708 (1993). In *Fear v Rogers*, 207 Mich App 642, 644-645; 526 NW2d 197 (1994), cited by defendant, the trial court had to proceed with an evidentiary hearing because there was no mediation agreement due to the lack of a signed writing. Here, the parties reached and signed an agreement that resolved the dispute and obviated the need for an evidentiary hearing.

The interest involved was the determination of whether a mediation agreement was influenced by fraud or mutual mistake. After hearing defendant's arguments to the contrary, the circuit court found that the mediation agreement was valid. The circuit court then followed the procedures of MCR 2.602(B)(3), the seven-day rule, which allows for the submission of a proposed judgment for review by the other party. Defendant had seven days to object to the proposed judgment, did so, and these objections were again heard in another hearing. The circuit court followed *Wyskowski, supra*, and the court rules and properly entered the judgment.

IV. Attorney Sanctions

Defendant also protests the circuit court's imposition of sanctions. A trial court's decision to impose a sanction is reviewed to determine if it is clearly erroneous. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). A decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

An attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). An attorney's signature on a document is a certification that the document is "well grounded in fact and . . . warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law" and that "the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D); *In re Pitre*, 202 Mich App 241, 243-244; 508 NW2d 140 (1993). Filing a signed document that is not well grounded in fact

and law subjects an attorney to sanctions pursuant to MCR 2.114(E). *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 407; 651 NW2d 756 (2002). MCR 2.114(E) states that the trial court "shall" impose appropriate sanctions when a document has been signed in violation of the rule. Therefore, if MCR 2.114(D) is violated, then the sanctions provided for by MCR 2.114(E) are mandatory. *Guerrero v Smith*, 280 Mich App 647, 678; ___ NW2d ___ (2008).

In the instant case, the circuit court found that defendant's objections to the proposed divorce judgment were not "based on reasonable inquiry, well founded in fact, and warranted by existing law" and that they protracted the litigation. The essence of defendant's objections in the June 12, 2008 document, that the mediation agreement was not valid, were heard in the June 2, 2008 pro confesso hearing to establish grounds for divorce and enter the proposed judgment. The circuit court found in that hearing that the mediation agreement was valid and not obtained by any mistake or fraud. The court then asked if defense counsel had reviewed the mediation agreement and compared it with the proposed judgment of divorce she received on May 15, 2008, so that any differences could be noted.

When defense counsel said that she instead disagreed with the judgment of divorce, the court ordered her to compare the documents and note any objections she had or be found in contempt. Defense counsel then indicated that she could not sign the judgment of divorce that day, and the judge decided to proceed under the seven-day rule, MCR 2.602(B)(3), and asked for an alternative proposed judgment if she had objections. This gave defense counsel a third opportunity to compare the documents and resulted in the defendant's objections, which were again overruled. Defendant did not argue about any differences in the mediation agreement and the judgment of divorce during the hearing on the objections or in defendant's brief on appeal, instead arguing only that the mediation agreement was invalid. As a result, the April 2008 mediation agreement could not be entered as a judgment of divorce until August 2008.

The purpose of MCR 2.114(E) is to deter attorneys and parties from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or which are intended to serve an improper purpose, without sacrificing zealous representation. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 719; 591 NW2d 676 (1998). An appropriate sanction may include an order to pay the opposing party the reasonable attorney fees that resulted from the frivolous document. *Id.* at 726-727. Here, the circuit court's order for defendant to pay $1,000 to plaintiff's attorney as the reasonable cost for protracting the litigation was not clearly erroneous.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey