[Cite as *Murray v. Murray*, 2011-Ohio-1546.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

David D. Murray	Court of Appeals No. L-09-1305
Appellant	Trial Court No. DR2002-1134
v.	
Dianne E. Murray	**DECISION AND JUDGMENT**
Appellee	Decided: March 31, 2011

* * * * *

John L. Straub and Rebecca E. Shope, for appellant.

Mervin S. Sharfman, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Domestic Relations Division, pursuant to a final divorce decree which determined child and spousal support, and divided marital property. Because we conclude that the trial court properly determined the designation of marital property but

erred in not enforcing the parties' consent agreement, we reverse in part and affirm in part.

{¶ 2} Appellant, David D. Murray, and appellee, Dianne E. Murray, were married in 1989, with two children born as issue of the marriage: A.M., born in 1991 and A.E., born in 1994. Appellant filed for divorce in September 2002. Over the next three years, the parties disagreed on and attempted resolution of various issues, including child support, spousal support, pre-marital property, and marital property division. On August 23, 2004, during a court hearing, the parties entered an agreement on the record regarding a shared parenting plan, which the court accepted. Issues involving child support, spousal support, marital property values and division, separate property values, pre-nuptial agreement enforceability, and a Merrill-Lynch Cash Management Account ("CMA") remained in dispute.

{¶ 3} On September 20 and 27, 2004, the court conducted hearings and heard evidence regarding the still unresolved issues between the parties. Both parties presented their cases-in-chief and rested. On December 7 and 14, 2004, and March 18, 2005, the parties paid $2,600 to a mediator for "four-hour sessions" on "three full days of mediation," to further facilitate settlement of certain issues.

{¶ 4} On April 22, 2005, the court again held a hearing to admit exhibits and hear rebuttal evidence. The parties reported their efforts to resolve issues through mediation. Appellant's counsel had prepared and redrafted a consent agreement which was to cover all remaining issues between the parties. Despite those efforts, however, appellee refused

to sign the agreement that day, representing to the court that it did not, in fact, cover all matters discussed and agreed to during mediation. Appellee's counsel also objected to an allegedly forgotten Keybank IRA bank account which was initially not disclosed, as being non-marital. The parties then outlined the issues they intended to address during rebuttal. Issues regarding tax exemptions for 2003 and the 2002 refund were also discussed.

{¶ 5} On June 16, 2005, the court conducted a "final" hearing as to any unresolved issues. The parties had, in fact, signed an agreement that morning, regarding child support and spousal support. After the agreement was read into the record, however, appellee expressed dissatisfaction with its terms and said she had signed it under "duress." The trial court then refused to accept the agreement, ruling that appellee's statement alone was enough to show that no agreement existed.

{¶ 6} The court then heard rebuttal evidence regarding the undisclosed Keybank IRA and the tracing of pre-marital funds. Appellant testified regarding a fax notice he received during the summer of 2002 from State Street Bank, regarding an old IRA account which he did not know existed at the time he had initially disclosed assets. A State Street Bank inquiry letter, sent to him by mail in July 2002, was received at the marital residence address after he moved out. That letter explained that several former unconfirmed owners of funds had been in an old data base, and it requested information to determine his ownership of a State Street Bank account. After confirmation, the money was transferred directly into the Keybank IRA account, which was referenced in a

statement designated as appellant's Exhibit 16. Appellant testified that he had never contributed marital funds into the account.

{¶ 7} Appellant then testified regarding a box of documents, which had been stored at the marital residence, and stated that appellee had just recently given the documents to him as a result of discussions during mediation. Appellant discovered documents in the box which allegedly supported his claim that certain premarital accounts could be traced to his current Merrill Lynch CMA. Appellant said he did not receive the documents until after presenting his case-in-chief in September 2004, and that the information was now being provided on rebuttal to appellee's claim that the CMA was marital. Appellee objected, arguing that the documents were beyond the scope of her case-in-chief and should not be admitted. The court conditionally admitted the evidence, stating that it would later determine whether to consider it on rebuttal.

{¶ 8} The parties then submitted post-trial briefs. The court issued a non-final judgment on April 30, 2009, which made certain factual findings and determinations regarding the values and division of the marital assets, and determined child and spousal support, as well as other issues. The court noted that appellant's rebuttal evidence pertaining to the CMA funds should not be considered. On October 28, 2009, the court then issued its final "order of divorce," which included the required statutory findings, but included only the ultimate orders regarding the disposition of the parties' assets and the awards of child and spousal support.

{¶ 9} Appellant now appeals from that judgment, arguing the following five assignments of error:

{¶ 10} "First Assignment of Error

{¶ 11} "The trial court abused its discretion in refusing to enforce the mediated agreement.

{¶ 12} "Second Assignment of Error

{¶ 13} "The trial court erred in improperly imputing income to David for the purpose of calculating his support obligations.

{¶ 14} "Third Assignment of Error

{¶ 15} "The trial court erred in awarding spousal support retroactive to September 20, 2004 in its decision of April 30, 2009.

{¶ 16} "Fourth Assignment of Error

{¶ 17} "The trial court erred in failing to account for separate property related to the purchase of the Sulphur Spring Road residence.

{¶ 18} "Fifth Assignment of Error

{¶ 19} "The trial court abused its discretion in refusing to consider evidence with regard to David's premarital contributions to his Merrill Lynch CMA."

I.

{¶ 20} In his first assignment of error, appellant asserts that, absent actual evidence of duress, the trial court erred in failing to enforce the mediation agreement signed by the parties prior to the hearing. We agree.

{¶ 21} Settlement and compromise are highly favored by the law. *State ex rel. Wright v. Weyandt* (1977), 50 Ohio St.2d 194, 197; *Presjak v. Presjak*, 11th Dist. No. 2009-T-0077, 2010-Ohio-1455, ¶ 56. "In divorce actions, the parties can reach a settlement agreement as to the issues in lieu of litigating those issues before the domestic relations court." *Perko v. Perko*, 11th Dist. Nos. 2001-G-2403, 2002-G-2435, and 2002-G-2436, 2003-Ohio-1877, ¶ 27, citing *Walther v. Walther* (1995), 102 Ohio App.3d 378, 383. "When parties to a divorce enter into an in-court settlement agreement, the court may accept the agreement even if one person tries to repudiate it. Neither a change of heart nor poor legal advice is a reason to set aside a settlement agreement." Id., citing *Van Hoose v. Van Hoose* (Apr. 7, 2000), 2d Dist. No. 99 CA 18. "A settlement agreement eliminates the necessity of judicial resolution of a controversy as the parties reached a compromise regarding their respective rights and obligations." Id., citing *Green v. Clair* (Feb. 14, 2001), 9th Dist. No. 20271.

{¶ 22} Mediation is, by definition, "a procedure by which the parties negotiate a resolution to their dispute with the assistance of a third party mediator. If the parties do not reach an agreement, the mediation process is at an end; no resolution may be imposed on the parties." *Oliver Design Group v. Westside Deutscher Frauen-Verein, d.b.a. The Altenheim*, 8th Dist. No. 81120, 2002-Ohio-7066, ¶ 12. Nevertheless, although "mediation" is a nonbinding process, a settlement agreement reached through a mediation process is as enforceable as any contractual agreement. *Forysiak v. Laird Marine & Mfg.*

(Oct. 19, 2001), 6th Dist. No. OT-00-049. See, also, *Engelmann v. Engelmann*, 11th Dist. No. 2003-A-0020, 2004-Ohio-1530.

{¶ 23} As long as a settlement agreement reached by the parties was not procured by fraud, duress, overreaching, or undue influence, the court has the discretion to accept it. *Walther*, supra. "To avoid a contract on the basis of duress, a party must prove coercion by *the other party* to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party." (Emphasis added.) *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, syllabus. To demonstrate duress, the party must show: "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) *that said circumstances were the result of coercive acts of the opposite party. * * * The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities*." (Emphasis added.) Id. at 246. Where a party seeks to negate an agreement entered into after mediation and has not shown that any duress occurred as a result of the opposing party's conduct, the agreement is enforceable. See *Fichthorn v. Fichthorn*, 5th Dist. No. 09-CA-10, 2009-Ohio-5138 (mediation agreement enforceable where no showing of duress caused by wife's conduct and husband entered into agreement knowingly and voluntarily).

{¶ 24} In this case, the parties had spent many hours in mediation, with their attorneys present. They had been to court on at least one prior occasion where appellant and his attorney thought an agreement had been reached, only to find after coming into

court that appellee again took issue with the agreement or its language, and refused to sign. On the day of the final hearing, the parties had, yet again, met to work out the terms of the agreement. Before entering the courtroom, appellee had finally, with counsel present, signed the consent agreement.

{¶ 25} Once in the courtroom, however, appellee indicated that she was not entirely happy with the agreement and said that she signed it "under duress." At this point, while perhaps understandable since the case had lingered on for over three years, the court expressed its extreme frustration with the parties. As a result, the court issued an impulsive and improper ruling. The court did not question appellee further, but automatically rejected the consent agreement, simply on the sole basis of her statement. Even after a brief recess, the court continued the discussion with appellee's counsel, who offered that appellee "really and truly is not satisfied with the writing" submitted to the court. According to her counsel, appellee had "felt a certain amount of pressure during the whole process" which she had failed to disclose to either her counsel or the mediator.

{¶ 26} Upon our complete review, nothing in the record indicates that appellee was coerced or pressured by appellant. Contested divorces and mediation, by their very nature, are not without a certain amount of "pressure." Dissatisfaction with or general remorse about signing a consent agreement do not, however, constitute "duress." Without evidence to support that appellant had coerced her, appellee's statement indicates that she simply had a change of heart about signing the agreement. There is no evidence,

however, that she was under any coercion which would constitute the kind of duress which would invalidate the consent agreement.

{¶ 27} Both parties signed the consent agreement, which was the culmination of many hours of mediation, discussions between the parties and their attorneys, and subsequent modifications the very morning it was signed. As a result, the agreement became a contract, enforceable against both parties. Therefore, under the facts of this case, in the absence of any evidence that appellant had coerced appellee, we conclude that the trial court erred in refusing to accept and enforce the consent agreement.

{¶ 28} Accordingly, appellant's first assignment of error is well-taken.

II.

{¶ 29} We will address appellant's fourth and fifth assignments of error together. In appellant's fourth assignment of error, he contends that the trial court erred in failing to credit him with non-marital funds which were allegedly used to purchase the Sulphur Spring marital home. In his fifth assignment of error, appellant claims that the trial court erred in failing to consider evidence presented to trace the Merrill Lynch CMA as non-marital property.

{¶ 30} Pursuant to R.C. 3105.171(B), "[i]n divorce proceedings, the court shall * * * determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section." A trial court assumes that any property acquired during marriage is marital, unless evidence is

offered to rebut that presumption. *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 160. The party to a divorce action seeking to establish that an asset or portion of an asset is separate property, rather than marital property, has the burden of proof by a preponderance of the evidence. *Zeefe v. Zeefe* (1998), 125 Ohio App.3d 600, 614.

{¶ 31} Since a trial court's classification of property as either marital or non-marital is a factual finding, an appellate court reviews the finding to determine whether it is supported by some competent, credible evidence. *Spinetti v. Spinetti* (Mar. 14, 2001), 9th Dist. No. 20113, citing *Barkley*, supra, at 159. See, also, *Keyser v. Keyser* (Apr. 9, 2001), 12th Dist. No. CA2000-06-127. "This standard of review is highly deferential and even 'some' evidence is sufficient to sustain the judgment and prevent a reversal." *Barkley*, supra, at 159. Accordingly, an appellate court is guided by a presumption that the findings of the trial court are correct, as the trial court is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use those observations in weighing the credibility of the proffered testimony. Id., citing *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 138.

{¶ 32} In this case, we agree with the trial court that appellant failed to adequately show that funds used to purchase the Sulphur Springs home were non-marital. The home was purchased in 1995, six years after the marriage, with cash from appellant's "brokerage account." Appellant contends that he should have been credited with the proceeds of the subsequent sale of his pre-marital Lincolnshire Blvd. property. The record provides inadequate information, however, regarding the disposition of the

Lincolnshire proceeds, either into a pre-marital account or as a traceable contribution to the Sulphur Springs home. Therefore, we conclude that the Sulphur Springs home, valued at $240,000, was properly designated as marital property.

{¶ 33} Regarding appellant's CMA, we agree with appellant that the evidence submitted on rebuttal was admissible. It was appellee's position throughout the entire divorce, including her case-in-chief, that the CMA funds were entirely marital. Moreover, the documents needed by appellant were in appellee's possession and were not discovered until she turned them over to appellant, after his case-in-chief had been presented. To deem the documents inadmissible on rebuttal might improperly encourage one party to withhold evidence in his or her possession which would assist the opposing party in proving his or her case. Thus, the evidence offered by appellant to bolster or rebut appellee's contention was admissible and should have been considered. Any error, however, is harmless for the following reasons.

{¶ 34} Our review of appellant's direct testimony and rebuttal evidence fails to establish any objectively verifiable transfer or deposits from appellant's pre-marital accounts into the CMA funds. Although the documents submitted by appellant purport to coincide with certificates of deposit ("CDs") that matured and were then deposited into the CMA, even he acknowledged that he could not determine "with assurance, but it's likely that it was another CD that was maturing or that matured * * *." He then attempted to show that certain CDs would have matured on certain dates, and that an amount corresponding to the initial deposit, less any interest earned, was deposited into

the CMA account. Appellant could only testify, however, as to his subjective "belief" that certain deposits were "rolled over" from non-marital funds. Consequently, even the documents offered on rebuttal do not establish a direct link between his pre-marital funds and the majority of the CMA funds. Therefore, we conclude that, with the exception of the $5,010 which the court calculated to be the non-marital portion, appellant failed to adequately trace any other non-marital contributions.

{¶ 35} Accordingly, appellant's fourth and fifth assignments of error are not well-taken.

{¶ 36} We note, in reviewing the trial court's decision as to the assignments of error regarding the distribution of marital assets, we discovered two errors in the recap tables showing the distribution of the marital assets/retirement accounts. In the Marital Property Recap, although the final totals were correct, there was a typographical error in the amount shown for defendant's distributive portion of the CMA funds. In the Retirement Asset Recap, the court included defendant's Textile Leather account, which had already been deemed to be separate, non-marital property. Rather, defendant's U.S. Government pension and PERS marital retirement accounts should have been included. Although this is a minor change, the sub-total for the retirement assets changes, along with the QDRO which will be filed. The following tables show the corrected amounts and calculations, which, on remand should be incorporated into the revised divorce decree.

Marital Property Recap

Asset	Value	Plaintiff	Defendant
Sulphur Springs (marital residence)	240,000		240,000
Consear Road (plaintiff's residence)	310,000	310,000	
Sky Bank checking acct. (defendant)	4,722		4,722
Sky Bank savings acct. (defendant)	1,052		1,052
Fifth Third checking acct. (plaintiff)	33,075	33,075	
Brinks Hofer stock (plaintiff)	79,931	79,931	
Paine Webber USB (investment) 228,739 -71,360 (non-marital) 157,739	157,379)		
Merrill Lynch CMA 556,327 - 5,010 (non-marital) 551,317	551,317)	239,882	468,814
Vehicles (plaintiff)	75,700	75,700	
(defendant)	24,000		24,000
	1,477,176		
	÷ 2		
Sub-total Non-Retirement Assets	738,588	738,588	738,588

Retirement Assets Recap

Asset	Value	Plaintiff	Defendant
Sky Bank	11,466	11,466	
STRS	2,000	2,000	
PERS	176		176
U.S. Govt. pension	772		772
Judicature 401(k) 426,237 -31,307 (non-marital) 394,930	394,930	191,206	203,724
	409,344		
	÷ 2		
Sub-total Retirement Assets	204,672	204,672	204,672
Total Marital Assets		943,260	943,260

{¶ 37} Pursuant to our disposition of appellant's first assignment of error, regarding the consent agreement, which covered both child support and spousal support issues, appellant's second and third assignments of error are moot.

{¶ 38} The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part, and is remanded for proceedings consistent with this decision. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE