AFFIRM as MODIFIED; and Opinion Filed March 21, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01367-CV

IN THE INTEREST OF T.L.T., A MINOR CHILD

On Appeal from the 255th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-16-00028

MEMORANDUM OPINION

Before Justices Francis, Brown, and Stoddart
Opinion by Justice Brown

Appellant Arpit Kirit Talati (Husband) appeals from an Agreed Final Decree of Divorce (Final Decree), entered pursuant to a mediated settlement agreement (MSA). In three issues, Husband contends the trial court erred in (1) entering the Final Decree, which he argues is inconsistent with the MSA, (2) denying his motion for new trial, and (3) awarding attorney's fees, including unconditional appellate attorney's fees, to appellee Sabena Singh Talati (Wife). We modify the Final Decree and, as modified, affirm.

BACKGROUND

Husband and Wife married on October 18, 2008. Wife filed a petition for divorce in January 2016, and Husband and Wife signed a MSA purporting to settle all claims and controversies between them in March 2016. The MSA addresses distribution of retirement plans in paragraph 8:

> 8. Each party shall produce evidence, if any, of any separate property portion of Husband's 401k and Wife's IRA, and the community portion of each shall be split equally. Husband shall also produce evidence, if any, of the separate property portion of his share purchase plan, and the community portion shall be split equally. Records shall be produced no later than March 15.

The MSA further provides that the community estate shall be divided as shown on a spreadsheet attached to, and made part of, the MSA. Like paragraph 8, the spreadsheet indicates each party shall receive 50 percent of the community value of Husband's retirement plans. The spreadsheet shows those community values as of March 1, 2016, the date of mediation, as $299,684.62 for Husband's 401k, $5.17 for Husband's Jacobs Engineering Corporation (JEC) stock purchase plan, $140,847.72 for Husband's JEC stock, and $77,320.00 for Husband's JEC restricted stock awards plan. The MSA, however, also states the values in the spreadsheet are guidelines only.

In May 2016, the trial court signed an agreed final decree of divorce. The decree recites that a hearing was held and Wife appeared, Husband did not appear, and both agreed to the terms of the order as evidenced by their signature. However, neither Wife nor Husband signed the decree, and Wife subsequently moved to vacate the decree because neither party had been present and no motion to enter had been on file in the trial court.[1] Wife also requested the trial court to compel arbitration because the parties disagreed on the form of the decree. On July 12, 2016, the trial court entered an agreed order vacating the decree and ordering the parties to attend an informal settlement conference and, in the event the parties were unable to agree on the form of a new decree, to submit to binding arbitration pursuant to the MSA.[2]

In September 2016, Wife filed a motion to enter and submitted a proposed agreed final decree of divorce. The proposed order provided for Husband and Wife to each receive 50 percent

[1] Wife also filed a motion for new trial, but the record contains no order on that motion.

[2] The MSA provides that, "[i]f one or more disputes arise with regard to the interpretation and/or performance of this agreement or any of its provisions, and the parties cannot resolve their differences by telephone conference or correspondence, then the mediator shall arbitrate the resolution of such disputes."

of the community values assigned to Husband's 401K plan, JEC stock purchase plan, JEC stock, and JEC restricted stock awards plan in the spreadsheet attached to the MSA. The trial court held a hearing on the motion to enter and, on September 20, 2016, signed the Final Decree incorporating the terms of Wife's proposed decree.[3]

Husband moved for new trial, arguing the Final Decree was not in conformity with the MSA. Specifically, he claimed the Final Decree divested him of separate property he held in his retirement accounts prior to the marriage. Husband attached copies of email correspondence with Wife's attorneys forwarding his October 31, 2008, 401k and December 31, 2008, JEC stock purchase plan statements. Husband, however, introduced no evidence at the hearing on his motion for new trial. Following the hearing, the trial court signed an order denying Husband's motion and also ordering him to pay attorney's fees and appellate attorney's fees to Wife. Husband appeals from the trial court's Final Decree and order denying his motion for new trial and awarding attorney's fees.

DIVISION OF HUSBAND'S RETIREMENT PLANS

In his first issue, Husband contends the Final Decree improperly contains terms inconsistent with the MSA's provision on retirement plans. Husband asserts he was entitled to judgment on the MSA, which unambiguously provides for division of community property only, and the trial court impermissibly divided his separate property by using the community values shown in the MSA's spreadsheet. Husband argues alternatively that, if the MSA is ambiguous, the trial court erred in resolving the ambiguity itself and should have referred the issue to arbitration pursuant to the MSA.

[3] Specifically, the Final Decree awarded the following amounts as separate property to both Husband and Wife: (1) $149,842.31 payable from Husband's 401k; (2) $2.58, representing 50 percent of balance of Husband's JEC stock purchase plan; (3) $70,423.86, representing 50 percent of balance of Husband's JEC stock; and (4) $38,660, representing 50 percent of balance of Husband's JEC restricted stock.

Applicable Law

Under Texas law, property possessed by either spouse during or on the dissolution of marriage is presumed to be community property absent clear and convincing evidence to the contrary. TEX. FAM. CODE ANN. §3.003(a) (West 2006). A spouse asserting separate property must rebut the community property presumption by clear and convincing evidence. *Chavez v. Chavez*, 269 S.W.3d 763, 767 (Tex. App.—Dallas 2008, no pet.). To overcome the presumption, the spouse claiming separate property has the burden to trace and clearly identify the property it claims is separate. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973). "Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property." *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied); *Boyd v. Boyd*, 131 S.W.3d 605, 611 (Tex. App.—Fort Worth 2004, no pet.). Any doubt as to the character of property should be resolved in favor of the community estate. *Moroch*, 174 S.W.3d at 856.

Under the Texas Family Code, MSAs meeting certain statutory formalities are binding on the parties and require rendition of a divorce decree adopting the parties' agreement. TEX. FAM. CODE ANN. § 6.602(b), (c) (West 2006). To be binding, a MSA must provide, in a prominently displayed statement with boldfaced type or capital letters or underlined, that the agreement is not subject to revocation and be signed by each party and the parties' attorneys, if any, present at the time the agreement is signed. *Id*. § 6.602(b).

Parties to a MSA need not agree to all of the provisions to be contained in the divorce decree. *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.—Dallas 2006, no pet.). They are required only to reach an agreement as to all material terms, and a trial court has no discretion to enter a decree that varies from those terms. *Id.*; *In re Marriage of Joyner*, 196 S.W.3d 883, 890-91 (Tex. App.—Texarkana 2006, pet. denied); *Garcia-Udall v. Udall*, 141 S.W.3d 323, 332 (Tex.

App.—Dallas 2004, no pet.). But "[t]erms necessary to effectuate and implement the parties' agreement do not affect the agreed substantive division of property and may be left to future articulation by the parties or consideration by the trial court." *Haynes*, 180 S.W.3d at 930.

We apply contract principles to interpret a MSA's meaning. *Toler v. Sanders*, 371 S.W.3d 477, 480 (Tex. App.—Houston [1st Dist.] 2012, no pet.). If an agreement can be given a certain or definite legal meaning, it is unambiguous. *Id*. An unambiguous agreement must be enforced as written as a matter of law. *Id*.

Analysis

The MSA entered into by Husband and Wife satisfied the statutory formalities. Both parties signed the agreement, as did their respective counsel, and the agreement contains the following provision immediately above the signature lines:

> **THE PARTIES HAVE BEEN ADVISED AND THEY FULLY UNDERSTAND THAT UPON EXECUTION OF EACH PARTY'S SIGNATURE TO THIS AGREEMENT AND THE EXECUTION OF EACH PARTY'S ATTORNEY, IF ANY, WHO IS PRESENT AT THE TIME THE AGREEMENT IS SIGNED, THIS AGREEMENT IS NOT SUBJECT TO REVOCATION.** (Section 6.602 and Section 153.0071 of the Texas Family Code).

Thus, the MSA is binding, and the parties are entitled to a judgment that conforms to their agreement. *See* TEX. FAM. CODE ANN. § 6.602(c).

Husband asserts paragraph 8 of the MSA is unambiguous, and the only reasonable interpretation requires that the community portions of the parties' retirement plans be split evenly and their separate property to remain undivested. We agree, as does Wife.

Husband, however, contends the Final Decree, by incorporating and evenly splitting the community values of Husband's retirement plans as stated in the MSA spreadsheet, improperly divested him of separate property. Paragraph 8 of the MSA provides that Husband "produce evidence, if any," of any separate property portion of his 401k and share purchase plan. Beyond requiring evidence of separate property in the retirement plans, the MSA does not specify the

mechanisms to implement and effectuate the division of community property or segregation of separate property, if any, in those plans.

On July 12, 2016, the trial court entered an agreed order vacating its initial divorce decree and ordered the parties to an informal settlement conference and, if that failed, binding arbitration on a new agreed final decree. Nothing in the record indicates a resolution, if any, resulting from either informal settlement discussions or binding arbitration. Then, on September 15, 2016, Wife filed a motion to enter a proposed decree tracking the division of the community values of the retirement plans shown on the MCA spreadsheet. The record contains no written response to Wife's motion to enter; nor is there a reporter's record of the hearing on the motion or anything else in the record to show Husband objected to the proposed decree or complained that it was inconsistent with the MSA.

Husband, claiming a portion of the retirement plans to be his separate property, bore the burden of establishing by clear and convincing evidence the separate origin of each asset. *See Chavez*, 269 S.W.3d at 767. The parties agreed to divide only the community property, the MSA spreadsheet provides the guideline for the value of that community property, and nothing in the Final Decree varies from their agreement. On the record before us, we must conclude the trial court properly implemented and effectuated the division of those retirement plans and, in the absence of any evidence of separate property, did not abuse its discretion by entering a Final Decree that varied from the terms of the MSA. *See Haynes*, 180 S.W.3d at 930. And, because we have concluded as a matter of law that paragraph 8 is not ambiguous, we need not address Husband's alternative argument that the trial court erred in not referring the resolution of any ambiguity to the mediator. We overrule Husband's first issue.

MOTION FOR NEW TRIAL

In Husband's second and third issues, he asserts the trial court erred in denying his motion for new trial and awarding Wife attorney's fees for defending the motion and in the event of an appeal. We review a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (per curiam); *Ricks v. Ricks*, 169 S.W.3d 523, 526 (Tex. App.—Dallas 2005, no pet.). A trial court abuses its discretion if it acts arbitrarily or unreasonably or without reference to guiding rules and principles. *Ricks*, 169 S.W.3d at 526.

Husband argues the trial court abused its discretion in denying his motion for new trial because the only question before the trial court was whether the MSA was ambiguous and, if so, any fact questions should have been addressed by arbitration pursuant to the MSA. However, as discussed under his first issue, there is no ambiguity in the MSA that required arbitration by the mediator.

In her brief, Wife urges this Court to strike the exhibits attached to Husband's motion for new trial on the basis that the motion was unverified and did not contain any affidavits. In order to introduce evidence outside the record, a motion for new trial must be verified. *See Carter v. Lavergne*, No. 05-09-00333-CV, 2010 WL 2880211, *2 (Tex. App.—Dallas July 23, 2010, no pet.); *Raymond v. Raymond*, 190 S.W.3d 77, 82 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Kreider v. Hempftling*, 137 S.W.2d 83, 87 (Tex. Civ. App.—Galveston 1940, no writ). Wife did not move the trial court to strike the exhibits, either in her response to Husband's motion or during the hearing on the motion, and we decline to strike those exhibits now. Husband claims he attached the exhibits simply to show the parties were exchanging information in a dispute over the language to be included in the decree related to the retirement plans. The trial court, however, ordered the parties to arbitrate the form of an agreed decree with the mediator more than two months before

entering the Final Decree and the record contains no indication the parties did so or that Husband timely asserted a right to arbitrate this particular dispute after Wife filed the proposed decree and motion to enter but before the trial court ruled on the motion and entered the Final Decree. *See, e.g., S.P., III v. N. P.*, No. 02-16-00278-CV, 2017 WL 3821887, at *6 (Tex. App.—Fort Worth Aug. 31, 2017, no pet.). Accordingly, we conclude the trial court did not abuse its discretion in denying Husband's motion for new trial.

Next, Husband argues the trial court erred in awarding Wife attorney's fees incurred in defending the motion for new trial and in the event of an appeal. A trial court has broad discretion in deciding whether to award reasonable attorney's fees in a suit for dissolution of a marriage. *See* TEX. FAM. CODE ANN. §6.708(c) (West Supp. 2016); *Diaz v. Diaz*, 350 S.W.3d 251, 256 (Tex. App.—San Antonio 2011, pet. denied). A movant must affirmatively plead for attorneys' fees unless the issue is waived or tried by consent. *In re Pecht*, 874 S.W.2d 797, 803 (Tex. App.—Texarkana 1994, no writ). Whether attorney's fees are reasonable is a question of fact that must be supported by evidence. *See, e.g. Velasquez v. Velasquez*, 292 S.W.3d 80, 86 (Tex. App.—Houston [14th Dist.] 2007, no pet.). An attorney's testimony on the total amount of fees, his experience, and the reasonableness of the fees charged is sufficient to support an award. *See In re A.B.P.*, 291 S.W.3d 91, 99 (Tex. App.—Dallas 2009, no pet.); *see also National Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 157 n. 7 (Tex. 2012) ("even conclusory attorney's fee testimony was not objectionable, however, because 'the opposing party, or that party's attorney, likewise has some knowledge of the time and effort involved and if the matter is truly in dispute, may effectively question the attorney regarding the reasonableness of his fee'") (quoting *Garcia v. Gomez*, 319 S.W.3d 638, 641 (Tex. 2010)).

The trial court's award of attorney's fees may include appellate attorney's fees. *Keith v. Keith*, 221 S.W.3d 156, 169 (Tex. App.—Houston [1st Dist.] 2006, no pet.). An award of appellate

attorney's fees, however, must be conditioned on which party prevails on appeal. *Ansell Healthcare Prods., Inc. v. United Med.*, 355 S.W.3d 736, 745 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). An unconditional award of appellate attorney's fees does not require reversal; we may modify an order to make the award of appellate attorney's fees contingent upon the receiving party's success on appeal. *Id*.

Husband argues the award of attorney's fees is improper because Wife had not filed an affirmative pleading requesting fees. He further argues the award materially alters the Final Decree's provision that each party "shall be responsible for his or her own attorney's fees, expense, and costs incurred as a result of legal representation in this case." With respect to the appellate attorney's fees, Husband contends they are improperly unconditional and there is legally insufficient evidence to support the amount of the fees.

Wife requested attorney's fees in her response to Husband's motion for new trial and, thus, sufficiently pleaded for the fees and put Husband on notice that she was seeking them. *See Lohmann v. Lohmann*, 62 S.W.3d 875, 879 (Tex. App.—El Paso 2001, no pet.) (pleading for attorneys' fees in original and amended responses to writ of attachment constituted adequate pleading for attorneys' fees in suit affecting the parent-child relationship).[4] At the hearing, Wife's counsel testified that his firm incurred total fees in the amount of $3650 related to the motion during the two-week period before the hearing. He further testified that he was board-certified in Texas, practices solely in the area of family law and believed the fees incurred were reasonable and necessary in cases involving similar facts. Counsel also requested $5000 in attorney's fees in the event of an appeal. Husband's attorney never objected at the hearing, either to the

[4] Husband also tried the issue of attorney's fees by consent when Wife's counsel presented evidence of the fees and Husband did not object. *See In re A.G.F.W.*, No. 06-12-00111-CV, 2013 WL 2459886, *4 (Tex. App.—Texarkana June 6, 2013, no pet.).

reasonableness of the fees or that the award was inappropriately granted in response to a motion for new trial or was inconsistent with the Final Decree.

Because the family code gives a trial court broad discretion in awarding attorney's fees and Wife's counsel proffered undisputed evidence as to his experience, the amount of fees, and the reasonableness of the fees, we conclude the trial court did not abuse its discretion in awarding the fees, including the appellate attorney's fees. *See* TEX. FAM. CODE ANN. §6.708(c); *Keith,* 221 S.W.3d at 169. However, the trial court did abuse its discretion in not conditioning the award of appellate attorney's fees upon Wife's success on appeal. *See Ansell Healthcare Prods.*, 355 S.W.3d at 745. Accordingly, we overrule Husband's second issue, but sustain his third issue to the extent he complains the appellate attorney's fees award is unconditional.

We affirm the trial court's Final Decree. We modify the trial court's Order on Motion for New Trial to reflect that the award of $5000 in appellate attorney's fees is conditional on Wife's success on appeal and affirm the Order as modified.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF T.L.T., A MINOR CHILD	On Appeal from the 255th Judicial District Court, Dallas County, Texas
	Trial Court Cause No. DF-16-00028.
No. 05-16-01367-CV	Opinion delivered by Justice Brown; Justices Francis and Stoddart participating.

In accordance with this Court's opinion of this date, the Agreed Final Decree of Divorce is **AFFIRMED.**

We **MODIFY** the last two paragraphs of the trial court's Order on Motion for New Trial as follows:

> IT IS THEREFORE ORDERED that Petitioner, Sabena Singh Talati, is awarded and does hereby recover a judgment against Respondent, Arpit Kirit Talati, in the total sum of $5,000.00 for reasonable attorney's fees, expenses and costs which is to be paid into the registry of the Court and to be disbursed to Sabena Singh Talati for use paying attorney's fees, expenses, and costs in the event Arpit Kirit Talati files an appeal in this suit *and Sabena Singh Talati prevails in that appeal*.
>
> IT IS THEREFORE ORDERED that Arpit Kirit Talati shall deposit $5,000.00 into the registry of the Court to be disbursed to Sabena Singh Talati for use paying attorney's fees, expenses, and costs in the event that Respondent files an appeal in this suit *and Sabena Singh Talati prevails in that appeal*. Arpit Kirit Talati shall deposit the $5,000.00 **on or before 5:00 p.m. on November 15, 2016** into the registry of the Court.

It is **ORDERED** that, as modified, the trial court's Order on Motion for New trial is A**FFIRMED**.

It is **ORDERED** that appellant Arpit Kirit Talati and appellee Sabena Singh Talati each pay his or her own costs of this appeal.

Judgment entered this 21st day of March, 2018.