Opinion issued December 8, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00163-CV

JILL J. MOORE, Appellant

V.

BILLY JOE MOORE, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Case No. 53437

MEMORANDUM OPINION

Jill J. Moore appeals the trial court's final decree of divorce entered after she had reached a mediated settlement agreement (MSA) with her husband, Billy Joe Moore. In her sole issue, Jill argues that the trial court abused its discretion by

entering a decree inconsistent with the terms of the MSA. Finding error, we reverse in part, reform in part, and affirm in part.

Background

Jill and Billy Joe entered into a mediated settlement of their divorce case that divided their marital estate, provided for conservatorship of their five children, and established child support. The MSA, signed by Billy Joe, Jill, and their respective attorneys, provided in boldfaced, capitalized, and underlined type that it was "**NOT SUBJECT TO REVOCATION**" and that Billy Joe and Jill were "**ENTITLED TO JUDGMENT**" thereon. To resolve future disagreements with respect to the MSA, the parties agreed to submit:

> (a) all drafting disputes; (b) all issues regarding the interpretation of this Mediated Settlement Agreement; and (c) all issues regarding the intent of the parties as reflected in the Mediated Settlement Agreement to [the mediator], whose decision shall be binding on the parties, including decisions on the payment for additional mediation fees (if any).

After the trial court rendered judgment on the MSA and while the parties were drafting the final decree of divorce, a dispute arose regarding the division of future disbursements from Billy Joe's employee stock ownership plan (ESOP).

The MSA divided Billy Joe's employment benefits as follows:

14. ISI, Specialist, Inc. 401(k) Plan CURRENT VALUE UNKNOWN	Husb-50% Wife-50%
15. ISI, Specialist, Inc. Employees' Stock Ownership Plan 100% Plan no. 4-51128 Balance as of 8/11/2009 $46,765.44	Husband
16. ISI, Specialist, Inc./Brand Industrial LLC Future Retirement Disbursement[12]	Husb-50% Wife-50%

Jill contended that this division entitled her to fifty percent of all Billy Joe's "future retirement disbursements," including disbursements from his 401(k) plan and his ESOP. Billy Joe agreed that Jill was entitled to fifty percent of the future disbursements from his 401(k) plan, but not from his ESOP. As provided in the MSA, they submitted their dispute to the mediator.

The mediator issued three separate letters announcing his decision. In his first letter, the mediator stated his recollection that the parties intended to "split" the 401(k) plan, grant one hundred percent of the ESOP to Billy Joe, and "split" the "future retirement disbursement . . . 50/50 between the parties." With respect to the language dividing the "future retirement disbursements," the mediator instructed that specific language be included in the divorce decree:

> W-6: 50.00% of Billy Joe Moore's future retirement disbursements from ISI Specialist, Inc. and/or Brand Industrial Specialist, LLC arising out of Billy Joe Moore's employment with ISI Specialist, Inc. and/or Brand Industrial Specialist, LLC as will be more particularly defined in a Qualified Domestic Relations Order entered by this Court.

Three months later, the mediator issued a second letter regarding the scope of the "future retirement disbursements." He wrote that he could "not recall that the parties were aware of whether item 15 [the ESOP] was separate from or a part of item 16 [the future retirement disbursements]. However, it is clear from my notes, my recollection, and the Mediated Settlement Agreement, that Mr. Moore was awarded 100.00% of item 15. Save and except for item 15, then whatever value was left in or left over from item 16 was then awarded on a 50/50 basis." Thus, in both his first and second letters, the mediator seemingly agreed with Billy Joe's construction of the MSA, concluding that Jill was not entitled to future disbursements from the ESOP because it had been awarded solely to Billy Joe.

Apparently these two letters did not finally resolve the parties' dispute about "future retirement disbursements" because the mediator issued a third letter. In it he stated that he was "aware of everyone's concerns and the practical effect that certain language may or may not have." He then suggested the following language for the division of Billy Joe's employee benefits, which was different from the previously suggested language and more in agreement with Jill's construction of the MSA:

> H-3 Fifty percent (50.00%) of Industrial Specialists, Inc. 401(k) Plan; Balance: unknown
>
> H-4 One hundred percent (100.00%) of the balance of ISI Specialists, Inc. Employees' Stock Ownership Plan; Plan No. 4-

51128, as of August 11, 2009 with an approximate balance of $46,765.44.

H-5 Save and except for that portion awarded to Billy Joe Moore in Item H-4, fifty percent (50.00%) of all future retirement disbursements arising out of Billy Joe Moore's employment with ISI Specialist, Inc. and/or Brand Industrial, whether from retirement or participation in the employee stock ownership plan.

W-5 Fifty percent (50.00%) of Billy Joe Moore's interest in Industrial Specialists, Inc. 401(k) Plan as of January 26, 2010 arising out of Billy Joe Moore's employment with Industrial Specialist, Inc. and more particularly defined in a Qualified Domestic Relations Order which will be entered with this court.

W-6 Save and except for that portion awarded to Billy Joe Moore in item H-4, fifty percent (50.00%) of all future retirement disbursements arising out of Billy Joe Moore's employment with ISI Specialist, Inc. and/or Brand Industrial, whether from retirement or participation in the employee stock ownership plan, and more particularly defined in a Qualified Domestic Relations Order to be entered by this Court.

Jill and Billy Joe then sought entry of the final divorce decree in the trial court. In their proposed decrees, they offered competing provisions with respect to the future disbursements from Billy Joe's ESOP. Jill's tender incorporated the language used in the mediator's third and final letter, whereas Billy Joe's tender was consistent with the mediator's first two announcements.

The court, finding that the mediator's letters were not "helpful because they're 180 degrees opposite of each other," entered a final decree dividing the

employee benefits in the manner proposed by Billy Joe and suggested in the mediator's first and second letters.

> Property to Husband
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> H-3. 50% of Industrial Specialists, Inc. 401(k) Plan; Balance unknown
>
> H-4. 100% of ISI Specialists, Inc. Employees Stock Ownership Plan;
>
> H-5. 50% of all future retirement disbursements due to Bill[y] Joe Moore's employment and the benefits arising from such employment with ISI Specialist, Inc. and/or Brand Industrial, save and except 100% of the Employee Stock Ownership Plan which is awarded solely to Billy Joe Moore.
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> Property to Wife
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> W-5. 50% of Billy Joe Moore's interest in Industrial Specialists, Inc. 401(k) Plan as of January 26, 2010 arising out of Billy Joe Moore's employment with Industrial Specialist, In[c]. and more particularly defined in a Qualified Domestic Relations Order which will be entered with the Court.
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> W-6. 50% of Billy Joe Moore's future retirement disbursements from ISI Specialist, Inc. [a]nd/or Brand Industrial Specialists, save and except for 100% of the Employee Stock Ownership Plan which is awarded solely to Billy Joe Moore here in [sic], and more particularly defined in a Qualified Domestic Relations Order which will be entered with this court.

Jill, arguing that the construction and language provided by the mediator in his third letter was binding on the parties and the trial court, appeals the divorce decree on the ground that its terms "vary from the terms of the MSA and operate to

deprive [her] of one-half of the future disbursements under the employees' stock ownership plan as called for by the MSA."

Entry of Judgment on the Mediated Settlement Agreement

Texas public policy encourages the peaceable resolution of disputes, particularly those involving the parent-child relationship, and the early settlement of pending litigation through voluntary settlement procedures. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2011). The Family Code furthers this policy by providing alternative dispute resolution procedures through which parties may settle a suit for dissolution of a marriage. *See, e.g.*, TEX. FAM. CODE ANN. §§ 6.601–.604 (West 2006). One such procedure is mediation. *See id.* § 6.602. A mediated settlement agreement is binding under section 6.602 of the Family Code if the agreement:

> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
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> (2) is signed by each party to the agreement; and
>
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

Id. § 6.602(b).

Settlement agreements complying with section 6.602 are immediately enforceable, not subject to repudiation by a party, and, with certain limited exceptions, binding on the trial court without approval or determination of whether

the agreement's terms are just and right. *See In re Joyner*, 196 S.W.3d 883, 889 (Tex. App.—Texarkana 2006, orig. proceeding); *Cayan v. Cayan*, 38 S.W.3d 161, 164–66 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237, 242 (Tex. App.—Austin 2007, pet. denied) (noting that when MSA meets section 6.602's requirements, "it must be enforced in the absence of allegations that the agreement calls for the performance of an illegal act or that it was 'procured by fraud, duress, coercion, or other dishonest means.'") (quoting *Boyd v. Boyd*, 67 S.W.3d 398, 403 (Tex. App.—Fort Worth 2002, no pet.). "After all, the purpose of mediation is to let parties settle their property as they see fit, keeping those matters out of the courtroom." *Joyner*, 196 S.W.3d at 889. A trial court has no authority to enter a judgment that varies from the terms of a mediated settlement agreement. *Cf. Garcia-Udall v. Udall*, 141 S.W.3d 323, 332 (Tex. App.—Dallas 2004, no pet.) (concluding that trial court abused its discretion under TEX. FAM. CODE ANN. § 153.0071 (West 2002) by entering judgment not conforming with MSA in suit affecting parent-child relationship).

Neither Jill nor Billy Joe disputes that the MSA here meets the requirements of section 6.602. Likewise, they do not dispute that the MSA is enforceable; there is no allegation that the agreement requires the performance of an illegal act or was procured by fraud, duress, or coercion. Rather, the parties' only dispute is with

respect to the meaning of that part of the MSA dividing Billy Joe's "future retirement disbursements" equally and whether future distributions from Billy Joe's ESOP are included within its scope.

Ordinarily, if the terms of the MSA could be given a certain or definite meaning, we would construe the agreement as a matter of law to determine whether Jill's or Billy Joe's construction is correct. *See Garcia-Udall*, 141 S.W.3d at 328. But, this case presents a unique circumstance in that the parties agreed in the MSA to submit "(a) all drafting disputes[,] (b) all issues regarding the interpretation of [the MSA,] and (c) all issues regarding the intent of the parties as reflected in the [MSA]" to the mediator and to make his decision on these matters binding. Thus, by their agreement, Jill and Billy Joe removed the resolution of their dispute from the province of the courts and assigned that responsibility to the mediator. Absent some allegation that the MSA requires an illegal act or was procured by fraud, duress, coercion, or other dishonesty, the trial court was obligated to enforce their agreement. *See id.* at 332; *Spiegel*, 228 S.W.3d at 242.

We reject Billy Joe's contention that the mediator's "flip-flopping" somehow nullifies his decision regarding the parties' intended division of Billy Joe's "future retirement disbursements." Billy Joe has offered no reason why a mediator should not have the same discretion afforded trial courts to reconsider a ruling. *See generally Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993)

(noting that trial court has power to set aside interlocutory orders at any time before a final judgment is entered). The record we have of the parties' dispute before the mediator is limited, consisting only of the MSA, counsels' representations at the hearing on the entry of judgment, and the three letters issued by the mediator. We will not speculate about the reasons for the mediator's reconsideration of his initial determination nor the arguments presented to him by the parties. We note only that the mediator acknowledged the parties' continuing dispute and professed an understanding of their "concerns and the practical effect that certain language may or may not have" in his third letter. We conclude that letter, being the last of the mediator's communications, constitutes the final expression of his decision with respect to the division of Billy Joe's "future retirement benefits."

The mediator suggested this division of the "future disbursements":

> H-5 Save and except for that portion awarded to Billy Joe Moore in item H-4, fifty percent (50.00%) of all future retirement disbursements arising out of Billy Joe Moore's employment with ISI Specialist, Inc. and/or Brand Industrial, whether from retirement or participation in the employee stock ownership.
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> …
>
> W-6 Save and except for that portion awarded to Billy Joe Moore in item H-4, fifty percent (50.00%) of all future retirement disbursements arising out of Billy Joe Moore's employment with ISI Specialist, Inc. and/or Brand Industrial, whether from retirement or participation in the employee stock ownership

> plan, and more particularly defined in a Qualified Domestic Relations Order to be entered by this Court.

The trial court's departure from the suggested language is not insignificant. By entering a divorce decree that awards Jill only fifty percent of Billy Joe's "future retirement disbursements from ISI Specialist, Inc. and/or Brand Industrial arising out of Billy Joe Moore's employment," the trial court deprived Jill of her right to fifty percent of all "future retirement disbursements . . . [from Billy Joe's] participation in the employee stock ownership plan," which is a right the mediator finally determined the parties intended her to have as a part of the MSA. The entry of a divorce decree like this one, which varies from the terms of the MSA, is inconsistent with the public policy favoring the resolution of disputes outside of our courthouses in the manner the parties see fit.

To defend the trial court's judgment, Billy Joe argues that the language suggested by the mediator in his third letter is technically incorrect because the ESOP is not a retirement plan and is not community property. But, we cannot pass upon the character of Billy Joe's ESOP because we have no record of the plan's terms or the history of his participation in it. The mediator, in contrast, was the decision-maker with whom the parties presumably discussed the character and division of their property. Even if the future dividends paid under the ESOP are properly characterized as Billy Joe's separate property, the parties certainly may agree to divide their property in a manner different than a court might divide it.

See Cayan, 38 S.W.3d at 166 ("[T]he prohibition against divesting a spouse of separate property applies only to judicial, *i.e.*, unagreed, divestitures and does not restrict the parties from dividing separate property by agreement.").

Although the trial court merely sought to give effect to the parties' true intent in its divorce decree, as the trial court understood that intent, the trial court erred in dividing the future disbursements from Billy Joe's ESOP in a manner other than that provided by the mediator. *See Garcia-Udall*, 141 S.W.3d at 332; *see also* TEX. FAM. CODE ANN. § 6.602(c); *Reza v. Reza*, No. 02-07-00371-CV, 2008 WL 4445619, at *1 (Tex. App.—Fort Worth Oct. 2, 2008, no pet.) (holding that court abused discretion by dividing property not mentioned in the MSA).

Accordingly, we sustain Jill's sole issue.

Necessity of Findings of Fact and Conclusions of Law

Billy Joe contends that because Jill did not request, and the trial court did not file, findings of fact and conclusions of law explaining the trial court's reasons for departing from the division of property set forth in the mediator's third letter, Jill has waived any error.[1] We disagree. In each of the family law cases cited by Billy

[1] Billy Joe relies on section 6.711(a) of the Family Code, which provides:

> (a) In a suit for dissolution of a marriage in which the court has rendered a judgment dividing the estate of the parties, on request by a party, the court shall state in writing its findings of fact and conclusions of law concerning:

Joe the trial court heard evidence and made a determination based on that evidence, and, when the appellant failed to request findings of fact and conclusions of law, the appellate court concluded the scope of its review was limited. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (concluding that trial court impliedly made all findings necessary to support its order modifying child support obligations); *Smith v. Smith*, 22 S.W.3d 140, 150 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (same with respect to trial court's division of community property); *Frommer v. Frommer*, 981 S.W.2d 811, 813 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd) (same). These authorities do not necessitate a request for findings of fact and conclusions of law in this case. The parties here agreed to the division of their marital estate in a binding MSA pursuant to section 6.602. *See* TEX. FAM. CODE ANN. § 6.602. They did not leave that matter to the trial court's discretion. Consequently, they did not present any evidence to the trial court as to the character or value of their property, and the trial court was required to render judgment on the MSA. *See Cayan*, 38 S.W.3d at 166–67. Under the circumstances of this case, the absence of any findings of fact or conclusions of

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> (1) the characterization of each party's assets, liabilities, claims, and offsets on which disputed evidence has been presented; and
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> (2) the value or amount of the community estate's assets, liabilities, claims, and offsets on which disputed evidence has been presented.

TEX. FAM. CODE ANN. § 6.711(a) (West 2006).

law does not preclude Jill's complaint that she was entitled to judgment on the MSA and the trial court failed to correctly enter that judgment.

Conclusion

We reverse the trial court's final decree of divorce with respect to the division of the future disbursements from Billy Joe's ESOP in items H-5 and W-6. In accordance with the mediator's third ruling, we reform the judgment to include this language for items H-5 and W-6:

> H-5 Save and except for that portion awarded to Billy Joe Moore in item H-4, fifty percent (50.00%) of all future retirement disbursements arising out of Billy Joe Moore's employment with ISI Specialist, Inc. and/or Brand Industrial, whether from retirement or participation in the employee stock ownership plan.
>
> W-6 Save and except for that portion awarded to Billy Joe Moore in item H-4, fifty percent (50.00%) of all future retirement disbursements arising out of Billy Joe Moore's employment with ISI Specialist, Inc. and/or Brand Industrial, whether from retirement or participation in the employee stock ownership plan, and more particularly defined in a Qualified Domestic Relations Order to be entered by this Court.

We affirm the trial court's final decree of divorce in all other respects.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.