Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

MEMORANDUM OPINION

No. 04-11-00700-CV

Andrew Darrell **BYRD**, Sr.,
Appellant

v.

Lillian Tonette **BYRD**,
Appellee

From the 407th Judicial District Court, Bexar County, Texas
Trial Court No. 2009-CI-12747
Honorable Victor Hugo Negron, Jr., Judge Presiding

Opinion by: Phylis J. Speedlin, Justice

Sitting: Catherine Stone, Chief Justice
Phylis J. Speedlin, Justice
Steven C. Hilbig, Justice

Delivered and Filed: June 27, 2012

MODIFIED; AFFIRMED AS MODIFIED

Andrew D. Byrd, Sr. challenges the division of his military retirement benefits within the domestic relations order rendered by the trial court, arguing that the order exceeds the scope of the parties' mediated settlement agreement. We modify the domestic relations order in accordance with the parties' mediated settlement agreement, and as modified, affirm the judgment of the trial court.

BACKGROUND

Andrew and Lillian Byrd married in 1989 and ceased living together in 2009, when Andrew filed for divorce. Andrew and Lillian mediated the division of their community assets and obligations, and signed a mediated settlement agreement (MSA) on or about June 24, 2010.[1] The MSA was approved by the trial court[2] on June 28, 2010. The parties agreed to defer entry of the divorce decree until after May 5, 2011 so that Lillian could obtain the benefit of Andrew's twenty years of active duty military service for the purpose of obtaining military medical benefits; the parties also agreed that all property would be divided "as of today's date," i.e., June 24, 2010. In the MSA, which was signed by the parties and their attorneys, Andrew and Lillian further agreed that the "fine points" regarding Lillian's share of Andrew's military retirement would be worked out by attorneys Jim Higdon and Gary Beahm, "and if they can't agree, present to court." On the attached inventory worksheet providing for the division of community assets, in the section titled "Retirement," was a column titled "Military – Army O-3E." This asset was to be divided 50/50 by Andrew and Lillian "as of 6/24/10."

A year later, on May 6, 2011, the trial court[3] rendered a final decree of divorce. In the decree, the court found that the parties had entered into a MSA. Lillian was awarded a portion of Andrew's retirement pay "as described in a separate Domestic Relations Order . . . filed with [the] Court and . . . incorporated herein for all purposes." On July 13, 2011, the trial court signed a "Domestic Relations Order (Military Retirement) of Service Member Andrew Byrd" (DRO). The DRO awarded Lillian military retirement pay calculated as follows:

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[1] Although Lillian signed and dated the MSA June 25, 2010, the mediator used the date June 24, 2010; the discrepancy between the two dates, however, is not problematic for purposes of this appeal.

[2] The Honorable Janet Littlejohn, presiding judge of the 150th Judicial District Court, Bexar County, Texas, signed the mediated settlement agreement.

[3] The Honorable Richard Price, presiding judge of the 285th Judicial District Court, Bexar County, Texas, signed the final decree of divorce.

> 24.05% times the High-36 month retired pay of an O-4 with 19 years 2 months of creditable service towards retirement, determined on the date of SERVICE MEMBER'S retirement from the U.S. Armed Forces.

Previous to the entry of the DRO, a hearing was held on May 6, 2011 pertaining to the provisions of the DRO. Counsel for each side presented a proposed DRO. Andrew's counsel argued that retirement benefits should be divided according to "what [Andrew] was" at the time the MSA was signed. "I realize that everybody is arguing that he's an O4, but if he had retired on that date of divorce on that particular date, he would have retired as an O3 E." Counsel later stated that his client was "willing to leave that as an O4." Counsel for Lillian also spent a great deal of time arguing that benefits should be calculated at the date of Andrew's retirement, but limited to that of an O-4 with 19 years 2 months, so that she could obtain active duty cost of living allowances; Andrew's attorney disagreed, and argued that pursuant to the MSA, benefits should be calculated as of June 24, 2010. At the conclusion of the hearing, Andrew's counsel stated, "We're conceding that he's an O4 as opposed to an O3." The trial court took the matter under advisement, and ultimately signed the DRO proposed by Lillian's attorney on July 13, 2011.

Thereafter, Andrew filed a motion to reform the DRO, arguing that the trial court erred in granting Lillian retirement pay calculated on the date of Andrew's retirement, and not as of the date the MSA was signed. Andrew additionally argued that the trial court erred in granting Lillian benefits of an O-4 (major) when her benefits should have been limited to Andrew's rank as it existed on June 25, 2010, which was O-3 (captain). The trial court held a hearing on the motion to reform. The motion was subsequently denied.[4] Andrew now appeals, raising five issues in which he essentially argues that the trial court erred in rendering a DRO that is

[4] The Honorable Martha Tanner, presiding judge of the 166th Judicial District Court, Bexar County, Texas, signed the order denying the motion to reform the domestic relations order.

inconsistent with the parties' MSA because (1) Andrew held the rank of O-3, not O-4, at the time the MSA was signed and (2) retirement benefits should be calculated from the date of the MSA, not from the date Andrew retires from the military.

STANDARD OF REVIEW

Like most appealable issues in a family law case, we review the trial court's rendering of a domestic relations order pursuant to a mediated settlement agreement under an abuse of discretion standard. *See Garcia v. Garcia*, 170 S.W.3d 644, 648 (Tex. App.—El Paso 2005, no pet.); *Garcia-Udall v. Udall*, 141 S.W.3d 323, 331-32 (Tex. App.—Dallas 2004, no pet.) (trial court has no discretion to vary from terms of mediated settlement agreement). The test for an abuse of discretion is whether the trial court acted without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

DISCUSSION

Applicable Law

Under section 6.602 of the Family Code, a mediated settlement agreement is binding on the parties 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;
> (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.

TEX. FAM. CODE ANN. § 6.602(b) (West 2006). Here, the record reflects that the MSA meets these three requirements. Moreover, neither Andrew nor Lillian argues that the MSA did not meet these requirements, or that section 6.602 is inapplicable.

A mediated settlement agreement that meets the requirements of section 6.602(b) is binding, and "a party is entitled to judgment on the mediated settlement agreement

notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." *Id*. § 6.602(c); *Milner v. Milner*, 361 S.W.3d 615, 618 (Tex. 2012). Unlike other settlement agreements in family law, the trial court is not required to determine if the property division is "just and right" before approving a mediated settlement agreement. *Milner*, 361 S.W.3d at 618 (citing *In re Marriage of Joyner*, 196 S.W.3d 883, 889, 891 (Tex. App.—Texarkana 2006, pet. denied)). A mediated settlement agreement 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. *See Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237, 242 (Tex. App.—Austin 2007, pet. denied). While a trial court in these circumstances has authority not to enforce the mediated settlement agreement, it has no authority to sign a judgment that varies from the terms of the mediated settlement agreement. *Udall*, 141 S.W.3d at 331-32.

Analysis

Andrew argues that the trial court had no authority to sign a DRO awarding Lillian military retirement benefits inconsistent with those she agreed upon in the MSA. Andrew contends that although he had attained the rank of major at the time the MSA was signed, Lillian agreed to accept the retirement benefits of an O-3 predicated on 19 years 2 months of service by Andrew because he did not yet have the requisite three years as a major for retirement purposes. He argues there was ample consideration between the parties for this agreement, as well as the agreement that Andrew would pay Lillian $1300 a month in spousal support and wait to enter the divorce decree so that Lillian could attain the benefits of a 20/20/20 spouse. In the absence of an allegation of fraud, accident, coercion, or mistake—none of which are alleged here—Andrew maintains the trial court must sign a judgment conforming to the MSA.

Lillian does not argue that the DRO follows the MSA, but instead asserts that Andrew's counsel stipulated or conceded that Andrew was an O-4 at the hearing on May 6, 2011. "A stipulation is an agreement, admission, or concession made in a judicial proceeding by the parties." *Hansen v. Academy Corp.*, 961 S.W.2d 329, 336 (Tex. App.—Houston [1st Dist.] 1997, writ denied); *Federal Lanes, Inc. v. City of Houston*, 905 S.W.2d 686, 689 (Tex. App.—Houston [1st Dist.] 1995, writ denied). A stipulation constitutes a binding contract between the parties and the court. *Federal Lanes*, 905 S.W.2d at 689.

We disagree that any stipulation made by Andrew's counsel had the effect of altering the terms of the MSA, which the trial court was bound to render judgment on pursuant to section 6.602 of the Family Code as well as the Supreme Court's recent decision in *Milner*. *See* TEX. FAM. CODE ANN. § 6.602; *Milner*, 361 S.W.3d at 618. Further, Lillian does not cite to any authority standing for the proposition that a party may stipulate to a different term than that agreed to by the parties in a binding mediated settlement agreement. In fact, once signed, there is nothing the parties can do to void or modify the agreement. *See Joyner*, 196 S.W.3d at 889-90; *Cayan v. Cayan*, 38 S.W.3d 161, 165 (Tex. App.—Houston [14th Dist.] 2000, pet denied). Absent a finding that the agreement was illegal or violated public policy, the trial court thus had no discretion to render a judgment that varied from the terms of the MSA. We therefore sustain Andrew's first three issues.

Andrew next argues the trial court erred in awarding the High-36 month average retired pay of an O-4 determined on the date of his retirement from the U.S. Armed Forces. Andrew contends that retirement benefits must be calculated from the date of the signing of the MSA. *See Marshall v. Priess*, 99 S.W.3d 150, 158-59 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Otherwise, Andrew contends he would be divested of his separate property in contravention of

Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983) (pension benefits accruing for services rendered after a divorce are not part of the parties' community estate subject to a just and right division).

Lillian responds that by calculating benefits at the time of Andrew's retirement, she will get active duty cost of living allowances to which she is entitled. Although Lillian cites cases concerning the division of military retirement, none of them involve a mediated settlement agreement. Thus, regardless of whether the benefits should be calculated at the time of divorce or at retirement, we must focus on what the parties agreed to in the MSA. Here, the MSA clearly reads that military retirement is to be calculated "as of 6/24/10." Even though Lillian now argues that this is an inequitable division of community property, the terms of an agreement made pursuant to section 6.602 are not required to be "just and right." *See Joyner*, 196 S.W.3d at 889 (noting that the purpose of mediation is to let the parties settle their property as they see fit). Because the MSA clearly dictated that the military retirement would be divided 50/50 as of June 24, 2010, the trial court had no authority to render a judgment that varied from the terms of the MSA. *Id*. at 890-91. Accordingly, we sustain Andrew's fourth issue, and modify the judgment of the trial court to reflect that military retirement benefits be calculated as of the date the MSA was signed. It is not necessary to reach Andrew's fifth issue. *See* TEX. R. APP. P. 47.1, 47.4.

CONCLUSION

Based on the foregoing, we modify the judgment of the trial court to reflect that Andrew's rank was classified as an O-3 as of the date the MSA was signed by the parties and that Lillian's community interest in Andrew's military retirement be calculated as follows:

> 24.05% times the High-36 month pay of an O-3 with 19 years 2 months of creditable service towards retirement, determined as of the date of June 25, 2010 to be paid on SERVICE MEMBER'S retirement from the U.S. Armed Forces.

As modified, the judgment of the trial court is affirmed.

Phylis J. Speedlin, Justice