



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00326-CV

Carl Gregory **HUBER**,
Appellant/Cross-Appellee,

v.

Beatrice Norma **HUBER**,
Appellee/Cross-Appellant

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2012-CI-19061
Honorable Michael E. Mery, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: April 18, 2018

AFFIRMED

Carl Gregory Huber (“Carl”) appeals a Final Decree of Divorce and contends the trial court erred by entering a decree that does not strictly comply with the terms of the parties’ Informal Settlement Agreement. Beatrice Norma Huber (“Beatrice”) cross-appeals the portion of the decree denying her claim for attorney’s fees. We affirm the trial court’s judgment.

BACKGROUND

Carl and Beatrice Huber filed cross-petitions for divorce. At the time the divorce petitions were filed, Carl and Beatrice owned several parcels of real property, including two parcels of

Beatrice's family ranch. Beatrice owned the first parcel as her separate property. During their marriage, Carl and Beatrice purchased the second parcel from Beatrice's brother and financed the purchase by taking a loan secured by Beatrice's separate property parcel. While the divorce was pending, Carl and Beatrice took a second loan secured by Beatrice's separate property parcel and used the funds to pay divorce attorney's fees.

After several years of litigation, Carl and Beatrice entered into an "Informal Settlement Agreement" in which they agreed to divorce and divide their property. The Informal Settlement Agreement awards Carl the family homestead and awards Beatrice both parcels of her family ranch. The agreement provides that Carl is "to pay and indemnify and hold [Beatrice] and [Beatrice's] property harmless from the payment of the" two loans secured by her separate property parcel of the ranch.

In Paragraph 2 of the Informal Settlement Agreement, the parties agreed to waive their right to appeal:

2. The making of a record of testimony was waived by the parties with the consent of the Court. The parties waive their right to file and/or prosecute a motion for a new trial or appeal, unless there is evidence of extrinsic fraud.

In Paragraph 15, the parties again waived their right to appeal and agreed to submit any disputes regarding the language to be used in the final decree to the trial court:

15. Any disputes regarding the content and language to be contained in the FINAL DECREE OF DIVORCE, and any other Orders to be entered by the Court herein, together with all Closing Documents, pursuant to the terms of this Informal Settlement Agreement, shall be submitted to the HONORABLE MICHAEL MERY. . . . Both parties waive appeal.

(emphases in original). The phrase "Both parties waive appeal" in Paragraph 15 is a handwritten insertion initialed by both Carl and Beatrice.

The parties notified the Honorable Michael Mery (hereinafter, the "trial court") that they had entered into the Informal Settlement Agreement, and the trial court rendered the parties

divorced on the record. Beatrice subsequently filed a motion asking the trial court to sign a final decree, and Carl filed a motion asking the trial court to “clarify the provision in the settlement agreement regarding [Carl’s] obligation to pay debt on real estate awarded to [Beatrice] should [Beatrice] sell the property to a third party.” Carl claimed he expected Beatrice would sell the property and argued his obligation on the debt should be discharged when she did so.

The trial court held a hearing on both parties’ motions. After hearing arguments from counsel, the trial court ruled on the record that the Informal Settlement Agreement does not provide that Carl’s obligation to pay the loans will be extinguished upon sale of the property. Counsel and the trial court then discussed the mechanism in the final decree to enforce Carl’s obligation to pay the loans. Carl’s counsel stated:

[I]f the Court is going to rule that there’s an owelty lien¹ or something to that effect, you know, I guess we can live with that. [Carl’s] concern is that there is going to be—in the language of the decree, basically he has a judgment against him for this debt. I don’t think there’s anything in here that says there’s a judgment.

After another hearing, the trial court signed the Final Decree of Divorce (the “Final Decree”), which imposes an owelty lien against the homestead property awarded to Carl “to secure the payment of the debt resulting from the award.” The trial court explained the owelty lien is “nothing but an enforcement mechanism.”

Carl did not sign the Final Decree, and Beatrice filed a motion to compel him to do so. At the hearing on Beatrice’s motion, Carl’s counsel explained that Carl had two objections to the Final Decree: (1) inclusion of the owelty lien, and (2) the division of household items in Exhibit 9 to the Final Decree. After hearing arguments from counsel, the trial court ordered Carl to sign the Final Decree.

¹ “An owelty lien is analogous to a vendor’s lien creating an encumbrance which follows the land upon sale and is otherwise enforceable by sale if not paid within a specific time.” 1 W. MIKE BAGGETT & BRIAN THOMPSON MORRIS, TEX. PRACTICE GUIDE: REAL ESTATE LITIGATION § 3:61.

DISCUSSION

The parties dispute whether, by signing the Informal Settlement Agreement, each waived their right to appeal from the Final Decree. To resolve this dispute, we must construe the Informal Settlement Agreement.

A. Standard of review

When construing a settlement agreement in the divorce context, we apply general contract construction principles. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). Our primary concern is to ascertain the parties' true intentions as expressed in the written agreement. *Id.* We examine the entire writing in an effort to harmonize and give effect to all the provisions so that none are rendered meaningless. *Id.* If the agreement can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and we will construe it as a matter of law. *Id.* An agreement is ambiguous only where its meaning is uncertain and doubtful or where it is reasonably susceptible to more than one meaning. *Id.* Whether an agreement is ambiguous is a question of law. *Id.* at 394.

B. Carl waived his right to appeal from the Final Decree.

While the parties agree the Informal Settlement Agreement is unambiguous, they dispute whether the appellate waiver provisions apply to Carl's present appeal. Carl argues the waiver does not apply here because (1) there is a "gross mistake" in the Final Decree, and (2) the Final Decree is not in "strict compliance" with the Informal Settlement Agreement. Specifically, Carl argues the Final Decree materially varies from the Informal Settlement Agreement because it imposes an owlty lien on property awarded to Carl and because the parties did not agree to the division of household items in Exhibit 9 to the Final Decree. Beatrice argues Carl waived his appellate rights.

1. *“Gross mistake” is inapplicable here.*

First, we reject Carl’s argument that the waiver provision does not apply where there is a “gross mistake” in the Final Decree. The Informal Settlement Agreement does not carve out an exception for “gross mistake.” Paragraph 2 provides the parties waive their right to appeal “unless there is evidence of extrinsic fraud.” Paragraph 15 is even less limited, stating only: “Both parties waive appeal.”

Carl does not allege any extrinsic fraud. Instead, Carl relies on our decision in *Barsness v. Scott*, 126 S.W.3d 232 (Tex. App.—San Antonio 2003, pet. denied) in support of his “gross mistake” argument. As Carl concedes, however, our opinion in *Barsness* was limited to the arbitration context. A “gross mistake” in an arbitration award “implies bad faith and/or failure to exercise honest judgment on the part of an arbitrator” and results in a decision that is “arbitrary or capricious.” *Xtria L.L.C. v. Int’l Ins. Alliance Inc.*, 286 S.W.3d 583, 598 (Tex. App.—Texarkana 2009, pet. denied). Even if this concept were applicable here, and we believe it is not, Carl does not cite any evidence in the record suggesting there was a gross mistake.

2. *The Final Decree strictly complies with the Informal Settlement Agreement.*

Second, for the same reason, we disagree that the waiver provision only applies if the Final Decree is in “strict compliance” with the Informal Settlement Agreement. Neither Paragraph 2 nor Paragraph 15 contains such a limitation. Regardless, for the reasons that follow, we hold the Final Decree strictly complies with the Informal Settlement Agreement because it does not vary the material terms of that agreement.

So long as the final decree of divorce does not vary the material terms of an agreed property division, the trial court may supply terms necessary to implement and effectuate that agreed division. *Davis v. Davis*, No. 01-12-00701-CV, 2014 WL 890899, at *8–9 (Tex. App.—Houston [1st Dist.] Mar. 6, 2014, no pet.) (mem. op.); *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.—

Dallas 2006, no pet.); *see also In re Lee*, 411 S.W.3d 445, 458 n.17 (Tex. 2013) (holding “to the extent there is no dispute about the parties’ intent, the trial court has discretion to provide clarification of this or any other provision” of a settlement agreement).

For instance, in *Haynes v. Haynes*, 180 S.W.3d 927 (Tex. App.—Dallas 2006, no pet.), the parties agreed husband’s non-transferable employee stock options would be divided sixty percent to wife and forty percent to husband. *Id.* at 929. While the settlement agreement was silent on the method of division, the final decree contained detailed procedures for the exercise and division of the stock options and made husband constructive trustee for the options awarded to wife. *Id.* On appeal, husband contended he never agreed to the specific terms of the decree regarding the stock options, including the constructive trust, and argued the trial court lacked authority to enter a judgment that varied from the terms of the settlement agreement. *Id.* Our sister court held the “divorce decree’s provisions implementing and effectuating the agreed division of the options do not vary the terms of the mediated settlement agreement; rather, they carry those terms into effect.” *Id.* at 930. Because the decree was consistent with the parties’ intent to divide the stock options 60-40, the court held the decree strictly complied with the settlement agreement. *Id.*

Similarly, here, Carl argues the Final Decree supplies a term not agreed to by the parties—the provision for an owelty lien on the homestead property. But there is no dispute that Carl and Beatrice intended Carl would “pay and indemnify and hold [Beatrice] and [Beatrice’s] property harmless from the payment of the” two loans secured by her separate property. The provision for the owelty lien does not change either the division of the assets or the division of the debts, but rather merely implements and effectuates the parties’ agreement. As the trial court noted, “[i]t’s nothing but an enforcement mechanism.” Importantly, Carl’s attorney stated on the record that “we can live with” an owelty lien to secure payment of the loans so long as no judgment was

entered against Carl on the indebtedness, which the trial court recognized could put Carl in default on other loans related to his business.

3. *The Informal Settlement Agreement permitted the trial court to resolve the parties' disputes regarding content and language to be contained in the Final Decree.*

To the extent there was a dispute regarding whether Carl agreed to pay off the loans, the trial court's resolution of that dispute is binding on the parties. Parties to a settlement agreement can agree to submit disputes regarding the language to be included in the final judgment to the trial court or a third party. *See Hilms v. Hilms*, No. 04-07-00631-CV, 2008 WL 859218, at *2 (Tex. App.—San Antonio Apr. 2, 2008, no pet.) (mem. op.). In *Hilms*, for instance, we held husband waived his right to complain that the final decree of divorce varied from a mediated settlement agreement where the parties had agreed to submit disputes regarding the form and substance of the divorce decree to arbitration and did so. *Id.*

Similarly, here, Carl and Beatrice agreed in the Informal Settlement Agreement that “[a]ny disputes regarding the content and language to be contained” in the Final Decree would be submitted to the Honorable Michael Mery (the trial court). Carl filed a motion seeking clarity on the precise question of whether the Informal Settlement Agreement requires him to extinguish (as opposed to service) the loans, and the trial court heard arguments from both parties before ruling that it does. The trial court also resolved the parties' disputes regarding whether to include an owelty lien provision and regarding the division of personal property. The trial court held multiple hearings and heard from both parties' counsel. Carl's counsel ultimately consented to the owelty lien provision, stating: “I guess we can live with that.”

Regarding the division of personal property, Exhibit 9 to the Final Decree of Divorce lists “Property to Bea Huber,” but Carl's briefs do not make it clear how he disputes the division. The “Huber Community Estate” addendum to the Informal Settlement Agreement provides, in part:

“Household contents and items in storage to be divided by agreement or arbitration without attorneys.” At the final hearing prior to entry of the Final Decree, Carl’s counsel suggested the parties either had reached or were in the process of reaching an agreement regarding the division of personal property, and neither Carl nor Beatrice sought to compel arbitration. While it is apparent the parties did not reach an agreement either on their own or by arbitration without attorneys, the inclusion of Exhibit 9 to the Final Decree reflects that the trial court resolved this dispute as well.

Accordingly, we hold Carl waived his right to appeal from the Final Decree, and his issues are overruled.

C. Beatrice also waived her right to appeal from the Final Decree.

In the sole issue she raises in her cross-appeal, Beatrice argues we should reverse the portion of the Final Decree denying recovery of her trial attorney’s fees and remand her claim for appellate attorney’s fees in the interest of justice.

Beatrice requested her trial and appellate attorney’s fees, and the trial court denied both requests in the Final Decree. The Informal Settlement Agreement does not address the award of attorney’s fees, but it does provide that “[a]ll relief requested but not specifically granted herein is DENIED.” (emphasis in original). Just as Carl did, Beatrice agreed the trial court would resolve any disputes regarding the language to be contained in the Final Decree and waived her right to appeal from the trial court’s decision. In addition, Beatrice voluntarily signed the Final Decree, which denies her request for fees, and moved for Carl to sign as well.

Accordingly, we hold Beatrice waived her right to appeal from the Final Decree, and her issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patricia O. Alvarez, Justice