In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00407-CV

MEREDITH KATHRYN HIGHSMITH, APPELLANT

V.

CHARLES ROBERT HIGHSMITH, APPELLEE

On Appeal from the 126th District Court
Travis County, Texas
Trial Court No. D-1-FM-15-001072; Honorable Amy Clark Meachum, Presiding

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September 28, 2017

MEMORANDUM OPINION

Before CAMPBELL, PIRTLE and PARKER, JJ.

Appellant, Meredith Kathryn Highsmith, appeals from a *Final Decree of Divorce* ending her marriage to Appellee, Charles Robert Highsmith. In support, she asserts the trial court erred by (1) rendering judgment at a hearing without giving her or her attorney proper notice, (2) rendering judgment in contravention of the express terms of a settlement agreement relied on by Charles to support the rendition of a judgment at the hearing, and (3) denying Meredith the opportunity to revoke her consent to the

settlement agreement prior to judgment.[1] We reverse the trial court's *Final Decree* and remand this cause for a new trial.

BACKGROUND

Meredith and Charles were married in February 2004. In October 2006, two children were born to the marriage. In February 2015, marital discord led to third-party directed dispute settlement negotiations. These negotiations resulted in a pre-petition settlement agreement entitled by the parties as a "MEDIATED SETTLEMENT AGREEMENT," wherein the couple sought to "settle all claims and controversies between them, asserted and assertable. . . ." The agreement provided for a division of personal/real property and a parenting plan. The agreement also provided that Meredith would appear in court "to present evidence and secure rendition of judgment in accordance with the agreement." Paragraph 18 of the agreement entitled, "THIS AGREEMENT IS NOT SUBJECT TO REVOCATION," curiously provided that "all mediators and lawyers *and parties* are qualified and not conflicted in any way." (Emphasis added).

An attachment to the agreement entitled Exhibit "A," also stated that the agreement was "FINAL AND NON-REVOCABLE." Under a section entitled "PROPERTY," Exhibit "A" further stated that Charles would be awarded the marital home although both parties would have the right to stay there during the pendency of the divorce "which will be filed by [Meredith] within 10 days of this agreement and which will be finalized not before May 1, 2015 but may be finalized at any time thereafter. . . ."

[1] Originally appealed to the Third Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Third Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

Under a subsequent section entitled "REAL PROPERTY," Exhibit "A" provided that "[Charles] shall be awarded the marital property located at 6507 Ladera Norte . . . UPON FINALIZATION IF FINALIZED AS ABOVE." The agreement was executed February 11, 2015.[2]

On February 20, 2015, Charles filed his *Original Petition for Divorce* and the same day, filed the agreement. On February 27, 2015, Meredith filed a waiver of service of citation. The waiver did not include either a waiver of notice of hearing or the making of a record of testimony. Thereafter, on March 30, 2015, her attorney, J. Scott Milner, filed an *Original Answer* on Meredith's behalf. On May 1, 2015, without notice of hearing to either Meredith or her attorney of record, Charles appeared before the trial court and was granted a divorce premised on the terms of their agreement.

On May 20, 2015, through new counsel, Rachel Moyle, Meredith filed her *Motion to Set Aside or Revoke Mediated Settlement Agreement.* On May 21, 2015, through Moyle, Meredith filed her *Motion to Set Aside Judgment, and in Alternative Motion for New Trial.* At a hearing on these motions, Meredith's undisputed testimony was that she did not receive notice of the May 1 hearing. In its order issued May 29, the trial court held that the settlement agreement was enforceable pursuant to "Subchapter G, Chapter 6 of the Texas Family Code and Chapter 154 of the Civil Practice and Remedies Code," and in its order of June 15, 2015, the trial court determined that her motion for new trial was "premature given that no judgment ha[d] yet been signed. . . ."

[2] Neither Charles nor Meredith were represented by counsel during the negotiation process. Instead, the agreement stated: "Both parties are Pro Se and are hiring Missy Hurtado as paralegal from Rippy & Taylor, PC to guide them through the required forms but either may hire a lawyer at any time *of course* and agree to the following if they do: . . . (3) Court Costs will be paid by [Meredith] who will also prove up the divorce if she remains pro se." (Emphasis added). Exhibit "A" to the agreement also provided that "Missy Hurtado, paralegal at Rippy & Taylor, PC will be hired by the parties for $500 per document PAID BY [MEREDITH] to guide the parties thought [sic] the forms needed to finalize the case."

Thereafter, on July 2, 2015, the trial court signed a *Final Decree* reciting that, on May 1, 2015, it had "reviewed, approved, and rendered judgment on the parties' Mediated Settlement Agreement." Although not waived by the settlement agreement, the waiver of service of citation, or the agreement of counsel, the *Final Decree* stated that the making of a record of testimony was "waived by the parties with the consent of the Court."

On appeal, Meredith asserts the trial court erred by (1) rendering judgment at the May 1 hearing without giving her proper notice pursuant to Rule 245 of the Texas Rules of Civil Procedure; *see* TEX. R. CIV. P. 245, (2) rendering judgment in contravention of the express terms of the agreement relied on by Charles to support the rendition of a judgment at the May 1 hearing, and (3) denying Meredith the right to revoke her consent to the "Mediated Settlement Agreement" relied on by the trial court to render its judgment when the agreement failed to comply with section 6.602 of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 6.602 (West 2006). Logic dictates that we initially address Meredith's third issue before we move on to address her first and second issues.

ISSUE THREE—SETTLEMENT AGREEMENT

Implicit within the third issue is the question whether an agreement between two persons contemplating a divorce can comply with section 6 of the Texas Family Code if the agreement is entered into when no divorce proceedings are pending?[3] We find that such an agreement does not comply with section 6 because no suit was pending. As

[3] *See generally* TEX. FAM. CODE ANN. §§ 6.001-.802 (West 2006 and Supp. 2016).

such, if the agreement is enforceable at all, it is enforceable in the same manner (and subject to the same defenses) as any other written contract.

STANDARD OF REVIEW

We review a trial court's decision not to set aside a mediated settlement agreement for abuse of discretion. *Cojocar v. Cojocar*, No. 3-14-00422-CV, 2016 Tex. App. LEXIS 6335, at *3 (Tex. App.—Austin June 16, 2016, no pet.) (mem. op.) (citing *Triesch v. Triesch*, No. 03-15-00102-CV, 2016 Tex. App. LEXIS 2365, at *1 (Tex. App.—Austin Mar. 8, 2016, no pet.) (mem. op.)). Whether a trial court abuses its discretion is a question whether the trial court acted without reference to any guiding rules and principles, i.e., whether the act was arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985), *cert. denied*, 476 U.S. 1159, 106 S. Ct. 2279, 90 L. Ed. 2d 721 (1986).

Whether a parties' agreement complies with requirements necessary to become a mediated settlement agreement set forth in section 6 of the Texas Family Code is a question that we review *de novo*. *See Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237, 241 (Tex. App.—Austin 2007, pet. denied). Our fundamental objective in interpreting a statute is "'to determine and give effect to the Legislature's intent;'" *In re Lee*, 411 S.W.3d 445, 451 (Tex. 2013) (quoting *Am. Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012)), and "[t]he plain language of a statute is the surest guide to the Legislature's intent." *Id.* (quoting *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012)). We consider the statute as a whole rather than its isolated provisions; *Springer v. Johnson*, 280 S.W.3d 322, 326 (Tex. App.—Amarillo 2008, no pet.), and do "not give one provision a meaning out of harmony or inconsistent with

other provisions, although it might be susceptible to such a construction standing alone." *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

If a trial court grants judgment premised on, or otherwise enforces, an agreement as a mediated settlement agreement when the agreement fails to meet the requirements of section 6.602 of the Texas Family Code, the trial court abuses its discretion. *See In re Lee*, 458 S.W.3d at 458-59 (trial court abused its discretion by enforcing a mediated settlement agreement that failed to comply with section 153.0071 of the Texas Family Code).[4] The plain language of section 6.602 requires that a mediated settlement agreement in a divorce proceeding meet the requirements of section 6.602 before a party is entitled to judgment on the agreement. *See* TEX. FAM. CODE ANN. § 6.602(c) (West 2006); *Milner v. Milner*, 361 S.W.3d 615, 616 (Tex. 2012).

SETTLEMENT AGREEMENT

"The Texas Family Code provides for a mediated settlement agreement that ostensibly cannot be revoked after its execution provided certain formalities are followed." *Milner,* 361 S.W.3d at 616. *See* TEX. FAM. CODE ANN. § 6.602 (West 2006). Such an agreement is binding, and a party is entitled to rendition of a divorce decree that adopts the parties' agreement notwithstanding Rule 11 or another rule of law. *See Milner,* 361 S.W.3d at 619; *Boyd v. Boyd,* 67 S.W.3d 398, 402 (Tex. App.—Fort Worth 2002, no pet.). In relevant part, the statute provides as follows:

> (a) On the written agreement of the parties or the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.

[4] Mediated settlement agreements are binding in suits affecting the parent-child relationship, as well as suits involving only marital property. TEX. FAM. CODE ANN. §§ 153.071, 6.602 (West 2014 and 2006). The wording of sections 153.0071(c)-(e) and 6.602(a)-(c) is nearly identical. *Id.*

> (b) 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.
>
> (c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (d) A party may at any time prior to the final mediation order file a written objection to the referral of a suit for dissolution of marriage to mediation on the basis of family violence having been committed. . . .

TEX. FAM. CODE ANN. § 6.602 (West 2006).

Mediated settlement agreements that comply with section 6.602 are an exception to the general rule that a party may revoke its consent to a settlement agreement before the court renders judgment on the agreement. *Milner*, 361 S.W.3d at 618 n.2. (citing *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995)). As a general rule, after a party revokes its consent to a settlement, an agreed judgment may not be rendered thereafter, although the revoking party may be liable for breaching the settlement agreement. *Id.* (citing *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009)). *See Padilla,* 907 S.W.2d at 461-62; *Boyd*, 67 S.W.3d at 402.

The plain language of section 6.602 indicates that the Legislature's intent in enacting the statute was to provide a method of alternative dispute resolution for parties when a suit for dissolution is pending. In fact, the threshold requirement for obtaining a mediated settlement agreement is that a suit for dissolution is pending. *See* TEX. FAM.

CODE ANN. § 6.602(a) (West 2006). The statute provides that "[o]n the written agreement of the parties or on the court's own motion, the court may refer a *suit for dissolution of a marriage* to mediation." *Id.* (Emphasis added). Thus, the statute's plain language presupposes the existence of a suit for dissolution of a marriage prior to the parties engaging in mediation from which a mediated settlement agreement may result.

As a further indication of the Legislature's intent, section 6.602 was placed in "SUBCHAPTER G. ALTERNATIVE DISPUTE RESOLUTION" under "CHAPTER 6. SUIT FOR DISSOLUTION OF MARRIAGE." *See generally* TEX. FAM. CODE ANN. §§ 6.001-.802 (West 2006 and Supp. 2016). Moreover, the procedure for obtaining a mediated settlement agreement is flanked by arbitration procedures wherein a court can refer a *suit for dissolution of a marriage* to arbitration on the written agreement of the parties; *id.* at § 6.601 (emphasis added), and the procedure for obtaining an informal settlement permitting "*parties to a suit for dissolution of a marriage* [to] agree to one or more informal settlement conferences" that may result in a binding agreement if certain formalities are met. *Id.* at § 6.604 (emphasis added). Thus, in addition to the statute's plain language, its placement in the Family Code among the specific statutes related to alternative dispute resolution that plainly require a suit be pending before alternative dispute resolution is undertaken indicates that the Legislature also intended that a mediated settlement agreement be negotiated *after* a suit is filed.

Our interpretation is also supported by a similar, if not identical, provision regarding alternative dispute resolution procedures affecting the parent-child relationship. *Compare* TEX. FAM. CODE ANN. § 153.0071(c)-(e) (West 2014) *with* § 6.602(a)-(c) (West 2006). Section 153.0071 provides that "[o]n the written agreement of

the parties or on the court's own motion, the court may refer a *suit* affecting the parent-child relationship to mediation." TEX. FAM. CODE ANN. § 153.0071(c)-(e) (West 2014) (emphasis added). Interpreting this language, our sister court, the First Court Of Appeals, stated "[w]e conclude that the legislature intended that 'suits,' not 'disputes,' be subject to mandatory mediation." *Dennis v. Smith*, 962 S.W.2d 67, 74 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (holding trial court erred by ordering mediation as a prerequisite to filing a motion to modify divorce decree or judgment).

Accordingly, by finding that the parties' agreement satisfied section 6.602's formalities necessary to establish a mediated settlement agreement in the absence of a pending suit for dissolution of their marriage, the trial court abused its discretion. Section 6.602(c) requires that a mediated settlement agreement meet the requirements of the *entirety* of section 6.602—one of which is having a pending suit for dissolution at the time the mediated settlement agreement is consummated. TEX. FAM. CODE ANN. § 6.602(a)-(c) (West 2006). Meredith's third issue is sustained.

FIRST ISSUE—DUE PROCESS

In her first issue, Meredith asserts she was denied due process of law because Charles failed to give her or her attorney notice of the hearing on May 1, 2015, during which the trial court granted Charles a divorce based upon their agreement and on which the trial court subsequently premised its *Final Decree*. We agree.

Because we have already determined the trial court abused its discretion by enforcing the agreement as a mediated settlement agreement, section 6.602(c) is not applicable. *See* TEX. FAM. CODE ANN. § 6.602(c) (West 2006). That is, if the agreement is enforceable at all, it is enforceable in the same manner (and subject to the same

defenses) as any other written contract. *See Padilla*, 907 S.W.2d 454, 459-62. Accordingly, we turn to Charles's contentions that (1) Meredith's due process rights were not violated because she had ample opportunity to revoke the agreement prior to the hearing on May 1, 2015, and (2) if there was error, any error was harmless.

Rule 245 of the Texas Rules of Civil Procedure provides that a trial court "may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days of a first setting for trial, or by agreement of the parties." TEX. R. CIV. P. 245. If a timely answer has been filed in a contested case or the defendant has otherwise made an appearance, as here, due process rights are violated when a judgment is subsequently entered without the party having received notice of the setting of the case; *In re K.M.L.*, 443 S.W.3d 101, 118-19 (Tex. 2014) (citing *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 86-87, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988)), even when that party previously waived notice of citation. *Id.* at 119 (citing *Delgado v. Hernandez*, 951 S.W.2d 97, 99 (Tex. App.—Corpus Christi 1991, no writ)). A trial court's failure to comply with the notice requirements in a contested case deprives a party of his or her constitutional rights to be present at the hearing and voice his or her objections in an appropriate manner, resulting in a violation of fundamental due process. *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)).

Here, after Charles filed his *Original Petition* on February 20, 2015, Meredith filed a waiver of service that did not include waiver of notice of hearing or the making of a record of testimony and on March 20, 2015, filed her *Original Answer*. Nevertheless, on May 1, 2015, Charles appeared in court without giving notice to Meredith and was granted a divorce premised on the terms of the agreement reached between the two

parties in February 2015. Meredith subsequently filed a *Motion to Set Aside Judgment, and in Alternative Motion for New Trial* which were denied at a hearing wherein Meredith's undisputed testimony was that she did not receive notice of the hearing on May 1, 2015. Thereafter, on July 2, 2015, the trial court signed its *Final Decree* premised on the May 1 hearing reciting that, at the hearing, the trial court "reviewed, approved, and rendered judgment" on the parties' agreement.

When a party has answered in a divorce case, he or she is entitled to notice of trial pursuant to Rule 245 of the Texas Rules of Civil Procedure. *See Blanco v. Bolanos*, 20 S.W.3d 809, 811 (Tex. App.—El Paso 2000, no pet.) (citing *Turner v. Ward*, 910 S.W.2d 500, 505 (Tex. App.—El Paso 1994, no writ)). *See also Platt v. Platt*, 991 S.W.2d 481, 483 (Tex. App.—Tyler 1999, no pet.) (stating that when a defendant has filed a timely answer, she is entitled to notice of trial setting as a matter of due process). Here, Meredith filed an answer and was entitled to notice of the hearing on May 1, 2015. The failure of the trial court to comply with the rules of notice in a contested case deprived Meredith of the constitutional right to be present at the hearing, to voice her objections in an appropriate manner, and resulted in a violation of her fundamental right to due process. *See Turner*, 910 S.W.2d at 505 (finding trial court abused its discretion by not requiring a new trial when appellant had filed two motions for new trial both asserting she had no notice of the hearing at which divorce was granted, gave sworn testimony that she was not told of the hearing, and appellee did not show where appellant received notice).

Charles does not cite any legal authority for his assertion that Meredith's right to due process was not violated by the absence of notice of the May 1 hearing because she had ample time prior to the hearing to revoke her consent to the agreement. Rule

245 of the Texas Rules of Civil Procedure offers no excuse to a trial court that fails to see that all parties to a suit receive notice of a trial setting regardless of how long a party's claim or defense was capable of being asserted. Neither does Charles cite any legal authority in support of his contention that the parties' rights under the agreement somehow trump either party's right to due process. Nevertheless, Charles contends that, if there was any error, it was harmless. Meredith's fundamental right to due process was violated by the lack of notice. This court will not speculate what path the May 1 hearing might have taken had Meredith received proper notice; however, if her subsequent motions are any indication, she would have revoked the agreement. Thus, the error was not harmless. *See In re K.M.L.*, 443 S.W.3d at 505 (such error is not harmless even though "it is clear the parties would have been divorced anyway").

Accordingly, we sustain issue one, reverse the trial court's *Final Decree*, and remand for a new trial. Issue two is pretermitted. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We reverse the trial court's *Final Decree* and remand this cause for a new trial in conformance with this memorandum opinion.

Patrick A. Pirtle
Justice