

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA JO KOHL,

Plaintiff-Appellee,

v

THOMAS FREDERICK KOHL,

Defendant-Appellant.

UNPUBLISHED

May 13, 2021

No. 353686

Van Buren Circuit Court

LC No. 2019-068961-DO

Before: BOONSTRA, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right, challenging the judgment of divorce as inconsistent with the settlement agreement entered into by the parties following mediation. We affirm in part, and remand for further proceedings consistent with this opinion.

The parties had been married for over 46 years when plaintiff filed her complaint for divorce. Subsequently, mediation was conducted and culminated in an agreement being reached by the parties that was memorialized in a document titled "Report from Mediator" which detailed the settlement reached by the parties. The first paragraph of this mediated settlement agreement states: "The parties have both faithfully and truthfully participated in mediation with their attorneys and have arrived at the following resolution meant to be full and final and binding. It will be incorporated into the Judgment of Divorce." This settlement agreement was dated February 4, 2020, and was signed by both parties and their respective counsel.

On April 21, 2020, defendant filed a motion for entry of judgment of divorce or, alternatively, to return to mediation or schedule a trial in this matter. Defendant argued that the mediated settlement agreement was unclear as to the disposition of the marital home. Further, defendant claimed that the agreement "is confusing in terms of whether it represents a full and final agreement of the parties or simply a template for further discussions in hopes that the parties would come to an agreement concerning the disposition of the marital home." According to defendant, he was awarded the marital home contingent on him paying plaintiff her 50% equity in the home. However, the settlement agreement restricted defendant from encumbering or selling the property; granted him only a life-estate interest; granted plaintiff a life-estate interest upon

defendant's death; and required that the home be deeded into an irrevocable trust for their children's benefit, despite the facts that defendant paid plaintiff for her share (\$181,000) and that he was responsible for all the debt and expenses of the property. Thus, defendant argued, the mediated settlement agreement was "inconsistent and ambiguous" because defendant was to receive an equal share of the marital assets but the value of the marital home was not actually \$362,000, as contemplated in the agreement.

Plaintiff responded to defendant's motion, arguing that the "Report from Mediator" constituted a settlement agreement that was a full, final, and binding agreement—as plainly stated on its face—which was signed by both parties and their respective counsel and was not "a template for further discussions." Further, the marital home was a hotly contested issue because it had been in plaintiff's family for generations yet, while this matter was pending, defendant attempted to remove it entirely from the marital estate by wrongfully executing a quit claim deed in favor of the parties' eldest son. In any case, the intention of the parties was for this home to remain in the family, which would be jeopardized if defendant remarried unless it was in a trust. Therefore, the parties agreed that the home was to be placed into an irrevocable trust. The paragraph about the marital home was the longest paragraph in the settlement agreement which clearly indicates that it was an integral and thoroughly negotiated issue. Plaintiff argued that defendant's attempt to challenge the equitableness of the divorce settlement through new and different counsel should be outright rejected by the trial court as simple "buyer's remorse" that cannot negate a binding settlement agreement.

On May 11, 2020, following oral argument, the trial court rejected defendant's challenge to the mediated settlement agreement, noting that both parties and their counsel signed the settlement agreement and it was binding. The court was going to review the proposed judgments of divorce submitted by both parties and sign the one that comported with the mediated settlement agreement. Thereafter, on that same date, the court entered the proposed judgment of divorce submitted by plaintiff. This appeal followed.

Defendant argues that the trial court erred in entering the judgment of divorce because it did not conform to the mediated settlement agreement. We agree, in part, and remand for further proceedings as discussed below.

A judgment of divorce is reviewed in light of the trial court's findings of fact and conclusions of law. *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008). In this case, the parties reached a settlement as a result of mediation and, as set forth in MCR 3.216, the terms of that settlement were reduced to a writing that was signed by the parties. Thus, as the trial court concluded, the settlement agreement was binding. See MCR 3.216(H)(8). "A divorce judgment 'entered upon the settlement of the parties . . . represents a contract, which, if unambiguous, is to be interpreted as a question of law.'" *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008), quoting *In re Lobaina Estate*, 267 Mich App 415, 417-418; 705 NW2d 34 (2005). Thus, the same legal principles that govern the construction and interpretation of contracts also govern a settlement agreement in a divorce matter. *Myland v Myland*, 290 Mich App 691, 700; 804 NW2d 124 (2010). The interpretation of a contract is reviewed de novo as a question of law. *Id.* Where the contractual language is clear and unambiguous, the court must enforce the contract as written. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). The language of a contract is "given its ordinary and plain meaning" and a contract is unambiguous if it "fairly admits of but

one interpretation[.]” *Holmes*, 281 Mich App at 594 (citation omitted). An unambiguous settlement agreement that is incorporated into a judgment of divorce may not be modified by the court to “rebalance the contractual equities.” *Id.* at 594-595 (citation omitted). Absent a showing of a traditional contract defense, like fraud, duress, or mutual mistake, the settlement agreement must be enforced as written. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142; 706 NW2d 471 (2005); *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999).

In pertinent part, the mediated settlement agreement provides:

1. The parties both faithfully and truthfully participated in mediation with their attorneys and have arrived at the following resolution meant to be full and final and binding. It will be incorporated into the Judgment of Divorce.

2. *Carla Drive Home*. Husband shall have exclusive use of the residence for the remainder of his life beginning June 1, 2020. He will assume the approximately \$38,000 liability attached to the home and pay it in full and hold wife harmless thereon. Husband shall be responsible for maintenance/repairs, the property tax liability and home insurance. He will be responsible for the correction and/or clear title of this property so that it can be legally deeded into the irrevocable trust created to effectuate this agreement. Husband is responsible for any costs associated with clearing title including any potential third-party action. The parties agree that this property is intended for their children and that it is not to be divested from the family. Specifically, Husband is restricted from the selling or transferring this property under any circumstances. Further that Husband will not be allowed to encumber this property in any manner including a lien/mortgage/or for any other such purposes. Upon Husband’s death, the property shall remain in trust and the Wife shall have a life-estate whereupon she may reside in the home until her death. Upon her death the property shall pass to the parties’ children. Husband and Wife agree to utilize John McNeil for estate planning purposes to effectuate this agreement and share those costs equally. Wife shall have exclusive use of the home from February 4, 2020 until May 31, 2020 in accord with the parties’ temporary order. For purposes of property equalization, Wife is to be paid \$181,000 by husband for her one-half marital share in this asset. The parties’ intent is to create an irrevocable trust to effectuate their desire for this property as stated above. Should that not be possible, the Court retains jurisdiction to create an equitable trust to effectuate the parties’ intent. Parties will include language in the irrevocable trust that the Wife will be able to receive the home in the event that Husband fails to pay taxes and or any liens attached to the home so that his possession of the home is threatened. Parties will include language in the irrevocable trust to include the terms of paragraph 2. Parties agree that the trust may need to be created prior to entry of the Judgment of Divorce and will so cooperate if so needed. [*The following is a handwritten addition*: Subject to rv by McNeil for effectuation or return to mediation to resolve issues w/ trust/prop.]

In pertinent part, the judgment of divorce provides:

PROPERTY SETTLEMENT

Real Estate:

With respect to the former marital residence located at: 43849 Carla Drive, Paw Paw, MI 49079, Defendant/husband shall have exclusive use of the residence for the remainder of his life beginning June 1, 2020. He shall assume the approximately Thirty-Eight Thousand Dollars and Zero Cents (\$38,000.00) liability attached to the home and pay it in full and hold Plaintiff/wife harmless thereon. Defendant/husband shall be responsible for maintenance/repairs, the property tax liability and home insurance. Defendant/husband shall be responsible for the correction and/or clear title of this property so that it can be legally deeded into an irrevocable trust created to effectuate this agreement. Defendant/husband shall be responsible for any costs associated with clearing title including any potential third-party action. The Defendant/husband is restricted from selling or transferring this property. Further, that Defendant/husband shall not be allowed to encumber this property in any manner, including a lien/mortgage or for any other such purposes. Upon the Defendant/husband's death, the property shall remain in trust and the Plaintiff/wife shall have a life-estate whereupon she may reside in the home until her death. Upon her death, the property shall pass to the parties' children. The Defendant/husband and Plaintiff/wife agree to utilize attorney John McNeil for estate planning purposes to effectuate this agreement and share those costs equally. Plaintiff/wife shall have exclusive use of the home from February 4, 2020 until May 31, 2020.

The parties shall create an irrevocable trust to effectuate the terms with respect to this property as stated herein and above. The Court shall retain jurisdiction to create an equitable trust to effectuate the terms as stated herein and above, if necessary. The parties will include language in the irrevocable trust that the Plaintiff/wife will be able to receive the said former marital residence located on Carla Drive in the event that the Defendant/husband fails to pay taxes and/or any liens attached to the home so that his possession of the former marital residence is threatened. The parties will include language in the irrevocable trust to include the terms of the above-stated paragraph.

Defendant first argues on appeal that the judgment of divorce did not comply with the mediated settlement agreement as pertains to the marital home because defendant did not "receive" the marital home with "clear legal title" after he paid plaintiff her equalized share of \$181,000. But that is not what the mediated settlement agreement stated. The plain terms of the settlement agreement do not award defendant "clear legal title" to the Carla Drive Home; rather, defendant was to receive a life-estate interest. Specifically, the settlement agreement states that defendant "shall have exclusive use of the residence for the remainder of his life beginning June 1, 2020" and the judgment of divorce states that defendant "shall have exclusive use of the residence for the remainder of his life beginning June 1, 2020." Accordingly, defendant's challenge in this regard is without merit.

Defendant also argues that the mediated settlement agreement directed that an irrevocable trust be agreed upon by the parties before a judgment of divorce was entered and that did not happen. However, the settlement agreement only stated that "the trust *may* need to be created prior to entry of the judgment of divorce and [the parties] will so cooperate if so needed." The settlement agreement did not mandate the creation of the irrevocable trust before the judgment of divorce was

entered. Further, the settlement agreement provides that the parties' intent was to create an irrevocable trust but if that was not possible, the court was to "retain jurisdiction to create an equitable trust to effectuate the parties' intent" with respect to this matter. Thus, defendant's challenge in this regard is without merit.

Defendant next argues that the mediated settlement agreement required plaintiff to retain defendant as the beneficiary of certain financial accounts she was awarded but the judgment of divorce has no such provision. In particular, the mediated settlement agreement provides:

4. Wife shall receive, free and clear of any claim from Husband as her sole and separate property, the following Investment Accounts/Retirement Accounts as an equalization of Husband receiving the marital home: Wife receives the Edward Jones Advance Solutions account in full, Edward Jones JTWROS in full, Edward Jones Wife IRA in total and \$15,000.00 from Husband's Lake Trust Credit Union Savings Account. These accounts represent the equalization of \$181,000 from Husband to Wife for her one-half equity in the marital home as well as her one-half marital share of retirement and investment accounts. *Wife shall maintain Husband as beneficiary of these accounts and shall effectuate whatever documents are necessary post-Judgment of Divorce.* [Emphasis added.]

Plaintiff admits in her brief on appeal that the judgment of divorce does not include language requiring her to maintain defendant as beneficiary of these accounts that she was awarded. Plaintiff argues that "there was a slight contradiction" in the settlement agreement because plaintiff was to receive the accounts "free and clear of any claim" from defendant, and thus, the trial court "corrected" that "contradiction" in the judgment of divorce. We cannot agree with plaintiff. The lower court record is clear that it was plaintiff who drafted the judgment of divorce that was ultimately entered by the trial court and there is no indication that the trial court "corrected" any terms. While plaintiff was awarded the specified accounts and was entitled to do with them whatever she wished while she was alive, essentially the settlement agreement stated that, if she predeceased defendant, defendant was to be the named beneficiary of them. The judgment of divorce does not include this negotiated term of the parties' settlement agreement. As discussed above, a judgment entered pursuant to an agreement of the parties is in the nature of a contract—rather than a judicial determination of the disputed matter—and must be enforced as written. See *Myland*, 290 Mich App at 700. Therefore, we remand this matter to the trial court to amend the judgment of divorce to conform to the parties' settlement agreement in this regard.

Finally, defendant argues that the judgment of divorce included provisions titled Tax Liability, Marital Debt, and Acknowledgment of Reading—and such provisions were not in the mediated settlement agreement. The Tax Liability provision of the judgment of divorce states that each party is responsible for the tax liability "as to any property either party is receiving." Only two pieces of real property were involved in this divorce. The mediated settlement agreement provided that defendant was to have exclusive use of the marital home and was responsible for the property tax liability, and plaintiff was to assume "the Florida condo in full including all equity." While not spelled out in detail in a separate paragraph, it is clear that settlement agreement included that defendant is responsible for the tax liability of the former marital home he was awarded and plaintiff is responsible for the tax liability of the Florida condo that she was awarded. Thus, we reject defendant's claim in this regard. However, there is no provision in the mediated settlement

agreement addressing marital debt, although there is a lengthy provision addressing marital debt in the judgment of divorce. In other words, the parties never addressed or reached an agreement as to the issue of marital debt. Thus, on remand the trial court must determine if this matter is contested and requires an evidentiary hearing or further proceedings. Finally, the Acknowledgment of Reading paragraph merely states that the parties read the judgment of divorce, and thus, would not have been a provision that was included in the mediated settlement agreement.

Next, defendant argues that the mediated settlement agreement terms are ambiguous with regard to the former marital home on Carla Drive, and thus, an evidentiary hearing or further mediation was warranted. We disagree.

As defendant argued in the trial court, defendant argues on appeal that the mediated settlement agreement is “ambiguous and inconsistent” because it contemplated that defendant would receive “\$362,000 of equity in the marital home” but that is not what he actually received. Instead, defendant argues, he received “something far less than a life estate interest with responsibility for all the debt and expenses of the property.” Further, defendant is prohibited from selling, conveying, or encumbering this property, but he must also pay for all of the expenses associated with the property. Consequently, defendant claims, the property settlement was inequitable and modification of the judgment of divorce is required. We cannot agree.

As set forth above, the terms of the mediated settlement agreement and the judgment of divorce as relates to the former marital home are completely consistent. And the terms of the settlement agreement are unambiguous because no reasonable person could dispute the meaning of the ordinary and plain contract language. See *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). It is well established that courts must uphold divorce property settlements that are reached through negotiation and agreement of the parties. See *Baker v Baker*, 268 Mich App 578, 585-586; 710 NW2d 555 (2005). While such an agreement does not have to be upheld if it was the product of fraud, duress, or mutual mistake, *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990), there was no showing of fraud, duress, or mutual mistake in this case. Rather, it appears that defendant merely had a “change of heart” and that is insufficient to set aside a settlement agreement. See *Vittiglio v Vittiglio*, 297 Mich App 391, 399; 824 NW2d 591 (2012), quoting *Metro Life Ins Co v Goolsby*, 165 Mich App 126, 128; 418 NW2d 700 (1987). As our Supreme Court explained in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005): “We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of ‘reasonableness’ as a basis upon which courts may refuse to enforce unambiguous contractual provisions.” *Id.* at 461. Further, the *Rory* Court noted, “When a court abrogates unambiguous contractual provisions based on its own independent assessment of ‘reasonableness,’ the court undermines the parties’ freedom of contract.” *Id.* at 468-469. In this case, the terms of the mediated settlement agreement were clear as to the former marital home on Carla Drive and because there was no appropriate reason for modifying those terms, the trial court did not err by including those terms in the judgment of divorce.

Next, defendant argues that the trial court failed to satisfy the requirements of MCL 552.19 and MCR 3.211(B)(3) because they require final resolution of the property rights of the parties. But in this case, defendant argues, the mediated settlement agreement “awards property and then

takes it away, directing the parties to come to an agreement concerning the entity that would hold a sizable portion of the marital estate without definition or certainty.” To the extent we understand this argument, we disagree.

MCL 552.19 provides:

Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money.

MCR 3.211 provides:

(B) A judgment of divorce, separate maintenance, or annulment must include

* * *

(3) a determination of the property rights of the parties[.]

Defendant appears to argue that the mediated settlement agreement did not finally resolve the parties’ rights with respect to the former marital home because he was not awarded clear legal title to the home. But, as discussed above, the terms of the mediated settlement agreement were freely negotiated and were plain and unambiguous. Defendant agreed that he would have “exclusive use of the residence for the remainder of his life beginning June 1, 2020.” Defendant further agreed, according to the plain terms, that he and plaintiff intended for the property to be placed in an irrevocable trust because it was “intended for their children” and was not to be “divested from the family.” Thus, contrary to defendant’s claim, the settlement agreement did not award defendant property and then take it away or fail to resolve the parties’ rights as to the former marital home.

Lastly, defendant argues that the mediated settlement agreement provides that John McNeil is to be utilized to prepare the irrevocable trust contemplated with regard to the former marital home but he is disqualified because of a conflict of interest. Defendant claims that, as far as he knows, McNeil represented plaintiff with regard to some matters “subsequent to her filing for divorce.” However, this issue was not raised before, addressed, or decided by the trial court, and thus, it is not properly preserved for our review. See *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). We need not address issues first raised on appeal. *Id.* Moreover, defendant is not definitive as to whether McNeil has or has not represented plaintiff after the divorce was filed and there is no indication as to what matters, if any, McNeil represented plaintiff. In other words, the facts necessary for a proper determination of this issue are not presented, and thus, we decline to review the issue.

Affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola