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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 21-0278

DA 21-0278

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 41

IN RE THE MARRIAGE OF:

SHARON ANN HARMS,

Petitioner and Appellee,

and

CHARLES RONALD HARMS,

Respondent and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DR 18-0937
Honorable Colette B. Davies, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Casey Heitz, Michael L. Dunphy, Parker, Heitz & Cosgrove, PLLC, Billings, Montana

For Appellee:

Daniel Ball, Justin Stark, Hendrickson Law Firm, P.C., Billings, Montana

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Submitted on Briefs: December 22, 2021

Decided: March 1, 2022

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Charles "Bo" Harms (Bo) appeals a May 11, 2021, order from the Thirteenth Judicial District, Yellowstone County, denying his motion for contempt and ordering equitable division of a jointly-owned retirement annuity with Sharon Harms (Sharon). The District Court ruled the omission of an annuity from the parties' property settlement agreement was a mistake. We reverse.

¶2 We restate the issues on appeal as follows:

> *Issue One: Is the District Court's contempt order properly before this Court on direct appeal?*
>
> *Issue Two: Did the District Court err in ruling an annuity was mistakenly omitted from the property settlement agreement when the parties were represented by counsel during two mediations, the asset had been properly disclosed, and the property settlement agreement contained a remainder clause distributing "all other" property?*
>
> *Issue Three: Is Bo entitled to attorney fees and costs pursuant to the attorney fee provision in the property settlement agreement?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 At issue in this case is whether a properly disclosed asset may be distributed pursuant to a remainder clause in the parties' property settlement agreement which provided that "all other real and personal property" would be distributed to Bo. The parties' property settlement agreement distributed over $3 million in assets that were either Bo's premarital assets or primarily gifted to or inherited by Bo. Bo maintains the agreement's remainder clause unambiguously provided for distribution to him of all assets not otherwise identified. Sharon claims the annuity was mistakenly omitted.

¶4 Bo and Sharon were married in 1994 when each were in their early 50's. Before their marriage, Bo had substantial assets largely attributable to his family's ranch. During the marriage, Bo received additional large amounts of gifted and inherited property, including over $2 million in financial assets; 40 acres of land in Park County; other real property; and property such as cattle and equipment. Sharon had individual income which was kept separate from Bo's assets. The parties jointly accessed marital assets.

¶5 In September 2018, Sharon filed a petition for dissolution and discovery commenced. The record clearly provides that Sharon and Bo were fully aware of their assets, including the $100,000 annuity with TransAmerica Life Insurance. In Sharon's sworn discovery response to Bo's production request, she provided:

> **Request for Production No. 15:** Please produce copies of all life insurance policies with all records showing the present cash surrender value thereof.
>
> **Response:** Bo has an annuity account with TransAmerica. I have attached copies of documentation that I have access to.

Bo similarly responded to Sharon's production requests and produced documents from UBS Financial Services, Inc., which specifically identified the TransAmerica annuity.

¶6 The District Court ordered the parties to participate in mediation, which occurred August 20, 2019. During mediation, Bo made Sharon the following settlement offer:

A. Sharon would receive certain identified property items.

B. Sharon would receive all personal property items titled solely in her name, including financial accounts, vehicles, etc.

C. Bo would pay Sharon $600,000.00 from the First Financial Equity Corporation account.

D. Bo would receive all remaining real property items and personal property items whether titled solely in Bo's name or jointly with Sharon or others.

The offer was to remain open for 24 hours.

¶7 Sharon, through her attorney, accepted the offer on August 21, 2019. Bo's attorney acknowledged Sharon's acceptance and emailed a representative of First Financial Equity Corporation stating that, pursuant to the terms of the agreement, Sharon was to receive $600,000 from the account. Sharon's attorney, also consistent with the terms of the settlement and the mediator's report, began drafting the necessary formal settlement papers to sign. Sharon, however, refused to sign the settlement papers and did not want to go through with the agreement. She maintained her attorney did not have authority to accept the offer. As a result, Sharon's attorney withdrew as counsel after Sharon refused to sign the settlement papers he prepared. On October 8, 2019, Bo filed a motion to enforce the settlement offer Sharon had accepted. Thereafter, Sharon hired new counsel and the District Court set the matter for hearing.

¶8 On July 9, 2020, both parties appeared before the District Court. Before their hearing, the parties again attempted to mediate their property disputes. These negotiations resulted in Bo and Sharon agreeing to amend their first settlement agreement to include an increase in the cash amount distributed to Sharon from the First Financial account—from $600,000 to $625,000. Aside from the increased distribution to Sharon of $25,000, the second settlement agreement was largely the same as the first settlement agreement, including the remainder provision that Bo would receive all remaining real and personal property items not otherwise identified. Both Sharon and Bo testified they understood and

accepted the terms of the property settlement agreement. The second property settlement agreement provided that it was Sharon and Bo's mutual desire to "amicably settle by this agreement all issues arising out of the marriage relationship existing between them, and to effect a complete settlement of any and all claims that either may have against the other, including but not limited to issues of disposition of the property and debts" from the marriage. It also provided that "each party hereto releases and forever discharges the other party . . . to claim under any . . . annuity . . . even though designated as a beneficiary thereunder . . . ." The District Court adopted the parties' second property settlement agreement [Settlement Agreement] in its Judgment entered July 20, 2020.

¶9 Several months after Sharon and Bo signed the Settlement Agreement, and after Sharon received the $625,000, Bo's attorney requested Sharon execute the annuity transfer divorce form relative to the $100,000 TransAmerica annuity. Sharon never responded and Bo had to request—for a second time—that the parties' agreement be enforced. On January 15, 2021, Bo filed a motion for contempt, claiming Sharon was noncompliant with the final decree for failing to transfer the annuity to Bo.

¶10 The District Court denied Bo's motion for contempt and ordered the parties to equitably divide the annuity. The court agreed the annuity fell within the definition of "personal property" but ruled that, given the specific itemization of other property and accounts in the agreement, it was unreasonable to interpret the agreement as including the $100,000 annuity as part of the remainder provision. Bo appeals.

STANDARDS OF REVIEW

¶11 "Where we review a district court's decision not to find a party in contempt, we will not reverse the decision absent a blatant abuse of discretion." *In re Marriage of Lutes*, 2005 MT 242, ¶ 7, 328 Mont. 490, 121 P.3d 561. "The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re Marriage of Epperson*, 2005 MT 46, ¶ 17, 326 Mont. 142, 107 P.3d 1268.

¶12 Property settlement agreements in marital dissolutions are governed by contract law. *In re Marriage of Mease*, 2004 MT 59, ¶ 20, 320 Mont. 229, 92 P.3d 1148; § 40-4-201(5), MCA. Contract construction and interpretation is a question of law which we review for correctness. *Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192. Contract formation is a mixed question of fact and law. *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, ¶ 13, 396 Mont. 488, 445 P.3d 1226. We review a district court's findings of fact under the clearly erroneous standard—that is, whether the court's findings are supported by substantial evidence, whether the court misapprehended the effect of the evidence, or whether a review of the record leaves this Court with the definite and firm conviction a mistake has been made. *Jarussi*, ¶ 13.

¶13 "We review a district court's grant or denial of attorney fees for abuse of discretion." *In re Marriage of Gorton*, 2008 MT 123, ¶ 45, 342 Mont. 537, 182 P.3d 746.

DISCUSSION

¶14 *Issue One: Is the District Court's contempt order properly before this Court on direct appeal?*

¶15 Sharon argues Bo's direct appeal of the District Court's order denying his motion for contempt is not properly before this Court because it is not a final order and fails to adjudicate the parties' rights.

¶16 Contempt orders in family law proceedings are only directly appealable when the "order appealed from includes an ancillary order that affects the substantial rights of the parties involved." Section 3-1-523(2), MCA.

¶17 Here, the District Court's order denying Bo's motion for contempt also ordered the parties "to attempt to divide the [annuity] on an equitable basis without further judicial intervention, if possible." The court thus ordered the disputed annuity be equitably divided pursuant to final equitable distribution of the parties' marital estate. The court's order thereby adjudicated an ancillary matter that determined the parties' rights. *See Lee v. Lee*, 2000 MT 67, ¶ 36, 299 Mont. 78, 996 P.2d 389 (holding the "family law exception" to § 3-1-523(1), MCA, would apply in an order where the court "found . . . contempt as well as modified . . . visitation and child support under one judgment" since "[a] petition for writ of certiorari may have been barred because the issuing court did not exceed its jurisdiction."); *see also Lutes*, ¶¶ 10, 11 (determining a contempt order was appealable when it also ruled federal preemption applied to the division of veterans disability benefits).

¶18 The contempt order was appealable under § 3-1-523(2), MCA, and is properly before this Court.

¶19 *Issue Two: Did the District Court err in ruling an annuity was mistakenly omitted from the property settlement agreement when the parties were represented by counsel during two mediations, the asset had been properly disclosed, and the property settlement agreement contained a remainder clause distributing "all other" property?*

¶20 Bo argues the Settlement Agreement unambiguously provided the TransAmerica annuity would be distributed to Bo under a remainder provision that provided "[a]ll other real and personal property" would go to Bo. Bo contends the agreement contained all essential terms and that the District Court erred in looking beyond the contract's "four corners" for the parties' intent because § 28-3-303, MCA, requires interpreting intent from the written agreement, if possible. Bo asserts the parties' mutual intent at the time of contracting is clearly represented by the agreement's express language since both parties signed the document, were independently represented by counsel, and were individually aware of the disputed annuity's existence. Sharon argues the District Court acted within its statutory authority to revise the Settlement Agreement under § 28-2-1611, MCA, upon finding the valuable annuity was omitted by mistake.

¶21 Section 40-4-201(2), MCA, provides "the terms of the separation agreement . . . are binding upon the court unless it finds, after considering the economic circumstances of the parties . . . on their own motion or on request of the court, that the separation agreement is unconscionable." We have explained that "[i]t is not the province of this Court to alter decisions and agreements made between husband and wife in the absence of compelling injustice." *Miller v. Miller*, 189 Mont. 356, 363, 616 P.2d 313, 318 (1980). Moreover, it is well-established that the "intentions of the parties are those disclosed and agreed to in

the course of negotiations" and thereafter memorialized by an agreement. *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 399, 849 P.2d 1039, 1042 (1993). This Court must "honor the separation agreement [and disclosure] statutes which clearly indicate that the terms of a separation agreement are binding upon a district court unless the court finds the separation agreement to be unconscionable." *Wagenman v. Wagenman*, 2016 MT 176, ¶ 14, 384 Mont. 149, 376 P.3d 121.

¶22 We are mindful these separation and disclosure statutes work together to promote the amicable settlement of disputes through written separation agreements that provide distribution of the parties' property. Section 40-4-201(1), MCA. They are binding on this Court. Section 40-4-201(2), MCA. Section 40-4-134, MCA, provides that the "entry of final judgment constitutes a final adjudication of the rights and obligations of the parties with respect to the status of the marriage and property rights . . . ." We are cognizant of the basic principle that "[t]here must be some point at which litigation ends and the respective rights between the parties are forever established. Under ordinary circumstances, once this point is reached a party will not be allowed to disturb that judgment." *In re Marriage of Waters*, 223 Mont. 183, 186, 724 P.2d 726, 729 (1986). This is Sharon's third time she has not abided by an agreement negotiated with Bo.

¶23 Neither Sharon nor Bo claim the Settlement Agreement is unconscionable or unjust. A settlement that distributes assets disproportionately is not necessarily inequitable where the reasons, such as the existence of premarital, inherited or gifted property, are present in the record. See *Slayton v. Slayton*, 195 Mont. 249, 252, 635 P.2d 1303, 1305 (1981).

Although § 40-4-202(1), MCA, requires a court in a proceeding for dissolution to "finally equitably apportion between the parties the property and assets belonging to either or both," there was nothing in the Settlement Agreement suggesting the parties' general intent was an *equal* distribution. Bo brought significant gifted, inherited, and premarital property to the marriage. The Settlement Agreement was drafted to specifically identify the property Sharon was to receive so that she would get particular property, leaving the remainder of the property to Bo. This remainder clause survived two mediations, a judgment adopting its provision, and full disclosure under the disclosure statutes of all the parties' assets. Montana's disclosure statutes are designed to protect against relitigating a judgment when a party is fully informed of the asset. Here, there had been compliance with the disclosure statutes, distribution of the annuity was provided for through the remainder clause of the Settlement Agreement, and there is no claim of unconscionability.

¶24 It is clear that, following their dissolution, Bo held more assets and property than Sharon. However, prior to their marriage, Bo had significant assets acquired from his family's ranch. Bo also received a substantial amount of gifted and inherited property during the marriage, amounting to over $2 million in financial assets, 40 acres of land in Park County, and other equipment, property, and cattle. The parties lived off these gifted and inherited assets. Sharon's individual assets remained separate from Bo's assets and assets jointly held by the parties during their marriage. These were distributed solely to Sharon in the Settlement Agreement. The only bank account specifically identified in the Settlement Agreement was the First Financial Equity Account. The account was identified

because Sharon was to receive $625,000 directly from this account and Bo was to receive the remaining balance, a distribution method similar to the manner the rest of the estate was distributed. Apart from the First Financial Equity Account, the other financial accounts were not specifically identified; rather they were indicated as "her" or "his" bank accounts. It is true the parties were specific about personal property distribution, such as silverware, rolling pins, and mixing bowls, but the District Court erred when it found the "specificity" as it relates to "salt and pepper shakers" meant every financial asset likewise had to be identified, or it was mistakenly left out. Given that most of the assets would be distributed to Bo as premarital, gifted, or inherited property, Sharon's attorney, who drafted the Settlement Agreement, identified specific property Sharon was to receive to ensure Sharon got the assets and property she wanted—with the remaining assets going to Bo. The Settlement Agreement accounted for the annuity by providing "[a]ll other real and personal property" was to be distributed to Bo, a common method of drafting a division of property.

¶25 Section 28-2-1611, MCA, relied upon by Sharon, pertains to revisions of written contracts, not judgments. The separation and disclosure statutes are specific to these proceedings and they provide the method by which a court may review a separation agreement or revise a judgment. M. R. Civ. P. 60 provides a procedural mechanism for a party to seek relief from a decree on the basis of duress, accident, fraud, or mistake. Section 40-4-135(1), MCA, provides "either party [may] institute an action to set aside the final judgment for fraud, duress, accident, mistake, or other grounds recognized at law or

in equity or to make a motion pursuant to the Montana Rules of Civil Procedure." However, neither party has filed a Rule 60 motion or invoked the provisions of § 40-4-135(1), MCA. Here, where there has been full disclosure of the disputed asset and the Settlement Agreement distributes the asset, we are not at liberty to set aside a settlement agreement adopted by a court on the basis of mutual mistake. "When parties are informed of the assets and liabilities of a marriage, there is good cause to enter the final dissolution decree." *In re Marriage of Fuller*, 2021 MT 175, ¶ 12, 404 Mont. 522, 490 P.3d 1254. See § 40-4-254, MCA; *In re Marriage of Anderson*, 2013 MT 238, ¶¶ 23-27, 371 Mont. 321, 307 P.3d 313. "Once a court enters a final decree, neither the court nor the parties may retry the marital equities." *Fuller*, ¶ 12. "Courts may reopen a judgment only in narrow circumstances." *Fuller*, ¶ 13. For example, § 40-4-253(4), MCA, provides that if a party fails to disclose an asset or liability, the court, without taking into consideration the equitable division of the marital estate may award the undisclosed asset to the opposing party. Further, the court may set aside a judgment if a party has committed perjury in the declaration of disclosure. Section 40-4-253(5), MCA. Neither the failure to disclose nor perjury are at issue here.

¶26 We conclude the District Court erred in finding there was a mutual mistake in omitting the annuity from the Settlement Agreement. The parties were represented by counsel in two mediations, the remainder clause in the Settlement Agreement was adopted by the court in its Judgment, the disputed asset was properly disclosed under Montana's

disclosure statutes, and the Settlement Agreement provided for the distribution of property through its remainder clause.

¶27 *Issue Three: Is Bo entitled to attorney fees and costs pursuant to the attorney fee provision in the parties' property settlement agreement?*

¶28 In its order denying Bo's motion for contempt, the District Court declined to award either party attorney fees based on the nature of the dispute and its finding that the disputed annuity was not part of the parties' Settlement Agreement. Bo argues he is entitled to attorney fees pursuant to the Settlement Agreement. Sharon contends the District Court's denial of attorney fees was not an abuse of discretion.

¶29 The Settlement Agreement included a provision that "[i]n the event of future litigation between the parties to enforce, modify, or interpret any provision of this agreement, the prevailing party shall be entitled to an award of his or her court costs, including a reasonable attorney's fee and expenses incurred." When a settlement agreement incorporated into a final dissolution decree contains an attorney fee provision, the provision controls and will be enforced pursuant to contract law. *Mease*, ¶ 57 (holding § 40-4-110, MCA, did not control in such circumstances). Bo clearly was attempting to "enforce" the Settlement Agreement when he filed his motion for contempt; this Court has had to "interpret" the remainder provision and the Settlement Agreement; and the Court is remanding these proceedings for the District Court to "modify" the Judgment to include an equitable distribution of the annuity.

¶30 Bo, as the prevailing party in subsequent litigation to enforce the Settlement Agreement, is entitled to reasonable attorney fees and expenses incurred.

CONCLUSION

¶31 We conclude the District Court's contempt order is properly before this Court. The District Court erred in concluding an annuity was mistakenly omitted from the parties' Settlement Agreement when the parties were represented by counsel during two mediations, the asset was properly disclosed, and the agreement contained a remainder clause distributing "all other" property. As the prevailing party, Bo is entitled to his reasonable attorney fees and costs. We will not reverse the District Court's ruling denying Bo's motion to hold Sharon in contempt. However, if Sharon fails to promptly transfer the annuity, Bo may file another contempt action and Sharon will be responsible for fees and costs of that proceeding. This case is remanded to the District Court for further proceedings consistent with this Opinion.

¶32 Reversed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE