Opinion issued December 21, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00147-CV

JULIE LOWERY, Appellant

V.

HOUSTON FORD LOWERY III, Appellee

On Appeal from the County Court at Law No. 1
Galveston County, Texas
Trial Court Case No. 08FD2780

MEMORANDUM OPINION

Appellant, Julie Lowery, appeals the trial court's order that terminated spousal maintenance in favor of appellee, Houston Ford Lowery III. In three issues, Julie argues that (1) the trial court erred in terminating spousal maintenance and (2) Houston's motion to clarify amounted to a collateral attack on the divorce decree.

We reverse.

Background

Julie and Houston entered into an agreed decree of divorce on July 7, 2009. As part of the divorce decree, Houston agreed to provide $1,600 in spousal maintenance per month to Julie until the first occurrence of either Julie's death, Houston's death, Julie's remarriage, or further order of the court affecting the spousal maintenance obligation, including a finding of cohabitation by Julie with another person in a permanent place of abode on a continuing conjugal basis. On the same day, the trial court entered an income-withholding order for spousal maintenance. The record does not indicate that either party filed an appeal of the 2009 divorce decree.

Over four years later, on October 29, 2014, Houston filed an original petition to modify his spousal maintenance obligation on the ground that the obligation did not terminate in accordance with section 8.054(a)(1) of the Texas Family Code, which provides that the court may not order maintenance that remains in effect for more than three years after the date of the order.[1] He alternatively argued that if the

[1] *See* Act of April 17, 1997, 75th Leg., R.S., ch. 7, § 1, sec. 8.005, 1997 Tex. Gen. Laws 8, 35–36, *amended by* Act of June 18, 2005, 79th Leg., R.S., ch. 914, § 3, 2005 Tex. Gen. Laws 3146, 3147) (current version at TEX. FAM. CODE ANN. § 8.054 (West Supp. 2017)). At the time the trial court rendered the divorce decree, former section 8.054, subsection (a) provided that "Except as provided by Subsection (b), a court: (1) may not order maintenance that remains in effect for more than three years after the date of the order. . . ." Subsection (b) provides, "If a spouse seeking maintenance is unable to support himself or herself through appropriate

trial court did not modify the termination date of the income-withholding order for spousal maintenance, then the income-withholding order for spousal maintenance should be terminated, as the obligation is contractual alimony and not subject to wage withholding. Julie filed an answer stating that Chapter 8 of the Texas Family Code does not require an end date for spousal maintenance.

On August 20, 2015, Houston filed a motion for judgment nunc pro tunc, asserting that the agreed divorce decree had a discrepancy between the judgment signed and the judgment the court intended to sign. Houston stated that, in their February 27, 2009 mediation agreement, the parties agreed that spousal maintenance would be "in accordance with the Family Code." Houston further stated that the agreed divorce decree "failed to include the alternate termination date of [Houston's] obligation after thirty-six months on March 12, 2012." The mediation agreement was not incorporated into the decree.

After Houston began missing payments starting on August 14, 2015, Julie petitioned for enforcement of spousal maintenance, asking that Houston pay spousal maintenance or be held in contempt. Julie also requested that if the trial court found that any part of the order was not specific enough to be enforced by contempt, it should enter a clarifying order.

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employment because the spouse has an incapacitating physical or mental disability . . . the court may order maintenance for as long as the disability continues." *Id.*

On November 10, 2015, Houston filed an amended motion for clarification of the final decree of divorce, arguing that the divorce decree "may not be specific enough to be enforceable by contempt and request[ing] that, if the Court so finds, the Court construe and clarify the terms of its prior order to make specific: the termination date of payment of spousal support."

At the hearing on the motion to clarify, Houston's counsel tendered to the trial court the original mediation agreement, which states that spousal maintenance (in accordance with the family code) will be paid to Julie at $1,600 per month. The mediation agreement did not provide a specific termination date, but it did allow for a wage withholding order. Unlike the agreed decree of divorce, the mediation agreement did not state that it ended upon the death of either party or Julie's remarriage. Julie's counsel objected to the relevance of the mediation agreement and argued that the trial court did not have plenary power to change the decree. The trial court said that for purposes of the hearing, it would take judicial notice of the entire clerk's file and overruled Julie's objection. Julie's counsel argued that the parties agreed to the spousal maintenance obligation and that the divorce decree did include a final date for payment. Houston's counsel agreed that spousal maintenance was "part of the parties' agreement where Mr. Lowery understood that his post-divorce—post-marriage maintenance support obligation would be limited by the terms with accordance to the Family Code." The trial court stated that "whether it's

an agreed decree or not, once the Judge signs the decree, it's an order. So, for the purposes of being an order, it is that. However, it looks like it's an order that is in conflict with the statute at the time." Julie's counsel responded that Houston's arguments were a "collateral attack on this order. . . ."

In its January 15, 2016 order, the trial court found that "the language in the 'Post-Divorce Maintenance' section . . . of the Final Decree of Divorce is contrary to the applicable statute at the time of the commencement of the proceedings, specifically section 8.054 of the Texas Family Code." The trial court further found that "the language in the 'Post-Divorce Maintenance' section . . . of the Final Decree of Divorce is not enforceable by contempt and may be enforceable as a contract." The trial court concluded that the maintenance obligation terminated by operation of law after thirty-six months on March 12, 2012. Julie appeals the trial court's order.

Motion to Clarify

In her third issue on appeal, Julie argues that Houston's motion to clarify the terms of the spousal maintenance obligation amounted to a collateral attack on the divorce decree. Houston responds that the divorce decree provides for spousal maintenance in accordance with Chapter 8 of the Texas Family Code which, in 2009, provided that spousal maintenance could only last for three years.[2]

[2] *See* Act of April 17, 1997, 75th Leg., R.S., ch. 7, § 1, sec. 8.005, 1997 Tex. Gen. Laws 8, 35–36, *amended by* Act of June 18, 2005, 79th Leg., R.S., ch. 914, § 3,

Standard of Review

We review the trial court's ruling on a post-divorce motion for enforcement or clarification of a divorce decree under an abuse-of-discretion standard. *Gainous v. Gainous*, 219 S.W.3d 97, 103 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). A trial court abuses its discretion when it (1) acts unreasonably, arbitrarily, or without reference to any guiding rules or principles or (2) erroneously exercises its power by making a choice outside the range of choices permitted by law. *See Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241–42 (Tex. 1985); *Murray v. Murray*, 276 S.W.3d 138, 143 (Tex. App.—Fort Worth 2008, pet. dismissed).

"An agreed divorce decree is a contract subject to the usual rules of contract interpretation." *Chapman v. Abbot*, 251 S.W.3d 612, 616 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Broesche v. Jacobson*, 218 S.W.3d 267, 271 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Our primary concern when interpreting a contract is to ascertain and give effect to the intent of the parties as it is expressed in the contract. *Seagull Energy E & P, Inc. v. Eland Energy, Inc*., 207 S.W.3d 342, 345 (Tex. 2006). Whether a contract is ambiguous is a question of law. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). A contract is

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2005 Tex. Gen. Laws 3146, 3147) (current version at TEX. FAM. CODE ANN. § 8.054 (West Supp. 2017).

ambiguous when its meaning is uncertain or doubtful or it is reasonably susceptible to more than one meaning. *Zeolla v. Zeolla*, 15 S.W.3d 239, 242 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). When a contract contains an ambiguity, its interpretation is a question of fact. *Id*.

As with other final, unappealed judgments that are regular on their face, divorce decrees and judgments are not vulnerable to collateral attack. *Berry v. Berry*, 786 S.W.2d 672, 673 (Tex. 1990). A collateral attack does not attempt to secure the rendition of a single, correct judgment in place of a former one, but, instead, seeks to avoid the effect of a judgment through a proceeding brought for some other purpose. *Gainous*, 219 S.W.3d at 105; *Armentor v. Kern*, 178 S.W.3d 147, 149 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The decree must be void, not voidable, for a collateral attack to be permitted. *Hagen v. Hagen*, 282 S.W.3d 899, 902 (Tex. 2009). Errors other than lack of jurisdiction over the parties or the subject matter render the judgment voidable and may be corrected only through a direct appeal. *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003). Res judicata applies to a final divorce decree just as it does to any other final judgment, barring subsequent collateral attack. *Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990); *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987). Clarification orders thus cannot be used to make a substantive change in a divorce decree after it becomes final. *Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003); *see also McGehee v. Epley*, 661

S.W.2d 924, 925–26 (Tex. 1983) (stating that clarification orders cannot be used to effect substantive change in divorce decree after trial court's judgment becomes final).

Analysis

Here, the decree of divorce is entitled "Agreed Decree of Divorce." It states that "[t]he parties have agreed to the terms of this divorce as evidence by their signatures hereto" and includes the trial court's signature. Although the decree in the record contains Houston's signature only, approving and consenting as to both form and substance, neither party disagrees that the divorce decree was agreed to by both parties. We conclude that the parties entered into an agreed decree of divorce and thus contract law governs the interpretation of their decree. *See Hicks v. Hicks*, 348 S.W.3d 281, 283 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (holding, because parties entered into agreed divorce decree, it is treated as contract between parties); *see also McEntire v. McEntire*, 706 S.W.2d 347, 349–50 (Tex. App.—San Antonio 1986, writ dism'd) (holding divorce decree was agreed judgment when decree was styled "agreed"; was signed by judge, parties, and their attorneys; and recited that parties agreed to judgment as reflected by their and their attorneys' signatures).

Houston argued to the trial court that the agreed decree of divorce did not provide a termination date for spousal maintenance while Julie argued that the contract specifically provided a termination date that was agreed to by the parties.

The decree provides when Houston's spousal maintenance obligation ends. Specifically, it provides that Houston's obligation ends upon the death of Julie, the death of Houston, or further orders of the court including a finding that Julie cohabitates with someone else. The termination date of the spousal maintenance obligation is not uncertain or doubtful and is not reasonably susceptible to more than one interpretation. *Heritage Res, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). Because the decree specifically provides when the obligation terminates, we hold that the spousal maintenance obligation is not ambiguous.

Although husband attempts to rely on the decree's reference to Chapter 8 of the Family Code to create an ambiguity in the spousal maintenance termination date, a court may only consider extraneous evidence to ascertain the true meaning of the instrument if the contract is ambiguous. *See National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). Houston does not argue that the spousal maintenance obligation in the agreed divorce decree is ambiguous. Instead, Houston argues that the obligation's reference to Chapter 8 of the Family Code creates the ambiguity because the Family Code states that spousal maintenance cannot continue past three years. Houston's argument asked the trial court to look

beyond the four corners of the agreed divorce decree to create the ambiguity. Because we have held that the termination date of the spousal maintenance obligation is not ambiguous, it is improper to rely on extraneous evidence. *See Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 450 (Tex. 2015) (stating that parol evidence cannot be used to create ambiguity in unambiguous instrument).

Moreover, even if we concluded that the spousal maintenance obligation was ambiguous, Family Code section 8.054 does not resolve the ambiguity. While section 8.054(a) provides a limitation on spousal maintenance for three years, section 8.054(b) provides that spousal maintenance can last for as long as a disability continues if the spouse cannot provide for her reasonable needs based on an incapacitating physical or mental disability. *See* Act of April 17, 1997, 75th Leg., R.S., ch. 7, § 1, sec. 8.005, 1997 Tex. Gen. Laws 8, 35–36, *amended by* Act of June 18, 2005, 79th Leg., R.S., ch. 914, § 3, 2005 Tex. Gen. Laws 3146, 3147) (current version at TEX. FAM. CODE ANN. § 8.054 (West Supp. 2017)). Neither the parties nor the appellate record provides any indication on which subsection of 8.054 governed Houston's obligation of spousal maintenance in 2009, or whether the parties agreed to maintenance without a termination date other than what was expressly provided in the divorce decree.

This is one of the reasons why an agreed divorce decree is a final judgment and must be appealed within the trial court's plenary power. A trial court retains

plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment within thirty days after the judgment is signed. TEX. R. CIV. P. 329b(d); *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex.1984) (orig. proceeding) (per curiam). After the expiration of those thirty days, the trial court has no authority to set aside a judgment except by bill of review for sufficient cause. TEX. R. CIV. P. 329b(f); *Thursby v. Stovall*, 647 S.W.2d 953, 954 (Tex. 1983) (orig. proceeding) (per curiam). If no party to a judgment files a motion that extends the trial court's plenary power, the trial court loses plenary power over the judgment thirty days after the judgment is signed. *Bass v. Bass*, 106 S.W.3d 311, 314 (Tex. App.—Houston [1st Dist.] 2003, no pet.). If an appeal is not timely perfected from the divorce decree, res judicata bars a subsequent collateral attack. *See Hagen*, 282 S.W.3d at 902. Even if a final judgment is erroneous or voidable, it is not void and subject to collateral attack if a trial court had jurisdiction over the parties and subject matter. *Id*.

The record does not indicate that either party appealed the 2009 divorce decree. Thus, the 2009 divorce decree, which appears valid on its face and not appealed, is not subject to collateral attack. *See Hagen*, 282 S.W.3d at 902 ("As with other final, unappealed judgments which are regular on their face, divorce decrees and judgments are not vulnerable to collateral attack.").

In his brief, Houston asserts multiple times that the trial court erred in 2009. Specifically, he states, "Ultimately, the Trial Court erred in 2009 having been given

no evidence of [Julie's] ability to be unable to support herself because of a physical or mental disability to determine that the decree of divorce in this case ordering spousal maintenance past a three year period until the death of a party, the party receiving maintenance marries or further order of the Court." He also states, "In reality the Court did not terminate spousal maintenance pursuant to a Motion to Clarify, but found by becoming familiar with this divorce case that the Court in 2009 erred in judgment by not requesting evidence to support using language referring to section 8.54(b) in the Divorce Decree."

Both of Houston's statements demonstrate that his motion for clarification served to collaterally attack the 2009 unappealed divorce decree. Likewise, the trial court's January 15, 2016 order granting the motion for clarification and terminating agreed spousal maintenance had the effect of a collateral attack on the unappealed divorce decree. To the extent that the trial court, in 2009, erred in failing to provide a three-year termination date pursuant to Chapter 8 of the Family Code, such error should have been raised by direct appeal. *See Reiss*, 118 S.W.3d at 443 ("Errors other than lack of jurisdiction, such as 'a court's action contrary to a statute or statutory equivalent,' merely render the judgment voidable so that it may be 'corrected through the ordinary appellate process or other proper proceedings."). As such, Houston's motion to clarify a provision of an unappealed divorce decree constitutes a collateral attack that is barred by res judicata. *See Hagen*, 282 S.W.3d

at 902; *Tome v. Tome*, No. 02–14–00037–CV, 2014 WL 3953638, at *2 (Tex. App.—Fort Worth Aug. 14, 2014, no pet.) (mem. op.) (stating that voidable spousal maintenance award not authorized by statues in effect at time divorce decree signed could be corrected through direct appeal; because there was no appeal, argument alleging lack of jurisdiction was impermissible collateral attack); *Kaiser v. Silfvast*, No. 01–08–00496–CV, 2010 WL 5186801, at *5 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, pet. denied) (holding that appellant could not collaterally attack unappealed divorce decree incorporating contract for support of wife); *see also Jones v. Jones*, 900 S.W.2d 786, 788 (Tex. App.—San Antonio 1995, writ denied) (holding that unappealed divorce decree could not be collaterally attacked); *Adams v. Adams*, No. 09–11–00409–CV, 2011 WL 6747420, at *3 (Tex. App.—Beaumont Dec. 22, 2011, pet. denied) (mem. op.) (attempting to avoid alimony provision pursuant to mutual mistake amounts to impermissible collateral attack on decree). By clarifying the terms of the divorce decree to eliminate spousal maintenance on March 12, 2012, the trial court abused its discretion.

We sustain Julie's third issue.

Conclusion

We reverse and render that the portion of the trial court's order that terminated spousal maintenance is vacated.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.

Justice Massengale, dissenting.