IN THE SUPREME COURT OF TEXAS

NO. 10-0776

JACK EDWARD MILNER, PETITIONER,

v.

VICKI ANN MILNER, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued November 9, 2011

JUSTICE JOHNSON, joined by JUSTICE GREEN and JUSTICE WILLETT, dissenting.

I agree with the Court's conclusion that the court of appeals erred by setting aside the divorce decree and the Mediated Settlement Agreement (MSA) on which it was based. But in my view the MSA is unambiguous, the trial court properly enforced it, and the case should not be remanded for further proceedings before the mediator. I would reinstate the judgment of the trial court. Because the Court does not, I respectfully dissent.

In interpreting an agreement we attempt to determine the true intent of the parties as it is expressed in the agreement. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). We consider the entire writing and harmonize and give effect to all its provisions. *Frost Nat'l Bank v. L&F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005). An agreement is unambiguous if its language can be given a certain or definite interpretation; it is ambiguous if applying relevant rules of interpretation to its

facial language yields a genuine uncertainty about which of two or more reasonable meanings is the proper one. *Universal C. I. T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951).

Jack and Vicki Milner agreed that the terms of the MSA were to be the basis of and incorporated into their final decree of divorce. Accordingly, they, and the MSA, contemplated that Jack's interests in Thelin Recycling and Thelin Management would be transferred to Vicki by the final divorce decree. In support of the court of appeals' decision setting aside the decree, Vicki contends (1) the MSA required that she replace Jack as a limited partner in Thelin Recycling Company, L.P., (2) her being made a limited partner was a material condition of the MSA, and (3) the MSA was not effective because that did not occur. Jack contends (1) the MSA plainly provides only that he would transfer his rights in the Thelin entities subject to the Agreement of Limited Partnership of Thelin Recycling Company, L.P. (the Partnership Agreement), which did not allow him to make Vicki a partner in his place, and (2) the MSA neither says it is contingent on Vicki replacing him as a limited partner nor does it evidence an unwritten contemplation that it is, as the court of appeals determined.

The dispute arises from the first paragraph of a four-paragraph section of the MSA entitled "Business Interests." It provides as follows:

> **Business Interests**:
> Jack agrees to transfer to Vicki all of his beneficial interest and record title in and to the 44.055% community property interest in Thelin Recycling Company, LP, and the 44.5% community property interest in Thelin Management Company, LLC, subject to all liabilities thereon, (except a portion of the mineral interests, as set out herein) and all provisions of the existing Partnership Agreement. The parties acknowledge that Thelin Recycling LP and/or Thelin Management LLC, have outstanding debt relative to the operation of the business. Vicki agrees to substitute her name, for Jack's name, for all outstanding liabilities on both companies. The parties

> acknowledge that this agreement is contingent upon the existing lender, or any successor lender, accepting Vicki as a guarantor in place of Jack on all existing liabilities of the Thelin businesses. Jack and Vicki agree to execute the Required Consents to Transfer of Record Title and Beneficial Ownership Interests, copies of which are attached hereto as Exhibit "A", and Exhibit "B", and incorporated herein fully by reference, at the same time this Agreement is executed.

The referenced paragraph contains three fairly straightforward commitments. The first is by Jack; the second is by Vicki; and the third is jointly by Jack and Vicki:

> 1. *Jack agrees* to transfer all of his beneficial interest and record title in and to the 44.055% community property interest in Thelin Recycling Company, LP, and the 44.5% community property interest in Thelin Management Company, LLC, subject to all liabilities thereon, . . . and all provisions of the existing Partnership Agreement.
>
> 2. *Vicki agrees* to substitute her name, for Jack's name, as guarantor for all outstanding liabilities on both companies, provided the lenders accept the substitution.
>
> 3. *Jack and Vicki agree* to execute, at the time the MSA is executed, the Required Consents to Transfer of Record Title and Beneficial Ownership Interests, copies of which are attached as exhibits.

Commitment two is not at issue; Jack waived Vicki's commitment to be substituted as guarantor on the Thelin debts. Pursuant to commitment three, Jack and Vicki executed the Required Consents. That leaves the commitment causing the difficulty: Jack's agreement to transfer all his beneficial interest and record title in the Thelin entities (except for some mineral interests not relevant to the dispute) to Vicki, "subject to all liabilities thereon . . . and all provisions of the existing Partnership Agreement."

The most relevant part of the Partnership Agreement is Article XIII, which is entitled "RESTRICTIONS UPON PARTNERSHIP INTERESTS." Article XIII, Section B.5 is entitled "Death, Divorce or Declaration of Incompetency of a Partner." It provides, in part, that in the event

a partner is divorced and the partner's former spouse receives all or a portion of the partner's Partnership Interest, the partnership will not be dissolved. Rather, the former spouse receives the partner's right to share in the profits and losses of the partnership and to receive distributions of partnership funds; but

> [i]n no event shall the . . . former spouse . . . become a Partner of the Partnership, nor be construed as a substituted partner, nor shall such [former spouse] have any voting rights as a Partner or any rights relative to the operations or management of the Partnership, except as provided in this Agreement and the [Texas Revised Limited Partnership Act].

Even though a former spouse cannot become a partner simply by transfer of the partner's interest, the Partnership Agreement provides a method by which a former spouse may become a partner. Article XIII, Section B.4 specifies:

> [A]ny successor to the Partnership Interest of a Limited Partner shall be admitted to the Partnership as a substitute Limited Partner only upon the (a) furnishing to the General Partners of a written acceptance in a form satisfactory to the General Partners of all the terms and conditions of this Agreement and such other documents and instruments as may be required to effect the admission of the successor as a Limited Partner; and (b) *obtaining the Required Consent. The consent may be withheld or granted in the sole discretion of those constituting the Required Consent*. The transferee shall be admitted to the Partnership as a substitute Limited Partner as of the effective date of the transfer.

(Emphasis added). Article IV of the Partnership Agreement defines terms used in the Agreement. "Required Consent" is defined as "that percentage of Partnership Interest required to admit a new or substitute Limited Partner as defined in Article XIII, Section A., of this Agreement." Article XIII, Section A specifies that "Required Consent" means unanimous consent of the partners:

> Neither *record title nor beneficial ownership* of a Partnership Interest may be transferred without the *unanimous* consent of all General Partner(s) and all Limited Partners (*"Required Consent"*).

(Emphasis added).

Thus, under the Partnership Agreement, regardless of what interest Jack agreed would be transferred to Vicki in the divorce—all his partnership interest, all his record title and beneficial interest, or some other interest—she could not become a limited partner without the unanimous consent of all the partners of Thelin Recycling. And under the Partnership Agreement, consent could be "withheld or granted in the sole discretion" of the partners. Vicki does not claim that at the time the MSA was drafted and executed she was unaware of Article XIII's provisions; indeed, she could not make such a claim when the MSA explicitly made Jack's agreement to transfer his interests subject to the Partnership Agreement. Further, the attachment of and references to the Required Consents demonstrate that Vicki was fully aware that all the other partners had to agree before she would be admitted as a limited partner in Jack's place.

The Court says that "Jack, of course, could not alone make Vicki a limited partner since there were other partners to consider, nevertheless the language chosen here at least implies that this may have been the parties' intent." I agree in part: clearly, neither Jack nor the trial court could make Vicki a limited partner absent consent of the other partners. But, just as clearly, Jack's only commitment was that all his interest in the Thelin entities would be transferred to Vicki, subject to the Partnership Agreement's provisions. He did not commit to secure, or even to use his best efforts to secure, the unanimous consent of the other partners to admit Vicki as a limited partner, although Vicki says that he did, or at least she intended for him to do so.

Vicki asserts that referencing in and attaching to the MSA the Required Consent forms, which included signature lines for the other partners as well as for Jack and Vicki, reflects her

position at the mediation and the agreement actually made: she was to take Jack's place as a limited partner. The problem with her position is that nowhere in the language of the MSA is its effectiveness made contingent on either the other partners executing the Required Consents or a commitment by Jack to obtain their consents. Such an unexpressed contingency cannot reasonably be implied when the MSA required Jack and Vicki to execute the Required Consents the same day they executed the MSA, and the same Business Interests section of the MSA in which Jack agreed to transfer his Thelin interests contained explicit contingency provisions as to other matters. One of those, the provision making the MSA contingent on the Thelin businesses' lenders accepting Vicki as substitute guarantor for Jack, actually used the word "contingent." Other provisions in the Business Interests section specifically referenced the other partners having to agree in order for the provisions to be effective. One of those provided that Jack could purchase the pickup he was driving from Thelin for $20,000, "subject to the agreement of the other partners." Another part of the same section provided that Jack and Vicki, "along with the other partners of Thelin" would execute documents necessary to transfer certain mineral interests to Jack.

Moreover, in different sections of the MSA Jack specifically agreed to take certain actions to effectuate the property division. For example, he "agree[ed] to attempt to refinance" the note on the Lake House he was awarded, and he "agree[d] to obtain the signature of the appropriate party, on the appropriate form, necessary to release" Vicki's cell phone number to her, individually. The agreements Jack made were specific and detailed. His agreement that his interests in Thelin would be transferred to Vicki was likewise specific and detailed. It did not contain a requirement that Jack obtain the other Thelin partners' signatures so Vicki would be a limited partner in Thelin Recycling.

To reach its conclusion that the MSA "implies" the parties "may" have intended it to be contingent on Vicki being admitted as a limited partner, the Court delves into the meaning of the terms "beneficial interest" and "record title" used in Jack's commitment in the MSA. The Court concludes that the MSA's use of the terms is reasonably "consistent with either an assignment of the partnership interest or the transfer of full limited partnership rights." I disagree with the Court's conclusion; but in the end it does not matter exactly what the terms mean because regardless of what Vicki was to receive, the Partnership Agreement was clear that she could not become a limited partner unless all the partners consented.

As the Court notes, the terms "record title" and "beneficial interest" are not defined in the MSA or the Partnership Agreement. But those phrases appear in the Partnership Agreement when it addresses transfer of a partner's interest. The context for their use in the Partnership Agreement compels the conclusion that the terms are intended to mean what they appear to mean: they encompass all the rights of a limited partner in the partnership. Their context in the Partnership Agreement also compels the conclusion that no matter what interest is transferred to the former spouse of a limited partner through a divorce decree—whether all or some, great or small, legal or equitable—the transferee cannot become a limited partner absent the existing partners' unanimous consent. *See Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009) (explaining that contract terms are given "their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning"); *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996) (noting that undefined words in an agreement are given their plain, ordinary, and generally accepted meaning unless the agreement shows the parties used them in a

technical or different sense). So, the only reasonable construction of the MSA's use of the phrase "beneficial interest and record title" in relation to Jack's agreement that his interests in the Thelin entities would be transferred to Vicki is that the parties agreed on transfer of exactly what the MSA required: all his interests of whatever nature in the entities. But, likewise, the only reasonable construction of the MSA is that Jack and Vicki agreed the transfer of Jack's interests was subject to the Partnership Agreement's provisions.

On the other hand, it is not reasonable to read into Jack's agreement to transfer all his "beneficial interest and record title" to Vicki an implication that they agreed, without saying so in the MSA, that their agreement depended on her being made a limited partner in his place. Both of them knew neither Jack nor the trial court could make her one because the Partnership Agreement specified that the other partners had the sole discretion to admit her. The "Required Consents" exhibits to the MSA included signature lines for the other partners. But even though the MSA was detailed enough to specify that Jack and Vicki would execute the Required Consents at the same time they executed the MSA, the MSA wholly failed to reference the other partners' execution of the Required Consents or to make the MSA contingent on execution of them by the other partners. That omission can reasonably be interpreted only one way in light of the MSA provisions requiring the partners' approval or participation in other, seemingly less important, events: the MSA neither implies nor contemplates an agreement between Jack and Vicki that its effectiveness would be contingent on all the other partners signing the Required Consents attached to the MSA so Vicki would be admitted as a limited partner.

As Jack points out, there is a big difference between an agreement that he would transfer his interests in the businesses and execute the Required Consents, which he had the authority to do, and an agreement that he would compel the other partners to consent to Vicki being admitted as a limited partner or for him to somehow make Vicki a limited partner, which he did not have the authority to do. It is not reasonable to interpret the MSA as *implying* Jack made the latter agreement—which is so important Vicki claims the entire MSA hinges on it—when the MSA clearly *expressed* he made the former agreement. Said another way, it is not reasonable to interpret the MSA as implying the parties agreed and intended, as an unexpressed material part of the MSA and on which it was contingent, for Jack to do something he had no legal authority to do when the MSA expressly sets out his commitment otherwise.

If Jack and Vicki agreed at the mediation that the MSA was contingent on Vicki being admitted as a limited partner, the omission of language expressing the contingency is inexplicable in the context of this divorce proceeding that must have included extended negotiations about property even before the mediation and the extensive, eight-page MSA addressing the property division agreement including such details as Jack's agreeing to obtain a signature of the appropriate party necessary for Vicki to retain her cell phone number. The failure to include language specifying that the MSA was contingent on the other partners' execution of the Required Consents is such a glaring omission it is unreasonable to interpret the MSA as possibly including such a requirement through finding ambiguity in what seems to me to be clear language. *See Frost Nat'l Bank*, 165 S.W.3d at 312.

In my view the only reasonable interpretation of the MSA is that it was not contingent on the other partners' executing the Required Consents. I would hold that because there are not two or more reasonable interpretations of the MSA language in question, the MSA is unambiguous and the trial court properly enforced it as written. *See Universal C. I. T. Credit Corp.*, 243 S.W.2d at 157.

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Phil Johnson
Justice

OPINION DELIVERED: March 9, 2012