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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-22-85

ANGELA WORMINGTON (FORMERLY SMITH) APPELLANT	Opinion Delivered January 17, 2024 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04DR-19-1554]
V.	HONORABLE XOLLIE DUNCAN, JUDGE
MARK SMITH APPELLEE	AFFIRMED IN PART; REVERSED AND REMANDED IN PART

RITA W. GRUBER, Judge

Angela Wormington, formerly Angela Smith (Angie), appeals from the October 13, 2021 divorce decree of the Benton County Circuit Court, taking issue with the court's distribution of property between her and appellee Mark Smith. She asserts three points on appeal: (1) the "arbitrator's" decision should have been confirmed; (2) the Vanguard mutual fund account's gains were marital property; and (3) Mark received more than his fair share of their company. We affirm in part and reverse and remand in part.

I. *Factual and Procedural Background*

The record reflects the following. Mark and Angie were married on May 3, 1986. They have one adult son, Connor Smith. The parties separated on May 6, 2008, and Mark

filed a complaint for divorce on September 13, 2019.[1] The parties have several significant assets relevant to the issues on appeal. The parties own a house in Lowell, Arkansas, in which Mark has resided and continued to reside as well as another house and eleven acres adjacent to it in Bentonville, Arkansas, in which Angie has resided and continued to reside. The parties also have a Vanguard account. They have ownership in two companies: Ozark Country Enterprises, Inc. (OCE), 50 percent of which is owned by Angie and Mark, with Angie's parents owning the other 50 percent; and Moran Properties, LLC (MP), which is wholly owned by Mark and Angie. There are two bank accounts at issue: the parties' personal joint account and a joint MP account. OCE's primary asset is commercial real property in Branson, Missouri. MP's assets are two triplexes in Bentonville, Arkansas, containing six rental units total. One of those rental units was leased to Connor on June 1, 2020, for a monthly rental rate of $325 from June through December 2020, after which time his rent increased to $500 for the entirety of 2021. There are also smaller personal-property items at issue—particularly, a gold-triggered 9mm Browning handgun.

The parties testified at various hearings. Angie testified that Connor's reduced rental rate for 2020 was an agreed-upon college-graduation gift to him from both her and Mark. Angie further testified that Connor prepaid the entirety of his 2020 rent to Angie—who deposited it into the MP account—to help offset MP expenses that she had been unable to cover due to a reduction in the business's rental income because of the pandemic. Angie

[1]There is no explanation contained in the record regarding why eleven years elapsed between the parties' separation and the beginning of the divorce proceedings.

explained that the reduced rental rate for 2021 was because he is the party's son and would be helping to manage the property. Angie also testified that she wrote three checks on the MP account totaling $7801.64 to Connor for work performed, expenses, and repayment of a loan. Mark testified that he was not aware of Connor's reduced rental rates or the checks issued to him, and he had been deprived of income to which he was entitled as a result.

Throughout the divorce proceeding, multiple attempts were made to reach a final agreement regarding the division of the parties' property. Two of those attempts resulted in a written agreement, which is at issue on appeal. The first was the result of a formal mediation held on September 23, 2020 (mediation agreement). The circuit court found the mediation agreement to be binding and entered an order implementing it on October 13, 2020. The other is a so-called arbitration agreement dated October 28, 2020 (October 2020 agreement). Additional details regarding these agreements are set forth below.

A final divorce decree was entered on October 13, 2021, attached to which were the mediation agreement and the October 2020 agreement; both were incorporated into the decree.[2] In relevant part, the decree awarded the Bentonville house and the adjacent eleven acres to Angie and the Lowell house to Mark. Angie received their 50 percent ownership interest in OCE and any assets associated therewith, and Mark received the entirety of MP

[2]There were numerous other motions and hearings throughout the proceeding regarding disputes about federal stimulus funds, various tax issues, insurance policies, contempt allegations, alleged violations of a protective order, Mark's unemployment benefits, and the payment of bills during the pendency of the divorce, none of which are relevant to the issues on appeal and thus are not set forth herein.

and any assets associated therewith. Each received one-half of the balance in their joint personal bank account as well as the MP bank account. Both were permitted to keep various pensions, stock, and retirement benefits in their respective names. Each party would be responsible for any debt incurred in his or her own name from the date of the mediation forward, which included a $15,000 credit-card debt incurred by Mark, with Mark receiving "all guns." Each party was awarded various personal effects and family items; Angie was awarded any items belonging to OCE; and Mark was awarded any items belonging to MP. As to the Vanguard account, it was to be split equally, with $40,000 of Mark's half being paid to Angie.

The decree reflects that the circuit court found that the parties had agreed to Connor's reduced rental rates as a graduation gift; however, the decree ordered that "[r]eimbursement is to be made to [MP] for the prepaid rent from Connor Smith for October, November, and December 2020." The circuit court found that $801.64 of the $7801.64 Angie paid to Connor out of the MP account for expenses was valid. However, the decree required that the remaining $7000 be restored to the MP account. But, once the $7000 was restored, Connor would be paid $12 an hour plus expenses for his manual labor, instead of the rates he had charged. After Connor was paid for his labor and expenses, any funds remaining in the MP account was to be divided equally between the parties. The decree required that a variety of expenses be split between the parties, including a payment to the parties' long-time CPA, Tim Bunch. Each party was ordered to pay their own attorney's fees, save $750 in attorney's fees assessed against Mark for contemptuous conduct.

On October 22, 2021, Angie filed a timely motion for reconsideration or new trial pursuant to Ark. R. Civ. P. 59(a)(5) and (a)(8). On November 12, she filed a timely notice of appeal, abandoning any pending but unresolved claims. On November 12, Mark filed a notice of cross-appeal, also abandoning any pending but unresolved claims.[3] Mark did not respond to Angie's posttrial motion, and the circuit court did not specifically rule on it. Thus, it was deemed denied on November 22. On November 29, Angie filed an amended notice of appeal to include the denial of her posttrial motion.

II. *Standard of Review*

We review division-of-marital-property cases de novo. *Chekuri v. Nekkalapudi*, 2019 Ark. App. 221, at 4, 575 S.W.3d 572, 575. "De novo review" means the whole case is open for review. *Stehle v. Zimmerebner*, 375 Ark. 446, 455, 291 S.W.3d 573, 580 (2009). It does not mean that the findings of fact of the circuit court are dismissed out of hand and that the appellate court becomes the surrogate trial court. *Id.* at 455–56, 291 S.W.3d at 580. What it does mean is that a complete review of the evidence and record may take place as part of the appellate review to determine whether the circuit court clearly erred in either making a finding of fact or in failing to do so. *Id.* at 456, 291 S.W.3d at 580. The circuit court's findings will not be reversed unless they are clearly erroneous. *Dare v. Frost*, 2018 Ark. 83, at 3, 540 S.W.3d 281, 283. A finding is clearly erroneous when the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been

[3]While not specifically stated in the record or brief, it appears as though Mark has abandoned his cross-appeal.

committed. *Skokos v. Skokos*, 344 Ark. 420, 425, 40 S.W.3d 768, 772 (2001). Special deference is given to the circuit court's superior position in evaluating the witnesses and their testimony. *Dare*, 2018 Ark. 83, at 3, 540 S.W.3d at 283.

III. *Discussion*

Contrary to Angie's arguments, Arkansas Code Annotated section 9-12-315 (Repl. 2020) does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. *Copeland v. Copeland*, 84 Ark. App. 303, 308, 139 S.W.3d 145, 149 (2003). The circuit court is vested with a measure of flexibility in apportioning the total assets held in the marital estate upon divorce, and the critical inquiry is how the total assets are divided. *Id.* The circuit court is given broad powers to distribute all property in divorce cases, marital and nonmarital, to achieve an equitable distribution. *Id.*

We now address Angie's points on appeal regarding the "arbitrator's award," the Vanguard account gains, and Mark's share of MP.

A. The "Arbitrator's Award"

Angie first contends that the circuit court erred as a matter of law by failing to give effect to what she refers to as the "arbitrator's award." In support of this point, Angie asserts that the parties agreed to submit their personal-property disputes to an arbitrator; the "arbitration agreement" was valid and unassailable; the arbitrator gave his "final say"; and the circuit court confirmed the "arbitration agreement."

The so-called arbitration agreement is the October 2020 agreement, which stated that any disputed items were to be returned to one of the residences for "evaluation by Connor." The October 2020 agreement further stated that "for all items remaining in discrepancy beyond Connor Smith's negotiations and recommendations, Connor shall have the final say, as to who will receive the items."

Angie argues that the "arbitrator's award" should have been confirmed because of the deference given to such by a reviewing court in determining if the arbitrator acted within his or her jurisdiction. Angie also argues that Mark disregarded the "arbitrator's award" of the guns and miscellaneous property to Angie. She requests that this court remand with instructions to confirm the "arbitrator's award in full."

Mark responds that the scope of the "arbitrator's" authority was expressly limited to the division and distribution of items that were either "personal effects" or "family items,"[4] and the items over which Angie takes issue do not fit into either of those categories. Mark further responds that the "arbitrator" attempted to award items to Angie that were neither "personal effects" nor "family items" and thus exceeded the scope of his limited authority. Mark argues that it was for the circuit court to determine what the terms "personal effects" and "family items" meant, and it did not err in distributing the parties' personal property as it did.

[4]Angie was also to receive any property owned by OCE; Mark was to receive any property owned by MP.

First, while Angie is correct that *this* court's standard of review for arbitration awards is deferential, *see Goldtrap v. Bold Dental Mgmt., LLC*, 2018 Ark. App. 209, at 8, 547 S.W.3d 104, 110, both parties miss the forest for the trees. The October 2020 agreement came about due to the following directive from the circuit court at the October 26, 2020 hearing:

> So, this is what we're going to do: By noon tomorrow, with the help of your grown son, who I understand has been trying to help in this situation, you will agree on a division of the personal property. If it is not agreed upon by noon tomorrow, I will enter an Order appointing an auctioneer and it will all be sold.

The so-called arbitrator is the parties' "grown son," Connor. However, the circuit court neither ordered the parties to arbitration nor appointed Connor as an arbitrator.

Rather, the parties were to come to an agreement regarding the remaining personal property items with the assistance of Connor. The circuit court clearly articulated the consequence of the parties' failure to agree regarding the distribution of any remaining personal property: an order that the personal property be auctioned. Given that the court retained authority to auction any remaining disputed items, it defies logic that the court, in ordering the parties to agree—with the "help" of Connor—somehow constituted an abdication of the court's authority to distribute the parties' property.

Second, the Arkansas Uniform Arbitration Act, codified at Arkansas Code Annotated §§ 16-108-101 et seq. (Repl. 2016) (UAA), upon which Angie attempts to rely,[5] clearly contemplates something more than what occurred here before it becomes applicable.

[5]There's no assertion or indication that Angie is arguing that the Federal Arbitration Act applies.

While the term "arbitrator" is not defined within the UAA, its various provisions and the cases interpreting it make clear that the keystone qualification for an arbitrator is neutrality. *See, e.g.*, Ark. Code Ann. § 16-108-211(b) (stating that "[a]n individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral"). Moreover, before an arbitrator may "proceed to act," he or she "shall take an oath to decide the controversy submitted to them according to law and evidence and the equity of the case, to the best of their judgment, without favor or affection." Ark. Code Ann. § 16-108-103(a)(1). Subdivision 103(a)(2) requires that a "certificate of oath shall be returned to the court with the award."

Connor is the parties' son; the record reflects an existing relationship between him and his parents; and he attempted to award some of the property at issue to himself. The record does not reflect that Connor took the requisite oath or returned any sort of certificate indicating he had. Moreover, Arkansas Code Annotated section 16-108-122 states that upon a motion to the court for an order confirming the award, "the court shall issue a confirming order unless the award is modified or corrected under § 16-108-220 or § 16-108-224 or is vacated under § 16-108-223." However, no party made a motion to the court for an order confirming the award, and even if they had, Arkansas Code Annotated section 16-108-107(c) provides that while no "award shall be set aside for the want of form, . . . courts shall have power over awards on equitable principles as heretofore." Accordingly, we do not believe this issue is governed by the UAA or any case interpreting it.

Simply stated, Connor was given the unenviable task of helping his parents divide the remainder of their personal property, specifically, "personal effects"[6] and "family items"—terms that were never defined herein and are not defined in the law. Moreover, there is no evidence that the circuit court authorized the October 2020 agreement or that the requirements for arbitration were met under the UAA. The circuit court retained full jurisdiction to decide this case.

At a September 16, 2021 hearing, the circuit court reviewed the remaining disputed personal-property items that were listed on the document created by Connor captioned "Items to be Returned to Angie" (Angie's Exhibit 8). As is reflected in the decree, the circuit court found that certain items did not meet "the criteria of being personal effects, family heirlooms or ancestral items." The circuit court further found that other items at issue ceased being assets of OCE when they were converted to personal use. The court then awarded the bulk of those items—for example, milk crates, plastic storage containers, a black long-handled dustpan, a working caulking gun, and Tupperware—to Mark.

The parties submitted themselves to the jurisdiction of the circuit court to dissolve their marriage and distribute their property, and pursuant to well-established law, the circuit court was obligated to make an equitable distribution. When viewing the record and the divorce decree as a whole, we do not find that the circuit court committed clear error in its division of the property identified in Angie's Exhibit 8. To the contrary, the circuit court

[6]The term "personal effects" has no settled meaning. *Goldtrap*, 2018 Ark. App. 209, at 10, 547 S.W.3d at 111.

diligently reviewed the evidence and testimony to reach a distribution that was fair and equitable. Angie makes no convincing argument or sufficient citation to authority in support of reversal under this point and has failed to demonstrate that the circuit court erred. *See Goldtrap*, 2018 Ark. App. 209, at 9–10, 547 S.W.3d at 111 (holding that this court will not reverse when a point on appeal is unsupported by convincing argument or sufficient citation to legal authority). Accordingly, we affirm as to Angie's first point on appeal.

B. The Vanguard Account

Angie's second point on appeal is that the Vanguard account's gains were marital property. The mediation agreement entered into by the parties on September 23, 2020, unequivocally stated that Angie was entitled to "[o]ne-half of the Vanguard mutual fund account *immediately*. Additionally, Mark shall transfer $40,000.00 of his half of said account to Angela as her separate property." (Emphasis added.) In the section of the agreement delineating Mark's property award, it also unequivocally provided, "One half of the Vanguard mutual fund account to be divided immediately. Additionally, Mark shall transfer $40,000.00 of his half of said account to Angela as her separate property *upon division*." (Emphasis added.) A hearing was held regarding the implementation of the mediation agreement, and the attendant order was entered on October 13, 2020. The circuit court made clear at the hearing and in the October 13 order that the mediation agreement was binding on both parties and would be enforced by the court. The divorce decree was entered on October 13, 2021—exactly one year after this order implementing the mediation agreement. For reasons unknown, the Vanguard account had not been divided at the time

the decree was entered, despite the mediation agreement specifying that it was to be divided immediately, and that the $40,000 offset was to be transferred to Angie at the time of the division.

Angie argues that the circuit court erred when it did not grant her request that she be granted the appreciation of the $40,000 beginning October 13, 2020—the date the order implementing the mediation agreement was entered. Mark responds that Angie got exactly what she was entitled to under the mediation agreement; specifically, while the mediation agreement had a timing requirement for the division of the account, it did not have a timing requirement regarding the transfer of the $40,000, and no provision of the agreement provides for the adjustment of any amounts due to the passage of time or changes in the valuation of the account. Angie replies that the Vanguard account's gains were marital property, and Mark's argument is nonsensical given the inclusion of the word "immediately" in the agreement.

A court has no authority to modify an independent contract that is made part of a divorce decree. *Fraser v. Fraser*, 2023 Ark. App. 540, at 16, ___ S.W.3d. ___, ___. A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *Boatmen's Ark., Inc. v. Farmer*, 66 Ark. App. 240, 242, 989 S.W.2d 557, 558 (1999). When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. *Id.* Different clauses of a contract must be read together and the contract

construed so that all its parts harmonize, if that is at all possible. *Pate v. U.S. Fid. and Guar. Co.*, 14 Ark. App. 133, 135, 685 S.W.2d 530, 532 (1985). The intention of the parties is to be gathered not from particular words and phrases but from the whole context of the agreement. *Id.*

There is no question that the Vanguard account was marital property. Ark. Code Ann. § 9-12-315(b). The mediation agreement does not qualify the term "immediately." In other words, the mediation decree does not state that the division will occur "immediately" *upon entry of the decree*—it just states "immediately." In this context, the word "immediately" is not ambiguous. When the provisions of the mediation agreement are read together, it is clear that the division should have occurred no later than October 13, 2020, with Angie receiving the additional $40,000 from Mark's share at that time. The circuit court failed to enforce the plain and unequivocal language of the mediation agreement, despite entering an order that stated it was binding and would be enforced. Accordingly, the circuit court erred, and we reverse and remand with instructions to divide the entire value of the Vanguard account pursuant to the mediation agreement, including the appreciation, consistent with the court's opinion.

C. Mark's Share of MP

Angie's final point on appeal is that Mark received more than his fair share of MP. She makes multiple arguments in support of this argument: (1) the circuit court erroneously ordered a $3000 offset of MP to Mark for the loan made by Connor and paid back by Angie; (2) the circuit court erroneously ordered a $4000 offset for the work performed by Connor;

(3) the circuit court erred when Mark received 150 percent of the prepaid rents; and (4) the circuit court erred when it required Angie to pay Tim Bunch's CPA fees, specifically, the $700 charged for doing MP's 2019 taxes. Mark responds that Angie's argument that the division was unfair is not legally cognizable. Mark further responds that Angie presents an incomplete picture of the property distribution in support of her argument and that the distribution was, in fact, equitable. Angie replies that Mark's not having to repay Connor the $3000 loan is inequitable and runs counter to the parties' agreement that "the business be evenly divided." Angie further replies that the $4000 offset is unfair to Connor.

The only issues Angie raised to the circuit court in her posttrial motion were the prepaid rent and the $700 CPA payment for MP; thus, her arguments regarding the $7000 total paid to Connor are not preserved, and even if the arguments were preserved, Angie has no standing to assert claims or errors on Connor's behalf. We cannot say that on this record, the division was inequitable. This is so even taking into account this court's holding regarding the $40,000 offset in connection with the Vanguard account. Regarding the prepaid rents, the decree directed that those amounts be reimbursed to the MP account, which was then divided equally between the parties. The CPA fees Angie had to pay a portion of were in connection with the preparation of MP's 2019 taxes. Angie still owned 50 percent of MP in 2019 and did not agree to anything otherwise until the latter part of 2020. Thus, on this record, as to this point, we find no error. Accordingly, we affirm as to Angie's third point on appeal.

D. Attorney's Fees

Under each point on appeal, Angie requests that she be awarded attorney's fees. Requesting fees within a brief is not the proper method through which fees should be requested. As such, we decline to disturb the circuit court's rulings in that regard.

Affirmed in part; reversed and remanded in part.

ABRAMSON and THYER, JJ., agree.

Kezhaya Law PLC, by: *Matthew A. Kezhaya* and *Sonia A. Kezhaya*, for appellant.

Putman Law Office, by: *William B. Putman*, for appellee.