Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-279

NOVEMBER TERM, 2004

Gary Helfman	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
Kristine Helfman	}	
	}	DOCKET NO. F198-3-00 Cndm
		Trial Judge: Linda Levitt

In the above-entitled cause, the Clerk will enter:

Husband Gary Helfman appeals from a family court order construing the parties' divorce decree and property settlement agreement to permit wife Kristine Helfman to freely convey the marital home. Husband contends: (1) the court erred in concluding that the agreement unambiguously permitted the sale; (2) the court erred by not taking evidence relating to the circumstances surrounding the making of the agreement; (3) the order is void because husband was not properly served with the motion to enforce and the notice of hearing; (4) the court improperly failed to appoint counsel to protect the interests of the parties' children; and (5) the court violated husband's constitutional rights by denying a motion for continuance. We affirm.

The parties were divorced in August 2001. They had two minor children at the time. The final decree and order of divorce incorporated the parties' marital settlement agreement, dated August 17, 2001, which provided, inter alia, that wife would receive the marital home, located in the Town of Charlotte, and that husband would receive $280,000 from the parties' joint money market account as his share of the equity in the home. The agreement also provided that wife would refinance the mortgage and remove husband from any responsibility for the debt, and that if wife was unable to refinance within sixty days the home would be placed on the market for sale. The same provision in the agreement stated that "so long as [wife] owns [the home], she shall leave the real property and the residence to the children . . . via her Will irrevocably in its entirety. Any other party must vacate the residence upon [wife's] demise."

In November 2001, the parties executed an amendment to the provision clarifying that husband would immediately tender a quitclaim deed conveying the property to wife, but that, if the refinancing failed, wife would reconvey the property and place the house on the market. The amendment noted that husband had already received his share of the equity in the home. Wife was eventually able to refinance the home, husband was removed from the mortgage, and husband executed and delivered a quitclaim deed conveying all of his right, title, and interest in the property to wife.

In the spring of 2004, wife remarried and entered into a purchase and sale agreement for the sale of the home. Husband objected to the sale and caused the marital settlement agreement to be recorded in the Charlotte land records. In early June, wife filed an emergency motion to enforce the settlement agreement, alleging that husband had contacted counsel for the buyers and falsely informed them that he had not received his equity in the home, that wife was prohibited from transferring the property to anyone other than the parties' children, and that he would institute a lawsuit if the sale went forward. Wife further alleged that the purchase and sale agreement provided for a closing before the end of June, and that buyers refused to close unless wife obtained a court order clarifying and enforcing the terms of the settlement agreement.

Following a hearing on June 11, the court issued a brief entry order, finding that "upon consideration of the clear and plain language" of the parties' settlement agreement, wife was entitled to sell the property "free and clear of the terms and conditions" in the agreement. This appeal followed.

Husband contends the court erred in concluding that the agreement clearly allowed wife to sell the property to a third party. We have held that where the language of a settlement agreement incorporated into a divorce decree is unambiguous, "we apply it according to its terms." Sumner v. Sumner, 2004 VT 45, ¶ 9, 15 Vt. L. Wk. 144. Whether a term is ambiguous is a question of law for the court to decide, and a provision is ambiguous "only to the extent that reasonable people could differ as to its interpretation." Isbrandtsen v. North Branch Corp., 150 Vt. 575, 577 (1988). The trial court here focused on the pertinent language of the agreement, in which wife agreed that "so long as she owns [the property] she shall leave [it] to the children . . . via her Will irrevocably in its entirety." (Emphasis added). The court found at the conclusion of the hearing that the meaning of the language was clear and unambiguous, to wit, that "if [wife] owned the property when she died, her children would inherit the property. And on the other hand, if she sells it before she dies, the children do not get the property and there's no other interests involved." We agree with the court's construction of the plain language. Although husband contends the agreement merely created a life estate in wife, with the remainder to the children, nothing in the text of the agreement supports the claim. Husband maintains that the next sentence in the agreement, providing that "[a]ny other party must vacate the residence upon [wife's] demise," creates at least an ambiguity in this regard. This provision, however, relates only to the rights of a third party living in the home when wife dies. It neither imposes nor implies any limitation on wife's right to sell the home to a third party before that. Accordingly, we discern no basis to disturb the court's ruling.

Husband next contends the court erred by not taking evidence on the question of the existence of an ambiguity in the agreement. We have held that it may be appropriate, when inquiring into the existence of an ambiguity, for a court to consider the circumstances surrounding the making of an agreement. Isbrandtsen, 150 Vt. at 579. Here, husband's attorney represented at the hearing that evidence of conversations between the parties at the time of the agreement and subsequent amendment would show that husband had an "interest in maintaining the asset for the benefit of the children." Nothing in this proffer supports an argument that the agreement, when read in light of these purported conversations, is ambiguous or could reasonably be read to create a life estate in wife or limit her ability to convey the property. See Kipp v. Chips Estate, 169 Vt. 102, 107 (1999) (limited extrinsic evidence is relevant only when, "in combination with the writing, it supports an interpretation that is different from that reached on the basis of the writing alone, and both are reasonable. . . . It may not be used to vary the terms of an unambiguous writing."); Isbrandtsen, 150

Vt. at 579 ("Ambiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable."). Accordingly, we discern no error in the court's failure to take extrinsic evidence.

Husband next asserts that "personal service" of the motion to enforce and the notice of hearing, as called for in V.R.F.P. 4(j)(2)(A), was not properly effected because the motion and notice were taped to his door in Florida by a sheriff's deputy rather than delivered to husband or a designated agent. Therefore, husband contends that the order is void. We note, however, that husband had actual notice of the hearing, that he appeared at the hearing through counsel, and that the sole question presented—the application of an unambiguous settlement agreement—was one of law that did not turn on the admission of additional factual evidence and was adequately addressed by husband's counsel. Accordingly, any error relating to the service of process was harmless. See Sumner, 2004 VT 45, ¶ 14 (court's issuance of ex parte order following hearing in which husband was not afforded adequate notice was harmless error where main issue before court was one of law, husband was able to present his arguments, and ruling was not "inconsistent with substantial justice").

Husband next claims that the court improperly denied his motion to appoint counsel for the parties' children to protect their interests in the home. Having concluded that the agreement did not create a remainder interest in the children, as husband contends, we discern no error in the court's denial of the motion.

Finally, husband contends the court violated his due process rights by denying his request for a continuance and proceeding with the hearing without affording him an adequate opportunity to be heard or to file a reply memorandum. Although husband's counsel mentioned a due process issue at the hearing in connection with the service by posting rather than personal delivery, he did not claim that husband's due process rights had been denied by proceeding with the hearing. Accordingly, the claim was not preserved for review. New England P'ship v. Rutland City Sch. Dist., 173 Vt. 69, 73 (2001). Furthermore, as noted, the record here discloses that the legal issue did not require additional evidence, and was adequately addressed by counsel. Accordingly, we discern no prejudicial error resulting from the denial of the motion for a continuance.

Affirmed.

BY THE COURT:

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned