

IN THE COURT OF APPEALS OF IOWA

No. 6-710 / 05-1690
Filed November 16, 2006

**IN RE THE MARRIAGE OF CYNTHIA COLLINS EUBANK
AND KEITH HAROLD EUBANK**

**Upon the Petition of
CYNTHIA COLLINS EUBANK,**
Petitioner-Appellee,

**And Concerning
KEITH HAROLD EUBANK,**
Respondent-Appellant.

Appeal from the Iowa District Court for Warren County, William Joy,
Judge.

Keith Eubank appeals from the district court's decree dissolving his
marriage to Cynthia Eubank and the court's ruling granting Cynthia's application
to enforce a settlement agreement. **REVERSED AND REMANDED.**

William Graham of The Graham Law Firm, P.C., Des Moines, for
appellant.

Leslie Babich and Kodi Petersen of Babich, Goldman, Cashatt & Renzo,
P.C., Des Moines, for appellee.

Heard by Sackett, C.J., Zimmer, J., and Hendrickson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ZIMMER, J.

Keith Eubank appeals from the district court's decree dissolving his marriage to Cynthia Eubank and the court's ruling granting Cynthia's application to enforce a settlement agreement. We reverse and remand.

I. Background Facts & Proceedings

Cynthia and Keith were married in 1989. It was the second marriage for both parties, and there were no children born to the marriage.

Cynthia filed a petition to dissolve the parties' marriage on March 29, 2004, with the assistance of her attorney, Leslie Babich. Keith filed an answer to the petition after retaining an attorney, Steve DeVolder, to represent him. The discovery process commenced, and the petition was set for trial. After several continuances, trial was scheduled to begin on February 10, 2005. On the day prior to trial, counsel for the parties informed the court a trial would not be necessary because a settlement had been reached. On February 14 Keith met with his attorney, refused to approve a proposed decree, and disavowed any settlement. After learning Keith did not agree the case had been settled, DeVolder withdrew from the case, and Keith's present counsel entered an appearance.

On March 11, Cynthia filed an application to enforce the settlement agreement. Cynthia's application and the petition for dissolution of marriage were set for trial commencing May 4, 2005. At the time of the dissolution trial, Cynthia was fifty-six years old, and Keith was sixty-five years old. Cynthia has worked full-time as a teacher at Des Moines Area Community College (DMACC) since approximately two years prior to the marriage, and Keith has been a

veterinarian at the Indianola Veterinary Clinic since 1968. Cynthia earns \$58,000 per year from DMAACC, \$200 to \$300 per month working as a midwife, and \$300 to \$600 per year working as an expert witness. Keith owns a twenty-five-percent interest in the veterinary clinic and earned \$190,239 in 2004.¹ During the marriage, Cynthia and Keith operated a Christmas tree farm on the property surrounding their home.

Following a six-day trial, the district court did not make its own determination regarding an equitable division of property. Instead, the court accepted Cynthia's contention that the parties had reached a pretrial settlement agreement and entered a dissolution decree that contained the provisions of a decree prepared by petitioner's counsel on February 10, 2005.

Keith has appealed from the district court's decree dissolving his marriage to Cynthia and the court's ruling granting Cynthia's application to enforce the settlement agreement. He contends the district court erred in determining a binding settlement agreement had been reached by the parties. He also claims the decree is not consistent with the terms intended by his attorney and does not equitably divide the parties' assets.

II. Scope & Standard of Review

We review dissolution of marriage proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993). Although we are not bound

¹ The district court valued Keith's interest in the veterinary clinic at \$206,000. Keith is considering retiring in 2006.

by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g).

III. Settlement Agreement

Keith first claims he and Cynthia did not reach a binding settlement agreement. A settlement agreement in dissolution proceedings is considered a contract between the parties. *In re Marriage of Lawson*, 409 N.W.2d 181, 182 (Iowa 1987). Neither party is entitled as a matter of right to withdraw a stipulation for disposing of an entire issue at any time before actual entry of judgment because such stipulations are entitled “to all of the sanctity of an ordinary contract if supported by legal consideration.” *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). However, an attorney cannot settle or compromise a claim of his or her client without special authority. *Starlin v. State*, 450 N.W.2d 257, 258 (Iowa Ct. App. 1989). With these principles in mind, we turn to the facts of this case.

The record reveals Cynthia provided her financial affidavit and a proposed settlement to Keith on February 7, 2005. Keith’s attorney faxed his client’s financial affidavit and proposed dissolution decree provisions to Cynthia’s attorney on the morning of February 9. At the time, the parties substantially differed in their valuations of the marital assets. Keith valued the marital home, surrounding real estate, and tree farm at \$380,000, and Cynthia valued the property at \$660,795. Keith submitted two proposals to Cynthia. The first proposed that Cynthia would take all the real estate if her higher values were used. The second proposal stated Keith would take the real estate if his lower values were used.

The parties continued to discuss settlement through their respective attorneys on February 9. At first, the discussions focused on issues related to the parties' real estate. Keith initially wanted to receive the real estate at the values he placed on them, and Cynthia made a counteroffer to accept the real estate at the values she placed on them. DeVolder testified he had several telephone conversations with Keith regarding the real estate.²

At some point, DeVolder informed Babich the terms of a proposal which had been communicated to him by Babich were acceptable. The terms of this proposal awarded Cynthia the homestead at her appraised value of \$400,000, the real estate surrounding the homestead at her appraised value of \$131,500, the tree farm at her appraised value of \$129,295, and the contents of a shed located on the property valued at \$18,000. The agreement obligated Cynthia to assume the mortgage on the home at approximately \$78,959. Babich confirmed this agreement in a letter faxed to DeVolder and asked DeVolder to confirm the agreement.

DeVolder discussed the contents of the letter with Keith by telephone and told him a response would be faxed to Babich. DeVolder testified he "thought" Keith had given him authority to accept the offer regarding the real estate. DeVolder faxed Babich a letter confirming an agreement had been reached regarding the real estate and stating Keith would not be calling his expert appraiser at trial.

Later that day, the attorneys continued their discussion of issues unrelated to the parties' real estate. Cynthia sought an interest in Keith's veterinary clinic,

² Keith was working at his veterinary clinic on February 9.

alimony, and attorney's fees. During the afternoon of February 9, each attorney made a global settlement offer. Late that afternoon, the attorneys reached a comprehensive settlement agreement to become final after being reduced to writing and approved by the court. The final agreement included a \$100,000 equalizing payment from Cynthia to Keith. As part of the agreement, Cynthia relinquished her claims for an interest in the clinic, alimony, and attorney's fees, and the parties agreed to split court costs equally. When asked at trial whether there was any question in his mind whether he had authority to agree on the settlement, DeVolder said, "I thought I had authority."

Babich and DeVolder agreed that Babich would contact Judge William Joy to inform him of the settlement and cancel the trial. Babich agreed to provide DeVolder with a proposed dissolution decree incorporating their agreement on February 10. Cynthia met with Babich on February 10 to review the proposed decree. Cynthia testified she found the decree to be "totally consistent" with the parties' agreement. Babich faxed the proposed decree to DeVolder. DeVolder believed the proposed decree was consistent with the parties' agreement, but indicated some concerns remained about the accuracy of real estate legal descriptions. During his testimony at trial, DeVolder indicated Keith had purchased land constituting platted, undeveloped roadways extending throughout a subdivision. He stated that some of the roads extended beyond the tree farm and into agricultural property owned by Keith and his veterinary clinic partners. DeVolder testified if Cynthia was awarded these roads, it could interfere with the veterinary clinic's agricultural operations. DeVolder and Keith both testified they did not intend to transfer the roads to Cynthia. According to DeVolder, he hoped

the matter regarding the roads could be worked out so “it wouldn’t be a deal breaker.”

DeVolder mailed the proposed decree he received from Babich to Keith on February 10. At some point on February 10, Keith expressed concern to DeVolder about the real estate agreement. On February 11 Keith spoke with his attorney by phone and said he was still having thoughts about the real estate and would be reviewing the proposed decree and thinking about it. DeVolder testified he intended to meet with Keith to review the proposal line by line, and he stated the agreement was subject to being reviewed, approved, and signed by Keith.³ DeVolder met with Keith on February 14, and at that meeting Keith refused to approve the proposed decree and disavowed any settlement. At the conclusion of the meeting, DeVolder told Keith he would need to hire another attorney because DeVolder could be called as a witness. On that same day, DeVolder informed Cynthia’s counsel that his client denied any settlement had been reached.

Keith does not claim he has the right to repudiate an agreement he has previously approved. Instead, he argues the evidence shows he did not make an agreement or authorize his attorney to enter into a final agreement on his behalf. Upon review of the record, we find the evidence insufficient to establish a binding settlement for several reasons. Keith adamantly denies giving his attorney authority to reach a settlement agreement. His attorney testified he “thought” he had authority from Keith to reach a settlement. However, DeVolder did not testify

³ Cynthia also testified she was provided with the proposed settlement agreement on February 10 so she could review it before approving and signing it.

regarding the basis for his belief, and he was not asked to elaborate regarding any statement Keith may have made purporting to grant him settlement authority. In addition, the record is clear that at least one matter related to the parties' property remained unresolved when the attorneys concluded their discussions on February 9. As we have mentioned, DeVolder acknowledged he and his client needed to confirm that the legal descriptions set forth in the proposed decree prepared by Cynthia's counsel did not encompass platted roadways extending into or traversing agricultural property owned by Keith and his veterinary clinic partners. Finally, it appears the parties contemplated that the proposed agreement would be reduced to writing, reviewed by the parties, and then signed if they approved it. Keith never signed the proposed agreement. We conclude the district court erred in determining a binding settlement agreement had been reached by the parties. Our resolution of this issue makes it unnecessary for us to address the remaining issues presented by this appeal.

IV. Attorney Fees

Both parties request appellate attorney fees. Whether attorney fees should be awarded depends on the parties' needs and the respective abilities of the parties to pay. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). We also consider whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We decline to award any appellate attorney fees in this case.

V. Conclusion

We reverse the district court's ruling granting Cynthia's application to enforce the settlement agreement, including the award of trial attorney fees. We

remand the case to the district court for a full consideration of the issues presented and the entry of an appropriate decree based on the evidence previously presented at trial.

REVERSED AND REMANED.