

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA**

CP,	:	No. 14-21,281
Plaintiff	:	902 MDA 2017
	:	
vs.	:	CIVIL ACTION - LAW
	:	
RP, JR.,	:	
Defendant	:	

*Date: July 26, 2017*

**OPINION IN SUPPORT OF THE ORDER ENTERED JUNE 22, 2017,  
AND DECREE ENTERED MAY 9, 2017, IN COMPLIANCE WITH  
RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Appellant RP, Jr. (hereinafter referred to as "Husband") has appealed this Court's June 22, 2016, Order granting Plaintiff's Petition to Enforce Property Settlement Agreement and this Court's Decree in Divorce entered May 9, 2017.

Husband's appeal should be denied and the Court's Order of June 22, 2016, and Divorce Decree entered May 9, 2017, affirmed. The court will rely on its Opinion and Order dated June 22, 2016, and further addresses its reasoning in the foregoing opinion.

**I. FACTS AND PROCEDURAL HISTORY**

The relevant facts and procedural history leading up to the Court's decision that the agreement of the parties dated September 6, 2014, is a binding and enforceable Property Settlement Agreement, and subsequent Order which is the subject of this appeal, were recited in this Court's Order of June 22, 2017, and are incorporated

herein. On July 15, 2017, Husband filed a Notice of Appeal to the Superior Court regarding this Court's Order of June 22, 2017, granting Wife's Petition to Enforce Property Settlement Agreement. On July 19, 2017, Wife filed a Motion to Quash Appeal pursuant to Pa.R.A.P. 1972, and stated that the June 22, 2016, Order was interlocutory and not a final order as defined in Pa.R.A.P. 341(b). Further, it was not a collateral order because it did not result in an irreparable loss to Husband if review was postponed until after the entry of a divorce decree. On July 22, 2016, Husband filed an Application to Amend Order to Include Statement Specified in 42 Pa.C.S. §702(b) pursuant to Pa.R.A.P. 312. Wife's Counsel filed an Answer on August 1, 2016, and after careful consideration, this Court denied Husband's Application to Amend Order on August 10, 2016. On September 2, 2016, the Superior Court granted Wife's Motion to Quash.

On September 9, 2016, Wife filed a Petition for Contempt of the September 6, 2014, Agreement and Order of Court dated June 22, 2016, for Failure to Make Payments as Required by the Agreement and Order. A hearing was held on January 5, 2017, regarding Wife's Petition. The Court found that the Agreement termed the payments as "alimony" and by definition alimony is not available until after a divorce decree is entered. Therefore, on March 15, 2017, the Court entered an Order denying Wife's Petition for Contempt.<sup>1</sup>

Wife filed an Affidavit under Section 3301(d) of the Divorce Code on March 22, 2017. A Notice of Intention to Request Entry of Divorce Decree under Section 3301(d) was filed on April 13, 2017. On May 9, 2017, this Court entered a final Decree in Divorce between Wife and Husband.

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<sup>1</sup> This Order is the subject of a separate cross-appeal docketed to 945 MDA 2017.

A Notice of Appeal was filed by Husband on May 31, 2017. Husband appeals this Court's Order of June 22, 2016, granting Wife's Petition to Enforce Property Settlement Agreement and from the divorce decree entered on May 9, 2017. On May 31, 2017, Husband also filed an Application for Supersedeas on the enforcement of the two Orders. Wife filed an Answer to Husband's Application for Supersedeas on June 8, 2017. A hearing before this Court is pending on Husband's Application for Supersedeas.

## **II. DISCUSSION**

In his Concise Statement of Matters Complained of on Appeal, filed on June 23, 2017, Husband raised the following issues:

1. On June 6, 2017, the Trial Court issued an Order directing Defendant ("Husband") to file a concise statement of the errors complained of on appeal.
2. The Trial Court committed an error of law and abused its discretion by denying Husband's Motion in Limine to Exclude Privileged Mediation Document.
3. The Trial Court committed an error of law and abused its discretion by admitting into evidence and enforcing a document that was a mediation document as defined by 42 Pa.C.S.A. §5949(c).
4. The Trial Court committed an error of law and abused its discretion by finding that the mediation document met the exception of 42 Pa.C.S.A. §5949(b) even though the document did not meet the definition of a "settlement document," as defined by 42 Pa.C.S.A. §5949(c), which is a requirement for the exception to apply.

5. The Trial Court committed an error of law and abused its discretion by finding the document was a settlement document because the document was not a “written agreement,” but rather the face and plain language of the mediation document unambiguously stated it was a Draft.
6. The Trial Court committed an error of law and abused its discretion by finding the document was a settlement document because the only way the court determined the document was signed by certain people was to rely on “mediation communications,” as defined by 42 Pa.C.S.A. §5949(c), and/or to rely on hearsay, both of which are prohibited by law.
7. The Trial Court committed an error of law and abused its discretion by denying Husband’s Motion in Limine to Permit the Testimony of Dr. Anthony Butto, who was also a signatory of the document.
8. The Trial Court committed an error of law and abused its discretion by denying Husband’s request to allow Dr. Butto to testify about his general practices.
9. The Trial Court committed an error of law and abused its discretion by denying Husband’s request to allow Dr. Butto to testify about the rules and scope of the mediation that Husband and Wife agreed upon.
10. The Trial Court committed an error of law and abused its discretion by denying Husband’s request to allow Dr. Butto to testify about his intent when he signed the document that was found to be an enforceable agreement.
11. The Trial Court committed an error of law and abused its discretion by relying on some written mediation communication, oral mediation communications, but not others, and/or hearsay in its reasoning and Order.

12. The Trial Court committed an error of law and abused its discretion by not considering the intent of the parties through what occurred at mediation, including but not limited to, Dr. Butto's rules concerning the mediation and the scope of the mediation that Husband and Wife agreed upon.
13. The Trial Court Committed an error of law and abused its discretion by finding that the document was signed by "both Husband and Wife, in the presence of a third party, Dr. Butto, who also signed the document" when all writings that took place at mediation are "mediation communications," as defined by 42 Pa.C.S.A. §5949(c), and nowhere on the document are the signature lines identified as being any of the individuals named by the court.
14. The Trial Court committed an error of law and abused its discretion by hearing and relying on some confidential mediation communications but not hearing other mediation communications, including the intent of the individuals present at the mediation.
15. The Trial Court committed an error of law and abused its discretion by relying on the mediation document in the Order.
16. The Trial Court committed an error of law and abused its discretion by finding the mediation document to be ambiguous.
17. The Trial Court committed an error of law and abused its discretion by finding that Husband intended the mediation document when Husband was only trying to be generous and when the oral terms of the mediation corroborate Husband's intent to do the right thing and also to have the mediation document be non-binding.

18. The Trial Court committed an error of law and abused its discretion by granting Wife's Petition to Enforce Property Settlement Agreement and seeking to enforce it through the final divorce decree entered on May 9, 2017.

The Motions in Limine were filed on February 11, 2016, well after the first day of testimony which was held on December 1, 2015, and one day before the hearing was to conclude on February 12, 2016. The first Motion requested to exclude the very document which was the subject of the proceedings. The second Motion sought to permit the testimony of Anthony Butto, DSW, LSCW, ACSW, the marriage counselor who engaged in the mediation session with Husband and Wife. The Motions were addressed prior to the second day of testimony and denied by this Court on February 12, 2017, after argument by counsel for both parties.

Issues #2-6 raised in Husband's Concise Statement allege errors of law and abuse of discretion regarding this Court's finding that the September 6, 2014, document was an enforceable agreement. Husband characterized the agreement dated September 6, 2014, as a "mediation memorandum" and argues that this Court erred and abused its discretion in admitting it into evidence and finding it enforceable. A mediation document is "[w]ritten material, including copies, prepared for the purpose of, in the course of or pursuant to mediation. The term includes, but is not limited to, memoranda, notes, files, records and work product of a mediator, mediation program, or party." **42 Pa.C.S. §5949(c)**. Husband, in both his Motion in Limine and in his argument that the September 6, 2014, agreement was not enforceable, relied on the following rule that mediation documents are privileged:

**42 Pa.C.S. §5949. Confidential mediation communications and documents.**

(a) GENERAL RULE.—Except as provided in subsection (b), all mediation communications are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process. Mediation communications and mediation documents shall not be admissible as evidence in any action or proceeding, including, but not limited to, a judicial, administrative, or arbitration action or proceeding.

(b) EXCEPTIONS.

(1) A settlement document may be introduced in an action or proceeding to enforce the settlement agreement expressed in the document, unless the settlement document by its terms states that it is unenforceable or not intended to be legally binding.

Husband argues that this Court erred and abused its discretion by finding that the document met the exception of 42 Pa.C.S. §5949(b) because, in Husband’s opinion, the document did not meet the definition of a “settlement agreement.” A settlement document is “[a] written agreement signed by the parties to the agreement.” **42 Pa.C.S. §5949(c)**. This Court, after carefully reviewing Husband’s Motion in Limine and the arguments of both counsel, determined that the exception to the general rule that mediation documents are privileged had been met. The document dated September 6, 2014, was signed by the parties and a witness, who was identified through the parties’ testimony to be Dr. Butto. Although there are no printed names below the signature lines on the document to identify the signors, Husband himself testified that he and Wife both signed the document on the last day of their mediation session in Dr. Butto’s office. (T.P. 12/1/15, pg. 10-11). The document had no language indicating that it was unenforceable or not intended to be legally binding. The parties later took steps to effectuate their mutual obligations under the agreement. This Court’s determination that the document was a settlement document, and not a mediation document, was not an abuse of discretion.

Husband further argues that this Court erred and abused its discretion in determining that the document was a settlement document because it was not a “written agreement,” but rather the face and plain language of the mediation document unambiguously stated it was a “draft.” The fact that the parties signed the document, despite failing to remove the word “draft,” made the contract ambiguous in the eyes of this Court. Therefore, the Court looked beyond the four corners of the document to determine the parties’ intent. As stated in this Court’s Order dated June 22, 2016, there was no testimony from either party indicating that the agreement was not a comprehensive listing of their assets and debts, and both parties began to take steps to effectuate the transfers contemplated by the agreement within a reasonable time after it was signed. In fact, the parties mutually agreed to adjust the way the assets were split in order to most efficiently perform their obligations under the agreement. This Court carefully reviewed the testimony of both parties over two days of hearings and found that the parties intended for the Agreement to be a binding, final agreement regarding the division of their marital assets and the support owed by Husband to Wife. There was no error of law or abuse of discretion by this Court in determining that the document was a settlement document and therefore permitted to be introduced as evidence.

Issues #7-14 raised in Husband’s Concise Statement are related to this Court’s denial of the Motion in Limine to Permit the Testimony of Dr. Anthony Butto, who was also a signor of the document that was later determined to be an enforceable agreement. The Court notes preliminarily that at the beginning of the first day of testimony, counsel for Wife asked counsel for Husband if he had any witnesses other than his client that he intended to call in this case. Wife’s counsel specifically referred to

Dr. Butto, to which counsel for Husband responded “no.” (T.P. 12/1/15, pg. 4). However, in Husband’s Motion in Limine dated February 11, 2016, Husband argued that the testimony of Dr. Butto was relevant and necessary to show the parties’ intent during the mediation sessions because it was not his practice to have spouses enter into legally binding agreements. In denying Husband’s Motion in Limine, this Court, after argument by both counsel as well as independent research, stated it was clear based upon the statute that the testimony of Dr. Butto would not be permitted. (T.P. 2/12/16, pg. 28).

Husband argues on appeal that this court erred and abused its discretion in denying his request to allow Dr. Butto to testify about his general practices, about the rules and scope of the mediation, and about his intent when he signed the document. Having ruled that the sessions were mediation sessions and not counseling sessions, this Court again looked to the statute regarding confidential mediation communications. A mediation communication is “[a] communication, verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program.” **42 Pa.C.S. §5949(c)**. “Except as provided in subsection (b), all mediation communications and mediation documents are privileged. . . .Mediation communications and mediation document shall not be admissible as evidence in any action or proceeding. . . .” **42 Pa.C.S. §5949(a)**.

Husband failed to establish that any of the exceptions enumerated in 42 Pa.C.S. §5949(b) applied in the present case to the general rule that mediation communications are privileged. Furthermore, this Court finds that the communications made by Dr. Butto

during the mediation session are irrelevant as to whether the document created by the parties at home and signed after the final mediation session by Dr. Butto and the parties, who subsequently took significant steps to perform the obligations outlined in the document, is an enforceable settlement agreement. There was no error of law or abuse of discretion in this Court's denial of Husband's request to permit the testimony of Dr. Butto.

Issues #15-17 raised in Husband's Concise Statement allege that this Court committed an error of law and abused its discretion by relying on the "mediation document" in the Order, by finding the document to be ambiguous, and by finding that Husband intended the document to be binding when he was only trying to be generous and "do the right thing." Issue #18 alleges that this Court committed an error of law and abused its discretion by granting Wife's Petition to Enforce Property Settlement Agreement and seeking to enforce it through the final divorce decree entered on May 9, 2017. These issues were at the heart of this Court's Order of June 22, 2016, and the reasons this Court found the document to be a fully enforceable agreement were addressed in depth at that time. Therefore, this Court upon its Order dated June 22, 2016, and asserts that there was no error of law and no abuse of discretion committed.

**III. CONCLUSION**

This Court believes that the Order of June 22, 2016, should be affirmed and enforced through the divorce decree dated May 9, 2017, as no abuse of discretion by a misapplication of the law or failure to follow proper legal procedure occurred.

BY THE COURT,

Joy Reynolds McCoy, Judge