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Supreme Court of Texas.
Jack Edward Milner
v.
Vicki Ann Milner; from Tarrant County.
No. 10-0776.

November 9, 2011.

Appearances:

Jeff Kobs of Kobs, Haney & Hundley, LLP, for Petitioner.

Rebecca Tillery of Koons Fuller, PC, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

ORAL ARGUMENT OF JEFF KOBS ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF REBECCA TILLERY ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF JEFF KOBS ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0776, Jack Edward Milner v. Vicki Ann Milner. Justice Willet is sitting in this cause, but could not be here for the oral argument.

MARSHAL: May it please the Court, Mr. Kobs will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JEFF KOBS ON BEHALF OF THE PETITIONER

ATTORNEY JEFF KOBS: May it please the Court, my name is Jeff Kobs. I'm a lawyer from Ft. Worth. I'm here today on behalf of Petitioner, Jack Milner, who was the husband in a divorce proceeding pending in Tarrant County. We are asking the Court today to set aside the judgment of the Court of Appeals to reinstate the judgment of the trial court below. The judgment of the trial court below enforced a mediated settlement agreement.

JUSTICE DEBRA H. LEHRMANN: Let me ask you something, Mr. Kobs. You're arguing that contract principles shouldn't apply in this situation. Now, when you look at mediation, which is certainly very, very important in the area of family law where we want people to be able to continue their family relationships after the end of the litigation so there's a huge presumption in favor of mediation, but doesn't the principle underline that? Isn't it that the parties actually have a meeting of the mind and they actually are agreeing to whatever it is that is going to resolve the controversy?

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ATTORNEY JEFF KOBS: I think there's two answers to that. I agree with you that mediation is favored, particularly in the family law context. However, the Mediated Settlement Agreement Statute 6.602, of the Family Code, which had a predecessor, but which has been in place now for 12 years, never construed by this Court or ruled up on by this Court, states very clearly in section (c) that if the terms of the statute are complied with, in other words, the language, the boldness, the signatures, etc., the statute says "if a Mediated Settlement Agreement meets the requirements of this section, a party is entitled to judgment on a Mediated Settlement Agreement, notwithstanding Rule 11 or another rule of law."

JUSTICE DEBRA H. LEHRMANN: But doesn't there have to be an agreement in order for that to apply?

ATTORNEY JEFF KOBS: And in this case, clearly there was an agreement. There was an agreement that was embodied in the Mediated Settlement Agreement that was signed by the parties.

JUSTICE DEBRA H. LEHRMANN: What about the problem with the partnership and the fact that you couldn't, the other partners had to agree to what they had agreed to and one of them wouldn't?

ATTORNEY JEFF KOBS: That's not a problem. In the Mediated Settlement Agreement, there was no contingency. There was not even an agreement that they would seek to obtain the approval of the other partners. There were forms attached in which Jack Milner signed his consent, but the Mediated Settlement Agreement is completely silent as to any parties' obligation to obtain the other partners' signature. In other words, there was one aspect of the agreement that was contingent.

JUSTICE DAVID M. MEDINA: Isn't that where the agreement is flawed within itself?

ATTORNEY JEFF KOBS: No, Your Honor, I don't believe so because if the other parties had consented and had voluntarily signed the sections where they could have, then the assignment of the interest would have taken place and Mrs. Milner, Vicki, would have had the assigned partnership agreement. By withholding their consent, the interest is still assigned. The partnership agreement permits the interest to be assigned without the consent of the other partners and pursuant to the divorce decree, it simply then allows the other partners by withholding their consent to enforce their buyout provision, obtain an appraisal and buy that interest out. Everybody knew that--

JUSTICE EVA M. GUZMAN: You mentioned the divorce decree. Does the divorce decree alter the MSA terms?

ATTORNEY JEFF KOBS: It does not. It enforces them strictly.

JUSTICE EVA M. GUZMAN: Assume that it does, assume, I'm not saying you're conceding. Assume that it does alter the MSA terms, what is the remedy in that event if we find that it does?

ATTORNEY JEFF KOBS: And you would find that I would lose and that the Court of Appeals was correct because trial judges are not free to take Mediated Settlement Agreements and alter the terms of those settlement agreements on their own initiative. In this case, there's an argument set forth that the divorce decree attaches an exhibit, an assignment of the interest is an exhibit to the divorce decree, but it's different than the exhibits that were attached to the mediated settlement agreement and that's absolutely correct because there were two different purposes. Attached to the Mediated Settlement Agreement were consents, partnership consents to an assignment. Jack Milner signed them as he promised to do in the Mediated Settlement Agreement. Attached to the divorce decree was the actual transfer, the actual assignment, the deed, so to speak, to the partnership. There was no assignment attached to the mediated settlement agreement.

JUSTICE EVA M. GUZMAN: Are the legal consequences of those separate attachments different though?

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ATTORNEY JEFF KOBS: Yes, the attachment to the divorce decree actually assigns the interest as it was agreed to between the parties. The consents that were not executed by the other partners that were attached to the Mediated Settlement Agreement provide an entirely different purpose; they're not transfer documents or consents.

JUSTICE EVA M. GUZMAN: Yes, sir. Did the consents form an integral part of the MSA?

ATTORNEY JEFF KOBS: According to the MSA itself, Jack's agreement to consent to his assignment of the interest to Vicki was required and he did give that consent.

JUSTICE EVA M. GUZMAN: So that agreement was essential to fulfillment of the terms of the MSA?

ATTORNEY JEFF KOBS: Jack's agreement or Jack's consent. If Jack had refused to consent, then that would have been a violation.

JUSTICE EVA M. GUZMAN: The consents reflected in the attachment to the MSA, were those consents a substantial part of that MSA?

ATTORNEY JEFF KOBS: According to the MSA, the consent of Jack was an integral part. The consent--

JUSTICE EVA M. GUZMAN: How many signatures were on the attachment, the consent attachments in the MSA?

ATTORNEY JEFF KOBS: Well, four. Vicki signed as a spouse, but there were three partners so there were three blanks for partners to consent. Jack agreed to consent in the MSA. The other partners were not parties to the MSA, weren't there and never agreed to consent [inaudible].

JUSTICE EVA M. GUZMAN: So back to my question, was that consent agreement a substantial part, portion of the MSA in order to effectuate the terms?

ATTORNEY JEFF KOBS: I tried to answer that, but I think maybe I understand where you're going now. There was no requirement in the MSA that the other partners consent so it was not an integral part. It was not a requirement at all that the other partners consent.

JUSTICE EVA M. GUZMAN: And how does that differ from the what you're calling transfer deeds attached to the decree?

ATTORNEY JEFF KOBS: The decree attached to the assignment of a partnership interest, it's a legal assigning document. It didn't require anybody else to sign it. It was just I, Jack Milner, hereby convey and assign my beneficial interest and right and title to my partnership interest.

JUSTICE EVA M. GUZMAN: So just so that I understand this, when they were negotiating and preparing documents during that mediation, three partners were going to consent, but somehow when they got in front of the trial judge and prepared a decree, that, those three signatures became one signature.

ATTORNEY JEFF KOBS: I disagree with that.

JUSTICE EVA M. GUZMAN: Okay.

ATTORNEY JEFF KOBS: There was never an agreement between Jack and Vicki that the other partners would consent. There was no contingency and no contingency in the MSA that required the other partners to consent. There wasn't even a language that Jack would try and get the other partners to consent.

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JUSTICE EVA M. GUZMAN: That sort of flies in the face of the attachment though, you have signature lines for the two other partners, but you're telling me no one even considered that an important aspect.

ATTORNEY JEFF KOBS: What the parties considered important at the mediation was that Jack would consent. In other words, Jack agreed not only to convey his interest but to consent to the conveyance so he couldn't go back and so decide how--

JUSTICE DEBRA H. LEHRMANN: But how could he do that? He couldn't consent for the other partners.

ATTORNEY JEFF KOBS: Of course, not. He could agree to consent for himself and that was sufficient. The mediated settlement agreement was signed. It was fully enforceable. The partnership interest was transferred. If the other partners consented, then Vicki would retain the partnership interest. If they elected to withhold their consent, then she would be bought out at a predetermined appraised price. That was the deal. Jack completely complied with it. It was evident in the face of it. Both parties were represented by counsel. It was a multimillion dollar divorce. The mediator was a former judge.

CHIEF JUSTICE WALLACE B. JEFFERSON: If you were Mrs. Milner's lawyer, you would have put in this, made the agreement contingent on the partners all signing or at the very least, the husband doing everything in his power to persuade their signatures.

ATTORNEY JEFF KOBS: If I was Mrs. Milner's lawyer and it was important to Mrs. Milner that the part that she not only received the partnership interest, but that she kept it, then, yes, I would certainly have put that in there, but her lawyer didn't and that creates the whole problem of really why we're here and I hope why this Court granted the petition for review and is hearing this argument today. The problem with going back and looking at meeting of the minds and unexpressed or expressed attentions, hopes, desires, expectations realized in the settlement is the very thing that the Mediated Settlement Agreement statute in my opinion was designed to avoid. Here's a deal. We got a deal that a day later, a week later or a month later, I thought about it. I don't like the deal anymore or I failed to include something that I wanted to include but I didn't and it would open up, will open up all of these Mediated Settlement Agreements to second guessing, to evidence before the trial court. The Courts of Appeal have been very clear. This Court hasn't dealt with it, but they have found that fraudulent inducement, duress, coercion, whatever that may be, I know this Court's wrestling with that, those type dishonesty, illegality, those are the types of things that can set aside a mediated settlement agreement so there is a remedy--

JUSTICE DEBRA H. LEHRMANN: Excuse me, but in this case, if it would be impossible in order to comply with it because in fact, if the intent was that in order to have a fair or maybe not fair, but what they agreed upon division of the property, she was going to get the partnership and if that was, in fact, not possible because of the fact that these other partners need to sign off then doesn't that have an impact?

ATTORNEY JEFF KOBS: If the question is, is impossibility of performance a ground to set aside a mediated settlement agreement, no Court of Appeals that I have seen has squarely addressed that question.

JUSTICE DAVID M. MEDINA: But you're not looking to impossibility. You're looking for the value that was attached to that so it didn't matter if they signed it or not, right?

ATTORNEY JEFF KOBS: Right, we don't have impossibility in our case because the agreement was to transfer the interest and that was the only agreement and the interest was transferred so there's nothing impossible about it. If there had been an agreement to obtain the other partner's consent or for her to actually become limited partner, which is a whole other issue, then you might have that question, but the mediated settlement agreement is solid as to those things. There is a contingency in it with respect to lenders so they knew how to draft contingency language, but this is not a contingency. There is a best efforts clause in there. Jack agreed to use his best efforts to get the cell phone number company to transfer a cell phone into her name. The agreement wasn't con-

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tingent on it, but he at least agreed to try and he did. He did not in this agreement even agree to try to get the other partners to consent. So if it was of that much importance and there's a lot of other property that was divided in this case, but if it was that important to Vicki that she not only receive the valuable partnership interest, but that she be allowed to, as she stated I think in her motion for new trial affidavit, occupy Jack's office, have a car allowance, have a salary, all those other things that she wanted to do as part of the limited partnership, it simply should have been in the agreement.

JUSTICE EVA M. GUZMAN: Couldn't Vicki have expected the trial court to enter a decree that reflected the terms of the MSA including a place for those other two partners to sign? Wasn't that a reasonable expectation on her part?

ATTORNEY JEFF KOBS: I would not think so because the other partners weren't before the court.

JUSTICE EVA M. GUZMAN: Why have them in there then? Why have those two signature lines in that attachment if they weren't going to be in the attachment with respect to the decree and I understand the problems of bringing them into the lawsuit, but I'm asking you why wouldn't it be the same?

ATTORNEY JEFF KOBS: When a lawyer and I'll be honest with you, I was not trial counsel for either party, but a lawyer clearly prepared those consents. They're pretty standard consents for action by the limited partnership and there LLC that was its managing partner. When you're going to prepare a consent for partners to sign whether it's a consent to admit a new partner or consent to ratify or consent to waive the minutes or whatever, you're going to put all the partners' names in there so that when it's fully executed, everybody would have consented to it, but the agreement didn't require those other partners to consent, only Jack and Jack signed what he was supposed to.

JUSTICE EVA M. GUZMAN: Can you effectuate the transfer of assets contemplated in the agreement without the signatures of the other partners?

ATTORNEY JEFF KOBS: Yeah, certainly. And it was. The entire partnership interest that Jack owned in both the partnership [inaudible] management company was effectively assigned as part of the MSA.

JUSTICE EVA M. GUZMAN: Is her voting right or potential voting right had she become a full partner. That's sort of an asset, if you will, that was also contemplated on being divided?

ATTORNEY JEFF KOBS: She was never going to become a voting partner even if the other partners had signed. There were consents to the assignment not consents to admit her as a partner. So even if--

JUSTICE DEBRA H. LEHRMANN: So was the main issue the salary and the car allowance basically?

ATTORNEY JEFF KOBS: Well, and I guess voting. I mean, that could have been negotiated and perhaps the other partners might have admitted her. I suspect it had something to do with her financial ability, her ability to incur debt, but I don't know that to be the case, but the point is that wasn't negotiated and it wasn't part of the agreement. What was part of the agreement was he would give up his entire interest to her and she would obtain it and she would either keep it if the other partners consented not as a partner, but as an assignee or it would be subject to sale land that was the only thing that was in the agreement. To go beyond that, to go exploring into what the expectations were, I think, is very problematic. I see my time is up. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Ms. Tillery will present argument for the Respondent.

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ORAL ARGUMENT OF REBECCA TILLERY ON BEHALF OF THE RESPONDENT

ATTORNEY REBECCA TILLERY: May it please the Court, as the Justices know, the civil bar would absolutely love to have the statute that we have in family law. Section 6.602 of the Texas Family Code is unique to family law and it's an important mechanism that needs to be preserved. We're asking you today to affirm the judgment of the Court of Appeals and I'm here today to explain why that is not going to open up the floodgates to other appellate challenges. If the Court will bear with me and flip to the actual opinion of the Court of Appeals and I'm looking on my page 10, the actual holding of the Court of Appeals is extremely narrow and extremely limited. I'm reading from the opinion when I state, "Because the MSA contemplated unanimous consent and therefore, a limited partnership interest for Vicki, but the divorce decree contemplated only an assignment and because the rights of a limited partner are greater than those of an assignee under the partnership agreement, we hold there was no meeting of the minds regarding the transfer of the partnership agreement."

JUSTICE DEBRA H. LEHRMANN: Can I ask you what is your response to his argument that the agreement was that either she would get the partnership if the other partners agree or she would get the value thereof and in either situation, she would get her part of the property division that was agreed to. What's your response to that?

ATTORNEY REBECCA TILLERY: My response to that is twofold, Your Honor. First of all, I think the document both the MSA and those two attached exhibits, Exhibit A and B, are 100% clear and unambiguous and you can look within the four corners of that document. You don't have to get into what did Vicki think? What did Jack think? What was said, at mediation? What was insinuated? You can look simply within the four corners of that document and you can see without a doubt that what was bargained for and what was negotiated for was full limited partnership interest.

JUSTICE DEBRA H. LEHRMANN: So is it your argument that regardless what was signed, that signed document if we look at that period, that controls.

ATTORNEY REBECCA TILLERY: Absolutely, Your Honor, absolutely. We are not the one up here trying to get out of the deal that we made. We're not the one that's trying to rewrite the deal, renegotiate the deal, go back and figure out what did everybody think that day in mediation.

JUSTICE NATHAN L. HECHT: I thought the Court of Appeals said, there was no meeting of the minds.

ATTORNEY REBECCA TILLERY: Your Honor is absolutely correct. They used that phrase.

JUSTICE NATHAN L. HECHT: Then there's no agreement if there's no meeting of the minds.

ATTORNEY REBECCA TILLERY: Well, the paragraph I just read to you is the actual holding of the Court of Appeals and what it's centering it's "no meeting of the minds" phrase on is actually the variance between what the MSA said, and what the final decree of divorce said. It was apples and oranges. In the Mediated Settlement Agreement, without a doubt, looking at those Exhibits A and B, looking at the language that it used, what was bargained for and what was exchanged was full partnership interest. You go look at the final decree of divorce-

JUSTICE NATHAN L. HECHT: Well, I'm, so I'll be clear. You think there was a meeting of the minds on the mediated settlement agreement?

ATTORNEY REBECCA TILLERY: Absolutely, Your Honor.

JUSTICE NATHAN L. HECHT: All right.

ATTORNEY REBECCA TILLERY: There was a meeting of the minds to that Mediated Settlement Agreement. It's unambiguous.

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JUSTICE NATHAN L. HECHT: So the parties just disagree on what the meeting was?

ATTORNEY REBECCA TILLERY: I don't even really, I believe if you're going to look at what the intent of the parties was, you look within the four corners of the documents and I think it's as clear as day.

JUSTICE NATHAN L. HECHT: Nothing in there that says, the other partners would agree.

ATTORNEY REBECCA TILLERY: Well, there's nothing in there that says, specifically that Jack is going to get their agreement. I agree with that, but when you actually look at Exhibit A and B, at the top they're entitled Required Consent and it's a capital R and it's a capital C and that is a term of art that's defined in the partnership agreement.

JUSTICE DALE WAINWRIGHT: Were Jack's partners involved in this discussion during the settlement?

ATTORNEY REBECCA TILLERY: As far as I know, Your Honor, they were not. I don't believe that they were.

JUSTICE DALE WAINWRIGHT: Did Jack compel them to be, to sign over their interests or agree to the arrangement?

ATTORNEY REBECCA TILLERY: I don't think Jack could compel them to sign the agreement. I think the agreement within the four corners of it shows that what was bargained for was full partnership interest and Jack said, on page 4 of that Mediated Settlement Agreement, I agree to transfer to Vicki beneficial interest and record title. That's another term of art that when you go look at the partnership agreement and you look at what does Required Consent mean, capital R and capital C and what does beneficial interest and record title mean, they mean unanimous consent.

JUSTICE PAUL W. GREEN: So he could do, I'm sorry. Go ahead.

JUSTICE DALE WAINWRIGHT: Thank you, Justice Green. Did Jack have the authority to convey that unilaterally, beneficial interest and record title?

ATTORNEY REBECCA TILLERY: I don't believe he, well, I believe he was saying I agree to give you this and this means unanimous consent.

JUSTICE DALE WAINWRIGHT: Jack had the authority to convey beneficial title and record, beneficial interest and record title without the signature of his partners?

ATTORNEY REBECCA TILLERY: I don't believe he did and I think that leads to the conclusion that's also found in the Court of Appeals' decision particularly in Justice Gardner's concurring opinion that in addition to the fact that there was this enormous variance between what the MSA said, and what the decree said. In addition to that, there was also concerns because of this impossibility of performance.

JUSTICE PAUL W. GREEN: It's really more of a failure to consideration isn't it? I mean, he did everything he could and the power to do to effectuate this agreement, but it fell short of what you say that your client was entitled to get out of that MSA, right? So the agreement fails for lack of consideration.

ATTORNEY REBECCA TILLERY: I think there's a couple different ways you could phrase it, to tell you the truth. I think lack of consideration. I think you could kind of skew it and say it was some kind of mutual mistake maybe, but I think what it boils down to in the end is impossibility of performance because the parties contracted for, negotiated for and bargained for something that wound up through let's assume for the sake of the

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argument that there was no dishonesty going on that they just couldn't perform.

JUSTICE PAUL W. GREEN: But how could a partner ever enter into an agreement in a partnership which would compel one of his partners to take on a partner that maybe they don't want?

ATTORNEY REBECCA TILLERY: I think you're absolutely right. I don't think that that could happen.

JUSTICE PAUL W. GREEN: The only thing he could do was to bargain within, in the context of what he was empowered to do, which is what he did it it sounds to me like.

ATTORNEY REBECCA TILLERY: And I do not disagree that Jack did not have the power to compel his partners to agree to this transfer and that's why it was an impossibility of performance. And then when that came to the trial court's consideration, when it came before the trial court, what the trial court should have done was set aside that Mediated Settlement Agreement. There's a few other circumstances in the reported decisions where trial courts have set aside a mediated settlement agreement because there was some tremendous problem with it.

JUSTICE EVA M. GUZMAN: This is-

JUSTICE NATHAN L. HECHT: But the statute that you think we should uphold doesn't allow that. It says, if you meet these conditions, that's it.

ATTORNEY REBECCA TILLERY: But the statute also markedly, notably doesn't prohibit a trial court from looking at the agreement and reviewing it before it goes forward to enforce it and if you have a situation like this-

JUSTICE NATHAN L. HECHT: It seems to me you're arguing that these should just be treated like any other agreements.

ATTORNEY REBECCA TILLERY: I respectfully-

JUSTICE NATHAN L. HECHT: But the family bar went to a lot of trouble to get this statute passed.

ATTORNEY REBECCA TILLERY: Absolutely and it's an important statute and you know what, it still absolutely prohibits anyone from coming back a few days later and saying well, I've changed my mind. I don't like the deal I got into. I don't think it's fair. I think we said, it was a separate property when maybe it, I mean, it still prohibits that. The Milner v. Milner decision at the Court of Appeal level doesn't change that. It doesn't change the fact that if someone unilaterally repudiates their consent, that doesn't make the deal unenforceable. It doesn't make the deal go away. 6.602 still has teeth. All that the Milner court was pointing out was that, number one, because of this tremendous difference between the MSA and the divorce decree, that actual, that difference between the two documents resulted in a "no meeting of the minds" and secondly, the Court of Appeals expressed the concerns about the glaring tremendous contingency that was there that Your Honors are pointing out. Jack could not make his partners agree to this, but when you look within the four corners of the MSA, that's what was bargained for was unanimous consent.

JUSTICE PAUL W. GREEN: But the wife was represented. The wife's lawyer had to know that Jack could only convey what he owned, right? So how was there any disagreement over what the terms were?

ATTORNEY REBECCA TILLERY: And Your Honor, you know, neither myself nor Mr. Kobs were the trial counsel and we weren't present at that mediation and furthermore, I think as another public policy concern here, I think mediation procedures as much as possible should be kept confidential for the purpose of encouraging settlement so I don't even think we have to go there. I don't think we have to get into what was said or, not said. In this case, we have documents attached to this MSA and incorporated that are clear within the four corners.

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All you have to do is look at these terms of art that were used and these terms of art that defined in the partnership agreement and the intent of the parties is clear, unanimous consent is what was bargained for and that equates to full partnership interest.

JUSTICE PAUL W. GREEN: Is that a form over substance argument though?

ATTORNEY REBECCA TILLERY: I don't believe so Your Honor, because when there's no allegations that there's any ambiguity and I don't think really either side is saying there's ambiguity. Then all you can do to determine the intent of the parties is look to the four corners of the document and that's what it looks like and furthermore, Your Honor, if you look at the MSA as a whole, Mr. Milner is taking the vast majority of the hard assets. He's taking the cars and the real property and the cash and some of those things and what was Mrs. Milner taking in exchange was the partnership interest. So even just reviewing the MSA, you start to wonder why in the world would she have agreed to this.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is that partnership interest without any value without the consent of the other partners?

ATTORNEY REBECCA TILLERY: It's absolutely a powerless, voiceless assignee type interest where all she gets is a huge K1 each year with the pass-through partnership taxation. She now has no rights to compel any distribution. She has no voting rights to try to get out of the deal and furthermore, after mediation, approximately two weeks after the mediation occurred, one of the limited partners, Joey Milner, who's Mr. Milner's brother, sold his 20% interest to the other limited partner, Michael Hill and so when Vicki was at mediation and signing these documents, it said, she was going to take 44% interest and the other two partners had roughly 35 and 20%. Then two weeks after mediation, in violation of the standing order that's in place in Tarrant County, that interest was sold and Jack consented to it and so now all of a sudden, Ms. Milner is faced with the situation where instead of being the interest holder that had the greatest share, 44%, she's now a minority interest holder.

JUSTICE NATHAN L. HECHT: But a partner always buys into that. That could have happened a year later too.

ATTORNEY REBECCA TILLERY: Absolutely, Your Honor, but the difference is we hadn't even had a final decree yet.

JUSTICE NATHAN L. HECHT: Well, what difference is it? It seems to me you're running the risk that one partner's going to sell to another, the partner's going to sell out, whatever.

ATTORNEY REBECCA TILLERY: The difference in this case is that there's evidence that reflects that Mr. Milner knew at the time of mediation that this sale was imminent and didn't say anything and that Mrs. Milner didn't know and I'll be the first to tell you, the record is not 100% clear on those facts. I think they were contested facts--

JUSTICE PHIL JOHNSON: And the trial court held a hearing on those and the trial court listened to both of them and took that evidence into consideration and still entered the decree that is under consideration here.

ATTORNEY REBECCA TILLERY: Yes, Your Honor, the trial court did consider those facts and went ahead and entered the decree, but the difference is the trial court entered a decree that 180 degrees changes the deal from what the MSA said.

JUSTICE PHIL JOHNSON: Well, you know you were pointing out the Court of Appeals' language just a moment ago. The Court of Appeals also said that, it says, in the MSA, "Jack and Vicki agreed to execute the required consents" and then it goes and talks about the exhibits, but the Court of Appeals and then the Court of Appeals says that, "unanimous consent was contemplated," but the Court of Appeals' opinion itself says, "the

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only people who agreed to sign those consents were Jack and Vicki."

ATTORNEY REBECCA TILLERY: And that's absolutely correct, but what the Court of Appeals saw is that when you look at Exhibit A and B of the MSA, they use these terms of art that mean something, that mean something under the partnership agreement and the entire MSA is subject to the partnership agreement so when you see at top required consent to transfer beneficial interest and record title.

JUSTICE PHIL JOHNSON: But the entire agreement is subject to, the MSA is subject to partnership agreement, but it seems to me like that's putting the cart before the horse. Isn't the partnership agreement and the partnership interest an asset that these two people were dealing with? Whatever that asset is, it's a property interest so the MSA agreement deals with a lot more than that partnership interest, correct?

ATTORNEY REBECCA TILLERY: Absolutely.

JUSTICE PHIL JOHNSON: So it seems to me like that it's the MSA agreement that makes the partnership interest part and subsidiary to the MSA in this instance.

ATTORNEY REBECCA TILLERY: I don't disagree with that analysis and I think that's probably correct, but the reason it matters in this case is because when you start seeing these defined terms of art in the MSA, you have to figure out what did the parties mean by this? Why did they use the term, required consent. Why did they use the term, beneficial interest and record title? It obviously means something. And then you go look at the partnership agreement and sure enough, it's defined there. That means unanimous consent because that means--

JUSTICE PHIL JOHNSON: Let me ask you two questions. Did the partnership agreement say Jack and Vicki agreed to sign the consents?

ATTORNEY REBECCA TILLERY: Yes, it did.

JUSTICE PHIL JOHNSON: Did the partnership agreement say that Jack would guarantee or even use best efforts to get anyone else to sign the consents?

ATTORNEY REBECCA TILLERY: It didn't say that and I think the reason is because it was so clear from what the Exhibits A and B were. This wasn't a case where, you know it's about the existing lenders and who's going to give us best efforts. Those Exhibits A and B have signature lines for Michael Hill and for Joey Milner.

JUSTICE EVA M. GUZMAN: Well, if the divorce decree had mirrored the MSA, if the attachment to the divorce decree was exactly like the attachment to the MSA and we all recognize that Jack could not force the other partners, what would be the effect of having those attachments mirror each other, the legal consequence from that, that flowed from that?

ATTORNEY REBECCA TILLERY: If the attachments mirrored each other, we would at least get out of the briar patch of a trial court changing the terms of a Mediated Settlement Agreement, which under establishing Texas precedent is disallowed. We'd at least get out of that problem, but we would still be stuck with the problem that the trial court is looking at an agreement that comports a 6.602, but is impossible to perform. There's--

JUSTICE EVA M. GUZMAN: In order for you to ultimately win following that logic, you still have to allow traditional contract defenses to void the decree because there is no practical consequence to the fact that the attachments don't mirror each other, is that right?

ATTORNEY REBECCA TILLERY: Well, I don't think our position is that generic common law, contractual defenses can be used in a situation where you have a 6.602 Mediated Settlement Agreement because you're right, that would absolutely take all the teeth out of 6.602. But when you have a situation like this, where this

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isn't just a generic contractual defense, this is a concern about whether or not there is even a contract to begin with. There are two civil cases, City of Colony and Pickle v. Guarantee National Life Insurance Company that both hold that when you have a material and essential term of a deal that is left out, that is based on a contingency, then you cannot have a contract to begin with. It can't be a final deal. So even if the documents, the exhibits mirrored what was in the MSA, I still think the trial court within its authority even though 6.602 says, what it says, had to step back, look at that agreement and say this isn't just someone complaining about the deal. They have buyer's remorse. They decided they didn't like it. There's not even a contract here to begin with.

JUSTICE EVA M. GUZMAN: Are there any posts--

JUSTICE NATHAN L. HECHT: If the exhibits were the same, that really wouldn't help it?

ATTORNEY REBECCA TILLERY: If the exhibits were the same, I think that would at least get past the concern that the trial court exceeded its' authority.

JUSTICE NATHAN L. HECHT: But it wouldn't help you win the case. You're trying to get a different split of the property. It wouldn't help you there.

ATTORNEY REBECCA TILLERY: No, I mean, no, we would still be stuck with the position that the parties contracted for and negotiated for something that simply could not be performed because just as Your Honors pointed out, you know, Jack couldn't force these partners to consent to the deal.

JUSTICE EVA M. GUZMAN: So in order for you to win, we have to allow another defense into the equation here and we've not spoken on it, but the CA's have and that would be that where there is no meeting of the minds, there is no valid contract and we would have to allow you to raise this traditional contract defense in the context of a 6.602 MSA, correct?

ATTORNEY REBECCA TILLERY: I don't think so because the Court of Appeals' opinion is so narrow and so limited. You look at it, they're not really talking about no meeting of the minds in terms of the formation of the contract. When they say no meeting of the minds, if you look at the holding, they're really talking about the glaring difference between the decree and the MSA.

JUSTICE EVA M. GUZMAN: But you don't win even if they were the same. You don't, even if they were the same, your, I guess I understand you to say you don't win anything. You can't win your lawsuit. You can't get a new--

ATTORNEY REBECCA TILLERY: Well, I think I still, okay, let me backtrack. If the trial court was presented with a decree with identical exhibits and it still signed off on it, I still think there would be a problem because they signed off on a deal that was impossible to perform and how can that be allowed to go forward that way--

JUSTICE EVA M. GUZMAN: I'm going to ask you one question because your time's running out. If they had been the same, are there are post decree causes of action that would arise if they were the same. Could you super tortuous interference or something else or anything?

ATTORNEY REBECCA TILLERY: I don't know whether or not tortuous interference would play a part. You know, I presume.

JUSTICE EVA M. GUZMAN: For Joey Milner, I guess and--

ATTORNEY REBECCA TILLERY: Yeah, I presume there may be something in the civil context that would allow or a motion to enforce the property division, but then we're stuck back to the same problem that there's this impossibility of performance. There wasn't a contract to begin with.

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JUSTICE DALE WAINWRIGHT: Is there an argument made that the signature of Jack's partners was necessarily implied. The parties agreed to transfer beneficial interest and record title. That can only happen if Jack and his partners all signed off and the exhibit with consents included Jack's partners.

ATTORNEY REBECCA TILLERY: Absolutely. That's--

JUSTICE DALE WAINWRIGHT: Do you make that argument here?

ATTORNEY REBECCA TILLERY: Absolutely because again, we're back to these terms of art. When Jack says, I agree to transfer my beneficial interest and record title and it's under this heading of required consent, that means unanimous consent so I do believe that Jack was making a representation. I'm going to get unanimous consent. That's what I put in this MSA. I'm going to get this unanimous consent and we have a couple options here. One, Jack really thought he was going to be able to and then in the end, he couldn't, impossibility of performance. Two, he never intended to try to get those signatures, that he was trying to hoodwink Vicki this entire time. If that's the case, I think this case squarely falls under Boyd v. Boyd and is encouraging legal gamesmanship to allow that deal to stand and three, that something happened where Jack thought he was going to be able to get the signatures and then later changed his mind and I think that's some of kind of repudiation. Any which way you slice it, this deal rested squarely on a contingency that wound up that could not be performed so there's not a contract to begin with. I don't think you're getting into the slippery slope of common law contractual defenses here. You could stop right here and say, first, the variance caused a problem that the trial court overstepped its bounds and two, it wasn't a contract to begin with.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Lehrmann, do you have a question?

JUSTICE DEBRA H. LEHRMANN: That's okay, but thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF JEFF KOBS ON BEHALF OF PETITIONER

ATTORNEY JEFF KOBS: Thank you, Your Honor, just a few brief points--

JUSTICE DALE WAINWRIGHT: Actually, let me start with a question if I may, Counsel. The MSA said, Vicki gets "beneficial interest and record title." Do you agree?

ATTORNEY JEFF KOBS: Yes, sir.

JUSTICE DALE WAINWRIGHT: Is that possible to convey to her that without Jack and his partners all signing?

ATTORNEY JEFF KOBS: Yes.

JUSTICE DALE WAINWRIGHT: It is?

ATTORNEY JEFF KOBS: Yes. It was done right here in the exhibit divorce decree where Jack signs his name and he transferred all my beneficial interest and record title.

JUSTICE DALE WAINWRIGHT: Did beneficial interest and record title in the partnership get conveyed?

ATTORNEY JEFF KOBS: Yes.

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JUSTICE DALE WAINWRIGHT: With only Jack signing?

ATTORNEY JEFF KOBS: Yes, no problem there.

JUSTICE DALE WAINWRIGHT: You know, your opposing counsel adamantly disagrees on that point.

ATTORNEY JEFF KOBS: I know that.

JUSTICE DALE WAINWRIGHT: Okay, explain.

ATTORNEY JEFF KOBS: The partnership agreement, partnership law is very clear. The partner can convey beneficial interest and record title to his partnership interest pursuant to a divorce decree as part of a divorce decree. It's right there in the partnership agreement. We put it our brief. The other partners do not have to consent. If they fail to consent and they elect the buyout provision, then the interest that has been transferred is going to be acquired by the partnership and consideration to pay pursuant to provisions of to the partnership agreement for that. So she wouldn't have it for more than I think 90 days.

JUSTICE DEBRA H. LEHRMANN: If you prevail in this, isn't this going to encourage all kind of gamesmanship?

ATTORNEY JEFF KOBS: I don't believe so Your Honor. That's why the litigants in this case and in almost all of these cases pursuant to the MSA are represented by lawyers and in this case, very competent and very widely known divorce lawyers.

JUSTICE DEBRA H. LEHRMANN: Who will learn how to play the game, right?

ATTORNEY JEFF KOBS: It's not a game. It's simply a question of as interest are conveyed whether they're business interests, whether they're personal property interest, real property interest, they're legal effects to those conveyances and transfers.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you would say that Vicki M. holds an asset that has no value?

ATTORNEY JEFF KOBS: No, I would not say that at all.

CHIEF JUSTICE WALLACE B. JEFFERSON: How is it truly an asset without the signature of the partners?

ATTORNEY JEFF KOBS: Well, it's a valuable asset. Potentially worth millions of dollars.

CHIEF JUSTICE WALLACE B. JEFFERSON: How so?

ATTORNEY JEFF KOBS: Because it's an interest in a limited partnership that's engaged in business with, I believe millions of dollars of revenue that will ultimately be acquired and paid pursuant to the terms of the partnership agreement.

JUSTICE DALE WAINWRIGHT: Does Vicki have a right to sit in Jack's old office?

ATTORNEY JEFF KOBS: No.

JUSTICE DALE WAINWRIGHT: With his car allowance?

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ATTORNEY JEFF KOBS: No.

JUSTICE DALE WAINWRIGHT: To vote?

ATTORNEY JEFF KOBS: No. It was not negotiated. It wasn't included in the MSA.

JUSTICE DALE WAINWRIGHT: Included in the term, beneficial interest and record title?

ATTORNEY JEFF KOBS: No. It's clearly not.

JUSTICE PAUL W. GREEN: Would she be able to trigger a buyout provision on her own or is that something the partnership would have to do?

ATTORNEY JEFF KOBS: The partnership had the option when an interest is conveyed pursuant to a divorce to trigger a buyout provision. I don't believe Vicki had that option, but I'd have to go back and look. That hadn't been an issue that's been raised in the case.

JUSTICE PAUL W. GREEN: I tried to stay away from family law work when I was in practice and this is one of the reasons why, but it just occurs to me that there's got to be lots of decrees out there that when they're entered either pursuant to settlement agreement or not, there are problems with them and enforcing them, getting them carried out, partnership agreements whatever and there has got to be a procedure I would guess to go back to the court and say we need some clarification here, some modification here post decree.

ATTORNEY JEFF KOBS: And the family code provides for that in cases where the judge has divided property. You can go back and see clarification of the judgment. Sometimes the judge works property and there's problems with it. In a Mediated Settlement Agreement, though, the purpose of the statute is to allow the parties themselves to make those decisions and to eliminate court tinkering, so to speak, with those things.

JUSTICE PAUL W. GREEN: But by entering into an agreement that has inherent problems, what are the remedies for the parties? We're done?

ATTORNEY JEFF KOBS: In this case, there's no inherent problem.

JUSTICE PAUL W. GREEN: But if there were.

ATTORNEY JEFF KOBS: If, if--

JUSTICE DEBRA H. LEHRMANN: If it were impossible to perform?

ATTORNEY JEFF KOBS: If it were truly impossible to perform, then I suppose that that would be raised. We are not, have not briefed in this case whether that would be a legitimate defense. The courts, as I said, earlier, no Court of Appeals has addressed that squarely where there's an impossibility. They have addressed situations where there's been fraudulent inducement or duress or illegality in the contract if they agree to do something that was illegal, the courts will not enforce that, but other than those very narrow exceptions, the courts have enforced these agreements as written, as the trial court did in this case.

JUSTICE DALE WAINWRIGHT: Do you disagree with the Court of Appeals that there's a difference in the terminology of the MSA, beneficial interest and record title, versus the terminology in the trial court judgment about assignment of limited partnership rights?

ATTORNEY JEFF KOBS: The trial court judgment--

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JUSTICE DALE WAINWRIGHT: Do you disagree that there's a difference in the terminology between the MSA and the trial court judgment?

ATTORNEY JEFF KOBS: No, it's an identical. In fact, I just held it up awhile ago. The language in the divorce decree exhibit is identical to the language in the MSA.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise. Oyez, oyez, oyez, the Honorable, the Supreme Court of Texas now stands adjourned.

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