

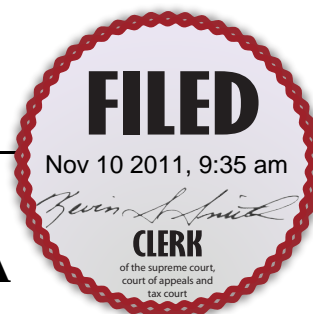
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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF:)

LEIGH SEWELL,)

Appellant,)

vs.)

No. 53A05-1103-DR-272

LOIS SEWELL,)

Appellee.)

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Elizabeth A. Cure, Judge
Cause No. 53C04-0810-DR-580

November 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Leigh Sewell (“Husband”) appeals the trial court’s order dated October 20, 2010, and the court’s subsequent denial of his motion to correct errors and orders dated February 9, 2011. Husband raises two issues, which we consolidate and restate as whether the court erred in ordering that he receive \$140,000 from the TIAA-CREF retirement account of Lois Sewell (“Wife”) and no amount of the remainder of the funds in the account. We affirm.

The relevant facts follow. On October 3, 2008, Wife filed a petition for dissolution of marriage, and on December 3, 2008, the trial court entered a decree of marriage dissolution and approved a final separation and final property settlement agreement executed by the parties (the “Settlement Agreement”). Numbered Paragraph 10 of the Settlement Agreement provided:

This Agreement shall be come [sic] irrevocably binding upon the parties hereto and their respective successors, legal representatives, executors and administrators. In the event this Agreement is approved by the Court, upon such approval, this Agreement shall be incorporated into any Decree rendered by the Court. Each party specifically states his or her waiver to certain property in any subsequent legal action, including any probate action.

Appellant’s Appendix at 13. In addition, according to the Settlement Agreement, the parties agreed that Wife would retain certain real estate in Indiana and that Husband would retain certain real estate in Texas. Further, a paragraph in the Settlement Agreement under the heading “REAL ESTATE” provided:

The parties stipulate that [Wife] shall cause the sum of One Hundred Forty Thousand Dollars (\$140,000) from her TIAA-CREF account to be transferred to [Husband] for this home as a property settlement cash equalization payment. Said transfer shall be via a Qualified Domestic

Relations Order [“QDRO”]] or any other documents required to transfer said \$140,000 to [Husband] from [Wife’s] TIAA-CREF account.

Id. at 15.

On April 17, 2009, Darcie and Kyle McCune, heirs of Wife, filed a Petition to the Court Regarding a Distribution to be Made from Decedent’s TIAA-CREF Account, in which they alleged that Wife died on January 19, 2009, before having executed the QDRO provided by TIAA-CREF and requested the court to order TIAA-CREF to make a distribution to Husband in the amount of \$140,000. On May 8, the court ordered TIAA-CREF to make a distribution to Husband in the amount of \$140,000.

On September 30, 2009, Husband filed a Petition to Redocket, Request for Court to Issue Qualified Domestic Relations Order. On October 6, 2009, the court issued a QDRO which ordered TIAA-CREF to pay Husband \$140,000 on a pro rata basis from Wife’s annuities within the account. In November 2009, Darcie McCune was appointed the personal representative of the estate of Wife (the “Estate”). On December 7, 2009, TIAA-CREF sent a letter to counsel for Husband and the Estate indicating that it would distribute \$140,000 in proportionate amounts from Wife’s annuity contracts and requesting the parties to provide instructions on how to distribute the balance in the contracts.

On January 15, 2010, the Estate filed a Verified Petition for Instructions and Order Regarding Interpretation of Decree of Marriage Dissolution and Final Property Settlement Agreement. The Petition alleged that “[a]fter [Wife’s] death and before the QDRO was issued, [the Estate] learned that [Husband] is named as primary beneficiary

on three (3) of the [Wife's] TIAA-CREF accounts,” that it “has reviewed the [Settlement] Agreement entered into by [Wife] and [Husband] and believes that pursuant to the terms of that [Settlement] Agreement, [Husband] agreed to waive any interest he may have had as a designated beneficiary of [Wife's] TIAA-CREF accounts when he agreed to accept a total of \$140,000 from those accounts,” that “TIAA-CREF is aware of [the Estate's] position regarding those accounts on which [Husband] is a named primary beneficiary, and TIAA-CREF will not release the remaining account balances without instruction on how to distribute the balance held in [Wife's] contracts,” and that “in order to clarify the interpretation of the [Settlement] Agreement, [the Estate] seeks instructions from this Court to determine whether [Husband], based upon the language of the [Separation] Agreement and Decree, waived any interest in [Wife's] TIAA-CREF accounts other than the \$140,000.00 which he agreed to receive in the [Settlement] Agreement and which has already been distributed to him by TIAA-CREF.” Id. at 39-41.

On February 12, 2010, Husband filed a Response and Objection to Court's Jurisdiction alleging that he remained the beneficiary on Wife's TIAA-CREF accounts at the time of her death and arguing that a divorce decree alone does not result in a change in beneficiary, and on April 13, 2010, Husband filed a memorandum of law in support of his response. On April 19, 2010, the Estate filed a memorandum in response to the jurisdictional challenge raised by Husband. In July 2010, the Estate filed a Praecipe and Motion for the Supreme Court to Appoint Special Judge, and in September 2010 the case was transferred from Monroe Circuit Court VIII to Monroe Circuit Court IV.

On October 18, 2010, the trial court held a hearing on the Estate's January 15, 2010 Verified Petition at which the parties presented oral arguments. On October 20, 2010, the court issued an order in favor of the Estate, which provided in part:

In the present case, this Court believes that there is an inherent ambiguity in the language of the contract. The ambiguity arises from paragraph 10 from the introduction of the Agreement which language is as follows:

This Agreement shall become irrevocably binding upon the parties hereto and their respective successors, legal representatives, executors and administrators. In the event this Agreement is approved by the Court, upon such approval, this Agreement shall be incorporated into any Decree rendered by the Court. Each party specifically states his or her waiver to *certain property* in any subsequent legal action, including any probate action. (emphasis added)

In the relevant paragraph of the Agreement, "certain property" can mean either the property not specifically given to each person in the following Settlement Agreement or it can mean the property which specifically contains the additional waiver provisions. If it is the former, then [Husband] has waived the proceeds of the TIAA-CREF beyond the \$140,000 specifically awarded him in the Settlement Agreement. If it is the later [sic], he did not waive his beneficiary status as the paragraph dealing with the TIAA-CREF accounts, paragraph 4 of the body,^[1] does not contain specific waiver language that many other paragraphs do in the body of the Agreement. Given this ambiguity in the language of the contract, the Court turns to a determination of the intention of the parties.

[Wife] knew she was dying, which in fact she did within a few months of the signing of the Settlement Agreement. It makes no sense for her to bargain away \$140,000 from the proceeds of the TIAA-CREF if she intended to have [Husband] receive the entire amount only a few months later. In fact, [Husband] was in the process of trying to obtain the \$140,000

¹ This paragraph of the Settlement Agreement provided:

4. PENSION/RETIREMENT ACCOUNTS: Each had a substantial vested interest in his or her retirement accounts prior to their marriage. Each shall be awarded his or her pension/retirement accounts/plans except that from [Wife's] TIAA-CREF account she shall cause the sum of \$140,000 to be transferred to [Husband] as set out in Paragraph 1 REAL ESTATE contained in this agreement.

in the form of a QDRO from the TIAA-CREF funds when he discovered that he was still the named beneficiary of the funds. Because it is clear from the nature of the parties [sic] actions in bargaining for specific amounts and not others, that both intended the [Husband] would get \$140,000 for the TIAA-CREEF [sic] and no more.

Given this clear intent, the Court resolves the ambiguity in the Settlement Agreement in favor of the Estate and finds that “certain property” meant “any property not specifically awarded by the terms of the Agreement.” This interpretation comports with the parties’ actions and intentions as well as with the language of the Agreement itself.

TIAA-CREF is hereby ORDERED to distribute the proceeds of the accounts in question in accordance with the QDRO \$140,000 (one hundred forty thousand dollars) to [Husband] and the remainder of the proceeds to the Estate of [Wife].

Id. at 69-70.

Husband filed a motion to correct errors, and the Estate filed a statement in opposition to the motion. On February 8, 2011, the trial court issued an order denying Husband’s motion to correct errors, an order vacating the QDRO issued on October 6, 2009, and a revised QDRO.

The issue is whether the court erred in ordering that Husband receive \$140,000 from Wife’s TIAA-CREF account and no amount of the remainder of the retirement account.² Husband essentially argues that he did not waive any interest he had as a designated beneficiary on Wife’s TIAA-CREF retirement account. Specifically, Husband argues “there literally was no waiver provision in the Settlement Agreement concerning [Wife’s] pension,” that “there were such mutual waiver provisions regarding

² Husband also presented an issue in his appellant’s brief regarding whether the trial court had jurisdiction to enter the challenged order. However, in his reply brief, Husband withdrew his argument related to jurisdiction. In addition, the Estate argues that Husband’s appeal should be dismissed for failing to comply with certain appellate court rules, and we decline to dismiss on such grounds.

every other aspect of the settlement,” and that “[t]he only reasonable conclusion possible is that [Wife] did not want such a clause in the pension section of the Settlement Agreement, since her lawyer drafted the agreement.” Appellant’s Brief at 15. Husband appears to argue that the Settlement Agreement was unambiguous and “[i]t was unreasonable for the Court to re-write the contract so as to read into it a one-way waiver clause to comport with the trial court’s guess as to one of the party’s intentions.” Id. Husband further asserts that he “could not have waived something he knew nothing about, as a waiver is an intentional relinquishment of a known right” and that “there was nothing to waive at the time of the Settlement Agreement” as he “possessed at best an expectancy.” Id. at 16.

The Estate argues that the terms of the Settlement Agreement support the trial court’s conclusion that Husband waived any expectancy interest he had as a designated beneficiary on Wife’s TIAA-CREF accounts. The Estate argues that, given all of the provisions of the Settlement Agreement, the court “reasonably concluded that the intended meaning of ‘certain property’ under introductory paragraph 10 is ambiguous” and that it was proper to consider extrinsic evidence in an attempt to effectuate the parties’ intent. Appellee’s Brief at 20. The Estate argues that “[i]t is undisputed by the parties that at the time this agreement was executed, [Wife] suffered from terminal cancer and knew she was dying.” Id. The Estate argues that the court correctly construed the Settlement Agreement “such that [Husband] waived any expectancy interest he may have had in the TIAA-CREF accounts, other than the \$140,000.00 for which the parties expressly bargained” based upon “the language of the agreement as a whole and the

circumstances of the parties at the time of execution,” including “the specific provisions which provide that [Husband] was to receive a total of \$140,000.00 from [Wife’s] TIAA-CREF accounts.” Id. at 20-21. The Estate also points to the “fact that the \$140,000.00 from [Wife’s] TIAA-CREF accounts was intended as a cash equalization payment related to the manner in which the parties’ respective real property was divided,” along with “the waiver language which appears under introductory paragraph 10” Id. at 21.

In his reply brief, Husband argues that neither Husband nor Wife waived any rights regarding the other’s pension in their Settlement Agreement. Husband further argues that the Settlement Agreement “was the work of [Wife] and her attorney, and she knew exactly what she was doing when she did it.” Appellant’s Reply Brief at 4. Husband also points to Paragraph 10 of the Settlement Agreement and argues that “the Estate imagines an ambiguity that is not there, by reinterpreting the word ‘certain’ to mean ‘all.’” Id. at 5.

The Indiana Supreme Court has held:

When dissolving a marriage, the parties are free to craft an agreement providing for the maintenance of either party, the custody and support of the parties’ children, and the disposition of property. Settlement agreements become binding contracts when incorporated into the dissolution decree and are interpreted according to the general rules for contract construction. Unless the terms of the agreement are ambiguous, they will be given their plain and ordinary meaning. Interpretation of a settlement agreement, as with any other contract, presents a question of law and is reviewed de novo.

Bailey v. Mann, 895 N.E.2d 1215, 1217 (Ind. 2008) (citations omitted).

When construing the meaning of a contract, our primary task is to determine and effectuate the intent of the parties. Whitaker v. Brunner, 814 N.E.2d 288, 293 (Ind. Ct.

App. 2004), trans. denied. First, we must determine whether the language of the contract is ambiguous. Id. The unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts. Id. (citation omitted). If the language of the instrument is unambiguous, the parties' intent will be determined from the four corners of the contract. Id. at 293-294. If, on the other hand, a contract is ambiguous, its meaning must be determined by examining extrinsic evidence and its construction is a matter for the fact-finder. Id. at 294. When interpreting a written contract, we attempt to determine the intent of the parties at the time the contract was made. Id. We do this by examining the language used in the instrument to express their rights and duties. Id. We read the contract as a whole and will attempt to construe the contractual language so as not to render any words, phrases, or terms ineffective or meaningless. Id. We must accept an interpretation of the contract that harmonizes its provisions, rather than one that places the provisions in conflict. Id.

Indiana law provides that in order for a waiver of interest to be valid, the waiver must be made knowingly, voluntarily and intelligently. Von Haden v. Supervised Estate of Von Haden, 699 N.E.2d 301, 304 (Ind. Ct. App. 1998). Upon dissolution, the parties to a marriage have "free rein to make such continuing financial arrangements as, in a spirit of amicability and conciliation, they wish." Id. at 305 (citations omitted). The dissolution court should accept such an agreement unless the record demonstrates some unfairness, unreasonableness, or manifest inequity in the agreement, or that the execution of the agreement was procured through fraud, misrepresentation, duress, coercion, or lack of full disclosure. Id. We favor upholding marital property settlement agreements. Id.

A beneficiary can waive his or her interest in a spouse's retirement plan and may do so through a property settlement agreement. See id. at 304-306.

Here, the Settlement Agreement contained sections addressing the parties' various property interests, debts, and expenses, including their real estate, personal property and household items, motor vehicles, pension/retirement accounts, life insurance policies, and healthcare insurance. The Settlement Agreement provided, under the section titled "REAL ESTATE," that Wife shall be awarded certain real estate in Indiana and Husband shall be awarded certain real estate in Texas. Appellant's Appendix at 15. One of the paragraphs under the heading provides:

The parties stipulate that [Wife] shall cause the sum of One Hundred Forty Thousand Dollars (\$140,000) from her TIAA-CREF account to be transferred to [Husband] for this home as a property settlement cash equalization payment. Said transfer shall be via a Qualified Domestic Relations Order [{"QDRO"}] or any other documents required to transfer said \$140,000 to [Husband] from [Wife's] TIAA-CREF account.

Id.

Under the heading "PENSION/RETIREMENT ACCOUNTS," the Settlement Agreement provides:

Each [party] had a substantial vested interest in his or her retirement accounts prior to their marriage. Each shall be awarded his or her pension/retirement accounts/plans except that from [Wife's] TIAA-CREF account she shall cause the sum of \$140,000 to be transferred to [Husband] as set out in Paragraph 1 REAL ESTATE contained in this agreement.

Id. at 16.

The implication of the language in the quoted paragraphs above related to the parties' real estate and retirement accounts is that the parties intended for Husband to

receive a total of \$140,000 from Wife's retirement account and not the entire sum of the account. This is consistent with the express statement that the \$140,000 transfer would constitute a property settlement cash equalization payment. In addition, the paragraph related to the retirement accounts states that "[e]ach [party] shall be awarded *his or her pension/retirement accounts/plans except that from [Wife's] TIAA-CREF account she shall cause the sum of \$140,000 to be transferred to [Husband],*" *id.* (emphasis added), which further supports the determination that it was the intention of the parties that not all of the funds in Wife's retirement account would be transferred to Husband.

While the language in the paragraph related to the parties' retirement accounts does not contain an express waiver of each party as to that party's interest in the other party's retirement plan, we note that the Settlement Agreement contains a number of introductory paragraphs which include the following:

6. The parties agree that in reaching this agreement, *each has had access to or the right to have access to all relevant financial information from the other and that this agreement is a negotiated and compromised agreement.*

* * * * *

10. This Agreement shall be come [sic] irrevocably binding upon the parties hereto and their respective successors, legal representatives, executors and administrators. In the event this Agreement is approved by the Court, upon such approval, this Agreement shall be incorporated into any Decree rendered by the Court. *Each party specifically states his or her waiver to certain property in any subsequent legal action, including any probate action.*

* * * * *

13. [Wife] and [Husband] shall execute any and all documents necessary to carry out *the terms and intent of this Agreement*, including any

other documents required to achieve *the intent of the retirement provisions*.

* * * * *

17. This Agreement constitutes the entire understanding and agreement of [Wife] and [Husband]. Each represents he or she has examined and read this Agreement and fully understands all of the contents of this Agreement and its legal effect, and that each deems this Agreement to be fair and equitable. . . .

Id. at 12-14 (emphases added).

Further, a paragraph in the section titled “CASH EQUALIZATION AND FINAL PROPERTY SETTLEMENT” provides:

[Wife] and [Husband] specifically stipulate and agree that other than the personal and real property transfers as set forth in this agreement and the values thereon and *the agreement to transfer \$140,000 to [Husband] from [Wife’s] TIAA-CREF account*, neither party shall be required to pay any additional monetary sum as a cash equalization settlement to the other party.

Id. at 17 (emphasis added).

The provisions of the Settlement Agreement expressly provide that Husband would receive \$140,000 from Wife’s TIAA-CREF retirement account, that the amount constituted a cash equalization payment related to the parties’ division of the marital real estate, and that the parties intended for Wife to retain the balance or remaining funds in her retirement account. Further, it is clear from the provisions that the parties negotiated the terms of the Settlement Agreement and that each party had access to or the right to have access to all of the other party’s relevant financial information. While the words “certain property” in the sentence “[e]ach party specifically states his or her waiver to certain property in any subsequent legal action, including any probate action,” see id. at

13, may not be particularly specific, it is apparent from the terms of the Settlement Agreement that the parties intended for Husband to receive \$140,000 from Wife's TIAA-CREF retirement account and that Husband waived any interest he may have had in any remaining funds in her TIAA-CREF or other retirement accounts.

Based upon the record and the Settlement Agreement, we cannot say that the trial court erred as a matter of law in finding that Husband waived his right to any funds in Wife's retirement accounts other than the sum of \$140,000 specifically awarded to him in the Settlement Agreement. See Von Haden, 699 N.E.2d at 305-306 (holding that in light of language in the property settlement agreement that the trial court did not err in finding the language broad enough to encompass a waiver by the wife of her right to her deceased ex-husband's share of his pension and noting that the court's judgment that the wife was entitled to no more than one-half of the husband's pension benefits was consistent with the apparent intent of the parties as indicated throughout the settlement agreement).

For the foregoing reasons, we affirm the trial court.

Affirmed.

BAKER, J., and KIRSCH, J., concur.