

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000847-MR

GWENDOLYN GOLDEN

APPELLANT

APPEAL FROM BELL CIRCUIT COURT
v. HONORABLE RODERICK MESSER, SPECIAL JUDGE
ACTION NO. 03-CI-00350

JOHN HOWARD GOLDEN

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: Gwendolyn Golden (Gwendolyn) appeals from a decision of the Bell Circuit Court terminating the maintenance obligation of her ex-husband, John Golden (John), following her remarriage. Gwendolyn also appeals from the

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

circuit court's May 5, 2009, order denying her Kentucky Rule of Civil Procedure (CR) 60.02 motion. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts are not in dispute. On June 27, 2003, John filed a petition seeking a divorce from Gwendolyn, his wife of twenty-four years. On November 6, 2003, the Bell Circuit Court entered an interlocutory decree of dissolution of marriage. All remaining issues were reserved for a final hearing, including custody and support of the minor child and the division of the property and debts.

A hearing was held, and on July 5, 2006, the circuit court entered a final order as to the division of the property and debts. The parties each filed a motion to alter, amend, or vacate the final order, and on March 1, 2007, the circuit court entered an "Amended Findings of Fact, Conclusions of Law, and Judgment."

In pertinent part, this order stated the following:

[John] presently receives retirement benefits by virtue of his past service as the Bell County Attorney. [John] purchased five years of retirement credit with funds he inherited. This portion of his retirement benefit is nonmarital and equals sixteen percent (16%) of his total retirement benefit.

The remaining eighty-four percent (84%) of *[John's] retirement benefit is a marital asset* and the Court awards each party one-half of [John's] retirement benefit.

[John's] retirement benefit is \$5,367.00 per month. Since the Kentucky Retirement System will not issue a check to each party based on a Qualified Domestic

Relations Order, [John] will be liable for all taxes on his retirement benefit. [John] presently received a monthly retirement benefit of \$4,753.00 after taxes. [John] shall pay [Gwendolyn] on the 10th day of each month her part of his retirement benefit, in the amount of \$1,996.00. (42%, or one-half of 84%, which is the marital component.)

In the event [John's] retirement is increased, he should pay [Gwendolyn] an increased amount which is equal to 42% of [John's] after-tax retirement benefit.

[Gwendolyn] is awarded 42% of the death benefit from [John's] retirement benefit in the event he predeceases her.

(Emphasis added).

Once again, neither party was satisfied and both filed motions to alter, amend, or vacate the March 1, 2007, order. During the pendency of those motions, the parties entered into negotiations and tendered to the circuit court an "Agreed Division of Property, Maintenance Award, Child Support" (the Agreed Order). The Agreed Order was entered by the circuit court on July 13, 2007 and states in pertinent part the following:

3. [Gwendolyn] is awarded 42% of [John's] gross Kentucky Retirement benefits *as maintenance* during [John's] lifetime. The award increases with the cost of living increases. No deductions will be included in computing the 42%. This paragraph is non-modifiable.
4. Should [John] die before [Gwendolyn], the death benefit from Kentucky Retirement will be paid 84% to [Gwendolyn] with the remainder to be divided equally among [John's] and [Gwendolyn's] 3 children. This part of the Retirement Death Benefit will be characterized for

all purposes as a division of marital property. At the death of both parties, the retirement benefit will be divided among the three children as long as [John's] son John is alive.

.....

8. [John] shall receive 58% of his Kentucky Retirement benefits.

.....

11. [Gwendolyn] will owe [John] no other money; [John] will owe [Gwendolyn] no other money.

(Emphasis added). Neither party appealed the Agreed Order.

Gwendolyn remarried on April 5, 2008. John continued to pay maintenance to Gwendolyn in the amount of \$9,689.59 until he became aware of the marriage. At this time, John ceased paying the maintenance and filed a motion for the repayment of the \$9,689.59. Gwendolyn subsequently filed a motion for contempt asking the circuit court to hold John in contempt for failing to pay maintenance. On April 3, 2009, the circuit court entered an order wherein it determined that, pursuant to Kentucky Revised Statute (KRS) 403.250(2), John's maintenance obligation terminated upon Gwendolyn's remarriage. Thus, the circuit court ordered Gwendolyn to refund John the \$9,689.59.

Gwendolyn subsequently filed a Kentucky Rule of Civil Procedure (CR) 60.02 motion asking the circuit court to award her 42% of John's retirement benefits as undivided marital property. The circuit court judge orally denied Gwendolyn's CR 60.02 motion on April 30, 2009, and entered a written order

denying the motion on May 5, 2009. In the May 5, 2009, order, the circuit court noted that the parties characterized the 42% of John's retirement benefits awarded to Gwendolyn as maintenance and that John's maintenance obligation ceased upon Gwendolyn's remarriage. In denying Gwendolyn's motion, the court further concluded that the 42% was not undivided marital property, but was simply a factor used to determine the dollar amount John was to pay Gwendolyn as maintenance.

We note that before we can address the parties' arguments, there is a procedural issue that must be addressed. One day prior to the entry of the May 5, 2009, written order denying Gwendolyn's CR 60.02 motion, Gwendolyn filed her notice of appeal. Gwendolyn appealed from the Agreed Order that terminated John's maintenance obligation. Gwendolyn also tried to include the April 30, 2009, oral order denying her CR 60.02 motion in the notice of appeal. However, the Bell Deputy Clerk would not allow Gwendolyn to file the notice of appeal unless the portion appealing from the April 30, 2009, oral order was marked out. Having reviewed the notice of appeal, we note that the section appealing from the April 30, 2009, oral order is crossed out.

On May 15, 2009, Gwendolyn filed a motion with this Court to amend her notice of appeal to include the May 5, 2009, written order denying her CR 60.02 motion. This issue was passed to the merits panel in an order entered by this Court on November 19, 2009. Having reviewed the motion and noting that John

did not object, we grant Gwendolyn's motion to amend her notice of appeal. Thus, we address Gwendolyn's arguments with respect to her CR 60.02 motion below.

ANALYSIS

The two issues on appeal are whether the circuit court erred in terminating John's maintenance obligation and whether it erred in denying Gwendolyn's CR 60.02 motion. We address each issue in turn.

1. Maintenance

Gwendolyn's first argument involves the interpretation of the parties' Agreed Order. The terms of a settlement agreement "are enforceable as contract terms." KRS 403.180(5); *see also Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). The interpretation of a contract is a question of law for the courts and is subject to *de novo* review. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835-36 (Ky. App. 2000).

Gwendolyn first argues that the circuit court erred when it concluded that the provision in the Agreed Order dealing with 42% of John's retirement benefits constituted maintenance. Specifically, Gwendolyn is contending that 84% of John's retirement benefits constituted marital property and that she is entitled to 42%. We disagree.

Initially, we note that the parties litigated this case for a number of years and that numerous orders were entered by the circuit with respect to the division of the parties' property. In an order entered on March 1, 2007, the circuit court concluded that 84% of John's retirement benefits constituted marital

property. However, because both parties disagreed with portions of this order, they entered into the Agreed Order. Paragraph 3 of the Agreed Order provides that “[Gwendolyn] is awarded 42% of [John’s] gross Kentucky Retirement benefits *as maintenance* during [John’s] lifetime.” (Emphasis added). Based on this provision, it is clear that both parties agreed that Gwendolyn’s award of 42% of John’s retirement benefits would qualify as maintenance rather than marital property.

KRS 403.180(1) provides that parties may enter into a written separation agreement which contains provisions concerning maintenance, division of property, and the custody, support, and visitation of minor children. KRS 403.180(2) provides that, with the exception of those terms providing for custody, support, and visitation, the terms of the separation agreement are binding on the court. Because the Agreed Order provided that 42% of John’s retirement benefits was maintenance, we are bound by this provision.

Gwendolyn further contends that the April 3, 2009, order terminating John’s maintenance obligation left 42% of the “marital property” unassigned to either party. As a result, John now has 100% of his retirement benefits instead of the 58% awarded to him in the Agreed Order. In support of this argument, Gwendolyn points to Paragraph 8 of the Agreed Order which states that “[John] shall receive 58% of his Kentucky Retirement benefits.” As noted above, the parties clearly agreed that the 42% of the retirement benefits awarded to Gwendolyn constituted maintenance. Further, in Paragraph 11 of the Agreed

Order, the parties agreed that they would owe no other money to each other.

Therefore, we conclude that the circuit court did not err in concluding that 42% of John's retirement benefits was maintenance.

Having determined that the 42% constituted maintenance, we now must determine whether John's maintenance obligation terminated upon Gwendolyn's remarriage. KRS 403.250(2) states that "[u]nless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." Further, as concluded by the Supreme Court of Kentucky in *Messer v. Messer*, 134 S.W.3d 570, 573 (Ky. 2004):

[A]bsent a specific statement in the written agreement or in the decree that maintenance will not terminate upon the death of either party or the obligee's remarriage, the occurrence of one of those statutory contingencies terminates the maintenance obligation by operation of law.

As correctly noted by John, the Agreed Order was silent concerning the effect that Gwendolyn's remarriage would have on John's maintenance payment obligation. John contends that, based on *Messer*, his obligation to make future maintenance payments terminated when Gwendolyn remarried. Gwendolyn argues that unlike in *Messer*, John's maintenance obligation was not for future maintenance because the 42% was really a lump sum payable in installments.

We find Gwendolyn's argument to be unpersuasive. As noted by the Court in *Messer*, under KRS 403.250(2), a lump sum maintenance award may be

terminated upon the remarriage of the spouse receiving maintenance. *Id.* at 572-73. Thus, it is irrelevant whether or not the maintenance provision in the Agreed Order was for a lump sum. Because the Agreed Order is silent as to whether the maintenance award would terminate upon Gwendolyn's remarriage, we conclude that John's maintenance obligation did terminate upon Gwendolyn's remarriage.

We are also not persuaded by Gwendolyn's argument that the termination of her maintenance award resulted in John being unjustly enriched. As noted above, the parties agreed that the 42% awarded to Gwendolyn was maintenance. Because Gwendolyn remarried, John's maintenance obligation terminated as a matter of law. *See Messer*, 134 S.W.3d at 573. While Gwendolyn might find it unfair that John will now receive 100% of his retirement benefits, we are bound by the terms of the parties' agreement. *See* KRS 403.180(2). Accordingly, the Bell Circuit Court was correct in terminating John's maintenance obligation and ordering Gwendolyn to reimburse John the \$9,689.59.

2. CR 60.02 Motion

Gwendolyn also argues that the circuit court erred in denying her CR 60.02 motion. On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). In her motion brought in the circuit court, Gwendolyn alleged that she was entitled to relief under CR 60.02(d), (e), and (f), which state as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following

grounds: . . . (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief . . .

. . .

Although it is unclear, it appears that Gwendolyn is contending that, as a result of the April 3, 2009, order which terminated John's maintenance, there are marital funds left unassigned. We note that we addressed this issue above in Gwendolyn's appeal from the April 3, 2009, order. CR 60.02 "is designed to provide relief where the reasons for the relief are of an extraordinary nature." *Ray v. Commonwealth*, 633 S.W.2d 71, 73 (Ky. App. 1982). "Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal" *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). CR 60.02 "is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *Id.* Because Gwendolyn raised this same issue in her appeal from the April 3, 2009, order, she has not met the requirements of CR 60.02. Accordingly, the Bell Circuit Court was correct in denying Gwendolyn's CR 60.02 motion.

CONCLUSION

Gwendolyn's motion to amend her notice of appeal is hereby
GRANTED. The April 3, 2009, order and the May 5, 2009, order of the Bell
Circuit Court are affirmed.

ALL CONCUR.

ENTERED: December 10, 2010

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

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