RENDERED: SEPTEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000430-MR

SANDRA KAY ROSS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 11-CI-503245

DANIEL PATRICK ROSS
AND KATIE BROPHY, ESQ. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, SMALLWOOD, AND THOMPSON, JUDGES.

JOHNSON, JUDGE: Sandra Kay Ross appeals from a judgment of the Jefferson Family Court denying her request for additional monies from a retirement account owned by appellee Daniel Patrick Ross. After reviewing the record in conjunction with the applicable legal authorities, we affirm the judgment of the Jefferson Family Court.

BACKGROUND

The marriage of Sandra and Daniel Ross was dissolved by a decree of the Jefferson Family Court on April 22, 2014. The parties subsequently entered into an agreed order in May 2014, which provided for the division of the marital portions of their respective retirement plans. The court appointed attorney Charles Meers to prepare the necessary Qualified Domestic Relations Order ("QDRO"). Meers prepared the necessary release of information request in order to prepare the QDRO documents and submitted it to the parties in July 2014. Daniel signed his release, but Sandra had questions which delayed the processing of the QDRO. On August 19, 2014, the parties entered into another agreed order providing for the distribution of other marital assets. The second agreement included a provision under which Daniel would pay Sandra $350.00 in maintenance until such time as she began receiving her marital portion of his retirement benefits.

The QDRO was not finalized until August 28, 2015, and payments from the respective retirement accounts under the QDRO commenced on October 1, 2015. On November 10, 2015, Sandra filed a motion in the family court seeking a portion of the retirement benefits Daniel had received from May 29, 2014 through October 1, 2015, arguing that contrary to their agreed orders, Daniel received 100% of his retirement benefits during that period. Sandra maintained that once Meers determined the marital share of each retirement account, she was

entitled to her respective share of the retirement benefits Daniel received between May 2014, the date of their agreed order dividing the retirement accounts, and October 2015, the date on which payments pursuant to the QDRO commenced. On March 1, 2016, the family court denied Sandra's request for the additional payments.

This appeal followed.

STANDARD OF REVIEW

Under KRS 403.180(5), the terms of a separation agreement incorporated into a dissolution decree are "enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms." In addition, "judicial review of a property settlement agreement to determine its meaning is simply a matter of contract interpretation." *Sadler v. Buskirk*, 478 S.W.3d 379, 382 (Ky. 2015) (citing *Pursley v. Pursley*, 144 S.W.3d 820, 826 (Ky.2004)). An appellate court reviews a trial court's interpretation of a property settlement agreement *de novo*. *Id.*

ANALYSIS

In *Sadler*, the Supreme Court of Kentucky emphasized that the "primary objective of the court interpreting contractual provisions is to effectuate the intention of the parties." *Id.* The *Sadler* court also instructed that "[i]n the absence of ambiguity in the contract, we look only to the words contained within

the four corners of the agreement to determine the parties' intentions." *Id.* Thus, the focus of our review is the expression of intent set out in the agreed orders of May and August 2014.

In the May 2014 agreed order, the parties consented to divide the marital portion of their respective retirement plans with Kentucky Retirement Systems. In so doing, the parties anticipated that Sandra would receive no less than $350.00 per month from Daniel's retirement account. This is borne out by the language of their August 2014 agreement in which the parties provided maintenance for Sandra until she commenced receiving her share of Daniel's retirement account:

> Maintenance is subject to a temporary order entered by the Court on May 9th, 2014. Once Sandra receives in excess of $350.00 per month from Daniel's retirement, the maintenance Order shall terminate permanently. In the event of retirement payments less than $350.00 per month while all plan (sic) are being finalized, the retirement payments shall reduce Daniel's obligation on a dollar for dollar basis. The parties reserve the issue of what happens to maintenance in the unlikely event that retirement to Sandra from Daniel is less than $350.00.

During the period from the May 2014 order until the Kentucky Retirement Systems began the distribution of Daniel's account under the QDRO in October 2015, Daniel paid Sandra the required maintenance of $350.00 per month. In October 2015, each party began receiving his or her respective share of retirement benefits under the agreed order.

Review of the May and August 2014 agreements confirms the propriety of the family court's determination that there is no ambiguity in either document. Where a contract is unambiguous "'[a] written instrument will be enforced strictly according to its terms,' and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (footnotes omitted).

Viewing the plain language of the agreements under these criteria, it is clear that Daniel agreed to pay Sandra maintenance until such time as the QDRO was finalized and benefit payments under the QDRO had commenced. The maintenance payments were intended to equalize the parties' financial situation until the QDRO became effective. A reading of the August 2014 agreement discloses that the monthly maintenance payment was Daniel's only financial obligation to Sandra from May 2014 until October 2015. The agreements anticipated the amount Sandra would receive under the QDRO and provided her that amount through maintenance until she started receiving her share of Daniel's retirement benefit. Daniel did not receive a windfall or more than was anticipated in the agreements. The maintenance payment to Sandra reduced Daniel's available funds by the same dollar amount that would occur when the QDRO became effective. Nothing in either agreement expresses any intent that Sandra would

receive both maintenance and pre-payment of her share of Daniel's retirement at the same time. Sandra's contention that she is entitled to both a portion of Daniel's retirement benefit and a maintenance contradicts the parties' clear expression of intent.

Neither agreement contains any provision which would require any additional monies in excess of the require maintenance payment even if Daniel's monthly retirement benefits were to exceed the $350.00 during that time. The parties took great pains to include what Sandra would be entitled to in the unlikely event that the retirement was less than $350.00, but they included no provisions requiring Daniel to make up any difference between the monthly maintenance and the total sum Sandra was ultimately given. The parties could have included such language if they had wished to do so.

Construing the plain language of the parties' agreements, the family court correctly concluded that there was no ambiguity and that the parties did not express an intent that Sandra receive double payments for the period in question. Our *de novo* review convinces us of the propriety of the family court's interpretation of the settlement agreements.

Finally, concerning Sandra's request for attorney fees, we note that by failing to list the issue of attorney fees in her prehearing statement as required by

Kentucky Rules of Civil Procedure ("CR") 76.03(8), Sandra has not substantially complied with the rule:

> A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.

Because there are no citations to the record where this issue was raised below nor any indication that issue was either ruled upon or properly preserved for review, Sandra cannot show good cause. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 606 (Ky. App. 2006). It is a fundamental principle of appellate procedure that issues not raised or adjudicated in the trial court will not be considered when raised for the first time on appeal. *Fischer v. Fischer*, 348 S.W.3d 582 (Ky. 2011).

CONCLUSION

Based upon the foregoing, we affirm the order of the Jefferson Family Court.

SMALLWOOD AND THOMPSON, JUDGES, CONCUR IN THE RESULT ONLY.

BRIEF FOR APPELLANT:

Melinda Wandzilak
Louisville, Kentucky

BRIEF FOR APPELLEES:

Katie Brophy
Louisville, Kentucky