ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION I

CA06-1202

October 10, 2007

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| SEJU GOELLNER OH | APPELLANT | APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [DR-04-3889] |
| V. | | HON. ELLEN BASS BRANTLEY, CIRCUIT JUDGE |
| JOSEPH GOELLNER | APPELLEE | AFFIRMED IN PART; REVERSED AND DISMISSED IN PART |

In this divorce case, appellant Seju Oh moved for contempt against appellee Joseph Goellner, alleging that he failed to provide her an executed Qualified Domestic Relations Order authorization. Goellner answered the motion for contempt and filed a counter motion for contempt, claiming that Oh failed to timely vacate the marital property in violation of the property settlement, that she failed to pay him one-half of the parties' 2004 tax refund, and that she failed to pay him one-half of the proceeds from the sale of the parties' boat. The trial court entered an order[1] finding that Oh was not in contempt for failing to vacate the marital property and that Goellner was not in contempt for failing to provide Oh an executed

[1] While the trial court orally ruled that Goellner should receive one-half of the 2004 tax refund and one-half of the proceeds from the sale of the smaller boat, the written order transposes the parties's names and actually states that Goellner is ordered to pay Oh those amounts. Neither party addressed this mistake at the trial court level or on appeal.

QDRO authorization. The order concluded that Oh must pay Goellner one-half of the proceeds from the sale of the parties' boat and that Oh must pay Goellner one-half of the parties' 2004 tax refund. Oh appeals from the trial court's order. We affirm in part and reverse in part.

Oh and Goellner's divorce decree was entered February 28, 2005. Incorporated into the divorce decree was the parties' property-settlement agreement. Pertinent provisions of the agreement are as follows:

> 3. PERSONAL PROPERTY.
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> (a) Except as otherwise provided in this Property Settlement Agreement, Wife shall receive and retain as her sole and separate property all personal property in her possession.
> (b) Except as otherwise provided in this Property Settlement Agreement, Husband shall receive and retain as his sole and separate property all personal property in his possession.
> (c) Husband shall have ownership of the boat.
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> ...
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> 5. RETIREMENT ACCOUNTS AND FUNDS.
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> ...
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> (f) Husband shall bear all expenses, including any attorney's fees, incurred by Wife with regard to the drafting and approval of and Qualified Domestic Relations Orders or other post-divorce orders which may be obtained dividing retirement or other investment pensions or accounts.
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> ...
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> 13. INSTRUMENTS. Each of the parties, from time to time, at the request of the other, shall execute, acknowledge and deliver to the other any and all further instruments and take such steps as may be reasonably required to give full force and effect to the provisions of this Agreement.
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> ...
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> 16. WAIVER AND MODIFICATION. No modification or waiver of any of the terms of this Agreement will be valid unless made in writing and signed by both parties.

At the hearing on the competing motions for contempt, Oh testified that she filed the motion because Goellner refused to provide her an executed QDRO authorization as required in paragraph 13 of the property-settlement agreement. Oh further testified that she had requested the authorization on ten occasions. Oh conceded that in 2005 she knew of (and had received) different packages of QDROs from Goellner's prior attorney.

Oh then testified that Goellner mailed her the parties' 2004 tax refund, which was made payable to both parties and totaled $2880. She testified that she had not paid Goellner any portion of the refund and that the tax refund was not mentioned in the property-settlement agreement. Oh recalled that the day after she received the refund check from Goellner, he came over to her house and offered to pay her $6000 and to let her retain the entire refund check, in exchange for the title to the parties' Infiniti SUV.

Oh also testified that the parties had two boats. There was a larger boat that Oh and Goellner lived on for several years and that Goellner owned prior to their marriage. She testified that the smaller boat was in her possession at the time of the divorce and that she sold it for $7000. She admitted that she did not pay Goellner any of the proceeds of that sale and denied agreeing to divide the proceeds from the sale of the boat with him.

Goellner testified that it was his belief that he had complied with the requirements of the property settlement in 2005 when he hired a specialist to prepare the QDROs and that they were turned over to Oh's attorney at that time. Goellner denied reaching an agreement with Oh that he would pay her $6000 plus let her keep the 2004 tax refund check in exchange for the SUV. He testified that they agreed that he would only pay her $6000 for the

vehicle.

On the issue of the boat, Goellner testified that he understood that paragraph 3 of the divorce decree gave him the smaller boat, because the larger boat was non-marital property. He testified that Oh later told him that the decree gave him ownership of the larger boat, not the smaller boat, and so Goellner agreed to sell the smaller boat and split the proceeds with her. He testified that he cleaned the boat and towed it from the marina to Oh's house in January of 2005 for that purpose. He also testified about, and offered into evidence, e-mails that he received from Oh wherein she agreed to sell the "little boat" and give him half of the proceeds.

From the bench, the trial court found that Goellner prepared the QDROs and was not in contempt. The trial court found that there was ambiguity in the property-settlement agreement on the issue of the boat because the agreement only referenced one boat when there were two. The trial court also found that the parties, subsequent to the decree, did not follow the language of the decree in disposing of their personal property. The trial court ordered Oh to pay Goellner one-half of the proceeds of the boat sale and one-half of the 2004 tax refund. Each party was ordered to pay their own attorney's fees. Thereafter, the trial court entered an order that not only included its oral findings, but also found that Oh was not in contempt for failing to vacate the marital property.

Oh's first point on appeal is that the trial court erred in finding the property-settlement agreement ambiguous, modifying the agreement, and awarding Goellner one-half of the proceeds of the boat and one-half of the 2004 tax refund. Oh contends that Goellner waived his right to these proceeds by failing to assert these rights in the original divorce proceeding.

This is a jurisdictional argument.

Our court has held that a trial court does not have jurisdiction to modify a property-settlement agreement that purports to be a complete and final settlement of all marital property and that is incorporated into a divorce decree, if the modification is sought more than ninety-days after the divorce decree was entered and does not otherwise comply with Rule 60 of the Arkansas Rules of Civil Procedure,[2] or fall within the general reservation of jurisdiction provision in the decree. *Linn v. Miller*, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 5, 2007); *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988); *Harrison v. Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983).

In *Jones*, *supra*, the wife filed a motion, four months after the divorce had been entered, asking the court to distribute $66,000 of the husband's corporate stock and profit-sharing account. The trial court, relying on Missouri law, found that these assets were marital property

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[2] Rule 60 provides in pertinent part:

> (a) *Ninety-Day Limitation*. To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion fo the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.
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> ...
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> (c) *Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days*. The court in which a judgment, other than a default judgment...has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
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> ...
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> (3) For misprisons of the clerk.
> (4) For misrepresentation or fraud...by an adverse party.
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> ...

Ark R. Civ. P. 60(a), (c).

not accounted for in the property-settlement agreement or divorce decree and thus divided the undistributed marital property.[3] *Jones*, 26 Ark. App. at 3, 759 S.W.2d at 43. The husband appealed, arguing that the distribution of the corporate stock and profit-sharing account was an impermissible modification of the property-settlement agreement. *Id.* at 3, 759 S.W.2d at 43.

On review, we stated that although the rationale under Missouri's law had some appeal "at first blush," it was not in accord with Arkansas statutory or case law.[4] For example, Arkansas Code Annotated section 9-12-315 (Repl. 2002) requires that marital property be divided at the time the divorce is granted. Moreover, our court has held that "the chancellor loses the authority to distribute property not mentioned in the original decree after the decree has become final." *Jones*, 26 Ark. App. at 6, 759 S.W.2d at 45. Therefore, we declined to adopt Missouri's position on this issue:

> Because this claim was not advanced at trial [precluding the application of the general reservation of jurisdiction], no appeal was brought from the chancellor's failure to divide the property, and no grounds for modifying the decree after 90 days have been established, we hold that the appellee waived any rights she may have had in the stock and profit sharing account, and that the chancellor erred in amending the decree to

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[3] The trial court relied upon the Missouri case of *Schulz v. Schulz,* 612 S.W.2d 380 (Mo. App.1980), which held that, under the Missouri statute governing the disposition of property in divorce, the trial court is obliged to determine and divide marital property, and the jurisdiction of the trial court is not exhausted until it has done so. 612 S.W.2d at 382. The Missouri appellate court also held that, although a divorce decree is final and not subject to modification as to property distributed by the decree, the trial court nevertheless has jurisdiction in a subsequent or ancillary proceeding to distribute the remaining undistributed property.

[4] The Missouri statute discussed in *Schulz,* Mo. Ann. Stat. § 452.330 (1986), does not specify when the trial court must distribute the marital property; Arkansas's statute does. *See* Ark. Code Ann. § 9-12-315 (Repl. 2002).

distribute this property. *Mitchell v. Meisch, supra.*

*Jones*, at 5–6, 759 S.W.2d at 45–46. S*ee also Harrison*, *supra* (holding that trial court was without jurisdiction to modify the divorce decree where the property-settlement agreement did not mention a tract of land owned by parties; modification took place after the expiration of ninety days as per Arkansas Rule of Civil Procedure 60(b), and there was no clerical correction to make under Rule 60(a)); *Linn*, *supra* (holding that the trial court had no jurisdiction to enter an amended order to the original divorce decree directing the husband to pay the wife his share of the mortgage payoff and awarding a tract of land to the wife, where the amendment did not comply with Rule 60's time constraints or other Rule 60 requirements; general reservation of jurisdiction did not apply because the matters dealt with in the amended order were not issues brought before the trial court in the original action).

Applying the above law to the facts of this case we hold that the trial court erred in modifying the property-settlement agreement by ordering the parties to equally divide the 2004 tax-refund check. The divorce decree was entered February 28, 2005. Goellner's motion to distribute the refund, filed January 11, 2006, came long after Rule 60's ninety-day period expired. No other grounds for the application of Rule 60 were pled or proven, and therefore Rule 60 did not give the trial court jurisdiction to modify the property-settlement agreement. The general reservation of jurisdiction, which is included in the parties' divorce decree,[5] does not give the trial court jurisdiction because the parties never mentioned the refund at the time

[5] The general reservation of jurisdiction provides: "This Court doth retain jurisdiction for this cause for such further orders and actions as may be necessary and proper."

of the divorce, and the tax refund was not included in the property-settlement agreement. As such, the trial court had no jurisdiction to distribute the refund check, and we reverse on this issue.

The same jurisdictional analysis is required when reviewing the trial court's modification of the property-settlement agreement with regard to the boat. However, we hold that the trial court did have jurisdiction to modify the agreement to include the division of the proceeds from the sale of the boat under the general reservation of jurisdiction found in the decree. The general reservation of jurisdiction applies in this instance because the parties discussed the boat at the time of the divorce, and the property-settlement agreement addressed a boat and the personal property of the parties. Therefore, we hold that the general reservation of jurisdiction extended jurisdiction to the trial court to address this issue even though the modification came after Rule 60's time constraints.

The trial court found that the reference in the property-settlement agreement to "the boat" was ambiguous. When contracting parties express their intention in a written instrument in clear and unambiguous language, it is our duty to construe the written agreement according to the plain meaning of the language employed. *Pittman v. Pittman*, 4 Ark. App. 293, 139 S.W.3d 134 (2003). Where the meaning of the words is ambiguous, parol evidence is admissible to explain the writing. *Id.* The initial determination of the existence of an ambiguity in a written contract rests with the trial court and, if an ambiguity exists, then parol evidence is admissible and the meaning of the term becomes a question for the fact finder. *Id.* On appeal, we do not set aside a trial court's finding of fact unless it is clearly

erroneous.

Oh argues on appeal that the property-settlement agreement was not ambiguous, specifically, that the reference to "the boat" in paragraph 3 refers to the boat that Goellner was living in at the time of the divorce. She claims that all other personal property, including the boats and vehicles, were to be given to whomever had possession of them at the time of the divorce. Based on her interpretation, the smaller boat was hers because she had possession of it at the time of the divorce. She also argues that, while there may have been conversations and e-mails exchanged between the parties post-decree, there were no written agreements executed that modified the property-settlement agreement. Goellner testified that he thought the boat that was given to him in the agreement was the small boat, because the larger boat was non-marital property and would not have been discussed in the agreement.

We agree with the trial court that the reference to "the boat" in the property-settlement agreement is ambiguous. In that agreement, the parties agreed that Goellner was to receive "the boat," but there were two boats. Because it cannot be determined to which boat the property-settlement agreement referred, the agreement is ambiguous, and the trial court properly considered parole evidence to explain it. However, because the parol evidence was essentially a swearing match between the parties, the trial court relied on the e-mails exchanged by the parties to ascertain their intent. Based on the e-mails, the trial court found that Oh agreed that they should sell the small boat and split the proceeds. Because this factual finding was not clearly against the preponderance of the evidence, we affirm on this point.

Finally, Oh argues that the trial court erred in finding that Goellner was not in

contempt for failing to timely execute the QDRO authorization and in not assessing her attorney's fees against him. Our standard of review for civil contempt is whether the finding of the circuit court is clearly against the preponderance of the evidence. *See Gatlin v. Gatlin,* 306 Ark. 146, 811 S.W.2d 761 (1991). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that an error has been committed. *Omni Holding & Dev. Corp. v. C.A.G. Inv., Inc.*, ___ Ark. ___, ___ S.W.3d ___ (June 7, 2007). Facts in dispute and determinations of credibility are within the province of the fact-finder. *Id.*

In the instant case, Oh testified that she requested, ten times, an executed QDRO authorization from Goellner and that she did not receive the authorization until after she filed the contempt motion. However, the trial court heard testimony from Goellner that he hired a specialist in 2005 to prepare the QDROs and that those were forwarded to Oh's attorney in May of 2005. Oh testified that she was aware that those QDROs were prepared at that time. Goellner further testified that he thought by doing this, he complied with the property-settlement agreement. The trial court believed Goellner and found that he acted in accordance with the divorce decree/property-settlement agreement and that he was not in contempt. As such, the trial court did not order him to pay Oh's attorney's fees. We cannot say that the trial court was clearly erroneous in making these findings, and we affirm.

Affirmed in part; reversed and dismissed in part.

GLOVER and HEFFLEY, JJ., agree.