

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003046-MR

ANN S. REDDEN

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 91-CI-01466

DONALD L. REDDEN

APPELLEE

OPINION
REVERSING AND REMANDING WITH DIRECTIONS
** **

BEFORE: DYCHE, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Ann S. Redden has appealed from the post-dissolution judgment of the Kenton Circuit Court which interpreted the parties' separation agreement and Agreed Qualified Domestic Relations Order (QDRO) as awarding her a 50% interest in the marital contributions to Donald L. Redden's pension, and not to 50% of the marital benefits afforded by the pension. Having concluded that the trial court erred as a matter of law in interpreting the parties' agreement, we reverse and remand with directions.

The parties' twenty-eight year marriage was dissolved on August 14, 1992. Thereafter, on September 8, 1992, the parties negotiated and executed a property settlement agreement dividing their marital estate in equal proportions. The major asset of the marriage was Donald's pension, which was addressed in the agreement as follows:

Husband currently possesses retirement benefits through the Civil Service Retirement System, Office of Personnel Management, through his employment with the Federal Bureau of Investigation. The parties agree that the Wife shall be given and awarded by virtue [sic] of a separate Domestic Relations Order 50% of the Husband's existing retirement benefits, and in addition, the Wife is awarded a survivor's annuity benefit pursuant to Title 5 CFR Sec. 831.601. Husband's estimated total retirement member contributions as of March 11, 1992, is \$63,005.80 (emphasis added).

On October 20, 1992, a QDRO was entered by the Kenton Circuit Court to secure Ann's rights in Donald's pension. The QDRO provided that

the former spouse, Ann S. Redden, is awarded a fifty percent (50%) interest in her Husband, Donald L. Redden's, Retirement Benefits and Pension Plan through the Federal Government's Civil Service Retirement Benefits Plan. Wife's share shall be calculated as fifty percent (50%) of the employee's benefits accumulated in the Civil Service Retirement Governmental Plan as of March 11, 1992. A calculation of the former spouse's benefit shall be made pursuant to the above percentage and shall be paid over directly to said former spouse/alternate payee, or her designee, on whatever or whichever date the Participant Employee becomes entitled to benefits under such Plan according to the terms and provisions thereof and for so long as the Participant Employee remains so entitled (emphasis added).

Section 6. IT IS FURTHER ORDERED that the former spouse/alternate payee, Ann S. Redden, is hereby awarded a Survivor Annuity [sic] pursuant to Title 5 USC Sec. 8341(h), and accordingly, in the event of death of the Participant Employee either before or after commencement of retirement benefits, payment shall be made to the former spouse/alternate payee as provided in the Plan for a surviving spouse possessing a survivor annuity [sic][.]

Both the property settlement agreement and the QDRO were executed by Donald and Ann and their respective counsel. An amended decree was entered on November 9, 1992, incorporating both the agreement and the QDRO into the final decree of dissolution.

Donald retired in September 1995, three years after the dissolution. Ann applied for her share of the retirement annuity. On February 6, 1996, the OPM informed Donald that it had calculated Ann's share of his \$4,028 monthly pension benefit to be \$2,014, and that it would pay her that sum until her apportionment of \$31,502.90 was paid out. The notice, addressed to Donald, did not indicate whether Ann was provided with a copy of the agency's calculations. However, when Ann learned of the OPM's interpretation of the QDRO as providing her with a lump-sum distribution of half of Donald's contribution to the plan and not with a proportional share of the retirement annuity, she, through her attorney who drafted the QDRO, contacted the OPM and requested that it conduct a review of its treatment of the QDRO.

On September 23, 1996, the OPM advised the parties that it had misinterpreted the QDRO, and that after receiving "guidance" from its "Policy Office," had determined that Ann was entitled to an annuity as follows:

[The Policy Office] advise[s] that because the order states that the wife's share shall be computed as of a certain date--we are to process the apportionment as a prorata share defined in Part 838.621(a)(c) of Title 5, Code of Federal Regulations as follows:

(a) "Prorata share" means one-half of the fraction whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee.

(c) A court order that awards a portion of an employee annuity as of a specified date before the employee's retirement awards the former spouse a prorata share as defined in paragraph (a) of this section.

Pursuant to this formula, the OPM determined that Ann was entitled to 43.82% (50% of the marital portion) of Donald's pension until his death, at which time she was entitled to the survivor's annuity.¹ Thus, Donald's monthly pension was divided by the OPM as follows: \$1,733.33 to Ann; \$2,278.67 to Donald.

In January 1997, Donald, with new counsel, sought an order from the trial court requiring the OPM to reinstate its original interpretation of the QDRO. The trial court conducted an evidentiary hearing at which Donald testified that he did not intend to share his annuity with Ann, and that at the time of the dissolution, his intent and understanding was that Ann would only

¹At the time Donald retired, he had earned 332 months of creditable service, 291 of which were attributable to his employment during his marriage to Ann (that is, to March 1992, the agreed marital cut-off). These figures were used to determine that the marital portion of the pension equaled 86.65%. Donald does not quarrel with the percentage reached by the OPM, or with the manner in which Ann's benefits were calculated. Donald's only contention is that the parties did not intend that Ann would share in his annuity in the first instance.

receive 50% of his contribution as of March 11, 1992. Ann, who at this point in time was not represented by counsel, testified that the manner in which the OPM finally interpreted the QDRO best reflected the parties' intent. In its judgment entered on September 22, 1997, the trial court agreed with Donald's position and concluded that the OPM's most recent interpretation of the QDRO

was contrary to the intent of the parties as evidenced by their Separation Agreement, their acquiescence in the initial interpretation by OPM, and the receipt of the lump sum payments made until September, 1996. The new interpretation was simply wrong. The parties agreed to a lump sum distribution and not to the division of any annuity (except the survivor's annuity).

[Donald] did not retire until three years after entry of this Decree. To administer his pension as an annuity, calculated on earnings and contributions accruing after the divorce, would give to [Ann] more than that to which she was entitled.

Ann's motion to alter, amend or vacate the judgment was denied on October 30, 1997, and this appeal followed.

Ann argues that the trial court erred in its interpretation of the parties' property settlement agreement because it failed to give effect to the intent of the parties. We agree. Property settlement agreements, like other contracts, are to be interpreted and enforced according to the intent of the parties.² It is a "cardinal principle" in contract

²John v. John, Ky.App., 893 S.W.2d 373, 375 (1995); see also Kentucky Revised Statutes (KRS) 403.180(5) (terms of an agreement "are enforceable as contract terms"), and KRS 403.250(1) (terms of a decree involving property division "may not be revoked or
(continued...)

interpretation that "where the instrument is so clear and free of ambiguity as to be self-interpretive, it needs no construction and will be performed or enforced in accordance with its express terms."³ "If a contract has a plain meaning that can be understood without resorting to parol evidence to find the intent of the parties, then parol evidence is not admissible."⁴ The courts "cannot make a new contract for the parties under the guise of interpretation or construction but must determine the rights of the parties according to the terms agreed upon by them."⁵ Finally, even if a contract is ambiguous, or "susceptible of two constructions," the trial court must choose the interpretation "which makes a rational and probable agreement."⁶

With these principles in mind, it is obvious to this Court that the trial court clearly erred in interpreting the agreement as awarding Ann a lump-sum distribution equal to one-

²(...continued)
modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state").

³Ex parte Walker's Ex'r., 253 Ky. 111, 117, 68 S.W.2d 745, 747 (1933).

⁴Friction Materials Co., Inc. v. Stinson, Ky.App., 833 S.W.2d 388, 391 (1992).

⁵Meyers v. Kentucky Medical Insurance Co., Ky.App., 982 S.W.2d 203, 210, (citing Cheek v. Commonwealth Life Ins. Co., 277 Ky. 677, 126 S.W.2d 1084, 1089 (1939)).

⁶Ward v. Harding, Ky., 860 S.W.2d 280 (1993) (quoting Skivolocki v. East Ohio Gas Co., 38 Ohio St.2d 244, 313 N.E.2d 374 (1974)).

half of Donald's contributions to the pension.⁷ The property settlement agreement and the QDRO provide that Ann would receive half of Donald's pension "benefits" accumulated as of March 1992, not half of his "contributions." There is no question that the terms "benefits" and "contributions" employed by the documents are not synonymous. Donald's pension plan was a defined benefits plan, that is, his benefits were based on his salary and years of service, not on the amount of his contributions. Indeed, the amount of Donald's contributions to the plan is not even mentioned in the QDRO, the order giving the plan administrator (OPM) notice of Ann's rights, evidencing the lack of any significance to that amount's inclusion in the settlement agreement except for informational purposes. Further, there was no mention of the present-value of the pension's benefits as of March 1992, indicating that the parties' intent was that Ann's portion of the pension benefits would be in the form of a deferred annuity and not in a deferred lump-sum.⁸

⁷Donald, citing Ghali v. Ghali, Ky.App., 596 S.W.2d 31 (1980), states in his brief that this Court's standard of review is concerned with the question of whether the trial court abused its discretion "in valuing pension rights and dividing them" between the parties. There is no question that the parties in this case agreed not only to a division of their property, but to the exact wording of the QDRO effecting the rights and obligations for which they bargained with respect to Donald's pension. The trial court was never called upon to determine the value of the pension rights, nor to divide the parties' respective interest in that property, but was required to interpret and enforce the parties' agreement to effectuate the parties' intent. Thus, the manner in which the trial court could have distributed Donald's pension benefits is of no relevance in this appeal. The issue in this case is purely one of law to which the abuse of discretion standard has no application.

⁸See Graham and Keller, Kentucky Practice §§ 1528-1530
(continued...)

Donald correctly asserts that neither the agreement nor the QDRO contains the term "annuity" (except for the survivor's annuity). Of course, as Ann points out, neither do the documents employ the term "lump-sum." Nevertheless, that Ann was to receive an annuity is readily apparent from the language in the QDRO that provides that Ann would receive her share of the pension "for so long as the Participant Employee [Donald] remains so entitled." This language would be totally meaningless if the parties intended that Ann would receive a fixed, or a lump-sum paid in installments, in which case the documents would have provided that she receive 50% of the pension for as long as necessary to satisfy her fixed, or lump-sum. The language of the QDRO could not possibly be interpreted to award Ann her share of this marital asset in a lump-sum, unless Donald also received his share in that form.⁹ Neither the trial court, nor Donald, address why the QDRO would measure Ann's entitlement to benefits in terms of Donald's lifetime if it was the parties' intent that her interest in the pension benefits was equal to a fixed amount.

Further evidence that the parties intended to award Ann an annuity and not a lump-sum is gleaned from the documents'

⁸(...continued)
(1997); see also Carranza v. Carranza, Ky.App., 765 S.W.2d 32 (1989). As the treatise and Carranza discuss, it is often difficult to value a defined benefits plan such as Donald's, and that such valuation is a task that usually requires the assistance of an expert. This is one of the major reasons that payment to the non-employee spouse is deferred and the pension made subject to a QDRO.

⁹While Donald could have chosen to receive his pension in a lump-sum at the time he retired (a lump-sum which would have included more than his own contributions), he chose instead to receive an annuity.

provision that she receive a survivor's annuity in the event she survives Donald. Again, it is nonsensical to suggest that the parties contemplated that Ann would receive a lump-sum of \$31,000 and, after Donald's death, receive an annuity for life.

There is no question, as we glean from the agreement as a whole, and as Donald acknowledges, that the parties wanted to divide their property equally. While the record does not contain a valuation of the pension at the time of dissolution, there is no question that it was worth more than the sum of Donald's contributions. Even using elementary mathematical principals, it is apparent that \$31,000 is not equivalent to \$48,000 times the life expectancy of someone fifty-two years of age, Donald's age at retirement.¹⁰ Thus, it is evident from the agreement and QDRO, documents executed by both Donald and Ann, that the parties intended for Ann to receive an annuity equal to 50% of that portion of Donald's pension benefits attributable to his employment during the marriage. Accordingly, we hold that the trial court erred as a matter of law in interpreting the contract as providing Ann with a lump-sum distribution and thereby modifying the parties' rights contrary to their intent.

Although we believe that the parties' intent is readily ascertainable from their written documents, we will address

¹⁰While we cannot ascertain from the parties' agreement when they anticipated Donald would retire, we know the parties contemplated that it would be no later than March 2000, when, as Donald testified, he would reach the mandatory retirement age of 57. It does not take an accountant to figure out that the sum representing Donald's life expectancy, even at 57 years of age, times \$4,000+ per month, would still be considerably more than \$31,000.

Donald's arguments and the parol evidence considered by the trial court in its ruling. Instead of pointing to language in the written documents that support his interpretation of the agreement, Donald argues that he could not possibly have intended to give Ann one-half of his annuity as he was not eligible for an annuity in March 1992. He states: "To contract for something for which he was not eligible, would be a contract that would lack consideration and could not possibly reach the 'meeting of the minds' requirement for a valid Agreement." Donald cites no authority in making this argument, and ignores the case law that has developed in the last quarter of this century regarding the distribution of pension/retirement benefits upon dissolution. Further, Donald's argument, that is, that a vested pension that has not matured is not susceptible to be divided as a deferred annuity, is simply not the law. His contention that the value of the pension was equal to his contribution is not only unreasonable given the nature of the pension,¹¹ but more importantly, not supported by the record.¹²

¹¹See n. 10, infra.

¹²As stated, there is no evidence in the record of the value of the pension at the time of dissolution. Duncan v. Duncan, Ky.App., 724 S.W.2d 231 (1987), does not hold, as Donald suggests, that the value of a defined benefits plan is equal to the employee's contributions. In that case, the trial court did divide the contributions equally, but it was the husband, the employed spouse, who appealed, not the wife. In rejecting the husband's argument that the contributions should have been further discounted to present value, this Court observed that he was "guaranteed to eventually receive at least the amount he contributed . . . but it is very probable that he will receive an amount far greater than that." Id. at 234. It is only where an employee has a defined contributions plan, where benefits are not based on salary and years of service, but on the employee's
(continued...)

Pension and retirement benefit plans, even non-contributory funds, have for some time been recognized as marital property to the extent they were accumulated during the marriage.¹³ Frequently, as in the case sub judice, a pension is one of the most valuable assets accumulated by either party in a marriage, particularly where the employed spouse is near retirement.¹⁴ Kentucky courts have long recognized that pensions are a "form of deferred compensation" which are "earned during each day of [the] month of military service or other work."¹⁵ There are various methods a trial court may use in dividing pension benefits. Where practical, it should disentangle the parties by off-setting other marital property to the non-employed spouse.¹⁶ However, it is frequently impossible, particularly after a lengthy marriage, for the employed spouse to buy-out the other's interest in the pension and thus the interests of both may be deferred until the employed spouse retires, requiring that they remain in an economic partnership to the extent of the pension benefits.¹⁷

¹²(...continued)
contributions, that the value of a pension would be related to the contributions. See Kentucky Practice, supra § 15.28.

¹³See Foster v. Foster, Ky.App., 589 S.W.2d 223 (1979).

¹⁴From our examination of the record, it is apparent that the Reddens did not have another asset that came close to the value of Donald's pension.

¹⁵Light v. Light, Ky.App., 599 S.W.2d 476, 478 (1980).

¹⁶Duncan v. Duncan, supra, 724 S.W.2d at 233.

¹⁷See e.g., McGinnis v. McGinnis, Ky.App., 920 S.W.2d 68, 73 (1996) (trial court's award to wife of one-half equitable
(continued...))

In this regard, we hold that the trial court incorrectly observed that the agreement, as finally interpreted by the OPM and this Court, would give Ann "more than that to which she was entitled." Clearly, the formula contemplated by the agreement and utilized by the OPM is recognized in many jurisdictions as the appropriate manner in which to divide a pension plan such as Donald's.¹⁸ The same formula was used approvingly in Carranza, supra.¹⁹ In any event, the trial court's concern that Ann might get more than she is entitled was not relevant to the issue it was required to determine. The issue before the trial court was what distribution of the marital portion of the pension did the parties bargain for, not what distribution it would have made. Donald agreed to the terms of the QDRO, terms as discussed which gave Ann a percentage of Donald's benefits for so long as Donald is entitled to receive those benefits. Donald is unhappy with the agreement; however,

¹⁷(...continued)
interest in stock in closely held corporation held in husband's name (where transfer to wife not possible) and refusal to allow husband to buy-out stock at its value at time of dissolution upheld where "the stock's full value may not be realized for several years").

¹⁸See Kentucky Practice, supra, § 15.29; see also In Re Marriage of Hunt, 909 P.2d 525, 536, 540 (Co. 1995) (the Court recognized that where there is a deferred distribution of pension benefits, the "post-dissolution enhancements always must be treated as marital property" for the reasons that since the nonemployed spouse "must bear the risks attendant to waiting, then the nonemployee should share in increased benefits that accrue during the delay").

¹⁹Carranza, 765 S.W.2d at 34 (the Court reasoned that applying the coverture fraction to the annuity "relieves the court from the difficult, if not impossible, burden of placing a present value on a contingent benefit and results in a just division of the marital assets").

that dissatisfaction can not justify the trial court's judgment which altered the terms of the parties' contract.²⁰

Finally, in support of its conclusion that the parties' intent was to award Ann one-half of the contribution to the pension, the trial court found that Ann acquiesced in the initial interpretation by OPM. This finding is clearly erroneous. As stated earlier, although the record does not establish when Ann became aware of the OPM's initial, February 1996, interpretation of the QDRO, there is no question that once she did learn of that interpretation, Ann's counsel contacted the OPM to get it to review its interpretation. The record establishes that Ann's attorney drafted the QDRO to conform to the OPM's regulations and guidelines and that she was successful in getting the OPM to amend its initial interpretation to correspond to those guidelines.²¹ In response to Ann's request, the OPM acknowledged

²⁰Peterson v. Peterson, Ky.App., 583 S.W.2d 707 (1979); and Lydic v. Lydic, Ky.App., 664 S.W.2d 941 (1984).

²¹The OPM's "Guidelines for Interpreting State Court Orders Dividing Civil Service Retirement Benefits" provides that

3. Orders that contain general language awarding a specified portion of a Federal employee's "retirement benefits" as of a specified date before retirement, but do not specify whether OPM should use "creditable service" or "service worked" as of the date specified to complete the computation, will be interpreted to award a portion of the annuity equal to the monthly annuity rate at the time of retirement times a fraction, the numerator of which is the [n]umber of months of service worked as of the date specified and the denominator of which is the number of months of "creditable service" as of the time of retirement.

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its error and notified the parties of its corrected interpretation in September 1996.²²

It is precisely because Ann did not acquiesce in the OPM's initial construction of the QDRO that caused Donald to seek a different interpretation of the QDRO in the trial court. Donald acknowledges that it was Ann's attorney's efforts which resulted in the OPM's reversal of its interpretation. However, to convince this Court that there is "significant evidence" that Ann and her attorney "demurred to OPMS [sic] original ruling," he points to a letter her counsel allegedly sent to the OPM on February 13, 1996, in which she stated that it was her "understanding" that Ann would get "a monthly payout based on the lump sum that was invested" (emphasis original). The problem with this argument is that Donald does not cite where in the record

²¹(...continued)
Elsewhere, the guidelines provide that

[4] A. Orders that are unclear about whether they are dividing an annuity or a refund of contributions will be interpreted as dividing an annuity.

B. Orders using "annuities," "pensions," "retirement benefits," or similar terms will be interpreted as dividing an annuity and whatever other employee benefits become payable, such as refunds. Orders using "contributions," "deductions," "deposits," "retirement accounts," "retirement fund," or similar terms will be interpreted as dividing the amount of contributions the employee has paid into the Civil Service Retirement Fund.

²²The OPM's initial payments to Ann of 50% of Donald's pension, instead of 43.82%, resulted in an overpayment of over \$6,000 which the OPM planned to withhold from Ann's future installments.

this evidence is located. Our search of the record reveals no such letter from Ann's attorney on February 13, 1996, or any letter to the OPM on any other date containing the language that he has quoted, or any language close to it. It is well settled that evidence not contained in the record will not be considered on appeal.²³ Thus, even if this alleged letter does exist, it cannot support the trial court's finding.

For the foregoing reasons, we hold that the trial court has impermissibly altered the terms of the parties' agreement, resulting in an unfair distribution of the marital estate clearly not contemplated by the parties' contract. Accordingly, the judgment of the Kenton Circuit Court is reversed, and the matter is remanded for entry of any orders necessary to reinstate Ann's rights under the amended decree of dissolution consistently with the Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew L. Darpel
Ft. Wright, KY

BRIEF FOR APPELLEE:

James Kruer
Covington, KY

²³Jackson v. Jackson, Ky.App., 571 S.W.2d 90, 93 (1978).