

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001769-MR

ROBERT WAYNE BAKER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 86-CI-00642

RUTH ANN BAKER (SEARCY)

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, KNOFF, and TACKETT, Judges.

TACKETT, JUDGE: Robert Wayne Baker (Robert) appeals pro se from an opinion and order of the Fayette Circuit Court requiring him to pay an arrearage and make future payments from his retirement pension in accordance with the parties' property settlement agreement. Finding no error, we affirm.

Robert and Ruth Baker (Ruth) were married in 1969 and separated in 1985. They adopted two children during the marriage. In February 1986, Ruth filed a divorce petition in which she requested, inter alia, an award of maintenance. The

parties reached a settlement on property rights, maintenance, child custody, and child support. Robert was employed at IBM throughout the marriage and had earned certain retirement benefits. Paragraph 12 of their settlement agreement, which dealt with division and distribution of Robert's retirement benefits, stated in pertinent part as follows:

Retirement. Husband agrees that Wife shall receive one-half ($\frac{1}{2}$) of that portion of his retirement and pension benefits paid to him through IBM, his place of employment, which represents the percentage of years during which Husband and Wife were married to the total number of years worked. He agrees that, upon receipt of all such payments, he shall immediately forward to wife her pro rata portion. For example, if Husband works for IBM for forty years, Wife is entitled to one-half of $\frac{16}{40}$ of each payment, or 20%, for so long as he receives said payments.

A decree of dissolution of marriage was entered incorporating the parties' settlement agreement.

On April 6, 1999, Ruth filed a motion seeking an order from the court requiring Robert to show cause why he should not be held in contempt for failing to pay her \$10,378.29 as her share of his retirement benefits. In an accompanying affidavit, Ruth stated that Robert began working at IBM in 1966 and retired in 1991, but that under the terms of his retirement he started receiving retirement pension payments in December 1996. She alleged that from December 1996 through December 1997, Robert received monthly payments of \$1,638.64, which were increased to \$1,751.95 as of January 1998. Ruth further asserted that under paragraph 12 of the settlement agreement, she was entitled to receive 23% of the retirement payments, that she had received

only \$162.52 leaving an amount due of \$10,378.29 as of February 1999. On April 22, 1999, Robert filed a response to the motion in which he stated there was a dispute concerning the interpretation of paragraph 12 of the settlement agreement and contending that Ruth was only entitled to \$81.26 per month.

On April 26, 1999, the trial court conducted a show cause hearing and allowed the parties to submit any documents relevant to determining the amount of the retirement payments owed Ruth. Ruth submitted the deposition of the manager of employee benefits at IBM (now Lexmark) with the accompanying exhibits consisting of Robert's retirement file. Robert filed a letter from IBM personnel indicating that his retirement benefit attributable to the period from October 1969 through May 1986 was \$533.93 per month. On June 4, 1999, the trial court conducted a hearing during which the parties argued their positions on the interpretation of the settlement agreement. On July 13, 1999, an opinion and order was entered requiring Robert to pay Ruth one-half of the total monthly retirement payments he received based on the trial court's interpretation of the settlement agreement. This appeal followed.

Robert contends the trial court incorrectly required him to pay his former wife a portion of his retirement benefits based on the total number of years he was employed by IBM, rather than based on the number of years he worked at IBM during the marriage. He asserts that pension benefits are considered deferred compensation, so a former spouse is entitled to receive

credit only for an amount earned during the marriage. See Colley v. Colley, Ky., 460 S.W.2d 821 (1970).

Kentucky Revised Statute (KRS) 403.180 authorizes parties to enter into separation agreements in order to promote the amicable settlement of disputes. Except for issues concerning custody, child support and visitation, the terms of the separation agreement are binding on the trial court unless it finds the agreement unconscionable. KRS 403.180(2). See also Schraberg v. Schraberg, Ky., 939 S.W.2d 330 (1997). The parties' rights under a separation agreement depend on its terms, and the parties may waive or modify their statutory rights or obligations. See, e.g., Adkins v. Jones, Ky., 264 S.W.2d 265 (1954); Goodaker v. Littell, Ky., 314 S.W.2d 539 (1958). A separation agreement incorporated in a divorce decree is enforceable by all the remedies available for enforcement of a judgment and as a contract. KRS 403.180(5); Pegler v. Pegler, Ky. App., 895 S.W.2d 580 (1995).

Robert argues on appeal that the trial court's judgment awarded Ruth an excessive portion of his retirement benefits by including in its calculation benefits that he earned outside of the marriage. While he does not contest the coverture fraction¹ or dispute that Ruth is entitled to 23% (50% of 16/35) of his retirement payments, he argues that the base amount from which the percentage is taken should include only the amount he earned during the sixteen years of the marriage. While we have serious

¹The coverture fraction is defined as the number of years of the marriage divided by the number of years of work. See Pa. Super. Ct. Braderman v. Braderman, 488 A.2d 613 (1985).

questions about Robert's mathematical calculation,² the central issue in this case is interpretation of the terms of the separation agreement.

Although paragraph 12 of the separation agreement is not a paradigm of clarity, it does contain language supporting the trial court's interpretation. It states that Ruth shall receive that portion of Robert's pension benefits "paid to him through IBM. . . ." It also states that Robert would forward a portion of the retirement payments "upon receipt of all such payments." This language suggests that the parties intended that Ruth would receive her pro rata portion based on the actual amount of the retirement payment Robert received rather than the fictional amount he would have received at the time of the divorce.

The example included in the agreement clearly indicates that the parties contemplated Robert's continued employment at IBM and intended that Ruth would receive her portion based on the actual retirement payments, including his earnings subsequent to the date of the divorce. This interpretation is consistent with the use of the total number of years that Robert actually worked at IBM as the denominator in the coverture fraction. In addition, the parties did not prepare a qualified domestic

²Robert fails to provide clear documentary evidence explaining how he arrived at his calculation. For instance, Appendix 8 of his appellate brief appears to indicate he merely combined his total earnings for the sixteen year period, rather than determine his retirement payment as of 1986 based on the employer's pension formula. See, e.g., Louise E. Graham and James E. Keller, 15 Kentucky Practice, Domestic Relations Law § 15.29 (2nd ed. 1997); Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986); Light v. Light, Ky. App., 599 S.W.2d 476 (1980).

relations order (QDRO), which is typically used to authorize direct payment by the employer to the non-employed spouse for her share of retirement payments, and is calculated based on the value of the pension plan as of the date of the dissolution. See, e.g., Clark v. Clark, Ky. App., 782 S.W.2d 56 (1990).

Consequently, we hold that the trial court did not err in its interpretation of the settlement agreement. Thus, we affirm the order of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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