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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000276-MR
AND
NO. 2004-CA-001648-MR

KELLY W. WILSON APPELLANT

v.

APPEALS FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 98-CI-00218

SHARON L. WILSON;
COMMONWEALTH OF KENTUCKY
EX REL. SHARON L. WILSON APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

BARBER, JUDGE: These consolidated appeals stem from a dissolution of marriage proceeding originating in Meade County, Kentucky. On August 26, 1998, Appellee, Sharon L. Wilson (hereinafter referred to as Sharon), filed for divorce from Appellant, Kelly W. Wilson (hereinafter referred to as Kelly).

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

A separation agreement between the parties was filed with the trial court on August 9, 1998. Each party was duly represented by counsel during the execution of the settlement agreement. At that time, Kelly was still on active duty in the military. Subsequently, a dissolution decree incorporating the terms of the separation agreement was entered on October 13, 2000. On December 12, 2000, an amended decree was entered to correct a typographical error dealing with the parties' and their minor child's social security numbers. All other terms were verbatim of the original decree.

Following the entry of the decree, several motions were filed by Sharon in relation to benefits she felt due to her pursuant to the separation agreement. The two judgments which ultimately led to this appeal dealt with maintenance and child support arrearages. The first judgment was entered on January 9, 2004, and found arrearages through November 2003 in the amounts of $2,170.14 for maintenance and $2,233.88 for child support. Following this order, Sharon received child support services through the Cabinet for Health and Family Services (Cabinet). The Cabinet utilized the services of the Meade County Attorney's office to seek reimbursement for services rendered to Sharon as evidenced by an order entered March 4, 2004. With the assistance of the Meade County Attorney's office, Sharon received the second judgment August 9, 2004. The

August 9, 2004 judgment, which is the subject of this appeal, found arrearages beginning December 1, 2003 through June 30, 2004 in the amounts of $2,304.88 for child support and $2,407.57 for maintenance.

Kelly's arguments can be categorized into three primary issues. First, Kelly argues that Sharon was entitled to maintenance of $1,000 per month until his date of retirement on May 31, 2003 per their separation agreement; therefore, he could not accumulate an arrearage for monies he had no legal obligation to pay. Second, Kelly argues that Sharon has been and is being paid all monies due to her from his military retirement benefits in accordance with the separation agreement. Third, Kelly argues he owes no child support arrearage, because his child support obligation should have been reduced in June 2003 due to a change in his economic circumstances. We shall review each argument accordingly.

Kelly first argues that Sharon was entitled to maintenance of $1,000 per month until his date of retirement on May 31, 2003 per their separation agreement. We first turn to the language of the separation agreement. The separation agreement states in pertinent part:

> [Kelly] shall pay to [Sharon] as alimony and maintenance for [Sharon's] support, both temporarily and permanently, $1,000 per month commencing immediately and **lasting for five (5) years or until [Kelly]**

> **retires from the United States Air Force whichever first occurs.** (Emphasis added.) [Kelly] shall cause the aforesaid $1,000 monthly maintenance to be paid by voluntary allotment.[2]

Kentucky Revised Statute 403.180 governs separation agreements in dissolution proceedings. Kentucky Revised Statute 403.180(2) states ". . . the terms of the separation agreement, except those providing for the custody, support, and visitation of the children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable." In this instance, the separation agreement was found to be conscionable by the trial court and incorporated accordingly into the decree and subsequent amended decree. Kentucky Revised Statute 403.180(5) states "Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms." This concept has been reiterated in case law.

Questions relating to the construction, operation and affect of separation agreements between a husband and wife are governed, in general, by the rules and provisions applicable to the case of other contracts generally. Richey v. Richey, 389

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[2] Separation Agreement, paragraph 4.

S.W.2d 914, 917, (Ky.App. 1965). The primary object in construing a contact or compromise settlement agreement is to effectuate the intentions of the parties. Cantrell Supply, Inc. v. Liberty Mutual Insurance Co., 94 S.W.3d 381, 384, (Ky.App. 2002); see also Wilcox v. Wilcox, 406 S.W.2d 152, 153, (Ky. 1966). Also, absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. Cantrell, supra 94 S.W.3d at 385 (citing Hoheimer v. Hoheimer, 30 S.W.3d 176, 178, (Ky. 2000)).

The plain language of the separation agreement states that the monthly maintenance of $1,000 was to occur for either five years or until Kelly retired from the Air Force, whichever occurred first. In this instance, Kelly retired from the Air Force prior to the end of the five year period. His retirement was effective as of May 31, 2003. Therefore, Kelly's obligation to pay Sharon $1,000 per month under this provision in the separation agreement ceased to exist on June 1, 2003. Kelly states he continued to pay Sharon $1,000 per month in June and July 2003 despite not being obligated to do the same. Sharon concedes that she received these payments in her brief[3] and her September 10, 2003 affidavit. Kelly is entitled to reimbursement for these overpayments. See Wheeler v. Wheeler,

[3] Appellee's Brief p.5.

579 S.W.2d 378, 380, (Ky.App. 1979). We remand to the trial court so that an appropriate method of repayment of the $2,000 to Kelly by Sharon may be determined.

Another separation agreement provision became applicable following Kelly's retirement from the Air Force and is the subject of his second argument. Kelly claims Sharon has been and is being paid all monies due to her from his military retirement benefits in accordance with the separation agreement. The relevant separation agreement provision states:

> "As a part of the division of marital property, [Sharon] shall receive forty-three percent (43%) of [Kelly's] Air Force retirement pay which is roughly the percentage [Sharon] would receive based upon [Kelly] remaining in the Air Force for twenty (20) years, despite the fact that [Kelly] might remain in the Air Force for longer than twenty (20) years. **It is specifically understood that in the event that** [Kelly] medically retires or **if [Kelly] retires with full or partial disability benefits**, or for any other reason which would cause [Sharon's] portion of [Kelly's] retirement benefits to be less than she would received had [Kelly] retired with full retirement, or 100 percent retirement benefits, **then in any such eventuality [Kelly] shall pay to [Sharon] maintenance in an amount to cause [Sharon's] monthly income to equal the portion of [Kelly's] retirement which [Sharon] would otherwise have received had [Kelly] received his full, 100% retirement benefits**."[4] (Emphasis added.)

[4] Separation Agreement, portion of paragraph 16.

It is important to note that a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay. 38 U.S.C. §5305. Also, disability benefits are exempt from taxation under 38 U.S.C. §5301(a), retirees who waive retirement pay in lieu of disability benefits will increase their after-tax income.

When Kelly retired on May 31, 2003, he was rated 50% permanently disabled by the U.S. Department of Veterans Affairs ("VA"). As such, Kelly opted to receive 50% of his entitled retirement benefits in the form of disability benefits under Title 38 of the U.S. Code.[5] Kelly now argues that this particular section cannot be enforced due to contradiction with federal law and a United States Supreme Court case.

The United States Supreme Court case Kelly refers to is Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). In Mansell, the court held that the Former Spouses' Protection Act ("Act")does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits. Id. 490 U.S. at 594-595. In reaching its decision, the High Court reviewed 10 U.S.C. §1408 which deals with the payment of retired or retainer pay in compliance with court orders. The term "disposable retired pay" is defined in 10 U.S.C.

[5] Title 38 of the U.S. Code contains the provisions related to VA disability benefits.

§1408(a)(4) as the total monthly retired pay to which a member is entitled less certain deductions. Mansell, supra 490 U.S. at 584-585. Among the allowed deductions are amounts waived in order to receive disability benefits under Title 38. Id. at 585, (citing 10 U.S.C. §1408(a)(4)(B)). The language of the Act covers both community property and equitable distribution states. Id. at 584, n.2. State courts are given the power to divide disposable retired pay in accordance with the law of the jurisdiction. Id. at 588-589, (citing 10 U.S.C. §1408(c)(1)). It is important to note that the Mansell ruling only applied to a state court's division of such benefits and not the parties division of those benefits. Nothing within the Mansell ruling prevents the parties to a dissolution proceeding from reaching an agreement that varies from the statute. While there are no Kentucky cases directly on point regarding the issue at hand, several other jurisdictions have held that parties should be free to agree to a division of property, including military retirement benefits, through a separation agreement despite variations from the restrictions given state courts by the Act. See Stone v. Stone, 908 P.2d 670 (Mont. 1995); Hoskins v. Skojec, 265 A.D.2d 706 (N.Y. App. Div. 1999); Dexter v. Dexter, 661 A.2d 171 (Md. App. 1995), cert. denied 668 A.2d 36 (Md. 1995); Hisgen v. Hisgen, 554 N.W.2d 494 (S.D. 1996); Gatfield v. Gatfield, 682 N.W.2d 632 (Minn. App. 2004); In re Marriage of

Mansell, 217 Cal.App.3d 219 (Cal. App. 1989); Krapf v. Krapf, 786 N.E.2d 318 (Mass. 2003); Abernethy v. Fishkin, 699 So.2d 235 (Fla. 1997); and Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001). In Kentucky, parties have the option to reach amicable separation agreements in dissolution proceedings. As we do not wish to hinder the ability of parties to reach amicable separation agreements, we opt to follow the above jurisdictions.

Kelly cites Davis v. Davis, 777 S.W.2d 230 (Ky. 1989), as support for the proposition that the veteran disability benefits at issue are not marital property subject to division by the court. Kelly's reliance is misplaced because this is another instance where the court divided the property between the parties rather than a division by the parties through a separation agreement. The only limitation the General Assembly has placed upon parties' ability to reach a settlement agreement in a dissolution of marriage proceeding is that its terms be conscionable. KRS 403.180(2). The trial court found the parties' separation agreement to be conscionable as evidenced by the decree and amended decree. Based on the foregoing, we believe the section of the settlement agreement entitling Sharon to a percentage of Kelly's retirement benefits is enforceable. As such, Sharon is entitled to 43% of what Kelly's retirement pay would have been had he not opted to receive a portion in the form of disability benefits under Title 38 of the U.S. Code. We

remand for the trial court to determine the appropriate amount Sharon is entitled to each month in accordance with the separation agreement. Kelly shall be liable for any amount remaining owed to Sharon after payment by Defense Accounting and Finance Service ("DAFS").

In relation to Sharon's entitlement to Kelly's military retirement benefits, Kelly also argues that he should not be held liable for an arrearage for a delay in her receipt of payment of benefits following his retirement. We agree. The payment of benefits to a former spouse is governed by 10 U.S.C. §1408(d), which states, in pertinent part: "In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay." Kelly retired on May 31, 2003 and Sharon received her first payment in early September 2003 in accordance with the statute.[6] There is no provision in the separation agreement for the interim between Kelly's retirement and Sharon's receipt of her first payment and we are not inclined to add one at this time. As such, we believe Kelly could not accumulate an arrearage for the period of time between June 2003 and Sharon's first payment from DAFS.

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[6] The payment received in September 2003 was for maintenance earned in August 2003. This is conceded by Sharon in her Affidavit filed September 10, 2003, in which she states she is owed an arrearage of $359.48 for August 2003 rather than the full amount.

However, we do not believe that there could not be an arrearage for the period of time beginning with Sharon's receipt of her first payment from DAFS. It is possible that Kelly may be required to supplement Sharon's payment from the DAFS in accordance with their separation agreement. We remand that issue for the trial court's determination. We will now turn to Kelly's final issue and argument: his adjudged child support arrearage.

Kelly argues he does not owe child support arrearage because his obligation should have been reduced in June 2003 due to a change in his income. Child support was discussed in the parties' separation agreement and set at $654.72 per month.[7] This figure was calculated in accordance with the Kentucky Child Support Guidelines[8] based on Sharon's gross income being $2,309 per month with an additional $1,000 for maintenance received and Kelly's gross income being $7,425 less $1,000 maintenance paid. Kelly claims that following his retirement on May 31, 2003, he suffered a drastic change in his income and was eligible for a reduction in his child support obligation pursuant to KRS 403.213. A settlement agreement incorporated into a decree does not deprive the trial court of jurisdiction to decrease child support due to a change in conditions. Richey, supra 389 S.W.2d

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[7] Parties' Separation Agreement, paragraph 3.
[8] KRS 403.212

at 919 (citing Ullman v. Ullman, 302 S.W.2d 849 (Ky. 1957)); see also KRS 403.180(6).

Modification of a child support obligation is governed in part by KRS 403.213(1) which states ". . . [C]hild support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing." The question then arises as to whether Kelly filed a motion to decrease his child support obligation following his change in circumstance. The rule applicable to the basic requirements of a motion is Ky. CR 7.02(1). Kentucky Rule of Civil Procedure 7.02(1) states, in pertinent part, that "An application to the court for an order shall be by motion . . . shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." Under Ky. CR 8.06 all pleadings shall be so construed as to do substantial justice. "Motions" are not included in the definition of a "pleading" pursuant to Ky. CR 7.01. However, the Kentucky Supreme Court analyzed a motion under the purview of Ky. CR 8.06 in Dalton v. Dalton, 367 S.W.2d 840, 844 (Ky. 1963). Kentucky Rule of Civil Procedure 8.06 is a "liberal construction" rule, requiring that a pleading be judged according to its substance rather than its label or form. McCollum v. Garrett, 880 S.W.2d 530, 533 (Ky. 1994).

Upon a review of the record, we do not see any motions filed by Kelly. Having found no filed motions, we look to see if the substance of any of his filed documents could be construed as a motion even though it was not identified as such. On July 21, 2003, a document was filed by Kelly entitled "Objections to Commissioner's Report." In this document, following his objections, Kelly additionally requested the court to reduce his child support based on his current gross income. Kelly states that his retired pay statement was attached for the court's use. While this is not the ideal form for a child support reduction motion, we believe it was sufficient to put the court on notice he was requesting a hearing on the issue of child support reduction. As such, this issue shall be remanded to the trial court for a hearing on the proper amounts of child support due by Kelly from August 2003 until present or until the date of the parties' youngest child's emancipation in accordance with KRS 403.212.

In the event an overpayment is calculated by the trial court, Kelly will not automatically be entitled to a reimbursement. Kelly's entitlement to reimbursement depends upon the circumstances of the case. If the direct recipient has not, in fact, expended the "overpayment" for the support of the child and has it, or its equivalent (in whole or in part), available for repayment, it is only fair and just that the

paying parent be able to recover it. Clay v. Clay, 707 S.W.2d 352, 354 (Ky.App. 1986). Whether, and to what extent, the receiving parent in fact used the "overpayment" for the support of the child and whether the receiving parent has the funds from which to permit a proper recoupment without depriving the child, is a determination that must necessarily be made by the trial court, exercising its discretion upon the relevant evidence. Id. The trial court shall make a ruling in accordance with the foregoing in the event an overpayment is calculated.

For the reasons set forth above, the arrearage judgments entered on January 9, 2004 and August 9, 2004, respectively, shall be vacated and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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