RENDERED: JUNE 15, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000524-MR

BRENDA L. PEAVY (NOW SAPP) — APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE ALLEN RAY BERTRAM, JUDGE
ACTION NO. 85-CI-00028

LACKY IRVINE PEAVY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,[1] SENIOR JUDGE.

NICKELL, JUDGE: Brenda L. Peavy (now Sapp) (hereinafter "Brenda") has appealed the Green Circuit Court's February 11, 2006, order denying her motion to modify its December 27, 2005, order insofar as it construed her property settlement agreement with appellee, Lacky Irvine Peavy (hereinafter "Lacky"), with respect to the division of Lacky's pension and retirement benefits. For the following reasons, we affirm.

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Brenda and Lacky were married on June 24, 1962, and divorced by decree entered on October 7, 1985. Brenda was represented throughout the action by counsel, while Lacky was unrepresented. Brenda's counsel prepared all of the necessary documents relating to the divorce, including a separation agreement dated April 3, 1985. This agreement was incorporated into the parties' divorce decree entered in the circuit court.

The separation agreement provided for the division of marital assets and debts, child custody, child support, and various other matters. Specifically, paragraph 7 of the agreement related to the division of Lacky's pension and retirement benefits. That provision reads as follows:

> 7. PENSION AND RETIREMENT PLANS: It is understood and agreed between the parties hereto that [Lacky] has two (2) pension and retirement plans with his employer and he agrees to furnish unto [Brenda] a statement setting forth the status of those plans.
>
> It is further understood and agreed between the parties hereto that [Brenda] shall be the legal owner of one-third (1/3) interest of said retirement and pension plans and shall be entitled to draw from those plans at such times as [Lacky] begins to draw from said plans, one-third (1/3) of the proceeds from same.
>
> The parties do mutually agree that any documents that must be executed to effectuate this agreement shall be done within thirty (30) days from the date of the Decree entered herein.

No further documents were executed by the parties to effectuate the agreement. Sometime in late 2004, a dispute arose between the parties as to

interpretation of the above provision. On February 25, 2005, at Brenda's request and without notice to Lacky, the Marion Circuit Court entered two separate Qualified Domestic Relations Orders (QDRO) setting forth the rights and interests of the parties in and to Lacky's two retirement and pension plans. On April 5, 2005, based upon a motion filed by Lacky, with the assistance of counsel, an order was entered by the Green Circuit Court setting aside the two February 25, 2005, orders, as they were entered in the wrong court. The same two QDROs were entered by the Green Circuit Court on May 6, 2005, again without notice to Lacky, and were once more set aside by an order entered on June 8, 2005.

On October 13, 2005, Brenda filed a motion in the Green Circuit Court, the proper court, for entry of a QDRO, this time providing notice to Lacky. After a hearing, the circuit court entered an order concluding that paragraph 7 of the separation agreement was clear and unambiguous, prohibiting Brenda from offering parol evidence regarding the intent of the parties, granting Brenda a one-third interest in the two pension and retirement plans Lacky had at the time of divorce, and fixing the value of Brenda's share as of the date of entry of the divorce decree.

On December 29, 2005, Brenda filed a motion to alter, amend, or vacate the December 27, 2005, order. Additionally, Brenda tendered an affidavit from the attorney-draftsman of the separation agreement purporting to show the intent of the parties at the time the agreement was executed. Lacky objected to the motion and moved to strike the affidavit from the record. On February 7, 2006, the circuit court entered an order denying

Brenda's motion to amend and granting Lacky's motion to strike the affidavit. This appeal followed.

Brenda first contends that the trial court erred in its interpretation of the provisions contained in paragraph 7 of the separation agreement as evidenced by the holding that she was entitled to share only in those plans which were in existence at the time of the divorce. Under the principles of general contract law, our first determination must be whether the provision in question is ambiguous. *See Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32 (Ky. 1981). If we find ambiguity, then extrinsic evidence may be considered in order to determine the intent of the parties. When there is no ambiguity, resort to parol evidence is prohibited.

The trial court found the provisions of paragraph 7 of the separation agreement to be clear and unambiguous. It is well-settled that the interpretation and construction of contracts are questions of law to be dealt with by the court. We review such decisions of law de novo. *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992); *Cinelli v. Ward*, 997 S.W.2d 474 (Ky.App. 1998). While we are not bound to give any deference to the trial court's ruling on this matter, we find it informative to note that both parties agreed with this ruling in their briefs.

"An ambiguous contract is one capable of more than one different, reasonable interpretation." *Central Bank & Trust Co.*, 617 S.W.2d at 33. In determining whether ambiguity exists, we must look no further than the four corners of the

instrument. Our review is not intended to determine what the parties meant to say, but rather to determine what the parties meant by what they said. *Id*.

The provision sub judice sets forth specific duties, rights, and benefits for the parties in plain and clear language. On its face there is no uncertainty or confusion. Paragraph 7 of the separation agreement contains the whole of the discussion of the division of pension and retirement plans. The balance of the instrument discusses child custody and support; division of debts; division of real and personal property, including specific provisions for the disposition of savings and checking accounts; medical insurance coverage; and legal fees and court costs associated with the divorce action. It is evident that much thought, negotiation, and preparation went into the final separation agreement. This was not an instrument full of boilerplate, but was highly individualized to suit the needs of the parties. There is nothing in the instrument or in the record to indicate a meeting of the minds did not exist at the time of the execution of the separation agreement. Therefore, the plain language of the instrument shall control our inquiry.

Paragraph 7 of the separation agreement specifically stated that Lacky had two pension and retirement accounts at the time of execution. Lacky was to provide Brenda with statements regarding the status of those plans. Further, the parties agreed therein that Brenda was to become the owner of a one-third interest in said plans. Brenda was entitled to begin drawing her one-third at the same time or times Lacky began drawing his portions. The parties were to execute the necessary documents to effectuate the agreement within 30 days from the date their divorce decree was entered.

Upon our review of the language of the provision in question, and in light of the separation agreement as a whole, we find that paragraph 7 is clear and unambiguous. Furthermore, lacking ambiguity, there is no need to resort to extrinsic evidence to determine the intention of the parties. *Central Bank & Trust Co.*, 617 S.W.2d at 33. Thus, we have no need to address Brenda's arguments regarding the extrinsic evidence stricken by the trial court, and no need to utilize such evidence in making our decision. Therefore, the circuit court's decision to strike from the record the affidavit by Brenda's attorney-draftsman is affirmed.

Brenda further argues she is entitled to share in all pension and retirement plans Lacky had at the time of his retirement, including plans not in existence prior to or during the marriage, but wholly funded after the date of divorce. We find nothing in the instrument supporting this assertion. In fact, Brenda's argument is directly contrary to the well-settled law of the Commonwealth regarding post-dissolution growth of retirement benefits. In *Foster v. Foster*, 589 S.W.2d 223, 225 (Ky.App 1979), this Court ruled "[t]he [non-employee] wife is not entitled to share in any pension benefits earned after divorce and before retirement. . . ." *See also Armstrong v. Armstrong*, 34 S.W.3d 83 (Ky.App. 2000); *Brosick v. Brosick*, 974 S.W.2d 498 (Ky.App. 1998); *Carranza v. Carranza*, 765 S.W.2d 32 (Ky.App 1989); and *Light v. Light*, 599 S.W.2d 476 (Ky.App. 1980). Furthermore, the agreement between the parties specifically discussed the two retirement and pension plans in force at the time of divorce and no others. Had the parties contracted to encompass additional plans, our discussion may well have taken a

different track. However, they did not do so, and we therefore find the trial court properly granted Brenda an interest only in the plans in existence at the time of the entry of the divorce decree.

Brenda further argues she is entitled to receive her one-third interest based upon the value of Lacky's retirement plans at the time of his retirement. Lacky's position is that Brenda's interest was fixed as to amount upon entry of the divorce decree. The trial court concurred with Lacky and ruled the value of Brenda's share was fixed at the time of divorce. We agree.

Similar to our discussion above, in *Poe v. Poe*, 711 S.W.2d 849, 855 (Ky.App. 1986), this Court held "[t]he value of a pension, if any, should therefore be marital property for the portion accrued during coverture" [emphasis added]. Thus, Brenda is entitled to a division only of the pension and retirement benefits to which she had a marital interest. A review of the separation agreement does not yield evidence of any intention to the contrary. The value of Brenda's interest was therefore fixed at the time of entry of the divorce decree. For the reasons set forth in *Foster* and *Poe*, Brenda is not permitted to share in Lacky's post-dissolution efforts at increasing his retirement benefits. To grant Brenda such a benefit would be a windfall to her and in clear contravention of the law of this Commonwealth.

Finally, Brenda argues the trial court erred in failing to modify the separation agreement, alleging this failure leads to an unconscionable result for her. She unsuccessfully attempted to offer parol evidence to the trial court in order to bolster her

position. We find no merit in Brenda's argument. The law favors stability in marital agreements, and a party challenging such an agreement based upon an unconscionable result has the burden of proof. The fact that a party entered into what he/she now considers to be a bad bargain is insufficient to warrant a finding of unconscionability. Furthermore, a trial court's finding on these issues will not be disturbed on appeal unless there is a showing of fraud, undue influence, overreaching, or material change of circumstances since the execution of the agreement. *Peterson v. Peterson*, 583 S.W.2d 707 (Ky.App. 1979). The record before us is devoid of a showing of any of these qualifying factors. As such, we shall not disturb the circuit court's ruling.

For the foregoing reasons, the judgment of the Green Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

PAISLEY, SENIOR JUDGE, DISSENTING: I respectfully dissent. I believe that, based on the plain language alone, the more reasonable interpretation of the parties' separation agreement is that advanced by the appellant. At the least I would hold that the agreement is ambiguous and remand this matter for the taking of extrinsic evidence on the intent of the parties.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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