

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001048-MR

MARY REGINA DUKE

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 99-CI-00068

JERRY JOE DUKE

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

LAMBERT, JUDGE: Mary Duke appeals from the Breckinridge Circuit Court's order interpreting a property settlement agreement in favor of her ex-husband, Jerry Duke. After careful review, we affirm.

Mary Duke and Jerry Duke were divorced by decree entered in the Breckinridge Circuit Court on September 23, 1999. Their marriage lasted

approximately forty-five months. A property settlement agreement and amended property settlement agreement were incorporated into the final decree. The parties are now disputing the retirement section of the property settlement agreement. The pertinent portions of the agreement are as follows:

The parties desire to settle, forever and completely, all disputes between them, including but not limited to, all real and personal property rights acquired by both parties by virtue of this marriage, and all other rights or claims arising or growing out of their marriage relation, other than herein set out.

The Husband and Wife agree that the Wife shall receive one-half of the Husband's retirement and the Husband hereby agrees to execute any and all necessary legal documents that need to be signed.

Approximately five years after the agreement and the final divorce judgment was entered, Jerry Duke filed a motion seeking to have the court interpret the retirement clause of the parties' property settlement agreement. Jerry Duke argued that the property settlement agreement determined that Mary Duke would receive one-half of his retirement earned during the marriage, and Mary Duke claimed that she was entitled to one-half of his entire retirement, as set forth in the property settlement agreement. The depositions of Mary Duke's attorney and paralegal were taken, which revealed that the terms of the property settlement agreement, particularly the portion regarding retirement, were not ever explained to Jerry Duke. Further, discovery and investigation of the attorney's divorce file indicated that the terms ".30 and .70" were written on the intake form next to the retirement section. The paralegal also testified that it would be unusual in a short-

term marriage for one spouse to receive fifty percent of the retirement of the other spouse, particularly if the retirement had been earned over a longer period of time.

The trial court entered its order on May 3, 2007, finding that the terms of the property settlement agreement were ambiguous and that the agreement should be construed to mean that Mary Duke should be awarded one-half of Jerry Duke's retirement benefits earned between December 13, 1995, the date of the marriage, and September 23, 1999, the date of entry of the decree of dissolution. This appeal followed.

This court may not disturb the trial court's findings in a case involving dissolution of marriage unless those findings are clearly erroneous. *Adams v. Adams*, 412 S.W.2d 857 (Ky. 1967). The trial court's findings are supported by substantial evidence and are not clearly erroneous. Specifically, the court held that KRS 403.190(1) required the court to assign each spouse's non-marital property to him/her and to then divide the marital property in just proportions. The court found that the portion of Jerry Duke's retirement earned during the marriage was marital property and the portion earned prior to the marriage was non-marital property. The court then determined that the agreement was ambiguous, in that it purported to pertain to rights acquired as a result of the parties' marriage, but then stated that Mary Duke was entitled to one-half of Jerry Duke's retirement without using express language to indicate the marital and non-marital portions were to be included. The court found that in order to obligate Jerry Duke to include the non-

marital portion of his retirement benefits, the provision in the property settlement agreement should have used such explicit language.

We agree with the court's interpretation of KRS 403.190(1) and with its finding that the contract was ambiguous. A contract is ambiguous when its terms are capable of more than one different, reasonable interpretation. *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32 (Ky. 1981). In the instant case, the contract terms regarding Jerry Duke's retirement funds were capable of more than one different, reasonable interpretation. One could reasonably interpret that the parties intended to share the entire retirement fund or that they intended to share only the portion of the retirement fund earned during the marriage, given that the agreement previously stated that it purported to only divide marital assets. Thus, we find no error in the trial court's determination that the contract was ambiguous.

The court then found that ambiguities in contracts should be construed strongest against the party who drafted the agreement. *See B. Perina & Sons, Inc. v. Southern Railway Co.*, 239 S.W.2d 964 (Ky. 1951). Because Mary Duke's counsel drafted the agreement, the court construed the agreement against Mary Duke, finding that explicit language could have been included and was not. As a matter of fundamental fairness, the court concluded that an express relinquishment or waiver of Jerry Duke's right to non-marital property should have been required and that Jerry Duke had the right to have the property settlement agreement explained to him.

We agree with the trial court that the contract, when read as a whole, was in fact ambiguous and accordingly should have been examined in light of the totality of the circumstances, including the parties' intent, the subject matter of the contract, the situation of the parties, and the conditions under which the contract was written. *See Whitlow v. Whitlow*, 267 S.W.2d 739 (Ky. 1954). The court then looked at the statements of the attorneys drafting the agreement, the divorce file maintained by the attorney, the parties' intent, and the conditions under which the contract was written. After so doing, the trial court concluded that the contract should be interpreted to award Mary Duke one-half of Jerry Duke's retirement portion earned *during the marriage*. Given the language in the contract indicating that it purported to divide up the marital property and the ambiguity of the language in the retirement section, we find that this was supported by the evidence in the record and as such, was not clearly erroneous. Accordingly, we affirm the judgment of the Breckinridge Circuit Court.

MOORE, JUDGE, CONCURS.

WINE, JUDGE, DISSENTS, AND FILES SEPARATE OPINION.

WINE, JUDGE, DISSENTING: Respectfully, I dissent. Because the parties entered into a Separation Agreement, any analysis under KRS 403.190, absent a specific finding the separation agreement to be unconscionable, is inappropriate. KRS 403.180 clearly provides for separation agreements such as the one entered into between the Dukes. As detailed by the statute, such agreements are not only sanctioned, but are subject to judicial review:

(1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.

(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of 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.

KRS 403.180.

A separation agreement, which was originally determined not to be unconscionable, may later be modified if due to a change in circumstances the agreement has become unconscionable. *Peterson v. Peterson*, 583 S.W.2d 707 (Ky. App. 1979). However, the party challenging the agreement as unconscionable has the burden of proof. *Id.* at 711. It is proper for a trial court to refuse to confirm a separation agreement where it was not made freely, voluntarily, or with an appreciation by the party of his/her rights. *Peagram v. Peagram*, 219 S.W.2d 772 (Ky. 1949). Here, the Appellee never argued the Separation Agreement was unconscionable or that circumstances had changed, nor did the court make any such findings. To the contrary, the trial court found the Appellee was literate and able to understand the written word.

In September 1999 the trial court reviewed the Separation Agreement and accepted it, incorporating it into the final Decree of Dissolution. The Separation Agreement was signed after the parties discussed the issues with the Appellant's attorney. Appellee attempts to use the "divorce worksheet" to create an ambiguity in the written Separation Agreement, because there is an entry of ".30 and .70" in the retirement section and a "star" in the maintenance section. This attempt to use documents outside the agreement to create ambiguity is wholly improper. Why not argue the Appellant decided to forego any maintenance in exchange for one-half of the Appellee's whole retirement? It is exactly this mischief we avoid by giving the terms of the Separation Agreement its everyday meaning.

In the recent case of *Bailey v. Bailey*, 231 S.W.3d 793 (Ky. App. 2007), this Court held the terms of a separation agreement should have been enforced as contract terms not under equity principles. "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." KRS 403.180(5).

Settlement agreements are a type of contract and therefore are governed by contract law. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). The Appellee argues the provision dealing with the retirement benefits is ambiguous because it does not distinguish between the marital and non-marital portions of the Appellee's pension. Contrary to the Appellee's argument, the

Separation Agreement does not need to distinguish between marital and non-marital property and debts. The parties were free to agree how to divide all of their property, regardless of how it might be classified under KRS 403.190

To determine that an ambiguity exists, the court must first determine that the contract provision is susceptible to inconsistent interpretations. *Transport Insurance Company v. Ford*, 886 S.W.2d 901, 905 (Ky. App. 1994). The criterion in determining the intention of the parties is not what did the parties mean to say, but rather what did the parties mean by what they said. *Central Bank & Trust Company v. Kincaid*, 617 S.W.2d 32, 33 (Ky. 1981). Simply omitting the terms “marital” and “non marital” does not create an ambiguity any more than omitting the term “temporary maintenance” from the Separation Agreement creates an ambiguity as to that potential provision.

Because there is no ambiguity in the terms of the Separation Agreement, the trial court’s findings are erroneous. I would reverse and vacate the judgment of May 3, 2007.

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