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APRIL 15, 2009
(FILE NO. 2008-SC-0559-D)

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000979-MR

JEREMY CARL DOWNS

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 04-CI-00288

EUNICE DOWNS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR
JUDGE.

CLAYTON, JUDGE: This is an appeal from the Nelson Circuit Court granting
summary judgment to the appellee, Eunice Downs.

¹ Senior Judge William L. Knopf, 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.

FACTUAL SUMMARY

The appellant, Jeremy Carl Downs (“Jeremy”), is the son of James Carl Downs (“Mr. Downs”) and Terry Ryan Downs Nevitt (“Ms. Nevitt”). Mr. Downs and Ms. Nevitt obtained a divorce on February 16, 1989. Their only child was Jeremy, born July 14, 1981. A settlement agreement entered into between Jeremy’s parents was made a part of the divorce decree in its entirety. The provision of the settlement agreement at issue in this action is the following:

7. Any life insurance policies shall be maintained with the infant child named as beneficiary.

At the time of the divorce, Mr. Downs was employed by Ketco Trucking and, through this employment, had a life insurance policy with a face value of \$50,000.00.

On June 29, 1990, Mr. Downs married Ms. Downs, the appellee. On November 18, 2002, Mr. Downs died and Ms. Downs petitioned the Nelson County District Court to transfer all his assets to her by virtue of the spousal exemption statute. Mr. Downs also had three life insurance policies in effect at the time of his death. A \$40,000.00 policy paid by his employer, a \$20,000.00 and a \$100,000.00 policy paid by Mr. Downs. Ms. Downs was the beneficiary of all three policies. Jeremy did not receive any of the proceeds.

On April 29, 2004, Jeremy filed an action in Nelson Circuit Court seeking the imposition of a constructive trust on the life insurance proceeds. He contends that the settlement agreement signed by his parents is the basis of the constructive trust. This issue is one of first impression in this Commonwealth.

DISCUSSION

Before addressing the merits of the issue of whether a constructive trust exists, Ms. Downs argues the case should be dismissed upon several different procedural grounds. First, she contends that Jeremy's action is barred by the statute of limitations set forth in KRS 413.090. It provides as follows:

Except as provided in KRS 396.205, 413.110, 413.220, 413.230 and 413.240, the following actions shall be commenced within fifteen (15) years after the cause of action first accrued:

- (1) An action upon a judgment or decree of any court of this state or of the United States, or of any state or territory thereof, the period to be computed from the date of the last execution thereon.
- (2) An action upon a recognizance, bond or written contract.

Ms. Downs argues that the divorce decree entered into between Mr. Downs and Ms. Nevitt was entered on February 16, 1989. Given that Jeremy filed his circuit court action on April 29, 2004, she argues that it is clearly outside the statute of limitations period. Since Jeremy was a minor at the time of the formation of the contract between his parents, however, KRS 413.170 applies. That statute reads, in relevant part:

(1) If a person entitled to bring any action mentioned in KRS 413.090 . . . except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant . . . the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued.

Regardless of Jeremy reaching the age of majority and the application of this statute:

The general rule governing the commencement of the running of the statute of limitations is that the statutory period is computed from the time when the right of action that the plaintiff seeks to enforce first accrued; ordinarily, in an action based on a contract, accrual occurs as soon as there is a breach of contract

31 Williston on Contracts § 79:14 (4th ed.) Thus, the statute of limitations does not bar Jeremy from bringing the action.

Next, Ms. Downs argues that, if Jeremy had a cause of action it would only be a claim against the estate of Mr. Downs. We disagree with this argument. While the trial court found that Jeremy could bring an action under a constructive trust theory, since we have determined the language of the contract to be controlling, we do not discuss this issue further.

The only remaining issue is whether the trial court erred in granting summary judgment to Ms. Downs. An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in determining that no genuine issue of material fact exists and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). A

summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000)).

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03.

The trial court found that based upon the language contained in the property settlement agreement, the words “infant child” were not words of identification. Applying the ordinary meaning to those words, the court found that there was no requirement placed upon Mr. Downs to maintain a life insurance policy with Jeremy as the beneficiary. We agree.

The interpretation of a contract is a question of law. *Baker v. Coombs*, 219 S.W.3d 204, 207 (Ky. App. 2007). This includes the question of whether an ambiguity exists. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829 (Ky. App. 2000). “In the absence of ambiguity a written instrument will be enforced strictly according to its terms[,]” *O’Bryan v. Massey-Ferguson, Inc.*, 413 S.W.3d 891, 893 (Ky. 1966), and a court will interpret the contract terms by assigning language to its ordinary meaning and without resort to extrinsic evidence. *Hoheimer v. Hoheimer*, 30 S.W.3d 176 (Ky. 2000).

In determining whether an ambiguity exists, a court must determine whether the contract provision may be interpreted in more than one way. *Transport Ins. Co. v. Ford*, 886 S.W.2d 901 (Ky. App. 1994). As set forth in *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32-3 (Ky. 1981), an ambiguous contract is one in which there is more than one different, yet reasonable, interpretation. In this case, the controversy stems around the use of the term “infant child” to describe Jeremy. Ms. Downs argues that this term is used to limit the obligation of Mr. Downs to Jeremy’s childhood and that since Jeremy turned 18 on July 14, 1999, Mr. Downs had no obligation beyond that date. Jeremy, however, contends that both “infant” and “child” are used in a legalese fashion and only describes him as Mr. Downs’s child.

The term “infant child” is used to describe Jeremy throughout the agreement with the exception of three provisions. One deals with Jeremy’s post-secondary education. Clearly, Jeremy would be an adult at that time. The other two times the word “child” is used rather than “infant child,” is the first paragraph of the agreement, which reads as follows:

- 1) The first party shall have the custody and control of the **infant child**. Second party shall have the privilege of visiting said **infant child** every other Saturday from 10:00 a.m. to 5:00 p.m. Second party shall also have the **child** visit with him on Christmas Eve from 9:00 a.m. to 3:00 p.m.; on Christmas Day from 6:00 p.m. to 9:00 p.m.; and Thanksgiving, Easter and on the **child’s** birthday from 6:00 p.m. to 9:00 p.m.

In that paragraph, “child” is describing Jeremy as a minor child only. Any other interpretation would render that provision nonsensical in that Jeremy’s parents would not need to enter into an agreement regarding Jeremy’s visitation with them as an adult. Given this, it appears to us that the terms “infant child” and “child” are meant to describe Jeremy’s status as a minor rather than as an adult.

With the exception of the provision regarding the life insurance policy, there is only one provision which deals with Jeremy as an adult. That provision is the requirement that the parties pay equally for his post-secondary education. It appears from the agreement that Jeremy’s parents entered into the agreement to provide for Jeremy throughout his childhood. The life insurance policy would have been on par with that interest. Once Jeremy was an adult and had finished his education, however, any obligation of support would be gone.

This Court agrees with the trial court that the provision regarding life insurance in the agreement did not obligate Mr. Downs beyond Jeremy’s age of majority. Thus, this Court affirms the judgment of the Nelson Circuit Court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

John S. Kelley, Jr.
Bardstown, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

William T. Hutchins
Bardstown, Kentucky