

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000605-MR

VALERIE GUEST

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 09-CI-00105

FRANKLIN DOUGLAS SMITH

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: Valerie Guest, f/k/a Valerie Smith, appeals an order of the Daviess Circuit Court, permitting Franklin Douglas Smith to withhold a monthly sum sufficient to pay all taxes owed by Valerie from the portion of his military pension benefits awarded to Valerie in the parties' marital separation agreement. She also appeals the portion of the order denying her attorney's fees.

Valerie and Franklin were married on June 6, 1985, when Franklin was on active duty with the United States Air Force and had been enlisted for approximately seven years. He continued to serve in the Air Force during the parties' five-year marriage and served an additional nineteen years following the dissolution of the parties' marriage on June 29, 1990.

At the time the petition for dissolution was filed, the parties were Missouri residents and, therefore, the petition was filed in that state. A separation agreement was incorporated into the decree of dissolution, which in part provided for the distribution of Franklin's military pension. The parties agreed as follows:

The parties agree that during the entire time of their marriage Respondent has been on active duty with the United States Air Force and has accrued retirement benefits which are marital property. At such time as Respondent retires from active duty from the United States Air Force and becomes entitled to retirement benefits, wife shall receive monthly payments from husband in the amount of 1/2 of 1/4 of the retirement benefits received as marital property.

Franklin retired from the military in September 2008 and did not immediately contact Valerie. Upon learning of Franklin's retirement, Valerie contacted the United States Air Force and other military officials in an effort to receive her share of Franklin's military pension benefits. The military informed her that pursuant to the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408, her application was denied because she was not married to Franklin for at least ten years during which he served in the military.

Valerie filed an action in the Daviess Circuit Court requesting that the Kentucky court give full faith and credit to the Missouri decree and enforce the provision regarding the payment of military benefits to her. Subsequently, Valerie served Franklin with interrogatories and requests for production of documents. In response to interrogatories regarding the amount of his benefits, Franklin acknowledged that from October 2008 until February 2009, he received \$4,568 per month gross pay and now receives a gross pay of \$4,796 per month. Additionally in 2008, he received \$12,913.24 as a gross distribution of his military pay.

Valerie moved for a summary judgment alleging that Franklin owed her \$6,838.16 representing past due payments based on one-half of one-fourth of Franklin's gross pension payments and requested an order awarding her future monthly benefits. She also requested attorney's fees. Franklin filed a response alleging that there were material issues of fact precluding summary judgment and requested an evidentiary hearing. He alleged that a one-half of one-fourth division of the military pension would be inequitable because it would entitle Valerie to a portion of benefits earned both prior to and after the parties' marriage and retirement benefits based on increased pay grades received after the dissolution of marriage.

The Daviess Circuit Court denied the motion for summary judgment, and the matter was referred to the domestic relations commissioner for an evidentiary hearing. According to the commissioner's recommended order, a hearing was held at which both parties testified. However, the hearing record is not included in the

appellate record nor in her appellate brief, and Valerie does not cite any evidence produced at the hearing to support her arguments on appeal.

The commissioner rejected Franklin's argument that Valerie is entitled to one-eighth of his retirement based on the amount he would have received if he had retired at twenty years and his rank at time of the dissolution. Instead, the commissioner found that the agreement was unambiguous and that "1/2 of 1/4 of [Franklin's] retirement benefits and retirement benefits means the amount he is being paid by the Department of Defense for his military retirement."

Franklin filed a motion for reconsideration and requested that he be permitted to withhold federal and state taxes from the amount owed to Valerie. Valerie filed a motion seeking expenses incurred for pursuing the action in Kentucky and attorney's fees.

After hearing counsel's respective arguments, the commissioner found that the military benefits received by Valerie were income and, therefore, taxable as her property. The commissioner then found that her share should be reduced by Franklin proportional to the taxes withheld from the benefits paid to him. Valerie's request for expenses and attorney's fees was denied.

The Circuit Court adopted the commissioner's recommendations except that in regard to the withholding of taxes, the Court ordered as follows:

FURTHER ORDERED that the Respondent shall, with each monthly installment, withhold from the retirement benefits otherwise payable to Petitioner, a sum sufficient to pay all taxes imposed on Respondent for that portion of his retirement, and upon the annual filing of

his tax returns he shall either refund the amount excessively withheld, if any, or increase the amount of his withholdings to satisfy the underage.

The circuit court's addition to the commissioner's findings was an attempt to rectify any inequity caused by Franklin withholding the taxes purportedly owed on Valerie's share of the pension. If too much were withheld, he would then be required to reimburse Valerie or, conversely, increase the amount withheld to satisfy any additional tax liability. Valerie contends that the circuit court's order will result in a double taxation of her benefits.

A marital settlement agreement is interpreted under the same rules that govern the construction of other contracts. *Richey v. Richey*, 389 S.W.2d 914, 197 (Ky. 1965). The primary objective of contract interpretation is to effectuate the parties' intention. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky.App. 2002). In *Cantrell*, the Court summarized the rules applicable to the consideration of parol and extrinsic evidence as follows:

Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms. Generally, the interpretation of a contract, including determining whether a contract is ambiguous, is a

question of law for the courts and is subject to *de novo* review. However, once a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract become subject to resolution by the fact-finder.

Id. at 385 (citations omitted).

The parties' marital settlement agreement is silent regarding whether the benefits paid to Valerie are to be based on the before or after tax value of the monthly benefit. Thus, the circuit court properly found that because the settlement agreement was ambiguous, there were material issues of fact and ordered an evidentiary hearing and considered parol evidence. *Id.*

Our review of the issues presented is precluded by Valerie's failure to include transcripts of the commissioner's hearings in the record on appeal. "It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). We also point out that Valerie's brief makes no citations to the hearing record as required by CR 76.12(4)(c)(iv) and, therefore, her claims that the court's order will result in double taxation or that she is entitled to expenses and attorney's fees are based on speculation. Absent citations to the record to support Valerie's contentions, we are not required to address the merits of her appeal. *Monumental Life Ins. Co. v. Dept. of Revenue*, 294 S.W.3d 12, 23 (Ky.App. 2008).

Based on the foregoing, the order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John W. Tullis
Owensboro, Kentucky

BRIEF FOR APPELLEE:

John W. Stevenson
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