

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000522-MR

BEVERLY K. JONES

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 92-CI-00212

STEPHEN MICHAEL SPENCER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO, TAYLOR AND THOMPSON, JUDGES.

STUMBO, JUDGE: Beverly K. Jones appeals from an Order of the Mason Circuit Court granting her Motion for Entry of a Qualified Domestic Relations Order (QDRO). Jones argues that the circuit court erred in fixing the valuation of her former husband's retirement account as of the date of Decree of Dissolution rather than his retirement date. She maintains that the parties' Separation Agreement

requires valuation of the account at the date of retirement rather than the date of dissolution, and that the court erred in failing to so find. We find no error in the circuit court's conclusion that the Separation Agreement is ambiguous on this issue, and accordingly Affirm the Order on appeal.

On September 22, 1992, Beverly K. Jones (then Beverly K. Spencer) and Stephen Michael Spencer (hereinafter "Spencer") executed a Separation Agreement evincing their intent to live separate and apart. Both parties were represented by counsel. The agreement was entered into after Mr. Spencer filed a Petition for Dissolution in Mason Circuit Court, and it addressed various property disposition and related issues. Of relevance herein, the agreement set forth the following provision:

RETIREMENT: Husband acknowledges that he is vested in a Dayton Power and Light Retirement account. The parties agree that benefit payable under this plan, upon Husband's actual retirement thereto, will be payable one-half to Husband and one-half to wife. The parties acknowledge that no **Qualified Domestic Relations Order** is envisioned; they further acknowledge that, with respect to retirement benefits, this agreement is exclusively between them as individuals and in no way obligates the plan administrator to pay any benefit directly to wife. The parties further acknowledge the advice of counsel that the entry of a **Qualified Domestic Relations Order** would require the payment of benefits directly to the Wife from the Plan Administrator.

The parties' marriage was later dissolved. On January 18, 2013, some twenty years after the dissolution, Jones filed a Motion for Entry of Qualified Domestic Relations Order. Therein, she maintained that Spencer was about to

begin receiving retirement benefits, and asserted her belief that he would not pay to her that portion of the benefits to which she was entitled. Jones also maintained that Spencer was seriously ill, and the QDRO was required to ensure her receipt of benefits if he should die.

Spencer filed a responsive pleading, and the matter proceeded for adjudication. Upon considering the Motion, the Mason Circuit Court determined that the Separation Agreement's retirement provision was ambiguous. Specifically, the court found as subject to more than one interpretation the phrase "that benefit", which in its view could mean either the benefit vested at the time of dissolution, or the benefit that was payable under the plan at the time of retirement. Additionally, the court asked rhetorically, "if 'benefit' was intended to mean one-half of all benefits, why was the word 'benefits' (plural) used, and why was the 'all' not specifically added?" (Emphasis in original). Also entering into the court's calculus was its recognition that approximately 20 years had elapsed between the time of dissolution and Spencer's retirement, and that Spencer had continued contributing to the retirement plan for those 20 years after dissolution.

Ultimately, the court sought to determine the parties' intentions from the contract as a whole, and it applied relevant case law wherein pensions in divorce proceedings were valued as of the date of dissolution. The court sustained Jones' motion for a QDRO and valued the retirement benefits at the time of dissolution rather than the time of retirement. This appeal followed.

Jones now argues that the Mason Circuit Court erred in valuing the retirement benefits at the time of dissolution rather than at retirement. In support thereof, she contends that the Separation Agreement's retirement provision is unambiguous and subject to but one reasonable interpretation, and must be construed to require valuation of the benefits at the time of retirement. She notes that the terms of a Settlement Agreement, as incorporated into a Decree of Dissolution, are enforceable according to contract principles, and in her written argument she dissects the relevant provisions of the agreement to conclude that no ambiguity may reasonably be found. After contending that the Mason Circuit Court "twisted and turned the English language in a way harking back to Bill Clinton" in reaching its finding of ambiguity, Jones seeks to distinguish as inapplicable those cases in which retirement benefits were valued at the time of dissolution. Also, she notes that the parties may contract to anything which does not run afoul of public policy or otherwise offend the sensibilities of the court, and that herein the parties agreed to split Spencer's retirement benefits 50/50. In response, Spencer contends that it is impossible to discern from the language at issue whether "that benefit" refers to the vested benefit at the time of dissolution or the retirement benefit some 20 years later, that the language is therefore ambiguous, and that the court acted properly in so finding.

As a general rule, parties in a dissolution of marriage proceeding are free to agree to a division of property, including the division of retirement benefits, which varies from the statutory law so long as the terms of the Separation Agreement are

conscionable. KRS 403.180. In the matter at bar, the terms of the parties' Separation Agreement were found to be conscionable at the time of dissolution, and were incorporated by reference into the Decree of Dissolution.

The question for our consideration, then, is whether the Mason Circuit Court properly found the terms of the Separation Agreement addressing the division of retirement benefits to be ambiguous. After being ratified by the court, the terms of a Separation Agreement are enforceable as contract terms. KRS 403.180(5). The terms of a Separation Agreement are ambiguous if the provision is “susceptible to multiple or inconsistent interpretations.” *McMullin v. McMullin*, 338 S.W.3d 315 (Ky. App. 2011). If a contractual ambiguity exists, the court's task is to “gather, if possible, the intention of the parties from the contract as a whole.” *Id.* (citations and internal quotation marks omitted). In determining the intention of the parties to a contract, the court will consider “the subject matter of the contract, the situation of the parties and the conditions under which the contract was written.” *Id.* (citation and internal quotation marks omitted).

In the matter at bar, the court determined that the phrase "that benefit" was ambiguous, as neither the local language nor the agreement as a whole specified whether it meant the benefit at the time of dissolution or at some point in the future. The court found that, " '[t]hat benefit' could be interpreted to mean those benefits vested at the time of dissolution, or the benefits that are payable under this plan whenever it would become payable, which could potentially include a portion of subsequent work to which a subsequent wife would likely be entitled." In

considering this issue, it is noteworthy that Jones is seeking benefits which accrued for 20 years after the dissolution, during which time she became remarried.

Though the parties could have contracted to such a division had they done so unambiguously, we find no error in the circuit court's conclusion that the language at issue is susceptible to multiple or inconsistent interpretations and is therefore ambiguous. We cannot discern whether "that benefit" referred to in the Separation Agreement is the accrued benefit as it existed at the time of dissolution, or the benefit to which Spencer became entitled some 20 years later. The language is susceptible to both interpretations.

After concluding that the language at issue was ambiguous, the court then sought to determine the parties' intention from the four corners of the agreement. This approach was in conformity with the line of cases represented by *McMullin, supra*. In considering the totality of the agreement, as well as case law holding that retirement plans were properly valued at the time of dissolution rather than at the time of retirement, the court concluded that the retirement plan at issue was properly valued at the time of dissolution. Additionally, "[i]t is the pension, not the benefits, which is the marital asset which is divided by the court." *Brosick v. Brosick*, 974 S.W.2d 498, 503 (Ky. App. 1998). Again, though the parties could have agreed to divide the pension value at the time of retirement rather than at dissolution, they did not unambiguously do so. We find no error.

For the foregoing reasons, we affirm the Order of the Mason Circuit Court.

ALL CONCUR.

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