

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of)	
)	No. 63377-5-I
NANCY QUINN HOWELL, k/n/a)	
NANCY COOPER,)	DIVISION ONE
)	
Respondent,)	
)	
and)	
)	UNPUBLISHED OPINION
GEORGE WILLIAM HOWELL,)	
)	FILED: December 7, 2009
Appellant.)	
_____)	

BECKER, J. -- In 1994, the court entered a decree of dissolution of the marriage of Nancy Cooper and George Howell. The decree incorporated the terms of the parties' property settlement agreement. In 2008, Cooper filed a motion to compel enforcement of the life insurance policy requirement in the agreement. The court concluded that because Howell's life insurance policy had lapsed, Cooper was entitled to a lien against Howell's present estate. Because we interpret the word "estate" in the property settlement agreement to mean Howell's future estate, we reverse. We deny Howell's request for attorney fees.

Nancy Cooper and George Howell married on March 25, 1989. They filed a petition for dissolution on April 8, 1994. Cooper and Howell entered into a property settlement agreement, which was incorporated into the decree of dissolution.

As part of the agreement, Howell agreed to make Cooper an irrevocable beneficiary of \$50,000 of his life insurance policy. The agreement provides that if the insurance lapses, Cooper shall have a lien against Howell's estate. But if Cooper precedes Howell in death, the obligation is null and void:

Husband shall pay the following separate obligations:

.....

... \$50,000.00 to be received by wife as an irrevocable beneficiary on husband's life insurance policy until his death. Husband shall provide wife with evidence of such insurance and its irrevocability prior to the execution of this agreement. If this life insurance lapses, wife shall have a lien against husband's estate in the amount of \$50,000.00. If wife precedes husband in death, this obligation shall become null and void.

At the time of the dissolution, Howell had a life insurance policy of \$300,000. It is undisputed that Howell provided Cooper with evidence of the life insurance and its irrevocability. Between 2000 and 2007, the cost of the insurance charges increased and eventually the cash surrender value of the policy was depleted. The life insurance policy lapsed in December 2007.

In 2008, Cooper filed a motion to compel enforcement of the life insurance policy requirement in the property settlement agreement. Cooper asked the court to order Howell to secure a life insurance policy of \$50,000, provide Cooper with proof of the life insurance policy, and for an award of attorney fees.

After a hearing, the court found that under the agreement, Howell was required to name Cooper as an irrevocable beneficiary on his life insurance policy and if that policy lapsed, Cooper would have a \$50,000 lien against Howell's estate. The court found that Howell had allowed the life insurance to lapse and "Although Petitioner/Wife still has a lien, she has lost some security." The court also found that "Respondent/Husband did not breach the contract."

Based on the finding that Cooper had lost some security, the court ordered Howell to, within 30 days of the order, either:

- 1) Secure and maintain a policy of life insurance in the amount of \$50,000, naming Petitioner Nancy Cooper (fka Nancy Quinn Howell) as irrevocable beneficiary of said policy pursuant to the Property Settlement Agreement filed with the Court on July 18, 1994; or
- 2) Write a Will or Codicil leaving Petitioner \$50,000 if she survives him. Said Will or Codicil shall be made nonrevocable and Respondent shall ensure that sufficient funds remain in his estate to fund this bequest; or
- 3) Provide Petitioner with some other asset such as a) a \$50,000 deed of trust or mortgage on real property with equity in excess of \$50,000 or b) a joint bank account in the amount of \$50,000 that cannot be decreased below \$50,000 by Respondent and cannot be accessed by Petitioner until Respondent's death; or c) name Petitioner as irrevocable beneficiary of an IRA or retirement account in the amount of \$50,000 with Respondent being required to ensure that the account value not be decreased below \$50,000; and
- 4) Provide proof of same to Petitioner's counsel immediately upon completion.

Howell filed a motion for reconsideration, arguing that there was no evidence to justify creating additional burdens on Howell that were not contained in the agreement and the court erred by modifying the terms of the agreement. The court denied Howell's motion for reconsideration and clarified its earlier order to say that "the word 'estate' contained in the property settlement agreement is ambiguous. The word estate

can refer to either the present estate, meaning a person's current wealth or the person's future estate created after the person's death. The court interpreted the agreement to mean the Respondent's present estate."

Howell appeals. He asserts that the court erred in concluding that the word "estate" was ambiguous in the property settlement agreement. Howell contends that the only reasonable interpretation of "estate" is "future estate." We agree with Howell.

The interpretation of a decree of dissolution and the language of a property settlement agreement is a question of law that we review de novo. In re Marriage of Gimlett, 95 Wn.2d 699, 705, 629 P.2d 450 (1981). "Interpretation by the reviewing court must be based upon the intent of the parties as reflected in the language of the agreement." Byrne v. Ackerlund, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987). We look for the objective manifestations of the meeting of the parties' minds; the parties' subjective intent is irrelevant. Olympia Police Guild v. City of Olympia, 60 Wn. App. 556, 559, 805 P.2d 245 (1991).

"If a decree is clear and unambiguous, there is nothing for the court to interpret." In re Marriage of Bocanegra, 58 Wn. App. 271, 275, 792 P.2d 1263 (1990). A provision is ambiguous if its terms can have more than one meaning. Mayer v. Pierce County Medical Bureau, Inc., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). "If a decree is ambiguous, the reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts." In re Marriage of Thompson, 97 Wn. App. 873, 878, 988 P.2d 499 (1999).

We focus not only on the words, but also the context in which the words are used.

BNC Mortgage, Inc. v. Tax Pros, Inc., 111 Wn. App. 238, 249, 46 P.3d 812 (2002).

In the property settlement agreement, which was incorporated into the decree of dissolution, Cooper was awarded:

\$50,000.00 to be received by wife as an irrevocable beneficiary on husband's life insurance policy upon his death. Husband shall provide wife with evidence of such insurance and its irrevocability prior to the execution of this agreement. If this life insurance lapses, wife shall have a lien against husband's estate in the amount of \$50,000.00. If wife precedes husband in death, the obligation shall become null and void.

It is undisputed that Howell made Cooper an irrevocable beneficiary on his life insurance policy and provided her evidence of the insurance. It is also undisputed that Howell's life insurance policy lapsed in 2007. The parties agree that Cooper has a lien on Howell's estate. "A lien is an encumbrance upon property, which secures payment of a debt but confers no property rights or title on the holder." Young v. Young, 44 Wn. App. 533, 536, 723 P.2d 12 (1986). But the parties dispute whether the lien is on Howell's present estate or future estate.

The word "estate" is not ambiguous as used in the agreement. Although in theory the word "estate" could mean present estate or future estate, it is clear from the context that the only reasonable interpretation of estate is future estate. If Cooper dies before Howell, the obligation is null and void. Because Howell's death is a condition precedent to Cooper's award of the life insurance proceeds, it logically follows that Cooper will become entitled to a lien against Howell's estate only after his death. Because the word "estate" is not ambiguous, we need not look beyond the language of the agreement to interpret it.

But even if the provision were ambiguous, Cooper's attorney drafted the agreement and any ambiguity is construed against the drafter. Queen City Sav. & Loan Ass'n v. Mannhalt, 111 Wn.2d 503, 513, 760 P.2d 350 (1988). If Cooper wanted the lien to be against Howell's present estate in the event the life insurance lapsed, she could have stated that unambiguously. Because Cooper's attorney drafted the agreement, we would construe the ambiguity against her and conclude that the word "estate" means "future estate" and Cooper is not entitled to a lien against Howell's present estate.

Consequently, the options provided to Howell in the order of February 20, 2009 amount to an improper modification of the agreement. If a property settlement agreement is incorporated into a dissolution decree, it cannot be modified later unless it was unfair at the time of its execution. RCW 26.09.070(3); Byrne, 108 Wn.2d at 453. "A decree is modified when rights given to one party are extended beyond the scope originally intended, or reduced. A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary." Thompson, 97 Wn. App. at 878. A court may not impose obligations which never before existed. In re Marriage of Mudgett, 41 Wn. App. 337, 341, 704 P.2d 169 (1985).

Here, the court imposed further obligations on Howell beyond those originally agreed to. The parties agreed only that if the life insurance policy lapsed, Cooper would have a lien on Howell's estate. In its order, the court required Howell, within 30 days, to either: (1) secure a life insurance policy of \$50,000 with Cooper as the irrevocable beneficiary, (2) write a will or codicil leaving Cooper \$50,000 if she survives

him, or (3) provide Cooper with some other asset. The court erred in modifying the agreement by making the \$50,000 obligation unconditional and requiring Howell to ensure that if the policy lapsed, there would be at least \$50,000 available in his estate after his death for Howell. The property settlement agreement gives Howell a lien against the estate, but if the estate is worthless, so is the lien. The lien is not secured. The order must be reversed.

Howell asserts that Cooper's petition was frivolous and asks this court to award him attorney fees. RCW 4.84.185 gives the court discretion to award attorney fees if a party files a frivolous civil action. An action is not frivolous if it can be supported by any rational argument. Timson v. Pierce County Fire Dist. No. 15, 136 Wn. App. 376, 386, 149 P.3d 427 (2006). We conclude Howell's argument was not frivolous and decline to award fees.

Reversed.

Becker, J.

WE CONCUR:

Schindler, CT

Grosse, J