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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001081-MR

MARK D. KELLY

APPELLANT

v. APPEAL FROM BOONE FAMILY COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 03-CI-01280

DEBRA L. KELLY

APPELLEE

OPINION REVERSING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: In this matter, the appellant asks us to consider whether the Boone Family Court incorrectly interpreted and applied the terms of a divorced couple's property settlement agreement which divided the appellant's retirement account. We are persuaded that it did, and so we reverse.

Mark D. Kelly and Debra L. Kelly were married in 1972. Debra filed a petition for dissolution in 2003, and the decree was entered on January 21, 2005. The decree incorporated a property settlement agreement which provided, in pertinent part, as follows:

[Mark] is a retired person. He receives a monthly retirement check from the Kentucky Retirement Systems in the net amount of \$5,093.37. Since [Mark] is already retired and drawing the retirement proceeds, a QDRO cannot be utilized to divide the monthly proceeds.^[1] The parties agree to equally divide [Mark's] monthly retirement check and to be equally responsible for any tax liability for such retirement funds. To that end, [Mark] shall pay, by check, to [Debra] a sum equal to one-half of each monthly check received from the Kentucky Retirement Systems. Said payment to [Debra] shall be made no later than three (3) business days from actual receipt of each month's retirement benefit payment. Additionally, the parties agree that they shall consult with a mutually agreeable tax professional, no later than 60 days from the entry of a Decree of Dissolution of Marriage in this action, for the purpose of devising a method, effective immediately for reporting the division of the gross proceeds of [Mark's] retirement plan payments and equalizing the tax obligation therefor. The parties shall equally divide the cost of the tax professional.

(Record, p. 51) (footnotes omitted).

The parties concede that they did not consult a tax professional. As a result, they encountered a number of tax-related complications. More specifically, Debra received notice that she had failed to report her portion of Mark's retirement

¹ In 2000, the legislature enacted amendments to Kentucky Revised Statutes (KRS) 61.690 which eliminated the obligation of the Kentucky Employees' Retirement System (KERS) to honor QDROs, but the parties and the family court seem to agree that KERS's current practices now ensure that QDROs will be honored. *See, e.g., Hardesty v. Hardesty*, 2009 WL 961106 (Ky. App. 2009).

proceeds as income, and she therefore owed significant amounts in federal taxes, penalties, and interest.

In July of 2011, Debra filed a motion for contempt, whereby she asserted, in relevant part, that for more than six years Mark had been incorrectly paying her one-half of the net proceeds of his retirement income rather than one-half of the gross income.² She claimed this practice violated the terms of the settlement agreement. Mark countered that he had paid Debra in accordance with the agreement.

The family court was persuaded that the settlement agreement required equal division of Mark's gross retirement income from the date of dissolution. In an order dated December 16, 2011, Mark was instructed to compensate Debra for the difference for the period of January 21, 2005, to December 31, 2011, and to prepare a QDRO which would take effect in January 2012.

Following an unsuccessful motion to alter, amend, or vacate, Mark appealed. He presents a number of reasons the December 2011 order should be reversed to the extent that it requires him to pay one-half of his gross retirement income for the period between January 21, 2005, and December 31, 2011.³ But since we are persuaded by the first of these, that the family court incorrectly applied the language of the agreement, we need not address the others.

² Debra also asserted that Mark had been paying the incorrect net amount of retirement income by amending the tax withholdings thereupon. The family court declined to hold Mark in contempt for that action, and Debra has not appealed the ruling.

³ Mark does not contest the portion of the order mandating that his gross retirement income be divided equally beginning January 1, 2012.

“Terms of the agreement set forth in the decree . . . are enforceable as contract terms.” KRS 403.180(5). “[I]n the absence of ambiguity a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence.” *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680, 687 (Ky. 2012) (as modified on denial of reh’g, Dec. 20, 2012) (citations and quotations omitted). “The construction and interpretation of a contract is a matter of law and is reviewed under the *de novo* standard.” *Money v. Money*, 297 S.W.3d 69, 71 (Ky. App. 2009) (citing *Cinelli v. Ward*, 1997 S.W.2d 474, 476 (Ky. App. 1998)).

Mark contends the agreement is ambiguous and that the parties intended to provide for equal division of his net retirement income. Debra argues the contract is unambiguous and reflects the parties’ agreement to divide the gross income. Both parties identify language of the agreement which they claim supports their respective provisions.

Mark relies on the language of the settlement agreement which requires him to “pay, by check, to [Debra] a sum equal to one half of each monthly check received” Because he received only the net value, he claims, that is what he was ordered to share with Debra. He also asserts that the parties’ behavior for the six-and-one-half years between the divorce and the filing of Debra’s motion is evidence that they intended to share only the net proceeds.

Debra relies on the portion of the settlement agreement which obligated the parties to “consult with a mutually agreeable tax professional . . . for the purpose of devising a method, effective immediately[,] for reporting the division of the gross proceeds of [Mark’s] retirement plan payments and equalizing the tax obligation therefor.” She believes the expression, “division of the gross proceeds,” is conclusive.

Having taken the whole document into consideration, we do not believe it is ambiguous, but we nevertheless find that it evinces the parties’ intention that Mark would pay one-half of his net retirement income to Debra. The portion of the order addressing division of the retirement income mentions only Mark’s net income and identifies the specific amount the parties intend to split, \$5,093.37 monthly. Debra was entitled to one-half of that amount. The agreement bears no mention of gross income until it addresses the parties’ payment of taxes. Furthermore, the agreement plainly intends an equal division which is impossible to accomplish if Mark is to pay to Debra, from his net check, one-half the gross amount, thereby leaving him with less than half the net amount. That is an absurd interpretation of the clear intent that the parties equally share the benefit and equally bear the burden of the retirement income.

The requirement that the parties consult a tax professional for the purpose of “reporting the division of the gross proceeds of [Mark’s] retirement plan payments and equalizing the tax obligation therefor[.]” shows that the family court recognized the tax imposed would be upon the gross amount, not the net amount, and that the

court anticipated confusion about the correct calculation of the parties' respective income for tax purposes. It was designed to help the parties avoid running afoul of the Internal Revenue Service (IRS) (although they failed to do so) and did not indicate that they would each receive one-half of the gross retirement payments.

Even if we perceived the settlement agreement's use of the two terms "net" and "gross" as an ambiguity, we would reach the same result. We agree with Mark that Debra's acceptance of one-half of the retirement funds for six-and-one-half years following dissolution is compelling evidence that the parties intended to share only that amount. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002) (the parties' conduct constitutes extrinsic evidence of their intentions). It was not until the IRS moved to hold Debra accountable for unreported income that she sought to change the arrangement with which she had previously been content.

We conclude the family court erroneously interpreted the contract when it ordered that Mark's gross retirement income be equally divided prior to January 2012. Accordingly, we reverse to the extent that the order requires Mark to pay one-half of the gross amount rather than one-half of the net income for the period of January 21, 2005, to December 31, 2011.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tasha Scott Schaffner
Florence, Kentucky

BRIEF FOR APPELLEE:

William G. Knoebel
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