

RENDERED: MARCH 6, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001639-MR

LISA DAWN RUSSELBURG (NOW BABB)

APPELLANT

v.

APPEAL FROM DAVIESS FAMILY COURT  
HONORABLE JAY A. WETHINGTON, JUDGE  
ACTION NO. 15-CI-00089

CHARLES ROBERT RUSSELBURG

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, MAZE, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Lisa Dawn Russelburg (now Babb) and Charles Robert Russelburg entered into a dissolution of marriage and property settlement agreement. Lisa appeals from subsequent orders of the Daviess Family Court denying Lisa's separate motions to alter and vacate filed pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 and 60.01. We conclude the property

settlement agreement unambiguously states that any pension plans in Lisa's name are marital property to be divided between the parties and Lisa cannot be afforded the requested relief.

On November 3, 2015, the parties and their respective counsel met and agreed upon the terms of a property settlement agreement. Three drafts of the agreement were prepared by Charles's counsel and sent to Lisa's counsel, with the parties signing the third draft. The agreement signed by the parties on December 8, 2015, contained the following provision:

## **5.2 Retirement and Pension Accounts**

5.2.1 Charles has a vested interest in a military pension or retirement. The Parties agree that such retirement is Charles' non-marital property, all such interest having been earned prior to the marriage of the Parties. The Parties further agree that Charles does not have any other type of retirement.

5.2.2 Lisa and Charles agree that *any* life insurance, retirement, pension, deferred compensation, and/or 401K savings accounts or annuity program in Lisa's name *are marital property*. Lisa has disclosed the existence of two such accounts, a Kentucky state pension and a Kentucky deferred compensation account as a consequence of her employment during the marriage, and *all* of which are *marital property* ("Retirement Accounts"). Lisa's Retirement Accounts shall be divided equally between the parties, 50/50, based upon the values of the Retirement Accounts as of the date of entry of a Decree of Dissolution of marriage. Thereafter, neither Party shall continue to be a beneficiary under an insurance policy payable on the death of the other, regardless of the

beneficiary designation made in the policy, unless such designation is made after the Decree of Dissolution.

5.2.3. Charles' counsel shall prepare the Qualified Domestic Relations Order ("QDRO") required to divide the Retirement Accounts and to establish a separate (divided) account in Charles' name only, for his interest and division as described in the preceding paragraph. The QDRO shall be reviewed by counsel for the Parties before being submitted for review to the administrators of the Retirement Accounts for acceptance, before being submitted to the Court for entry.

(Emphasis added).

The agreement contained numerous provisions whereby each party made acknowledgments including:

Each of the Parties has become fully advised of his or her rights, duties, and obligations and of the legal and practical effects of this Agreement and has become informed of the other Party's property rights, properties, income and expectations. Each of the Parties represents to the other that each has read and fully understands the terms, conditions, and provisions of this Agreement and, upon discussion with their respective Counsel, believes it to be fair, just, adequate and reasonable as to each of them. By their respective signatures below, each Party freely and voluntarily accepts such terms and conditions and provisions, and enters into this Agreement voluntarily, free from fraud, undue influence, coercion or duress of any kind.

Charles signed the property agreement on November 27, 2015, and the agreement was hand-delivered to Lisa's counsel. Lisa signed the agreement eleven days later, on December 8, 2015.

The property settlement agreement was filed of record on December 14, 2015, and incorporated into a decree of dissolution entered on the same date. The family court specifically found that the agreement was not unconscionable.

After the property settlement agreement was executed, numerous letters were exchanged between the parties' counsel to obtain the balances of the accounts in Lisa's name. On June 17, 2016, Lisa's counsel received a letter from Charles's counsel enclosing a draft QDRO dividing Lisa's retirement accounts equally between the parties. Lisa's counsel responded with a letter stating that the QDRO erroneously contained Lisa's nonmarital retirement funds.

After the parties' counsel exchanged communications and Lisa continued to maintain that the QDRO erroneously divided Lisa's entire total retirement accounts, on November 2, 2016, Charles filed a motion to enforce the settlement agreement. Because the Daviess Circuit Court and Master Commissioner system in Daviess County were being transitioned to the Daviess Family Court, the hearing on the motion was postponed until the family court judge took the bench and did not occur until January 9, 2017. Following the hearing, on January 17, 2017, the family court ordered that the retirement accounts be divided equally based on the values as of the date of the decree of dissolution. The family court found that section 5.2.2 of the property settlement agreement omitted any language that any part of the retirement accounts in Lisa's name was

nonmarital and provided that those accounts were to be equally divided. It further found that the agreement was not ambiguous or unconscionable and that Lisa had the opportunity to review the agreement prior to signing. Lisa did not appeal from that order interpreting the settlement agreement.

On February 20, 2017, Lisa filed a motion pursuant to CR 60.02(a) (alleging mistake, inadvertence, surprise, or excusable neglect) and (b) (alleging there was newly discovered evidence that could not have been earlier discovered). She also requested relief under CR 60.01, claiming that the omission of the term “nonmarital” in section 5.2.2 of the settlement agreement was an “oversight” by the parties and their counsels.

On September 6, 2017, the family court denied the motion on the grounds that the motion was not filed within one year of the entry of the decree of dissolution as required under CR 60.02(a) and (b). The family court further ruled that CR 60.01 affords relief only when an error is made by the clerk or other judicial officer or ministerial officer. Lisa appealed.

While that appeal was pending, on November 16, 2017, Lisa filed a motion pursuant to CR 60.02(f), the catch-all provision of CR 60.02, which provides that the trial court may grant relief from a judgment for “any other reason of an extraordinary nature[.]” A motion pursuant to that provision must be brought

within a reasonable time. CR 60.02. After Lisa filed her CR 60.02(f) motion, her pending appeal was placed in abeyance.

On May 14, 2018, the family court denied Lisa's CR 60.02(f) motion noting that in its January 17, 2017 order granting Charles's motion to enforce the settlement agreement, it found the agreement was not ambiguous or unconscionable and Lisa had a fair opportunity to present her claim at a trial on the merits. Further, the family court again found that Lisa had the opportunity to review the proposed settlement agreement and acknowledged in the agreement that she understood her rights, duties, and obligations under the agreement and that she believed it to be fair, just, adequate, and reasonable.

Under Kentucky law, property in a dissolution action may be divided by the trial court by assigning to each party his or her respective nonmarital property and dividing the marital property in just proportions. Kentucky Revised Statutes (KRS) 403.190. However, the parties may also by agreement define their rights in each other's property. In fact, our dissolution of marriage statutes encourage parties to resolve property distribution issues by agreement. KRS 403.180(1) provides:

To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any

property owned by either of them, and custody, support and visitation of their children.

Further, after a settlement agreement has been incorporated into a decree of dissolution of marriage, it “may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.” KRS 403.250(1). The reopening of a judgment under Kentucky law is governed by CR 60.02.

Relief under CR 60.02 is exceptional and is to be granted cautiously. *Louisville Mall Associates, LP v. Wood Center Properties, LLC*, 361 S.W.3d 323, 335 (Ky.App. 2012). Relief is available “only under the most unusual and compelling circumstances.” *Age v. Age*, 340 S.W.3d 88, 94 (Ky.App. 2011). For that reason, the decision “to grant or to deny a motion filed pursuant to the provisions of CR 60.02 lies within the sound discretion of the trial court.” *Id.* We will not disturb the family court’s decision absent an abuse of that discretion. *Id.* Only a decision that is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles” constitutes an abuse of discretion. *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010).

Lisa did not file her motion pursuant to CR 60.02(a) and (b) within one year of the entry of the decree of dissolution which incorporated the settlement agreement. Therefore, because her motion was untimely, she could not be granted relief under CR 60.02(a) or (b). The family court also properly ruled that Lisa

could not be afforded relief under CR 60.01. That rule is limited to clerical errors stating: “Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” *Id.* The only possible remedy available to Lisa is under CR 60.02(f) and only available if there are “extraordinary” circumstances to warrant relief.

A marital property settlement agreement is interpreted under the same rules that govern the construction of other contracts. *Wagner v. Wagner*, 563 S.W.3d 99, 103 (Ky.App. 2018). Under Kentucky law, a contractual provision is only ambiguous if it is susceptible to multiple or inconsistent interpretations. *Frear v. P.T.A. Industires, Inc.*, 103 S.W.3d 99, 106 n.12 (Ky. 2003). “Absent an ambiguity in the contract, the parties’ intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence.” *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky.App. 2002).

Lisa argues that this fact situation is analogous to the facts this Court considered in *Duke v. Duke*, No. 2007-CA-001048-MR, 2008 WL 2468794 (Ky.App. Jun. 20, 2008) (unpublished). In *Duke*, this Court affirmed a decision of the trial court that a settlement agreement was ambiguous where there was no



express relinquishment or waiver of Jerry Duke's right to nonmarital property and the agreement was not explained to him. *Id.* at \*1. This case is distinguishable.

In *Duke*, an appeal was taken from an order finding the settlement agreement was ambiguous and construing the agreement to award a portion of the parties' retirement account as nonmarital to Jerry. Here, Lisa has appealed from the denial of her CR 60.02 motion. That is significant because under CR 60.02(f), the basis for relief must be extraordinary.

Moreover, the language in the *Duke* agreement is much different than that used in the settlement agreement now before this Court. The *Duke* agreement was ambiguous "in that it purported to pertain to rights acquired as a result of the parties' marriage, but then stated that Mary Duke was entitled to one-half of Jerry Duke's retirement without using express language to indicate the marital and non marital portions were to be included." *Duke*, 2008 WL 2468794, at \*1. In this case, the property settlement agreement expressly states that retirement accounts in Lisa's name are "marital property." It unambiguously states that "all" the retirement accounts in Lisa's name are marital property. Given that in the paragraph immediately preceding Section 5.2.2 the parties agreed that Charles's military retirement account was nonmarital, the use of the term "marital property" in Section 5.2.2 convinces us that the provision is unambiguous.

Additionally, Lisa was represented by counsel and the agreement was reached after negotiations. She and her counsel had ample time to review the agreement before Lisa signed the agreement.

We conclude that the agreement is unambiguous. It expressly states the parties' agreement that the retirement accounts in Lisa's name are marital to be equally divided.

Lisa argues that if the family court is correct that Charles is entitled to one-half of all the retirement in Lisa's name under the terms of the settlement agreement, the provision is unconscionable. Unconscionability is defined as "manifestly unfair and inequitable." *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974). A property settlement agreement cannot be said to be unconscionable solely because "it is a bad bargain." *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky.App. 1979).

Other than Lisa's claim that a portion of the retirement accounts in her name is nonmarital, Lisa has offered no reason why the agreement is manifestly unfair or inequitable. She only expresses regret that she bargained away her nonmarital interest in the retirement accounts. Regret is an insufficient reason to grant CR 60.02(f) relief.

For the reasons stated, the orders of the Daviess Family Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jennifer L. Hendricks  
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BRIEF FOR APPELLEE:

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