IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1998 Term

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No. 24476

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MELANIE P. JESSEE (formerly Aycoth),
Plaintiff below, Appellant,

v.

EDWARD D. AYCOTH,
Defendant below, Appellee.

Appeal from the Circuit Court of Mercer County
Hon. David W. Knight, Judge
Case No. 86-CD-651-K

AFFIRMED

Submitted: April 29, 1998
Filed: June 12, 1998

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syllabus Point 1, *Berkeley Co. Pub. Ser. Dist. v. Vitro Corp.*, 152 W.Va. 252, 162 S.E.2d 189 (1968).

2. "Prior or contemporaneous parol statements may not be admitted to vary written contracts, but may be admitted to explain uncertain, incomplete or ambiguous contract terms." Syllabus, *Holiday Plaza, Inc. v. First Federal Savings and Loan Association of Clarksburg*, 168 W.Va. 356, 285 S.E.2d 131 (1981).

3. "'Extrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract, and in such case the intention of the parties is always important and the court may consider parol evidence in connection therewith with regard to conditions and objects relative to the matters involved. . . .' Syl. Pt. 2, *Berkeley Co. Pub. Serv. Dist. v. Vitro Corp.*, 152 W.Va. [252], [162 S.E.2d 189 (1968)]." Syllabus Point 2, *International Nickel Co., Inc. v. Commonwealth Gas Corp.*, 152 W.Va. 296, 163 S.E.2d 677 (1968).

Per Curiam:[1]

[1]We point out that a *per curiam* opinion is not legal precedent. *See Lieving v. Hadley*, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4 (1992).

The appellant, Melanie Jessee (formerly Aycoth), seeks reversal of an April 22, 1997 order of the Mercer County Circuit Court requiring the appellant to sell her residence and divide the proceeds with the appellant's former spouse, appellee Edward Aycoth. Appellant argues that the circuit court erred in determining that the settlement agreement which had been incorporated into the parties' divorce decree was ambiguous, and that the circuit court erred in ordering her to sell the residence. We affirm the order of the Mercer County Circuit Court.

I.

On August 15, 1986, the appellant and the appellee Edward Aycoth were divorced. The order of divorce incorporated a separation agreement which covered the division of property, child custody, and support. Included in this settlement agreement was a provision providing for the appellant to retain the exclusive use of the marital residence; specifically, the agreement stated, in part:

> 3. Melanie [the appellant] shall retain and keep possession of the residential premises of the parties, situate in Boulder Park, Princeton, Mercer County, West Virginia. Edward [the appellee] shall pay all taxes, mortgage payments, or loss or casualty insurance premiums, upon said residence. Melanie shall pay all other expenses attendant to her residence therein; necessary repairs and maintenance shall be paid equally. Melanie shall have the sole right to market and agree to the sale of said residential premises, and Edward shall execute such agreements or documents as may be necessary to effectuate any sale, including realtor's listing agreement . . . at closing, the parties shall divide and receive equal shares of the equity in said residential premises, which is expressly

> stated to be: the difference between the sale price; less realtor's commission; less attorneys fees, excise taxes, prorata real estate taxes, recording fees, document preparation fees, and other usual closing costs; the balance necessary to pay off the purchase money, first in priority, deed of trust.

Following the divorce, the parties' only child remained in the marital residence with the appellant until the child left home to attend college. After the child left the residence, the appellee through his attorney contacted the appellant and inquired when the appellant was going to place the marital residence on the market for sale. When no action was taken by the appellant to sell the marital residence, the appellee filed a petition for contempt, requesting that the circuit court order the appellant to sell the marital residence. The appellant replied to the petition and counter-petitioned for alternative relief requesting child support for the time periods in which the child was home from college, the residence being the home to which the child returned on college breaks. In a subsequent motion, the appellant requested that if the court should determine that the appellant was required to sell the marital residence, the issue of equitable distribution should be reviewed.[2]

Memoranda were submitted by both parties concerning the settlement agreement. After an examination of the memoranda and the settlement agreement, the trial judge determined that the settlement agreement was "vague and uncertain." The

[2] Both the counter-petition requesting additional child support and motion requesting review of the equitable distribution were denied by the circuit court, but only the issue of equitable distribution was appealed. Therefore, the issue of additional child support will not be addressed in this opinion.

trial court set a hearing to allow parol evidence to be offered to determine the effect of the agreement. After hearing parol evidence concerning the intent of the parties and examining the law, the court concluded that nothing in the agreement precluded the marital residence from being sold upon the child reaching 18 years of age. The court ordered the appellant to place the marital residence on the market for sale, with the proceeds of the sale to be divided according to the settlement agreement.

II.

When a trial court determines that an agreement is ambiguous and construes the meaning of a provision in the contract based on extrinsic evidence, such as the parties' intent, our standard of review is "clearly erroneous." *Fraternal Order of Police, Lodge Number 69 v. City of Fairmont,* 196 W.Va. 97, 100, 468 S.E.2d 712, 715 (1996).

The appellant argues that the settlement agreement was clear and not ambiguous concerning the marital residence. We agree that a mere difference of interpretation between the parties will not render a provision in a contract ambiguous:

> The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.

Syllabus Point 1, *Berkeley Co. Pub. Ser. Dist. v. Vitro Corp.*, 152 W.Va. 252, 162 S.E.2d 189 (1968). A contract is considered ambiguous if it is "reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the

established rules of construction." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 65 n.23, 459 S.E.2d 329 342 n. 23 (1995). We have also defined ambiguity as:

> Ambiguity in a statute or other instrument consists of susceptibility of two or more meanings and uncertainty as to which was intended. Mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.

Syllabus Point 13, *State v. Harden*, 62 W.Va. 313, 58 S.E. 715 (1907). *In accord*, *Toppings v. Rainbow*, 200 W.Va. 728, 733, 490 S.E.2d 817, 822 (1997).

In the instant case, the provision in the settlement agreement relating to the marital residence was clear and unambiguous as to the division of duties and the division of equity. However, the provision was entirely silent regarding *when the residence was to be sold*. Therefore, the lower court was correct to admit parol evidence, in order to ascertain the intent of the parties. "Prior or contemporaneous parol statements may not be admitted to vary written contracts, but may be admitted to explain uncertain, *incomplete* or ambiguous contract terms." Syllabus, *Holiday Plaza, Inc. v. First Federal Savings and Loan Association of Clarksburg*, 168 W.Va. 356, 285 S.E.2d 131 (1981) (emphasis added).

In *Fraternal Order of Police* we noted:

> If an inquiring court concludes that an ambiguity exists in a contract, the ultimate resolution of it typically will turn on the parties' intent. Exploring the intent of the contracting parties often, but not always, involves marshaling facts extrinsic to the language of the contract document. When this need arises, these facts together with reasonable inferences

> extractable therefrom are superimposed on the ambiguous words to reveal the parties' discerned intent.

Fraternal Order of Police, 196 W.Va. at 101 n. 7, 468 S.E.2d at 716 n. 7 (1996).

In addition to hearing parol evidence on the issue of the sale of the marital residence, the trial court also examined the law that was in effect when the settlement agreement was signed relating to the use of a marital home when divorced parties had minor children. In 1986, our statutes allowed courts to grant the exclusive use and occupancy of the marital residence to one of the divorcing parties, but stated:

> [e]xcept in extraordinary cases supported by specific findings set forth in the order granting relief, a grant of the exclusive use and occupancy of the marital home shall be limited to those situations where such use and occupancy is reasonably necessary to accommodate the rearing of minor children.

W.Va. Code, 48-2-15 (b)(4) [1986].[3]

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[3]*W.Va. Code,* 48-2-15(b)(4) [1986] provided:

> As an incident to requiring the payment of alimony or child support, the court may grant the exclusive use and occupancy of the marital home to one of the parties; together with all or a portion of the household goods, furniture and furnishings reasonably necessary for such use and occupancy. Such use and occupancy shall be for a definite period, ending at a specific time set forth in the order, subject to modification upon the petition of either party. Except in extraordinary cases supported by specific findings set forth in the order granting relief, a grant of the exclusive use and occupancy of the marital home shall be limited to those situations where such use and occupancy is reasonably necessary to accommodate the rearing of minor children of the parties. The court may require payments to third parties in the form of home loan installments, land contract payments, rent, payments for utility services, property taxes, insurance coverage, or other expenses or charges reasonably necessary

for the use and occupancy of the marital domicile. Payments made to a third party pursuant to this subdivision for the benefit of the other party shall be deemed to be alimony, child support or installment payments for the distribution of marital property, is such proportion as the court shall direct: Provided, that if the court does not set forth in the order that a portion of such payments is to be deemed child support or installment payments for the distribution of marital property, then all such payments made pursuant to this subdivision shall be deemed to be alimony. Nothing contained in this subdivision shall abrogate an existing contract between either of the parties and a third party, or affect the rights and liabilities of either party or a third party under the terms of such contract.

Also, in 1986, this Court had decided the case *McKinney v. McKinney*, 175 W.Va. 640, 337 S.E.2d 9 (1985), in which we stated:

> Except in extraordinary cases, the right to the exclusive use and occupancy of the marital home terminates when such use and occupancy is no longer necessary to accommodate the rearing of minor children. *W.Va. Code* 48-2-15(b)(4) [1984].

Syllabus Point 2 of *McKinney, supra.*

This Court has discussed the significance of the marital residence being awarded to the custodial parent. In *Murredu v. Murredu* we held:

> A trial court in the exercise of its sound discretion under the provisions of W.Va. Code 48-2-15, may award the exclusive use of the home property to a spouse incident to obtaining custody of the children.

Syllabus Point 2, *Murredu v. Murredu*, 160 W.Va. 610, 236 S.E.2d 452 (1977), *overruled on other grounds; Patterson v. Patterson*, 167 W.Va. 1, 5 n. 1, 277 S.E.2d 709, 712 n. 1 (1981). *In accord, Blevins v. Shelton*, 181 W.Va. 544, 547, 383 S.E.2d 509, 512 (1989)*; Fischer v. Fischer,* 175 W.Va. 753, 755, 338 S.E.2d 233, 235 (1985); *Stillings v. Stillings*, 167 W.Va. 796, 797, 280 S.E.2d 689, 690 (1981).

Here, the only child of the divorced parties was beyond 18 years of age, and had, for the most part, moved from the residence. We cannot find that the circuit court was clearly erroneous in ordering the appellant to sell the marital residence.

The final argument of the appellant is that the circuit court erred in denying appellant's motion for a re-examination of the issue of equitable distribution, under her request for alternative relief. The decision of the circuit court did not alter the original

agreement reached between the appellant and the appellee. Rather, after considering the evidence, the circuit court determined the exact terms of the incomplete settlement agreement. *See Yoho v. Borg-Warner Chems.*, 185 W.Va. 265, 266, 406 S.E.2d 696, 697 (1991). Therefore, the circuit court was correct to deny the appellant's motion.

III.

Accordingly, the circuit court's order of April 22, 1997 is affirmed.

Affirmed.