STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JUDITH KING,
Petitioner Below, Appellee

vs.) **No. 35696** (Kanawha County No. 01-D-1553)

CHARLES E. KING, JR.,
Respondent Below, Appellant

and

PHYLLIS SLACK KING,
Intervenor Below, Appellant

FILED
May 16, 2011
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The instant action is before this Court upon the appeal of Charles E. King, Jr. and his wife, Phyllis Slack King, from an order of the Circuit Court of Kanawha County entered February 25, 2010, denying their petition for appeal from an order of the Family Court of Kanawha County entered December 18, 2009.[1] Herein, Appellants assert that the family court order erroneously modified a qualified domestic relations order ("QDRO") and negated reservation of Charles King's right to elect "the form of benefit at the time of payment" upon his retirement. This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. For the reasons expressed below, the February 25, 2010, order of the circuit court is reversed and this case is remanded for further proceedings. In so holding, this Court finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Charles E. King, Jr. (hereinafter referred to as "Appellant") and Judith King (hereinafter referred to as "Appellee") were married in 1971, separated in 2001, and were divorced by a Final Decree of Divorce entered on November 7, 2003. The divorce decree

[1] The family court's order of December 18, 2009, denied Appellants' motion to reconsider the family court's prior order of November 5, 2009. The rulings in the family court's November 5, 2009, order are directly at issue in this appeal.

incorporated the parties' Settlement Agreement, which, among other things, specified that Appellee was to receive one-half of Appellant's pension as a survivor spouse, and one-half of her own pension with Appellant as the survivor spouse.[2] Also, on November 7, 2003, the family court entered two QDROs dividing each party's respective retirement plan. The QDRO pertaining to Appellant's Public Employee's Retirement System ("PERS") benefits provided, in pertinent part, the following:

> 5. The Participant's retirement benefits shall be divided between the Participant [Charles King] and Alternate Payee [Judith King] on the Calculation Date as follows:
>
> a. The marital property portion of the Participant's retirement benefits shall be determined as follows: the marital property portion of the Participant's retirement benefits shall be the amount to which the Participant is entitled, multiplied by a fraction, the numerator of which shall be the number of months of the Participant's contributing service from the parties' date of marriage through the parties' date of separation and the denominator of which shall be the total number of months of the Participant's contributing service determined as of the Calculation Date.
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> b. The Alternate Payee shall be entitled to 50% of the marital property portion of the Participant's retirement benefits as determined in paragraph 5a, above, payable at the time and in the same manner (either in the annuity form or, if allowed, in a lump sum) as paid to the Participant or, if a joint and survivor or other optional form of annuity is elected by the Participant, at the same time as paid to the Participant and the Participant's beneficiary. Provided, however, that nothing in this Order shall be construed as granting the Alternate Payee any election rights with respect to the form of benefit; rather, the form of benefit at time of payment shall be elected by the Participant.
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> c. The Participant's retirement benefits as determined in paragraph 5a, above, shall be reduced by the benefits to be paid to the Alternate Payee as determined in paragraph 5b, above.

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[2] The Settlement Agreement, which was drafted by Appellee's counsel, provides nothing with respect to Appellant's right to elect "the form of benefit at the time of payment" upon his retirement.

6. If the Participant elects to be paid retirement benefits in the form of an annuity, the annuity payable to the Alternate Payee shall continue until the earlier of (a) the Alternate Payee's death or (b) the cessation of the payment of the Participant's annuity, including survivor payments under a joint and survivor or other optional form of annuity.

In October 2008, Appellant retired and submitted paperwork to begin receiving his PERS benefits. On his PERS benefit option form, Appellant selected Option A, the "100% Joint & Survivor" option, and named his current wife, Phyllis Slack King, as his primary survivor. The PERS benefit option form provides, in pertinent part, that Option A "is a reduced annuity which provides a monthly payment to the member during his or her lifetime and will continue to pay the named survivor the same amount for his or her life after the member's death." Thus, this option provides a monthly payment to Appellant during his lifetime; upon his death, if his current wife survives him, the same amount would be paid to her for her lifetime.

Pursuant to the terms of the QDRO, PERS currently pays one-half of the monthly benefit to Appellant and one-half to Appellee. The PERS Executive Director, Anne Lambright, testified that, if Appellant should die, his one-half would go to his current wife and the remaining one-half would still go to Appellee. The Executive Director testified that if both Appellant and his current wife die, the payments would cease even if Appellee is still alive. However, Appellants dispute this and believe that under the QDRO, payments would continue to Appellee even if they both die.

Because his current wife was selected as Appellant's survivor, the monthly payment is calculated using her age. Appellee takes issue with the fact that because Appellant's current wife is younger than Appellant and Appellee, the monthly payment amount is lower than if Appellee had been named the survivor and the monthly payments had been calculated using her age.[3] Moreover, if the "50% Joint & Survivor Option" had been chosen, PERS would have paid the named survivor only 50% of the benefit amount upon the participant's death, but the payments would have been higher during the participant's lifetime.[4] The PERS Executive Director testified that once the benefits options are chosen

[3] According to the record, Appellant's current wife was born on September 14, 1962; Appellee was born on September 25, 1948; and Appellant was born on May 1, 1947.

[4] Appellee's calculated monthly benefits are currently $961.83. She alleges that had Appellant selected the 50% Joint & Survivor Option, her monthly benefits would have been $2,547.97.

and the participant retires, the options cannot be changed.[5]

On May 25, 2009, Appellee filed a Corrected Petition for Rule to Show Cause seeking to hold Appellant in contempt of the divorce decree and the QDRO because he did not choose the 50% survivorship option and name her as a survivor. After a hearing, by order entered November 5, 2009, the family court ruled in favor of Appellee and determined that the Settlement Agreement provision giving each party one half of the other party's pension "as survivor spouse" goes beyond a mere agreement to divide the pension by QDRO, but is "also an agreement that the parties would name the other as a 50% survivor." The family court order noted that both parties were represented by counsel and that Appellant is knowledgeable in legal matters. The court found that Appellant's actions have caused Appellee's payout to be less than she would have received as a 50% survivor, both now and if Appellant and his current wife should predecease her. The family court ordered Appellant to resubmit his retirement options to PERS naming Appellee as the 50% survivor and pay her for the difference of what she should have been receiving since the date of his retirement. However, the family court recognized that PERS may refuse to allow any adjustments. The family court directed that in the event that PERS refuses, Appellant must (1) regularly reimburse Appellee the difference between the payouts, and (2) purchase an annuity sufficient to pay Appellee an amount equal to the 50% payout she would receive if his pension election had named her as his 50% survivor and should he predecease her. The family court's order did not state any specific dollar amounts for the reimbursement or the annuity.

Following entry of the family court's order, Appellant filed a motion for reconsideration, which was refused by order dated December 18, 2009. Appellant then filed an appeal to the circuit court, which was denied on February 25, 2010. Subsequently, Appellants filed the instant appeal.[6]

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[5] Anne Lambright, Executive Director of the Retirement Board, testified at the family court hearing as follows:

> If your question is can Judge King's retirement, the terms of the retirement and what he has chosen, be overturned, the answer to that one is from the CPRB Board's perspective, no. He's made his selections. He has retired. The only way that it could be undone would be if he would choose to go back to work - - I mean stop, retire.

[6] During the proceedings below, the family court granted Phyllis Slack King's motion to intervene to protect her own interests in Appellant's pension.

We begin with a well-settled standard of review: "In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

Herein, Appellants present the following four assignments of error: (1) that the family court erred as a matter of law by modifying the QDRO to compel an election expressly reserved in the QDRO to Appellant; (2) that the family court erred by construing the QDRO in a manner inconsistent with the retirement statutes and its interpretation by the retirement board; (3) that the family court erred by failing to construe the QDRO and settlement agreement against the party whose counsel drafted those documents; and (4) that the family court erred in ordering Appellant to purchase an annuity to address a contingency that may never arise, resulting in a windfall to Appellee.

Specifically, Appellants allege that despite the fact that the QDRO provides that the form of benefit at the time of payment was completely within Appellant's "election" and Appellant was therefore free to select a straight life annuity or to select the actuarial equivalent in a reduced annuity payment and name someone else as the recipient of a survivor's benefit upon his death, the family court's order effectively amended the QDRO by holding, "[i]t appears to the Court that this designation goes beyond a mere agreement to divide the pension by QDRO but also an agreement that the parties would name the other as 50% survivor." Appellants submit that because the family court's ruling was contrary to the retirement board's interpretation of the plain language of the QDRO, it left the parties in a quandary because Appellant's decision to exercise his right of election to name the intervenor as his survivor was irrevocable.

Additionally, Appellants assert that Appellee is entitled to and is receiving 50% of her marital property portion of Appellant's retirement benefits and should Appellant die and his current wife commence receiving survivor's benefits, she will be entitled to 50% "at the same time as paid to . . . [Appellant's] beneficiary." Appellants argue that it is the QDRO, not the divorce decree, that dictates the distribution of retirement benefits. Furthermore, the Settlement Agreement and the QDRO were both drafted by Appellee's counsel and nowhere in these documents does it provide that the parties "would name the other as 50% survivor." Rather, the documents provide that Appellee is entitled to receive "50% of the marital property portion of [Appellant's] retirement benefits . . . payable at the same time and in the same manner. . . as paid to [Appellant]" and later, "at the same time as paid to [Appellant] and [Appellant's] beneficiary." Thus, Appellants assert that the Settlement Agreement and QDRO should be construed against the drafter.

Appellants also contend that if Appellee objected to the QDRO, she should have appealed it instead of waiting to file a motion for contempt after Appellant made his discretionary election. They assert that *res judicata* applies when there has been a final judgment on the merits. They further argue that the language of the Settlement Agreement casts no credible doubt on the plain language of the QDRO because the Settlement Agreement uses general language while the QDRO is much more specific. The QDRO was drafted after the Settlement Agreement by Appellee's counsel who presumably would not have included language inconsistent with the Settlement Agreement she also drafted. Thus, it is the QDRO, not the Settlement Agreement, according to Appellants, which should be the primary source document.

Next, Appellants assert that W. Va. Code §5-10-24 (2000) allows a PERS participant the right to choose the form of his retirement annuity. In this case, PERS interpreted the QDRO to permit his election of the annuity and beneficiary selection, and thus, the family court should have deferred to PERS's interpretation. Lastly, Appellants allege that the circuit court erred in requiring Appellant to purchase an annuity to address a contingency that he and his current wife may predecease Appellee, resulting in a windfall to Appellee, because such a possibility may never materialize.

After careful examination of the record in this case, we conclude that the terms of the QDRO and the Settlement Agreement, both of which were drafted by the Appellee's attorney, are conflicting. As stated above, the divorce decree incorporated the parties' Settlement Agreement, which, among other things, specified that Appellee was to receive one-half of Appellant's pension as a survivor spouse, and one-half of her own pension with Appellant as the survivor spouse. The Settlement Agreement, which was drafted by Appellee's counsel, provides nothing with respect to Appellant's right to elect "the form of benefit at the time of payment" upon his retirement. The QDRO was entered on November 7, 2003, and was never appealed by Appellee. It clearly provides that, "[Appellee] shall be entitled to 50% of the marital property portion of [Appellant's] retirement benefits as determined in paragraph 5a, above, payable at the same time and in the same manner (either in the annuity form or, if allowed, in a lump sum) as paid to [Appellant] or, if a joint and survivor or other optional form of annuity is elected by [Appellant], at the same time as paid to [Appellant] and [Appellant's] beneficiary." We find that under this language, Appellee is entitled to only "*50% of the marital property portion of [Appellant's] retirement benefits*." She is not, pursuant to the terms of the QDRO, entitled to dictate what "retirement benefits" are received by Appellant to which she is to receive a 50% distribution.

Furthermore, the QDRO expressly provides that those benefits are "payable at the same time and in the same manner . . . as paid to [Appellant] *or, if a joint and survivor . . . annuity is elected by [Appellant], at the same time as paid to [Appellant] and*

[Appellant's] beneficiary." The QDRO also provides that "[n]othing in this Order shall be construed as granting [Appellee] *any election rights with respect to the form of benefit*; rather, the form of benefit at the time of payment shall be elected by [Appellant]." Finally, the QDRO provides that "[i]f [Appellant] elects to be paid retirement benefits in the form of an annuity, the annuity payable to [Appellee] shall continue to the earlier of (a) [Appellant's] death or (b) the cessation of the payment of [Appellant's] annuity, including survivor payments under a joint and survivor or other optional form of annuity."

If Appellee wanted her spousal share of Appellant's retirement benefit and wanted to preclude Appellant from naming any subsequent spouse as beneficiary, her attorney could have placed such language in the QDRO, which Appellant could have opposed. However, the express terms of the QDRO granted Appellee 50% of the marital property portion of Appellant's retirement benefits, and provided that the form of benefit at the time of payment shall be elected by Appellant. Not even Appellee's own QDRO requires her to elect a 50% joint survivor annuity, instead providing only that, "[t]he Participant does select a joint and survivor form of annuity."

To the extent the ambiguity between the Settlement Agreement and the QDRO was created by the drafter of both of these documents, we must interpret the documents against the Appellee in this case.[7] Indeed, this Court has routinely applied the rule that documents are construed against the drafter when both side are represented by counsel. *See Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 176 n. 8, 507 S.E.2d 302, 309 n. 8 (1999)(courts apply contract principles to Rule 68 offers of judgment and in so doing, "courts tend to interpret Rule 68 offers against the defendants who drafted them[.]"(citations omitted)). *See also Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 273, 633 S.E.2d 22, 29 (2006)(where some of the lessors were large land companies represented by counsel, this Court nevertheless observed, "[W]e choose to adhere to our traditional rule and construe the language against the lessee."); and Syl. Pt. 1, *Charlton v. Chevrolet Motor Co.*, 115 W. Va. 25, 174 S.E. 570 (1934)("Uncertainties in an intricate and

[7] It is noted that the parties have been to this Court previously in Case No. 34715. On January 29, 2009, this Court granted Appellee's appeal and remanded the matter to the circuit court, consistent with the principles set forth in this Court's opinion in *SER Silver v. Wilkes*, 213 W. Va. 692, 584 S.E.2d 548 (2003), for entry of an order ruling on the petition for appeal. Appellee attaches significance to the fact that on remand, the circuit court concluded that the agreement between her and Appellant as set forth in the divorce decree and the QDROs is "clear and unambiguous." However, to the extent that circuit court's order pertained to the separate and distinct issue of Appellant's motion to modify the calculation date, and not specifically to the issues discussed herein, we find no merit to this argument.

involved contract should be resolved against the party who prepared it.").

Additionally, it is well-settled that ". . . a court speaks only through its orders." *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727, 736 (2000). In West Virginia, it is the QDRO which determines the allocation of retirement benefits. As this Court has noted, "[u]nder the Internal Revenue Code, a QDRO is defined as a domestic relations order '*which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan*.' 26 U.S.C. §414(p)(1)(A)(I)." *Chenault v. Chenault*, 224 W. Va. 141, 145, 680 S.E.2d 386, 390 (2009)(emphasis added). Accordingly, the terms of the QDRO must control in this case. To the extent that the circuit court's order is contrary to the language of the QDRO, we accordingly reverse the same.[8]

For the foregoing reasons[9], we reverse the February 25, 2010, order of the Circuit Court of Kanawha County and remand this matter to the circuit court for further action consistent with this Order.

Reversed and remanded.

ISSUED: May 16, 2011

CONCURRED IN BY:
Justice Menis E. Ketchum
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISQUALIFIED:
Chief Justice Workman and Justice Davis not participating.

Judge Groh and Judge Cummings sitting by temporary assignment.

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[8] In fact, the family court judge acknowledged at the hearing that the QDRO does not provide what Appellee is seeking: "THE COURT: And apparently that QUADRO [sic] did not set out that he was mandatorily required to name this Mrs. King as his survivor beneficiary, did it? THE WITNESS: No, it didn't. The witness was Anne Lambright, Executive Director of the Retirement Board.

[9] Because we reverse the circuit court order on the grounds specified above, it is not necessary for this Court to address the remaining assignments of error presented by Appellants.