IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

ARTHUR WELLING LAGRONE,

Plaintiff-Appellee,

Vs.

Williamson Chancery
No. 21892-R1
C.A. No. 01A01-9603-CH-00125

SALLI EULALIA LAGRONE,

Defendant-Appellant.

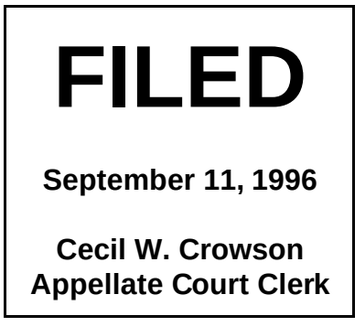
FROM THE WILLIAMSON COUNTY CHANCERY COURT
THE HONORABLE HENRY DENMARK BELL, CHANCELLOR

Herbert R. Rich of Nashville
For Appellee

Carol L. McCoy of Nashville
For Appellant

VACATED AND REMANDED

Opinion filed:



W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

BEN H. CANTRELL, JUDGE

This appeal involves a dispute concerning the provisions of a Marital Dissolution Agreement incorporated in a divorce decree and a Qualified Domestic Relations Order entered pursuant thereto.

Appellant, Salli Eulalia LaGrone (Wife), and appellee, Arthur Welling LaGrone (Husband), were divorced by final decree entered February 1, 1994, which incorporated a Marital Dissolution Agreement (MDA). The dispute in this case arises from that part of the decree that awards Wife a share of Husband's 401(k) plan. The decree provides in pertinent part:

> The parties agree that Mrs. LaGrone shall receive as her sole and separate property, free and clear of any claim of Mr. LaGrone, the sum of One Hundred Eighty Three Thousand Nine Hundred Fifty Dollars ($183,950.00) from the J.C. Bradford & Co. 401(k) plan in Mr. LaGrone's name. These monies shall be transferred into Mrs. LaGrone's name pursuant to the terms of a Qualified Domestic Relations Order. The transfer shall occur within thirty (30) days after the closing of the sale of the Old Natchez Trace property pursuant to paragraph 9, above, and $170,508.00 of the proceeds resulting from the sale has been paid to the 401(k) Plan in exchange for the transfer of the 15 acres to the ultimate purchaser. Further, the parties agree that the $183,950.00 to be transferred to Mrs. LaGrone shall be increased by 38% of any increase in value of the Plan between November 5, 1993, and the date of transfer to Mrs. LaGrone which is attributable to an increase in value resulting from appreciation of the Woodland partnership investment, periodic payments by Mr. LaGrone on the loans from the Plan to him, or an increase in the value of the bond. Similarly, should the value of the Plan decline between November 5, 1993 and the date of transfer to Mrs. LaGrone, the $183,950.00 to be transferred to Mrs. LaGrone pursuant to the Qualified Domestic Relations Order shall be decreased by 38% of the decline attributable to the Woodland investment, or a decline in the value of the bond.

In order to comply with the anti-alienation provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1001 - 1461 (1985 & Supp. 1996), the decree provided for the transfer of Wife's interest in Husband's 401(k) plan by a Qualified Domestic Relations Order (QDRO).

The sale of the "Old Natchez Trace property" occurred on March 17, 1995, and the above referred to $170,508.00 was paid into the 401(k) plan. On June 23, 1995, the trial court entered a QDRO which provides in pertinent part:

> Mrs. LaGrone is hereby awarded as of April 17, 1995,[the date thirty days after the sale of the marital home and adjoining acreage] as her sole and separate property, one hundred eighty-three thousand nine hundred and fifty dollars ($183,950) of the account balance of Mr. LaGrone under the Plan plus Mrs. LaGrone's pro rata share, if any, of the unallocated income or losses since April 17, 1995.

On June 26, 1995, the QDRO was mailed to the 401(k) plan administrator, J. C. Bradford

and Company. Rodney Brewer, a plan committee member at J.C. Bradford involved in the administration of the 401(k) plan, was confused by the language of the QDRO which awarded Wife a pro rata share of the unallocated income or losses in the plan, and he contacted the drafter of the QDRO to inquire as to the meaning of the language.[1] Mr. Brewer was informed by the drafter of the QDRO that the phrase meant "interest," and that he (Brewer) should distribute to Wife the $183,950.00 required by the QDRO and interest on this sum since April 17, 1995. On August 4, 1995, the plan administrator transferred to Wife $183,950.00 and interest on this sum from April 17, 1995, to August 4, 1995.

On August 11, 1995, Wife filed a motion requesting the trial court to modify the QDRO to reflect the agreement of the parties incorporated in the Final Decree. The trial court held a hearing on the motion on September 16, 1995, and by order entered November 15, 1995, the trial court denied Wife's motion. Wife appeals the trial court's order denying her motion to amend the QDRO, and she presents two issues for our review:

> 1. [Whether] the trial court erred by refusing to amend the QDRO to conform to the terms of the final divorce decree.
>
> 2. [Whether] the trial court erred by awarding the wife interest on her share of the 401(k) plan, when the divorce decree and the QDRO gave her a pro rata share of the plan's actual appreciation in value.

Wife contends that the QDRO impermissibly differed from the Final Decree by awarding her a pro rata share of the appreciation in the entire 401(k) plan balance, rather than a share of the appreciation in specific plan assets. Wife asserts that the share of the 401(k) interest conveyed to her by the QDRO is substantially less than the share conveyed by the final decree, because "the specific assets stated in the Final Decree have appreciated in a much greater amount than the plan as a whole . . . ." Wife further contends that she is entitled to 38% of the appreciation of the specific assets listed in MDA, and that the specific assets should be valued as of the date she physically received her portion of the funds rather than April 17, 1995.

Husband argues that April 17, 1995 was the valuation date of the Wife's share of the plan, and that she is only entitled to $183,950.00 plus interest on this sum from April 17, 1995.

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[1]The drafter of the QDRO was an attorney hired by Husband.

Judgments are to be construed like other written instruments, and the determinative factor is the intention of the court as gathered from all parts of the judgment. ***Branch v. Branch***, 35 Tenn. App. 552, 249 S.W.2d 581 (1952). Such construction should be given to a judgment as will give force and effect to every word of it, if possible, and make its several parts consistent, effective, and reasonable. ***Branch***, 249 S.W.2d at 583. A decree must be construed in light of the pleadings, particularly the prayer of the bill and the apparent purposes in the minds of the draftsman and the court. ***Hale v. Hale***, 838 S.W.2d 206 (Tenn. App. 1992). The general rules of evidence regarding the admission of parol evidence in the construction of written instruments also apply to the admission of parol evidence in the construction of a divorce decree. ***Id***. The test as to the application of the parol evidence rule is whether the testimony as to oral agreements or negotiations varies or contradicts the instrument in question or merely explains it. ***Id***.

After reviewing the Final Decree and the QDRO, it appears that the QDRO does not comport with the decree. The decree provides that Wife is to receive $183,950.00 and "38% of any increase in value of the Plan between November 5, 1993, and the date of transfer to Mrs. LaGrone which is attributable to an increase in value resulting from appreciation of the Woodland partnership investment, periodic payments by Mr. LaGrone on the loans from the Plan to him, or an increase in the value of the bond." The decree also provides the "transfer shall occur within thirty (30) days after the closing of the sale of the Old Natchez Trace Property . . . ." The QDRO, on the other hand, provides Wife with the "one hundred eighty-three thousand nine hundred and fifty dollars ($183,950) of the account balance of Mr. LaGrone under the Plan plus Mrs. LaGrone's pro rata share, if any, of the unallocated income or losses since April 17, 1995."

The decree provides that Wife is entitled to 38% of any increase in value of the plan attributable to increase in value of three specific plan assets from November 5, 1993, to the "date of transfer to Mrs. LaGrone." The decree also provides that "these monies shall be transferred into Mrs. LaGrone's name pursuant to the terms of a Qualified Domestic Relations Order" and that "the transfer shall occur within thirty (30) days after the closing" of the sale of the Old Natchez Trace property.

Wife asserts that since the transfer to her did not occur until August 4, 1995, she is

entitled to a calculation of the increase as provided in the decree for the period of time from November, 1993, to August, 1995. Husband asserts, however, that the date of transfer is mandated by the decree as the date thirty days subsequent to the sale of the Old Natchez Trace property, and that calculations are to be made as of that time.

Since the decree provided that the transfer should be "within" thirty days rather than mandating a specific time of thirty days after the closing of the sale, it appears that the intent of the decree is that the "date of transfer" means the actual date the transfer takes effect. Wife is, therefore, entitled to her part of the increase in the plan attributable to the three specific assets from November 5, 1993, to August 4, 1995. Under the terms of the decree, it should be determined whether there was an increase in the plan, and, if so, the part attributable to the increase in value of the three specific assets. Then, 38% of that amount would be allocated to Wife. These determinations should be made by the parties and the court prior to the entry of a QDRO. The purpose of the QDRO is to allow Wife to reach the Husband's interest in the 401(k) plan as allowed by the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001 - 1461 (1985 & Supp. 1996). The QDRO in the case before us does not conform to the provisions of the Final Decree of divorce which had become final long before the QDRO was entered. The provisions of this QDRO would, in effect, modify a property division which is not modifiable once the divorce decree becomes final. ***Vanatta v. Vanatta***, 701 S.W.2d 824, 827 (Tenn. App. 1985).

Accordingly, the Qualified Domestic Relations Order is vacated. This case is remanded to the trial court for a determination of the value of Wife's share of 401(k) plan as provided for in the Final Decree as of August 4, 1995. Upon making this determination, the Qualified Domestic Relations Order shall be entered ordering the transfer to Wife of her established share in the plan. Costs of the appeal are assessed against appellee.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

BEN H. CANTRELL, JUDGE