IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

December 10, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

PAUL T. MARQUESS	)	ROANE COUNTY
	)	03A01-9707-GS-00260
Petitioner-Appellant	)	
	)	
	)	
v.	)	HON. THOMAS A. AUSTIN,
	)	JUDGE
	)	
CHARLENE JOAN PARENT MARQUESS	)	
	)	
Respondent-Appellee	)	AFFIRMED AND REMANDED

STEVEN D. BROWN OF DAYTON FOR APPELLANT

PATRICIA D. MURPHY OF HARRIMAN FOR APPELLEE

OPINION

Goddard, P.J.

Paul T. Marquess appeals the General Sessions Court of Roane County's refusal to modify the parties' marital dissolution agreement. The only issue raised on appeal, which we restate, is whether the Court below erred in finding that the division of prospective retirement income, adjusted for cost of living increases, represented a non-modifiable division of property, rather than alimony subject to modification upon a material change in circumstances.

Mr. Marquess and Charlene Joan Parent Marquess Notz (hereinafter referred to as Ms. Marquess) married on January 26, 1961. The parties divorced on May 14, 1994, pursuant to a final decree which incorporated the marital dissolution agreement. Paragraph 1 of the marital dissolution agreement provided that Mr. Marquess would pay Ms. Marquess $1443 biweekly as permanent alimony. However, these "permanent" alimony payments were to cease upon Mr. Marquess' retirement or death. Mr. Marquess also agreed to pay Ms. Marquess' health care insurance premiums in addition to the permanent alimony payments.

Paragraph 3 of the marital dissolution agreement provides that upon Mr. Marquess' retirement, Ms. Marquess would receive 50 percent of Mr. Marquess' monthly annuity retirement benefits under the Civil Service Retirement System. Ms. Marquess' entitlement to the monthly annuity payments is based on the gross annuity earned as of June 1, 1994, the first month after the final decree of divorce was entered. The monthly annuity payments are adjusted upward for cost of living increases after June 1, 1994, and are reduced by $157 per month to provide for partial payment of several insurance premiums. All monthly payments are paid directly to Ms. Marquess by the United States Office of Personnel Management.[1]

Mr. Marquess worked for the United States Government for over 30 years. During the entirety of the marriage, Ms.

[1] The marital dissolution agreement also provides the method to divide the annuity upon Mr. Marquess' death. These provisions require no discussion since they are beyond the scope of this opinion and have not been called into question by Mr. Marquess.

Marquess was a homemaker and had no independent source of income or potential to save for retirement other than through her husband's retirement annuity provided by the Government. Mr. Marquess retired from employment with the United States Government on March 30, 1996. Both parties have received their monthly annuity payments subsequent to Mr. Marquess' retirement. Ms. Marquess listed on her 1996 tax returns $11,000 received prior to Mr. Marquess' retirement as alimony and $20,000 received from the Office of Personnel Management as pension or annuity payments.

Both parties have remarried since the divorce. Mr. Marquess filed a petition to modify the marital dissolution agreement on August 12, 1996. The basis of the petition was that the monthly annuity payment was alimony in futuro subject to modification upon a showing of a material change in circumstances. Mr. Marquess alleged that the material change in circumstances was that Ms. Marquess remarried. Thus, she no longer needed the spousal support provided through the monthly annuity payments.

The General Sessions Court heard arguments on the petition to modify on April 17, 1997. The Court dismissed the petition after finding that the division of the monthly annuity payments from Mr. Marquess' retirement income, as set out in paragraph 3 of the marital dissolution agreement, was a non-modifiable division of marital property rather than alimony

subject to modification. The Court stated that only the first paragraph of the marital dissolution agreement dealt with alimony while the remainder of the agreement dealt with the division of the marital property. For the following reasons, we affirm the Trial Court's holding.

The only issue raised, as previously noted, is whether the Court below erred in finding that the division of prospective retirement income represented a non-modifiable division of property, rather than alimony subject to modification upon a change in circumstances.

We begin our analysis by noting that pension rights provide post-retirement financial security in many marriages. These rights are frequently the most valuable assets in many marital estates. Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn. App. 1994).

Both vested and non-vested[2] retirement benefit pension rights which accrue during marriage are marital property subject to equitable distribution in divorce cases under T.C.A. 36-4-121. Cohen v. Cohen, 937 S.W.2d 823 (Tenn. 1996); Kendrick, supra. Therefore, the pension rights at issue in this case, whether vested or non-vested, are marital property. Since both vested

[2] Pension rights become vested when an employee completes the time of employment required to receive the pension upon retirement age. Kendrick, supra. Thus, the pension remains non-vested until the employee has completed the time of employment required.

and non-vested pension rights are marital property, our analysis of this appeal does not rely on the status of the pension rights.

Courts cannot modify divisions of marital property after the divorce, but may modify alimony upon a showing of changed circumstances. Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). Thus, the determinative inquiry in this case is whether paragraph 3 of the marital dissolution agreement was a division of marital property or alimony. This issue can only be resolved by examining the language of the provision and the circumstances regarding the execution of the provision. Towner, supra. Courts must construe divorce decrees incorporating property settlements as they would any other written instrument. Hale v. Hale, 838 S.W.2d 206 (Tenn. App. 1992). The words of a contract expressing parties' intent should be given their "usual, natural and ordinary meaning." Taylor v. White Stores, Inc., 707 S.W.2d 514 (Tenn. App. 1985). Also, when interpreting contracts, courts must ascertain the parties' intent and give effect to that intent, consistent with legal principles. Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc., 521 S.W.2d 578 (Tenn. 1975).

We must first examine the structure and terms of the marital dissolution agreement. "Alimony" is only discussed or referred to in paragraph 1 of the agreement. Paragraph 3 of the agreement, which includes the allocation of the retirement benefits, never mentions the word alimony nor implies that these

benefits are alimony. The remainder of the marital dissolution agreement divides the parties' marital property. The relevant portion of paragraph 3 states that:

> At the retirement of [Mr. Marquess] with [Mr. Marquess] eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government, [Ms. Marquess] shall be *entitled* to fifty percent (50%) of [Mr. Marquess'] gross monthly annuity earned as of June 1, 1994, under the Civil Service Retirement System. . . . This 50% *entitlement* is to be reduced by $157 per month to provide for all the insurance premiums responsibility in paragraph 2. (Emphasis added.)

"Entitle" is a legal term of art. The Tennessee Supreme Court stated that to "'entitle to' is to give a right to." Fitts v. Terminal Warehousing Corp., 170 Tenn. 198, 93 S.W.2d 1265 (Tenn. 1936). Thus, upon Mr. Marquess' retirement, Ms. Marquess received a right to 50 percent of Mr. Marquess' retirement benefits. This award is a right to marital property. Thus, paragraph 3 grants Ms. Marquess a property right in Mr. Marquess' retirement benefits. The language of grant in paragraph 3 does not appear to be even closely related to alimony, but does appear to be a division of marital property. Thus, based on the language and structure of the marital dissolution agreement, paragraph 3 appears to be a division of marital property and not an award of alimony.

Ms. Marquess' actions also show her understanding that her monthly payment of retirement benefits is her share of the marital property and not alimony. As previously noted, Ms.

Marquess reported on her 1996 tax forms that she received $11,000 as alimony and $20,000 as pension/annuity benefits.[3] These income tax forms evidence Ms. Marquess' understanding that the payments she received from the pension benefits were not alimony, but her share of the marital property.

Courts often divide marital property retirement benefits by awarding a spouse periodic payments directly from the pension fund. Cohen, supra; Towner, supra; Kendrick, supra. In Towner, the Tennessee Supreme Court held that an agreement in the "alimony" section of the property dissolution agreement was actually a non-modifiable division of marital property. The provision in question stated that the wife would receive $387.30 per month of "spousal support/alimony" in consideration of the wife waiving all rights to the husband's retirement benefits. These payments were to continue for the lifetime of the husband. The Towner Court stated that the definition of marital property subject to division, located at T.C.A. 36-4-121(b)(1)(B), contemplates the distribution of property rights in the form of periodic payments. Further, the Court found that the payments that Ms. Towner received were a distribution of a portion of Mr. Towner's retirement benefits. Therefore, the agreement in Towner was held to be a division of marital property rather than alimony.

---

[3] The $11,000 represents the money paid to Ms. Marquess before Mr. Marquess retired on March 30, 1996. The $20,000 noted as pension/annuity benefits constitutes the payments received from the Office of Personnel Management after Mr. Marquess' retirement.

The present case is similar to Towner in many respects. However, the Marquess' marital dissolution agreement nowhere states that the agreement was spousal support or alimony. The Marquess' agreement did contain language that grants a right in property through the use of "entitle." Ms. Marquess also did not agree to forego all rights to Mr. Marquess' retirement benefits in return for the monthly payments. The present case appears more like a division of marital property than the agreement in Towner. This conclusion further supports our determination that the agreement in question is a non-modifiable division of marital property rather than alimony.

Further, it appears from the record that the parties entered into the marital dissolution agreement freely, in good faith, and without coercion or duress. We note that Mr. Marquess drafted the initial agreement without the aid of counsel. He then sent the draft to Ms. Marquess' counsel for further revisions. Ms. Marquess' counsel then prepared the final draft of the agreement. Mr. Marquess worked with Ms. Marquess' counsel in drafting the agreement knowing that counsel represented Ms. Marquess' interests and not his. Mr. Marquess could have retained counsel to represent him at any time during the negotiation and preparation of the agreement, but failed to do so.

Although the amounts of the pre-retirement alimony and the award of the pension benefits are largely equivalent,[4] this fact does not convince the Court that the award of the pension benefits constitutes alimony. The fact that the monthly payments from the retirement benefits are adjusted for cost of living purposes also does not convince this Court that the monthly payments are alimony.

As the Trial Court noted, the split of marital property appears uneven. However, marital property divisions must be equitable, but do not have to be equal. Kendrick, supra. We believe that the marital dissolution agreement's award of 50 percent of the retirement benefits to Ms. Marquess was an equitable agreement in light of Ms. Marquess having no other source of income to rely upon for support through her retirement years.

To reiterate, we hold that the award of 50 percent of Mr. Marquess' retirement benefits, set out in paragraph 3 of the marital dissolution agreement, to Ms. Marquess is a division of marital property and thus not subject to modification.

For the foregoing reasons, we affirm the judgment of the Trial Court and remand the cause for such further proceedings

---

[4] Ms. Marquess received $2886 per month in alimony before Mr. Marquess retired. It was estimated that she would receive $2542 per month in retirement benefits after Mr. Marquess' retirement.

as may be necessary and collection of costs below. Costs of appeal are adjudged against Mr. Marquess and his surety.

_____
Houston M. Goddard, P.J.

CONCUR:

_____
Herschel P. Franks, J.

_____
William H. Inman, Sr. J.