

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA 09-111

PAMELA D. EVANS

APPELLANT

V.

JIMMY EVANS

APPELLEE

Opinion Delivered SEPTEMBER 30, 2009

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT,
[NO. DR-03-340]

HONORABLE BARBARA ELMORE,
JUDGE

REVERSED AND REMANDED

JOHN B. ROBBINS, Judge

Appellant Pamela D. Evans and appellee Jimmy Evans were married on June 20, 1981, and divorced on May 6, 2004. The parties' property settlement agreement, which was incorporated into the divorce decree, contained provisions for dividing Mr. Evans's retirement benefits. The trial court entered a Qualified Domestic Relations Order (QDRO) setting forth those provisions on June 17, 2004.

The controversy in this case began on March 14, 2008, when Mr. Evans filed a motion to determine retirement benefits. Mr. Evans, a Little Rock Police Officer, asserted in his motion that the City of Little Rock had erroneously construed the parties' property settlement agreement. Specifically, Mr. Evans contended that Ms. Evans was continuing to receive one-half of his deposits into his Deferred Retirement Option Plan (DROP), contrary

to their agreement that her interest in his retirement pay was limited to only that which accrued through the date of divorce.

After a hearing on Mr. Evans's motion, the trial court entered an order in his favor. The trial court ruled that, based on a review of the parties' property settlement agreement, it was clear that Ms. Evans's entitlement to Mr. Evans's monthly retirement benefits accrued only through the date of divorce. Thus, the trial court found that Ms. Evans was not entitled to any benefits acquired by Mr. Evans after May 26, 2004.

Ms. Evans now appeals, arguing that the trial court erred in modifying the parties' property settlement agreement. She further contends that the trial court erred in ignoring the plain terms of the property settlement agreement that gave her one-half of Mr. Evans's retirement benefits up to the last date of his employment. Because of these errors, Ms. Evans asserts that this case should be reversed and remanded for an award of retirement benefits that continued to accrue after the parties' divorce. We agree with Ms. Evans's second argument, and we reverse and remand.

The parties' property settlement agreement provides, in relevant part:

RETIREMENT ACCOUNTS AND FUNDS

(a) Husband shall waive any interest that he may have in any retirement pensions or accounts of Wife.

(b) Wife shall receive 50% of Husband's regular monthly retirement benefit accrued as of the date that a final decree of divorce is entered of record, the same being paid throughout the life of the Husband.

(c) Upon receipt by the City of Little Rock Policeman's Pension and Relief Fund (hereinafter "the Fund") of a Qualified Domestic Relations Order substantially setting out the terms of this paragraph, the Fund shall take 50% of the Husband's

DROP account as of the date that final decree of divorce is entered of record and set it aside for the sole benefit of and as the property of the Wife, the same to draw interest pursuant to the provisions of Ark. Code Ann. § 24-11-434(e)(2)(A) & (B) and the same being subject to distribution under the terms and conditions of the Fund's applicable DROP Rules and Regulations at the conclusion of the Husband's participation in the Deferred Retirement Option Plan. The Wife's share of Husband's regular monthly retirement benefit set forth in the preceding paragraph shall be paid into the Wife's DROP account until such time as distribution is allowed at the conclusion of the Husband's participation in the Deferred Retirement Option Plan.

(d) If the Husband is not yet retired or has not yet applied for DROP upon the effective date of the Qualified Domestic Relations Order, referenced above, the Fund shall begin regular monthly benefit payments to the Wife upon the earlier of the following two events:

- (1) when the Husband retires or applies for DROP; or
- (2) when he ceases employment in a covered position and requests a refund of contributions.

(e) If the Husband is retired or is participating in the DROP upon the effective date of said Qualified Domestic Relations Order, the Fund shall begin regular monthly benefit payments to the Wife as soon as the Fund's rules permit.

(f) The Wife shall receive the monthly benefit payments set forth in subparagraphs (a) and (b) of this section, throughout the life of the Husband, the same to cease upon his death.

It is undisputed that this agreement, the decree of divorce and the QDRO awarded Ms. Evans 50% of Mr. Evans's retirement benefits vested as of the date of divorce, May 6, 2004. Although she owned 50% of Mr. Evans's retirement benefits, Mr. Evans controlled when she could actually receive them, because she would not become entitled to receive them until Mr. Evans retired. As an incident of Mr. Evans's involvement in the City of Little Rock Policeman's Pension and Relief Fund, he could participate in a Deferred Retirement Option Plan. This DROP plan is a program for police officers with twenty years of service who are eligible to receive a service retirement pension. In lieu of terminating employment and receiving retirement benefits each month, the program permits such officers to elect to

do both, i.e., keep working *and* receive regular monthly retirement disbursements. However, these monthly retirement benefits are not paid directly to the officer, but are deposited into an interest-bearing DROP account. Ark. Code Ann. § 24-11-434 (Supp. 2009). He cannot access these funds until he actually retires. Ark. Code Ann. § 24-11-434(f)(1) (Supp. 2009).

Mr. Evans testified at the hearing that he has been a Little Rock Police Officer since 1979. He stated that, in executing the parties' property settlement agreement, he intended to give Ms. Evans one-half of the retirement benefits that he accumulated through the date of divorce. Mr. Evans testified that it was his understanding that, contrary to the agreement, the Retirement and Pension Board of the Little Rock Police have continued to deposit one-half of his retirement contributions into Ms. Evans's account.

Kathy Lindsey, a pension technician for the Little Rock police pension fund, testified about the parties' property settlement agreement as it pertains to Mr. Evans's retirement benefits. Ms. Lindsey indicated that as Mr. Evans continued to work after the parties' divorce, one-half of his retirement benefits were paid into his DROP account and one-half into Ms. Evans's DROP account. Ms. Lindsey stated that this result was based on the rules and regulations.

On appeal from the order limiting her share of the retirement benefits to those that accrued only through the divorce, Ms. Evans first argues that the trial court erroneously modified the parties' property settlement agreement. She relies on *Rockefeller v. Rockefeller*, 335 Ark. 145, 980 S.W.2d 255 (1998), where the supreme court held that a court has no

authority to modify an independent contract that is made part of a divorce decree. Rule 60(a) of the Arkansas Rules of Criminal Procedure permits modification of a decree within ninety days to correct errors or mistakes, but Ms. Evans notes that more than four years elapsed between entry of the divorce decree and the order now being appealed. And while Rule 60(c) sets out limited exceptions whereby an order may be set aside after ninety days, Ms. Evans asserts that none are applicable here.

We agree that the trial court had no authority to modify the parties' property settlement agreement. However, it is clear from the record that the trial court did not modify the agreement as Ms. Evans now contends. The trial court did not change any of the provisions in the agreement, but instead interpreted its meaning, which it was required to do under these circumstances. That brings us to Ms. Evans's next argument, which is that the trial court erred in its interpretation of the terms of the agreement.

The trial court has the power to construe, clarify, and enforce the parties' settlement agreement. *Surratt v. Surratt*, 85 Ark. App. 267, 148 S.W.3d 761 (2004). When a contract is unambiguous, its construction is a question of law for the court. *Id.* A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *Id.*

In arguing that the trial court misinterpreted the plain terms of the agreement, Ms. Evans relies on language in section (c) of the agreement that "[t]he Wife's share of Husband's regular monthly retirement benefit set forth in the preceding paragraph shall be

paid into the Wife's DROP account until such time as distribution is allowed at the conclusion of the Husband's participation in the Deferred Retirement Option Plan." We agree that the trial court erred in limiting Ms. Evans's interest in the Deferred Retirement Option Plan to only those contributions made as of the date of the parties' divorce.

Section (b) of the property settlement agreement provides that Ms. Evans is to receive fifty percent of the regular monthly retirement benefit accrued as of the date of divorce, paid throughout the life of Mr. Evans. Section (c) of the agreement clarifies that this pertains not only to regular retirement benefits after Mr. Evans retires but also to the monthly deposits to the DROP account. Section (c) first provides that fifty percent of Mr. Evans's DROP account as of the date of divorce is to be set aside for Ms. Evans and draw interest under the applicable rules. As Ms. Evans now contends, it is the next provision in section (c) that controls the outcome of this case: "The Wife's share of Husband's regular monthly retirement benefit set forth in the preceding paragraph shall be paid into the Wife's DROP account until such time as distribution is allowed at the conclusion of the Husband's participation in the Deferred Retirement Option Plan." We hold that this provision unambiguously means that Ms. Evans continues to receive one-half of the DROP deposits that accumulate throughout Mr. Evans's employment, to be distributed at the conclusion of Mr. Evans's participation in the DROP program.

The parties' agreement is consistent with the statutory scheme of the Deferred Retirement Option Plan. Had Mr. Evans elected to retire at the time of divorce, Ms. Evans

would have been entitled to begin receiving her share of the monthly retirement benefits, which are marital property. But because Mr. Evans continued to work, his retirement benefits instead were paid into a DROP account receivable as a lump-sum upon his retirement. The retirement benefits placed into the DROP account are marital property as these benefits were earned by Mr. Evans during the parties' marriage. This is true even for the contributions made after the parties' divorce. Enforcement of the property settlement agreement results in an even split of all of the DROP contributions throughout Mr. Evans's employment, including those made after the divorce. We reverse and remand for entry of an order consistent with this opinion.

Reversed and remanded.

MARSHALL and BAKER, JJ., agree.