Opinion filed June 30, 2020

In The

Eleventh Court of Appeals

No. 11-18-00139-CV

R.W. GATES, Appellant

V.

JANA BETH GATES, Appellee

On Appeal from the 1st Multicounty Court at Law
Nolan County, Texas
Trial Court Cause No. CC-3914

M E M O R A N D U M   O P I N I O N

Appellant, R.W. Gates, appeals from an "Order on Motion for Clarification and Enforcement of Agreed Final Decree of Divorce" granted in favor of Appellee, Jana Beth Gates. Appellant also complains about a Domestic Relations Order (DRO) that is based on the clarifying order. We affirm.

Background Facts

Appellant and Appellee appeared with their respective counsel for an agreed divorce prove-up hearing on July 7, 2000. The trial court entered an agreed final decree of divorce on August 14, 2000. In the agreed divorce decree, the trial court made the following award to Appellee:

> Property to Wife.
>
> . . . .
>
> W-7. All right, title and interest in and to the monthly amount determined under the formula set forth below of the United States Navy disposable retired pay to be paid as a result of [Appellant's] service in the United States Navy, and 50 percent of all increases in the United States Navy disposable retired pay due to cost of living or other reasons, if, as, and when received.

Despite this provision's reference to "the formula set forth below," the agreed divorce decree did not contain a provision awarding Appellee a specific portion of Appellant's military retirement. Appellee asserts that this omission rendered the agreed divorce decree ambiguous and that it was proper for the trial court to correct the omission with a clarifying order. Appellant asserts that the omission does not render the decree ambiguous. He asserts that, since the agreed divorce decree did not award any portion of his military retirement to Appellee, it awarded all of his military retirement to him under the following provision:

> Property to Husband.
>
> . . . .
>
> H-6. All right, title, and interest in and to that portion of the United States Navy disposable retired pay to be paid as a result of [Appellant's] service in the United States Navy not awarded to [Appellee].

Appellant retired from the military in October 2015 and began receiving military retirement benefits. Appellee subsequently contacted the Defense Finance and Accounting Service (DFAS) to obtain her share of Appellant's military

retirement. DFAS advised Appellee that it was unable to pay her a portion of Appellant's military retirement because the agreed divorce decree omitted the formula awarding her a portion of Appellant's military retirement.

Appellee subsequently filed a motion for clarification and enforcement of the agreed divorce decree. She sought in the motion to correct the omission of the formula awarding her a portion of Appellant's military retirement that she alleged the parties agreed to at the time of their divorce. The trial court determined that the agreed final decree of divorce was ambiguous because it was not clear what percentage of Appellant's military retirement was to be paid to Appellee.

The trial court subsequently conducted an evidentiary hearing to receive parol evidence concerning the parties' intent with respect to the agreed divorce decree's treatment of Appellant's military retirement. In this regard, a reporter's record from the prove-up hearing could not be found. Appellee testified that the parties agreed to split Appellant's military retirement "50/50." She also testified about an e-mail that she received from Appellant after he was served with the motion to clarify. In the e-mail, Appellant stated in part: "Just because the court gave you half my retirement, didn't mean the Navy was gonna agree."

Appellant testified at the evidentiary hearing that it was his understanding at the time of the prove-up hearing that he and Appellee were going to divide his military retirement 50/50 for the time that he and Appellee were married while he was in the military. He also answered as follows to questions from Appellee's attorney:

> Q. So there was never a question in your mind either that she was to be getting a portion of your military retirement?
>
> A. That's correct.

> Q. And it was your understanding that that was 50 percent of the time you were in the military while you were married, not before and not after?
>
> A. That's correct.

The trial court granted Appellee's requested relief by entering a clarifying order. The order contains the following finding: "The Court finds that certain terms of the prior order of the Court are ambiguous in regard to the shares of military retirement pay that the final decree was intended to award each party and that the prior order should be clarified as ordered below." The court then clarified the agreed final decree of divorce by specifying that Appellee is to receive fifty percent of Appellant's military retirement benefits that were earned during the marriage of the parties. The trial court also entered a DRO that awarded Appellee 34.62% of Appellant's military retirement based upon a calculation of the number of months that Appellant served in the military during his marriage to Appellee.

Analysis

In his first issue, Appellant asserts that the clarifying order is improper because it modifies the division of property in the agreed divorce decree. He contends that the trial court misinterpreted the agreed divorce decree by finding that it contained an ambiguity. Appellant acknowledges that the award of a percentage of his military retirement "was simply left out" and that "[i]t's clear that there was an obvious drafting mistake made by the lawyers for both parties." He contends that the proper remedy would have been for Appellee to have pursued a timely direct appeal from the agreed divorce decree rather than filing a motion to clarify several years later.

"We review the trial court's ruling on a post-divorce motion for enforcement or clarification of a divorce decree for an abuse of discretion." *Beshears v. Beshears*, 423 S.W.3d 493, 499 (Tex. App.—Dallas 2014, no pet.); *see Gainous v. Gainous*,

219 S.W.3d 97, 103 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (op. on reh'g). A trial court abuses its discretion when it acts arbitrarily or unreasonably or without any reference to guiding rules and principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam).

A trial court that renders a divorce decree generally retains the power to enforce or clarify the property division made or approved in the decree. TEX. FAM. CODE ANN. §§ 9.002, .006(a) (West Supp. 2019), § 9.008 (West 2006). The trial court may enter a clarifying order to enforce compliance with the original division of the property. *Id.* § 9.008(b). However, after its plenary power expires, a court may not alter, amend, or modify the substantive division of property in the decree. *Id.* § 9.007(a), (b). Thus, an order that amends, modifies, alters, or changes the actual, substantive division of property made or approved in a final decree of divorce is beyond the jurisdiction of the trial court and is void. *Id.* § 9.007(b); *DeGroot v. DeGroot*, 260 S.W.3d 658, 663 (Tex. App.—Dallas 2008, no pet.).

An agreed property division, although incorporated into a final divorce decree, is treated as a contract, and it is controlled by the rules of construction applicable to ordinary contracts, not by the law of judgments. *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986); *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984); *Gills v. Harris*, No. 11-15-00018-CV, 2017 WL 469407, at *1 (Tex. App.—Eastland Feb. 2, 2017, no pet.) (mem. op.); *Beshears*, 423 S.W.3d at 500. If a contract is unambiguous, the courts will give effect to the intention of the parties as expressed in the agreement. *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968). If an ambiguity exists, however, contract law provides that the property settlement agreement may be reformed to correct the mutual mistake of the parties or to reflect the true intent of the parties. *Allen*, 717 S.W.2d at 313. We held in *Gills* that a clarification proceeding may be used to

reform a property settlement agreement contained in an agreed decree of divorce to correct a mutual mistake. 2017 WL 469407, at *2.

"In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). A contract is ambiguous if its meaning is uncertain or it is reasonably susceptible to more than one interpretation. *Id.* The question of whether a divorce decree is ambiguous is a question of law we review de novo. *See id.* at 393–94.

We conclude that the agreed divorce decree is ambiguous as a matter of law because its meaning is uncertain. As noted previously, provision W-7 awards "[a]ll right, title and interest in and to the monthly amount determined under the formula set forth below." However, the agreed divorce decree did not contain a later provision awarding Appellee a specific portion of Appellant's military retirement. The express terms of the agreed divorce decree indicate that the parties intended for the trial court to award some portion of Appellant's military retirement to Appellee because provision W-7 awarded fifty percent of all cost of living increases to Appellee. Additionally, the agreed divorce decree contains a three-page section entitled "Division of Husband's Military Retirement" that contains findings under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, including the date of marriage, the number of months that the parties were married, and the number of months that Appellant served in the military during the marriage. Additionally, Appellant was appointed as a trustee for the benefit of Appellee for her share of his military retirement. These detailed provisions concerning the division of Appellant's military retirement would not have been required had the parties not intended to award a portion of the military retirement to Appellee.

"To be entitled to reformation based on mutual mistake, a party must prove that there has been 'a definite agreement between the parties that has been misstated

in the written memorandum because of a mistake common to both contracting parties.'" *Pearson v. Stewart*, 314 S.W.3d 242, 246 (Tex. App.—Fort Worth 2010, no pet.) (quoting *Pate v. Pate*, 874 S.W.2d 186, 188 (Tex. App.—Houston [14th Dist.] 1994, writ denied)). The evidence offered at the evidentiary hearing established that this occurred—the parties had an agreement for splitting Appellant's military retirement evenly for the community property portion of his military retirement. As a result of a scrivener's error, the amount awarded to Appellee was omitted from the decree. The trial court did not err by correcting this omission by entering the clarifying order. We overrule Appellant's first issue.

In his second issue, Appellant contends that the trial court erred by entering a DRO based upon the clarifying order. He presents two contentions challenging the DRO. First, he asserts that the DRO was improper because the trial court exceeded its authority by entering the clarifying order to correct the parties' omission. This contention is the same as the matter presented in Appellant's first issue, and our disposition of the first issue is also dispositive of it.

Appellant also asserts that the trial court erred in its calculation set out in the DRO that Appellee was entitled to 34.62% of his military retirement. He supports this contention with a document attached to his brief as an appendix that purports to be a statement of his military retirement benefits. He relies on this document to assert that his military retirement was based on a points-earned system rather than a months-served system.

The statement of military retirement does not appear in the appellate record. It is well established that an appellate court may not consider matters outside the record, which includes documents attached to a brief as an exhibit or an appendix that were not before the trial court. *Greystar, LLC v. Adams*, 426 S.W.3d 861, 865 (Tex. App.—Dallas 2014, no pet.); *Robb v. Horizon Cmtys. Improvement Ass'n*, 417 S.W.3d 585, 589 (Tex. App.—El Paso 2013, no pet.). Furthermore, the record does

not reflect that Appellant presented this complaint about the DRO to the trial court. Thus, Appellant has not preserved this complaint for appellate review. *See* TEX. R. APP. P. 33.1. We overrule Appellant's second issue.

This Court's Ruling

We affirm the orders of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

June 30, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

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[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.