IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE THE MARRIAGE OF:	)	No. 62273-1-I
ROBERT MILLER ADAMS,	)	
	)	
Appellant,	)	UNPUBLISHED OPINION
	)	
v.	)	
	)	
MICHELE E. ADAMS,	)	
	)	FILED: July 13, 2009
Respondent.	)	
	)	

Schindler, C.J. — In 1990, the court entered the decree of dissolution of the marriage of R. Miller Adams and Michelle E. Adams.[1] The decree incorporated the terms of the parties' property settlement agreement (PSA), drafted by Miller's attorney. Miller asserts that the superior court erred in interpreting the language of the PSA in determining that Michele was entitled to 25 percent of his retirement and pension benefits that accrued after entry of the decree. For the first time on appeal, Miller also argues that Michele's motion to enforce the PSA was barred by the 10-year statute of limitations. Because Miller did not raise the statute of limitations argument below, we decline to consider that argument for the first time on appeal. Under the plain language of the PSA, we conclude that Michele is entitled to 25 percent of Miller's retirement and pension benefits, including benefits accrued after entry of the decree, and affirm.

[1] For purpose of clarity, we refer to R. Miller Adams and Michele E. Adams by their first names.

R. Miller Adams and Michele E. Adams married on July 11, 1970. The parties separated in January 1991. During the marriage, Michele and Miller had two children and Miller obtained an undergraduate and a law school degree. When the couple separated in 1990, Miller had been employed for five years as an attorney with the law firm Ogden Murphy Wallace, earned approximately $50,000 a year, and contributed to the firm's retirement plan. Michele had not been employed for the previous seven years and was attending school.

An attorney represented Miller in the dissolution proceedings. Michele did not have an attorney. Miller's attorney drafted a property settlement agreement (PSA). The PSA provided for the division of property, allocation of debt, and two years of maintenance for Michele of $296.88 per month.

Sections 3.1.1 and 3.2.1 and Exhibits W-1 and H-1 of the PSA set forth the division of assets. Section 3.1.1 of the PSA states:

> The Wife shall receive free and clear of any and all right, title or interest of the Husband except as otherwise provided herein. All of the assets listed on Exhibit W-1, and hereafter all such assets shall be the sole and separate property of the Wife.

Exhibit W-1 awards Michele all bank accounts in her name, any retirement benefits arising out of her current or future employment, all life insurance policies in her name, a 1984 Volvo, and the furnishings and personal property in her possession.

Section 3.2.1 of the PSA provides:

> The Husband shall receive free and clear of any and all right, title, or interest of the Wife except as otherwise provided herein. All of the assets listed on Exhibit H-1, and hereafter all such assets shall be the sole and separate property of the Husband.

Exhibit H-1 states that Miller is entitled to any and all pension and retirement benefits "arising out of his current or future employment; [p]rovided, however, the Wife shall receive 25% of any employer generated retirement benefits actually received by the Husband."

As part of the PSA, Miller assumed responsibility for the parties' debts, including payment of the outstanding credit card debt and student loans. Section 3.3 of the PSA states that all property acquired after the date of the PSA would be separate property. Miller and Michelle signed the PSA on August 8, 1991.

The next day, on August 9, the court entered "Findings of Fact, Conclusion of Law and Decree for Dissolution of Marriage." Miller's attorney did not prepare a Qualified Domestic Relations Order (QDRO). The decree incorporates by reference the PSA and specifically incorporates by reference Exhibits H-1 and W-1.

> **DISSOLUTION**. The marriage of the parties is dissolved.
>
> **PETITIONER'S PROPERTY**. The following property is the sole and separate property of the Petitioner: all property as stated in Exhibit H-1 attached hereto.
>
> **RESPONDENT'S PROPERTY**. The following property is the sole and separate property of the Respondent: All property as stated in Exhibit W-1 attached hereto.

After the dissolution, Miller continued to work for the law firm. From November 1997 to March 2007 Miller worked for the Boeing Company. Miller transferred his retirement and pension benefits from the law firm to the Boeing Company's retirement plan. Miller currently serves as president and CEO of Sheppard Global, Limited, a venture capital enterprise. According to Miller, Sheppard Global does not have a

retirement or pension plan.

On September 25, 2007, Michele's attorney sent Miller a letter seeking to obtain information about his pension and retirement benefits in order to prepare QDRO orders to enforce the terms of the PSA awarding Michele 25 percent in Miller's pension and retirement benefits. In response, Miller stated that any retirement benefits he earned while working at the law firm were "rolled over to the Boeing plan" and he was not currently receiving any retirement benefits from Boeing. Miller agreed that "Michele is entitled to 25% of the balance that was rolled over to the Boeing plan . . . (plus investment earnings thereon)," but he took the position that "she is not entitled to any of my remaining benefits under the Boeing plan since those benefits were earned after our divorce." Although Miller said that he would send documentation showing the current value of the amount that was rolled over from the law firm to the Boeing plan to prepare the QDRO, he did not do so.

On May 23, 2008, Michele filed a motion to enforce the PSA and entry of the QDROs. Michele asked the court to determine that under the terms of the PSA, she was entitled to "25% of any employer generated retirement benefits actually received by the Husband, whether received before or after the date of the parties' August 9, 1991 Property Settlement Agreement." Michele argued that based on the plain language of Exhibit H-1 to the PSA, she was entitled to 25 percent of Miller's retirement benefits. Michele explained that she accepted 25 percent of the retirement benefits based on her understanding that she would receive future benefits, "Otherwise, I would have negotiated for at least 50% of these benefits, and probably more, given the extreme

disparity in our incomes at the time." Michele also asked the court to order Miller to disclose all the information necessary to draft a QDRO in conformity with the PSA and to authorize Michele to "issue subpoenas to the Petitioner's current and former employers to verify the accuracy of this information."

Miller argued that under Exhibit H-1, Michele was only entitled to 25 percent of Miller's retirement and pension benefits as of the date of the decree in August 1991. Miller argued that because Section 3.3 of the PSA specifically states that all property acquired after the date of the PSA is separate property, that provision, rather than Exhibit H-1, controlled.

The superior court commissioner rejected Miller's argument and ruled that the specific language addressing the pension and retirement benefits in Exhibit H-1 controlled. The commissioner interpreted the language of Exhibit H-1 to mean that Michele was entitled to receive 25 percent of Miller's pension benefits, including those acquired after the divorce. The commissioner also ruled that even if ambiguous, the language should be construed against Miller because his attorney drafted the PSA.

> Exhibit H-1 is specific contract language that modifies the general language of the PSA at paragraph 3.3, and the parties intended to award to the Wife 25% of all pension benefits including those acquired after the parties' dissolution decree was entered.
>
> The court further finds that any ambiguities in this PSA shall be construed against the drafter, the petitioner husband.

The commissioner ordered Miller to disclose "the names, addresses, & phone numbers of all his past & current employers, within 10 days of this order." The commissioner also authorized Michele to issue subpoenas to Miller's current and former employers "to

verify the values of any pension or retirement benefits he may have with these employers."

Miller filed a motion to revise the commissioner's decision. Miller argued the commissioner erred in awarding Michele 25 percent of Miller's retirement benefits, including the benefits after the parties' divorce. The court denied Miller's motion to revise the decision.

Statute of Limitations

For the first time on appeal, Miller argues that the ten year statute of limitations under RCW 4.16.020(2) bars Michele from enforcing the decree.[2] Michele asserts that under RAP 2.5(a), we should refuse to consider Miller's argument. RAP 2.5(a) provides that the appellate court has the discretion to refuse to review an issue raised for the first time on appeal. Miller contends that RAP 2.5(a) does not apply because "the question raised affects the right to maintain an action."

The decision in Bogle and Gates, P.L.L.C. v. Holly Mountain Resources, 108 Wn. App. 557, 32 P.3d 1002 (2001), is dispositive. In response to the same argument that Miller makes, we held that this narrow exception to waiver does not apply when the trial court is deprived of the opportunity to rule on the applicability of the statute of limitations. Bogle & Gates, 108 Wn. App. at 562. Miller's reliance on Stokes v. Polley, 145 Wn.2d 341, 345, 37 P.3d 1211 (2001), is unpersuasive. In Stokes, the husband raised the issue of the statute of limitations in the trial court. Here, as in Bogle & Gates, we decline to consider the applicability of the statute of limitations because it was not raised below.[3]

[2] The statute of limitations for an action enforcing a dissolution decree is ten years. RCW 4.16.020(2).

Interpretation of the PSA and Exhibit H-1

Miller asserts the superior court erred in interpreting the PSA and the language of Exhibit H-1 in determining that Michele was entitled to 25 percent of his retirement and pension benefits after the entry of the decree.[4] Michele argues that under the plain language of Exhibit H-1, she is entitled to 25 percent of all of Miller's employer generated retirement and pension benefits, including those activated after entry of the decree.

Interpretation of the decree of dissolution and the language of the PSA is a question of law that we review de novo. Gimlett v. Gimlett, 95 Wn.2d 699, 705, 629 P.2d 450 (1981).[5] When an agreement is incorporated in a dissolution decree, the court must ascertain the parties' intent at the time of the agreement. Boisen v. Burgess, 87 Wn. App. 912, 920, 943 P.2d 682 (1997). "Interpretation by the reviewing court must be based upon the intent of the parties as reflected in the language of the agreement." Byrne v. Ackerlund, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987). "If a decree is clear and unambiguous, there is nothing for the court to interpret." In re Marriage of Bocanegra, 58 Wn. App. 271, 275, 792 P.2d 1263 (1990). We look for the objective manifestations of the parties; the parties' subjective intent is irrelevant. City of Everett v. Sumstand's Estate, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). We construe the

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[3] For the first time in his reply brief, Miller also asserts that under RCW 4.16.020(2), Michele is not entitled to any portion of Miller's retirement benefits earned more than 10 years before she filed her motion to enforce the PSA. We do not consider this argument because it was raised for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[4] Miller does not dispute that Michele is entitled to retirement and pension plan benefits as of the date of the divorce.

[5] We also review the superior court's decision denying a motion to revise de novo. State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004).

decree and the PSA as a whole, giving meaning and effect to each word, and interpreting words using their ordinary meaning. Stokes, 145 Wn.2d at 346-47.

A provision is ambiguous if its terms can have more than one meaning. Mayer v. Pierce County Medical Bureau, Inc., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). "If a contract can reasonably be interpreted in two ways, one of which is ambiguous and one of which is not, the latter interpretation should be adopted when each clause can be given effect." Dice v. City of Montesano, 131 Wn. App. 675, 685, 128 P.3d 1258 (2006). We focus not only on the words, but also the context in which the words are used. BNC Mortgage, Inc. v. Tax Pros, Inc., 111 Wn. App. 238, 249, 46 P.3d 812 (2002). We give greater weight to specific and exact terms than general language. Adler v. Fred Lind Manor, 153 Wn.2d 331, 354, 103 P.3d 773 (2004). "Where the contract provides a general and a specific term, the specific controls over the general." Diamond B Constructors, Inc. v. Granite Falls School, Dist., 117 Wn. App. 157, 165, 70 P.3d 966 (2003).

Miller relies on Section 3.3 of the PSA to argue that his post dissolution retirement benefits are his separate property. Section 3.3 provides:

> Any and all property acquired by either Party to this Property Settlement subsequent to the date of this Property Settlement shall be and shall remain the separate property of the acquirer.

Michele relies on Section 3.2.1 and the specific language in Exhibit H-1 to argue that she is entitled to 25 percent of the retirement benefits Miller earned post dissolution. Section 3.2.1 states:

> The Husband shall receive free and clear of any and all right, title or interest of the Wife except as otherwise provided herein. All of

the assets listed on Exhibit H-1, and hereafter all such assets shall be the sole and separate property of the Husband.

Exhibit H-1 provides in pertinent part that Miller shall receive:

> Any and all social security's [sic] benefits, pension benefits, retirement benefits, and any other benefits arising out of his current or future employment; Provided, however, the Wife shall receive 25% of any employer generated retirement benefits actually received by the Husband.

Miller argues that the award of 25 percent of his pension and retirement benefits to Michele in Exhibit H-1 does not include the benefits he accrued after the dissolution because the word "any" only refers to assets that existed at the time of the decree. We disagree with Miller's interpretation. Miller ignores the language of the proviso. The portion of Exhibit H-1 that addresses retirement benefits first defines retirement and pension "benefits" as "any and all" benefits "arising out of his current or future employment" and specifically states that Miller is entitled to those benefits. However, the second half of the sentence is a proviso that clearly relates to and modifies the current and future benefits that Miller is entitled to receive by stating "[p]rovided, however, the Wife shall receive 25% of any employer generated retirement benefits actually received by the Husband." Reading the two parts of the sentence together, the plain language clearly grants Miller the benefits in his retirement plans from his current and future employment but subject to Michele receiving a 25 percent interest in the benefits that he actually receives including future benefits.

Miller also asserts that interpreting the language to include post dissolution benefits ignores the other provision of the decree that awards each party property acquired after the date of the PSA. Miller relies on Section 3.3 of the PSA, as well as

general community property principles, to argue that his retirement benefits are his separate property. Section 3.3 expressly provides that property acquired after the date of the PSA will be separate. However, there is no question that the language addressing the disposition of retirement and pension benefits in Exhibit H-1 is more specific than Section 3.3. Because the specific language in Exhibit H-1 controls over the general language in the decree, we reject Miller's argument. Diamond B Constructors, 117 Wn. App. at 165.[6]

We conclude the language of Exhibit H-1 is clear and unambiguous. Michele is entitled to 25 percent of all of the Miller's retirement benefits, including the post dissolution benefits he actually receives. We also note that even if the language of Exhibit H-1 was ambiguous, any ambiguity is construed against the drafter. Queen City Sav. & Loan Ass'n v. Mannhalt, 111 Wn.2d 503, 513, 760 P.2d 350 (1988). Here, it is undisputed that the PSA was drafted by Miller's attorney.

Michele seeks attorney fees under the terms of the PSA. Paragraph 3.7 of the PSA provides in pertinent part, "In any proceeding arising out of this Property Settlement or related court action . . . the prevailing spouse shall be entitled to receive an award against the other spouse which shall cover the entire actual and reasonable 'make whole' costs of litigation, including but not limited to attorneys' fees [and] costs . . . ." Upon compliance with RAP 18.1, Michele is entitled to attorney fees under the PSA

[6] And although Miller is correct that as a general rule post separation earnings are separate property, the parties can enter agreement to the contrary. In addition, all property, both separate and community, is before the court, and the trial court has wide discretion in deciding the distribution of property. RCW 26.16.140; Brewer v. Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999); Bulicek v. Bulicek, 59 Wn. App 630, 636, 800 P.2d 394 (1990) "The status of property as community or separate is not controlling." In re Marriage of Anglin, 52 Wn. App. 317, 320, 759 P.2d 1224 (1988).

as the prevailing party on appeal.

We affirm.

Schindler, CJ

WE CONCUR:

Appelwick, J.

Cox, J.