

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-260

FEBRUARY TERM, 2002

Paul W. Duprey	}	APPEALED FROM:
	}	
v.	}	Washington Family Court
	}	
Kathy Duprey	}	DOCKET NO. 144-4-00 Wndm
	}	
	}	Trial Judge: Amy M. Davenport
	}	
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Appellant Kathy J. Duprey appeals from a family court order denying a motion for relief from an order allocating retirement benefits. Appellant contends the court abused its discretion in: (1) denying the motion without a hearing; and (2) failing to find that provisions of the final stipulation and order relating to retirement benefits were ambiguous. We affirm.

In January 2001, the family court entered a decree and order of divorce incorporating the terms of a final stipulation signed by the parties. The order provided, in pertinent part, that appellee Paul W. Duprey would be entitled to sole possession of all pensions and other retirement plans held in his name, and that appellant

shall be entitled to a portion of [appellee's] postal pension under the Civil Service Retirement System. The parties agree to execute whatever documents are necessary to provide [appellant] with what would be a \$400.00 per month allocation of his current CSRS retirement benefits. This amount was determined by assuming [appellee] retires at age 55 and represents approximately 21.5% of his current postal pension benefit.

The order also directed appellee's attorney to prepare a court order, in accordance with federal regulations governing the Civil Service Retirement System, directing that the CSRS pension be apportioned "so that [appellant] receives no less than \$400.00 per month or 21.5% of his current postal pension benefit and provide for a survivor annuity for [appellant] in the case of his death at the same percentage rate or no less than \$400.00 per month in annuity."

Several months later, appellee submitted, and the court signed, an order allocating the retirement benefits. The order provided that appellant was entitled to \$400 per month from appellee's CSRS benefits, as well as a survivor annuity equal to \$400 per month, and further directed that the amount of benefits is "not to increase . . . by COLA's occurring before death of employee." Shortly thereafter, appellant filed a motion for relief from the allocation order, claiming that she had not received notice of the proposed order prior to its entry, and that it did not reflect the parties' stipulation. Appellee filed an opposition to the motion.

The court denied the motion in a brief entry order, ruling that the allocation order accurately reflected the stipulation incorporated into the final divorce decree. This appeal followed.

Appellant contends the court erred in failing to find that the provision in question is ambiguous, and in failing to conduct an evidentiary hearing to consider extrinsic evidence of the parties' intent. Determining whether an agreement is ambiguous is a question of law. Kipp v. Estate of Chips, 169 Vt. 102, 107 (1999). Generally the court must accept the plain language of the instrument, viewed in its entirety, and not look to construction aids, although we allow limited extrinsic evidence of circumstances surrounding the making of the agreement to determine whether a writing is ambiguous. Id. Here, the stipulation incorporated into the divorce order, and the correspondence submitted by the parties, indicate clearly that the parties' agreed appellant would receive pension benefits of \$400 per month, which represented approximately 21.5% of the pension with retirement at age 55. The agreement does not suggest that appellant was to receive 21.5% of the pension, including future COLA increases. The agreement says specifically that the calculation is based upon "21.5% of his current postal pension benefit" (emphasis supplied).

Nor do we find internal inconsistency, as urged by appellant, in the provision directing appellee to draft an order providing that appellant receive "no less than \$400 per month or 21.5% of his current postal pension." This provision simply implements the earlier provision under which appellant is awarded \$400. It is certainly not a directive to the draftsman to guarantee that appellant receive more than \$400 per month in the future.

Accordingly, we conclude that the trial court's construction was sound, and that it acted within its discretion in declining to hold an evidentiary hearing to consider additional extrinsic evidence. See id. at 108 (trial court has broad discretion to determine need for extrinsic evidence); Altman v. Altman, 169 Vt. 562, 564 (1999) (mem.) (court has discretion to deny motion for relief from judgment without a hearing where claim is totally lacking in merit).

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

James L. Morse, Associate Justice