

STATE OF MICHIGAN
COURT OF APPEALS

MYLES B. MCCORMACK,

Plaintiff-Appellant,

v

CONNIE L. MCCORMACK,

Defendant-Appellee.

UNPUBLISHED

May 20, 2014

No. 315624

Marquette Circuit Court

Family Division

LC No. 07-044442-DO

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's order, entered following an evidentiary hearing, requiring plaintiff to continue paying defendant spousal support payments pursuant to the stipulated judgment of divorce, and also from the trial court's order denying plaintiff's motion to amend the court's findings of fact.¹ We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties divorced in 2007. The judgment of divorce states the following with respect to spousal support:

¹ Although plaintiff filed a claim of appeal by right, plaintiff's brief on appeal states that plaintiff believes that the order appealed from is subject to appeal by leave granted. In fact plaintiff does possess the right to appeal a postjudgment order awarding attorney fees. See MCR 7.202(6)(a)(iv); MCR 7.203(A)(1). The trial court's order requiring plaintiff to continue paying spousal support includes an attorney fee award, and therefore is such an order. However, such an appeal by right is limited to portions of the order regarding attorney fees and costs. *Id.* Plaintiff makes no argument regarding that portion of the order. Thus, we could decline to grant relief to plaintiff on the ground that his argument is outside the scope of his appeal by right. However, in the interests of justice and judicial economy, we exercise our prerogative to treat this case as an application for delayed leave to appeal and decide it as on leave granted. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff shall pay to the defendant, spousal support in the amount of \$2,417.00 per month, pursuant to a Uniform Spousal Support Order to be entered contemporaneously with this Judgment of Divorce. Said spousal support shall be paid until the Plaintiff's official retirement date of September 2010, and until the Defendant commences receipt of her portion of the Plaintiff's retirement benefits. Defendant shall apply for her portion of Plaintiff's retirement benefits at the earliest possible date, and upon her receipt of the pension benefits, spousal support shall be reduced to \$500.00 per month, which shall continue until Plaintiff's full retirement from employment and receipt of Social Security benefits.

When the parties stipulated to the judgment of divorce, plaintiff was employed as a district commander with the Michigan State Police Department and earned \$103,000 per year. Plaintiff officially retired from the state police in September 2010 and paid defendant \$2,417 per month until February 2011, when he entered the police department's deferred retirement option program ("DROP"), which allowed him to collect his annual salary and draw his retirement benefits. Upon his enrollment in DROP, defendant began drawing her portion of plaintiff's retirement benefits in the amount of \$29,000 per year, and plaintiff began paying defendant \$500 per month, less an agreed-upon setoff of \$42.38 per month. The \$42.38 per month setoff resulted from the retirement fund's inability to pay defendant exactly \$29,000 per year. Instead, the retirement fund paid defendant \$29,508.61 per year, or an additional \$42.38 per month. Plaintiff fully retired from the police department in May 2012, thus ending his participation in DROP, and stopped making monthly support payments in June 2012. In July 2012, defendant gave plaintiff a check for \$42.38, referencing the month of June 2012. When defendant thereafter learned that plaintiff had a new employment contract, she filed a motion to collect her monthly support payments.

The trial court concluded that the phrase, "Plaintiff's full retirement from employment," as provided in the judgment of divorce, was ambiguous and held an evidentiary hearing to determine its meaning. Generally speaking, plaintiff testified that "full retirement from employment" means his full retirement from the police department, while defendant testified that it means his full retirement from any and all employment. In its order granting defendant's motion, the trial court acknowledged the parties' conflicting testimony, but concluded that the judgment of divorce required plaintiff to continue making such payments, less a setoff of \$42.38 per month, until his full retirement from all employment and his receipt of social security benefits.²

² The trial court also acknowledged the potential for unfairness if plaintiff had to pay defendant \$500 per month for minimal, part-time employment, but concluded that the judgment of divorce did not clearly and unequivocally state that it was nonmodifiable, and ordered that the \$500 monthly payment was subject to a potential downward modification in the event of a material change in plaintiff's circumstances.

Plaintiff thereafter filed a motion to amend the trial court's findings of fact, as stated on the record and in its order granting defendant's motion, on the basis that the trial court failed to consider certain of defendant's testimony that supported his interpretation of the judgment of divorce. The trial court characterized plaintiff's motion as one brought under MCR 2.517, and denied it following a hearing.

II. STANDARD OF REVIEW

"[A] divorce judgment entered by consent is in the nature of a contract," *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004), and "is to be construed and applied as such," *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). We review a trial court's interpretation of contractual language de novo. *Reicher v SET Enterprises*, 283 Mich App 657, 664; 770 NW2d 902 (2009).

We review a trial court's factual findings for clear error. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). In doing so, we afford "great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Lumley v Bd of Regents for Univ of Michigan*, 215 Mich App 125, 135; 544 NW2d 692 (1996).

III. ANALYSIS

On appeal, plaintiff contends that the trial court erred in determining that the language, "Plaintiff's full retirement from employment," as set forth in the stipulated judgment, referred to his retirement from employment generally, rather than his full retirement from the police department specifically. Further, plaintiff maintains that he attached no significance to the language "and receipt of Social Security benefits," and did not believe that it meant anything.

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Klapp v United Ins Group Agency*, 468 Mich 459, 473; 663 NW2d 447 (2003) (citation and internal quotation marks omitted). If the language of a contract is clear and unambiguous, it shall be enforced as written; however, if the language of a contract is ambiguous, a trial court may resort to extrinsic evidence to determine the parties' intent. See *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724, 727 (2010).

With due respect to the trial court, we do not find the quoted language to be ambiguous. The judgment of divorce states that plaintiff's spousal support payments "shall continue until Plaintiff's full retirement from employment and receipt of Social Security benefits." In interpreting a contract, a court should give all words not specifically defined their plain and ordinary meaning. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23, 28 (2005). The word "shall" generally indicates a mandatory requirement. See *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013). "Until" is generally understood as meaning "up to the time that or when" a specific event occurs. See *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 536; 669 NW2d 594 (2003).

Here, it was undisputed that plaintiff was still employed and was not receiving Social Security benefits. Thus, the plain language of the divorce judgment indicates that the necessary preconditions for the cessation of spousal support had not occurred. The language of the divorce judgment does not support defining the phrase "employment" as meaning solely "employment

with the Michigan State Police.” In addition, plaintiff provides no compelling reason why the judgment should be construed so as to render the language concerning receipt of Social Security benefits nugatory. Courts generally avoid such constructions of contracts and strive to give effect to every word and phrase. See *Klapp*, 468 Mich at 468.

Thus, the trial court erred in determining that the language of the divorce judgment was ambiguous, and did not need to hold an evidentiary hearing in order to determine that plaintiff was not relieved of his obligation to provide spousal support under the judgment of divorce. We affirm a trial court when it reaches the right result for the wrong reason. *Gleason v Mich Dep’t of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Further, assuming the language of the judgment of divorce was ambiguous, the trial court did not clearly err in finding that the parties intended that the phrase, “Plaintiff’s full retirement from employment,” was not limited to plaintiff’s full retirement from employment with the police department. The trial court accepted defendant’s interpretation that the term “employment” was not limited to plaintiff’s employment with the state police. The court found her testimony to be credible and consistent with the judgment’s language, which the court concluded broadly refers to defendant’s employment in general, as opposed to his employment with the police department. Plaintiff argues that the trial court’s determination was clearly erroneous because defendant testified under cross-examination that the parties discussed and agreed during their negotiations that plaintiff would not owe defendant \$500 per month if he had minimal employment income following his full retirement from the police department, and said she would only expect the \$500 monthly payments to continue if plaintiff’s future income was similar to his police department salary.

Although plaintiff is correct that defendant gave seemingly inconsistent testimony on cross-examination, the trial court’s decision to accept defendant’s direct testimony was not clearly erroneous. In her direct testimony, defendant unequivocally said that she “never, ever” would have agreed to the judgment of divorce if it only gave her the right to receive \$500 per month while plaintiff remained employed with the police department because she knew that state troopers such as plaintiff could, and often would, retire at young ages and move on to other well-paying jobs. While defendant acknowledged under cross-examination that she and plaintiff discussed the possibility of plaintiff earning minimal employment income following his full retirement from the police department, she also testified that this scenario was not discussed at length and was only mentioned briefly as a hypothetical, which she considered ridiculous.

Moreover, plaintiff’s reliance on defendant’s testimony that she only expected her support payments to continue so long as plaintiff’s earnings were similar to his police department salary is misplaced, as this testimony supports defendant’s position that “Plaintiff’s full retirement from employment” is not limited to plaintiff’s full retirement from the police department. Further, defendant testified that this was not “clearly spelled out” when she and plaintiff talked about it, explaining that she would not expect support payments if plaintiff was making \$10,000 per year, but that she would expect support payments if plaintiff was making \$50,000 per year, although “maybe something a little bit less” than \$500 per month.

In sum, the trial court was presented with defendant’s unequivocal testimony that she expected her \$500 monthly support payments to continue so long as plaintiff had any

employment, and her equivocal testimony that she may or may not expect such payments under certain unspecified circumstances, which were not clearly spelled out during her negotiations with plaintiff. Given the deference this Court affords to the trial court's special opportunity to examine witness credibility and weigh the evidence, we are not left with the definite and firm conviction that the trial court made a mistake in finding defendant's unequivocal direct testimony to be the most credible and probative in determining the parties' intent when stipulating the judgment of divorce. *Hill*, 276 Mich App at 308; *Lumley*, 215 Mich App at 135.

Plaintiff also argues that defendant's payment of \$42.38 to plaintiff for the month of June 2012 is conclusive evidence that she expected her \$500 monthly support payments to cease upon plaintiff's full retirement from the police department. We disagree. At most, her payment tends to show that she believed plaintiff was fully retired from employment at that point, and plaintiff testified that defendant demanded the reinstatement of her \$500 monthly payments when he informed her that he had a new employment contract.

Accordingly, the trial court did not clearly err in determining that the judgment of divorce required plaintiff to continue paying spousal support payments to defendant.³

Affirmed.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

³ Although defendant argues that the trial court erred in ruling that the \$500 monthly support payments are subject to a downward modification upon motion by plaintiff, we decline to address the issue as defendant has not filed a cross-appeal. See MCR 7.207. Further, defendant did not raise any objection to the trial court's order, and her counsel explicitly stated that he did not see "any problems, or inconsistencies, or any problem with the findings the Court made." Defendant thus waived objection to the trial court's order. See *Roberts v Mecosta Co General Hospital*, 466 Mich. 57, 64-65 n 4; 642 NW2d 663 (2002).