1/17/01

SUPREME COURT OF LOUISIANA

NO. 99-C-3097

JUNE COLEMAN, WIFE OF LESLIE LEON ROBINSON, JR.

versus

LESLIE LEON ROBINSON, JR.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

Victory, J., dissenting.

I dissent from the majority's holding that the general divestiture language in the partition settlement agreement (the "Agreement") did not transfer Ms. Coleman's interest in her husband's pension plan.

The majority opinion omits several salient details in finding that Ms. Coleman did not intend to waive her rights to the pension. The first is that Ms. Coleman was represented by a very competent divorce attorney throughout the settlement negotiations. Ms. Coleman testified that she knew about the pension at the time she entered into the Agreement and that she told her attorney about the pension; however, she claims that her attorney never told her that the pension was partially community property. Her attorney testified that he could not recall his conversations with her, but that it was his practice to find out about any pensions that may be community property and to advise his client as such. He also testified that it was his practice to go over any property settlement with his client line by line and Ms. Coleman testified that he did so, although she testified that the pension was never discussed, outside the provision relating to the survivor's annuity.

The trial court made a finding that "Ms. Coleman, having been represented by counsel, knew that the Agreement served to transfer and release all her marital rights." The court of appeal found that "Ms. Coleman's contention that her former husband's retirement benefits were not partitioned because she was unaware that they may have been community property seems incredulous." The majority does not address these factual findings, which cannot be overturned unless they are found to be manifestly erroneous.

Second, the majority opinion fails to point out that, instead of the other community assets being divided equally, Ms. Coleman received the following: (1) one-half of the proceeds from the sale of the couple's house, with no obligation to repay Mr. Robinson any portion of the $64,000 in separate property that he put into the house; (2) a two-year old Lincoln Town Car; and (3) approximately $100,000 worth of community antiques. Given that the pension benefits were not to be received until five years later and that Ms. Coleman was to be designated as the beneficiary of the survivor's annuity of the pension, it certainly appears, and the lower courts found, that Ms. Coleman intended to waive her rights to the pension in exchange for other property. Thus, contrary to the majority's holding, the agreement between Ms. Coleman and Mr. Robinson did not unfairly benefit Mr. Robinson to the detriment of Ms. Coleman.

In light of these factors, the majority's holding is clearly wrong. The parties chose North Carolina law to apply to the Agreement. La. Civ. Code art. 3540 allows this unless North Carolina law contravenes Louisiana's public policy. The majority's application of Civil Code articles 3515 and 3527 and its subsequent conclusion that under those two articles, Louisiana law applies, is misplaced. Those articles govern choice of law issues only when the parties do not stipulate what law will apply to their

contract and only then are contacts with the applicable states relevant. There is no question that had the parties not chosen North Carolina law to apply, that Louisiana law would apply under La. Civ. Code art. 3515 or 3527. However, parties in Louisiana are free to chose which state's law will govern their obligations without regard to either party's contacts with that state. It is only when application of the chosen law "contravenes the public policy of the state whose law would otherwise be applicable under Article 3527" that the courts will not give effect to the chosen law. Thus, the majority's conclusion that "[a]s a result of Louisiana's significant connection to the parties and their Agreement, Louisiana law must be applied to construe this Agreement . . ." is erroneous. Slip Op. at 11.

While I recognize that Louisiana certainly does have a strong public policy supporting community property, Louisiana law does not prohibit a wife from relinquishing her community property rights to a pension in exchange for other property rights, which is what occurred in this case. Nothing in this Agreement contravenes any public policy of Louisiana. The majority attempts to justify the disregard of the parties' choice of North Carolina law by stating that "[t]o chose a state's law that would unfairly benefit one spouse over another, absent some significant connection to that state is not just, and more importantly, against the public policy of our state." Slip Op. at p. 12. However, as I have pointed out, this agreement did not unfairly benefit Mr. Robinson over Ms. Coleman, as she received substantial consideration for her waiver of rights to the pension.

Under North Carolina law, if one party signs a property settlement containing a blanket waiver, there is a waiver to equitable distribution, even though the property is not specifically listed. ***Blount v. Blount***, 72 N. C. App. 193, 195 (N.C. App. 1984); ***Small v. Small***, 93 N.C. App. 614, 379 S.E.2d 273 (1989). Thus, under North

Carolina law, Ms. Coleman transferred her rights to the pension to Mr. Robinson by virtue of the broad waiver language contained in the Agreement.

Furthermore, even if La. Civ. Code art. 3540 required the application of Louisiana law, Ms. Coleman still transferred her rights to the pension. The jurisprudence in Louisiana indicates that whether a wife will be found to have waived her rights to a supplemental partition of her husband's pension by entering into a property settlement agreement containing broad waiver language largely depends on the wife's intent at the time. In the cases relied upon by the majority, the wife was found not to have waived her rights to the pension because there was no evidence that was her intent. ***Hare v. Hodgins***, 567 So. 2d 670 (La. App. 5 Cir. 1990), *aff'd in part, rev'd in part*, 586 So. 2d 118 (La. 1991); ***Faucheux v. Faucheux***, 97-1369 (La. App. 4 Cir. 1/28/98), 706 So. 2d 654, writ denied, 98-0482 (La. 4/9/98), 717 So. 2d 1146. In fact, in ***Hare v. Hodgins***, the wife testified that she did not even know of the existence of the pension. To the contrary, in cases where the wife knows of the pension and knows the pension is community property when she enters into a settlement agreement, particularly where she is represented by counsel, a blanket waiver will operate to divest the wife of her right to a partition of her husband's pension. ***Chrisman v. Chrisman***, 487 So. 2d 140 (La. App. 4 Cir. 1986); ***Brignac v. Brignac***, 96-1702 (La. App. 3 Cir. 6/18/97), 698 So. 2d 953, *writ denied*, 97-2584 (La. 1/16/98), 706 So. 2d 976.

As stated above, the trial court found that "Ms. Coleman, having been represented by counsel, knew the Agreement served to transfer and release all her marital rights." Because this was her intent, under this state's jurisprudence, the blanket waiver in the Agreement did operate to divest her of her right to a

supplemental partition of Mr. Robinson's pension. ***Chrisman***, *supra;* ***Brignac***, *supra*.

Finally, to entitle Ms. Coleman to a supplemental partition of the pension in light of the clear language of the Agreement and the trial court's finding that she intended to waive her right to the pension is completely unjust considering the substantial benefits she obtained at the time of the divorce. If this aspect of the Agreement is thrown out, then the remainder of the Agreement should also be thrown out and Mr. Robinson should be allowed to assert a claim for (1) the $64,000 of his separate property that he put into the community house, (2) his share of the Lincoln Town Car, and (3) his share of $100,000 worth of community antiques.

I also dissent from the majority's holding that Mr. Robinson's obligation to designate Ms. Coleman as beneficiary of the survivor's annuity terminated once his obligation to pay alimony terminated and disagree with their reasoning that "the purpose of Mr. Robinson's having to choose Option B was to provide plaintiff with some sort of income to replace the alimony she would lose should he predecease her" and that consequently, when his alimony obligation ceased upon her remarriage in 1988, so did his obligation to designate her as beneficiary of the survivor's annuity. Slip Op. at 18.

In the first draft of the agreement, this obligation was certainly not tied to alimony. All the correspondence between the parties on this issue, which occurred before either party remarried, indicated that the terms of the Agreement would provide that Mr. Robinson would designate Ms. Coleman as the beneficiary of the survivor's annuity, with no conditions attached. When Mr. Robinson forwarded the Agreement to Ms. Coleman, in the accompanying letter he confirmed that the Agreement "sets forth everything we have agreed on concerning alimony, survivor's annuity, etc."

Further, at the time the Agreement was executed, Ms. Coleman was not remarried and thus Mr. Robinson was clearly obligated to designate her as the beneficiary at that time.

In the final Agreement, although the paragraph providing for a survivor's annuity comes under the heading "Wife waives any and all rights to support and maintenance, except as set forth as follows:," the Agreement does not specifically say that this duty ceases upon remarriage. This is in contrast to the duty to provide alimony, which specifically ceases when Ms. Coleman remarries, and the duty to provide life insurance, which specifically ceases when alimony ceases. Mr. Robinson's duty to designate Ms. Coleman as beneficiary of the survivor's annuity, unconditionally, was specifically negotiated by the parties and was one of the valuable benefits Ms. Coleman received in return for waiving her future rights to the pension. Further, if the clause is ambiguous, it must be construed against the drafter, Mr. Robinson. Thus, I respectfully dissent.