Rel : February 11, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200494

Steve Lawrence Colafrancesco

v.

Kaylyn Annie Colafrancesco

Appeal from Shelby Circuit Court
(DR-19-900259)

THOMPSON, Presiding Judge.

Steve Lawrence Colafrancesco ("the husband") appeals from a judgment entered by the Shelby Circuit Court ("the trial court") divorcing

him from Kaylyn Annie Colafrancesco ("the wife"), specifically challenging the alimony award. We reverse and remand.

In September 1974, the husband began his career with the United States Air Force. In December 1974, he and the wife married. The parties had five children. During his military career, the family moved frequently and the husband was deployed 15-20 times. The wife testified that she was unable to maintain a career because of the family's frequent moves and her parenting responsibilities. In January 1998, the husband retired from the military. In November 2018, the husband and the wife separated, and in October 2019, the wife filed a complaint for a divorce.

On October 20, 2020, the trial court conducted ore tenus proceedings. With regard to the husband's income, the record reflects that the husband receives benefits from three sources: the Social Security Administration ("the SSA"), the Department of Veteran Affairs ("the VA"), and the Defense Finance and Accounting Service ("the DFAS"). The trial court admitted into evidence a letter from the SSA, dated October 18, 2020, that states that, on September 21, 2001, the SSA, pursuant to its rules, found the husband to be disabled and that beginning in December

2019, the husband's monthly Social Security disability benefits, before a deduction for medical-insurance premiums are $1,640. The trial court also admitted into evidence a letter from the VA, dated October 5, 2020, that states that the husband has one or more service-connected disabilities,[1] that his "combined service-connected evaluation" is 100%, that his monthly award of disability benefits from the VA is $3,480, and that the "effective date of when [he] became totally and permanently disabled due solely to [his] service-connected disabilities was March 8, 2001." See, generally, 38 U.S.C. Chapter 11 (Compensation for Service-Connected Disability or Death). Lastly, the trial court admitted into evidence a pay statement issued by the DFAS relating to the husband's Combat-Related Special Compensation ("CRSC"). See 10 U.S.C. § 1413a.[2]

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[1]"Service connected" is defined in 38 U.S.C. § 101(16).

[2]CRSC provides tax-free payments to a retired veteran with combat-related disabilities. To be eligible for CRSC, the veteran must, among other things, be retired and entitled to or receiving military retirement pay, have a combat-related disability, and currently have his or her Department of Defense retirement payments reduced by the amount of his or her VA disability payments. CRSC pay by definition is pay to a retired veteran for a combat-related disability in lieu of retirement. See 10 U.S.C. § 1413a.

That statement provides that the husband's net monthly CRSC benefits are $2,466, that the start date for receiving those benefits was June 1, 2003, that the husband's VA disability rating is 100%, and that the husband's combat-related disability is 100%. The husband testified that all of his military-based benefits are classified as disability-related compensation, and he denied receiving any military-retirement income. On November 20, 2020, the trial court entered a judgment divorcing the parties that provides, in pertinent part:

> "ALIMONY
>
> > "The testimony before this Court shows the parties were married in 1974, a forty-six (46) year marriage. The parties were married within six (6) months of [the husband's] joining the United States Air Force and were together for the remainder of [the husband's] time in the United States Air Force. During this time the parties had five (5) children. [The husband], by his own estimate was deployed 15-20 times and left [the wife] to take care and raise their children. Although [the wife] would work when she could, the frequent moves for [the husband's] career would not allow her to have an employment career in which she could progress.
> >
> > "[The husband's] pay consists of what has been termed as follows:
> >
> > 1. Combat Pay $2,400.00 plus
> > 2. Veteran's Disability Pay $3,480.00

3. Social Security	$1,640.00
TOTAL	$7,520.00

"The parties adopted two of their grandchildren (who currently reside with their mother) and [the husband] consequentially receives an additional $300 per month from the Air Force and $804 from Social Security to support those adopted children. The total funds received by [the husband] per month exceeds $8,720. [The wife's] sole source of income is $587.00 per month in social security disability.

"While military-retirement benefits cannot be considered in determining an award of alimony, this court finds insufficient testimony in this case from which it could determine that [the husband's] VA disability income is 'in lieu of retirement.' See Nelms v. Nelms, 99 So. 3d 1228 (Ala. Civ. App. 2012).

"9. [The husband] shall pay to [the wife] the sum of $2,500 per month as periodic alimony, beginning on 15 December 2020 and continuing until terminated by operation of law.

"10. Each party is awarded exclusive right, title and interest and the full value of any and all retirement/pensions in their names, if any, and the other party is divested of any right, title and interest therein."

On December 9, 2020, the husband filed a postjudgment motion in which he argued, among other matters, that his veteran's disability benefits -- i.e., his VA disability benefits and his CRSC benefits -- cannot be considered when determining the an award of periodic alimony. On

December 10, 2020, the wife filed a response to the husband's postjudgment motion in which she argued that the trial court's periodic-alimony award was in accord with Nelms v. Nelms, 99 So. 3d 1228 (Ala. Civ. App. 2012). The husband's postjudgment motion was denied by operation of law, and the husband timely appeals.

> "'When a trial court receives ore tenus evidence, its judgment based on that evidence is entitled to a presumption of correctness on appeal and will not be reversed absent a showing that the trial court exceeded its discretion or that the judgment is so unsupported by the evidence as to be plainly and palpably wrong. Scholl v. Parsons, 655 So. 2d 1060 (Ala. Civ. App. 1995). This "presumption of correctness is based in part on the trial court's unique ability to observe the parties and the witnesses and to evaluate their credibility and demeanor." Littleton v. Littleton, 741 So. 2d 1083, 1085 (Ala. Civ. App. 1999). This court is not permitted to reweigh the evidence on appeal and substitute its judgment for that of the trial court. Somers v. McCoy, 777 So. 2d 141 (Ala. Civ. App. 2000).'

"Ryland v. Ryland, 12 So. 3d 1223, 1225 (Ala. Civ. App. 2009).

"In addition, in Whorton v. Bruce, 17 So. 3d 661, 664-65 (Ala. Civ. App. 2009), we noted:

> "'"'[U]nder the ore tenus rule, the trial court's judgment and all

> implicit findings necessary to support it carry a presumption of correctness.' Transamerica [Commercial Fin. Corp. v. AmSouth Bank], 608 So. 2d [375,] 378 [(Ala.1992)]. However, when the trial court improperly applies the law to facts, no presumption of correctness exists as to the trial court's judgment. Allstate Ins. Co. v. Skelton, 675 So. 2d 377 (Ala. 1996); Marvin's, Inc. v. Robertson, 608 So. 2d 391 (Ala. 1992); Gaston [v. Ames], 514 So. 2d [877,] 878 [(Ala. 1987)]; Smith v. Style Advertising, Inc., 470 So. 2d 1194 (Ala. 1985); League v. McDonald, 355 So. 2d 695 (Ala. 1978). 'Questions of law are not subject to the ore tenus standard of review.' Reed v. Board of Trustees for Alabama State Univ., 778 So. 2d 791, 793 n.2 (Ala. 2000). A trial court's conclusions on legal issues carry no presumption of correctness on appeal. Ex parte Cash, 624 So. 2d 576, 577 (Ala. 1993). This court reviews the application of law to facts de novo. Allstate, 675 So. 2d at 379 ('[W]here the facts before the trial court are essentially undisputed and the controversy involves questions of law for the court to consider, the [trial] court's judgment carries no presumption of correctness.')."'

" 'City of Prattville v. Post, 831 So. 2d 622, 627-28 (Ala. Civ. App. 2002).'"

Beck v. Beck, 142 So. 3d 685, 692-93 (Ala. Civ. App. 2013).

On appeal, the husband contends only that the trial court exceeded its discretion by awarding the wife monthly periodic alimony in the amount of $2,500 because, he says, a portion of the alimony award would have to be paid from his veteran's disability benefits. Specifically, he contends that the trial court erred in determining that his veteran's disability benefits are not received "in lieu of retirement."

In 1982, Congress enacted the Uniformed Services Former Spouses' Protection Act ("the FSPA"), which is codified at 10 U.S.C. § 1408 and allows states to divide a veteran's military "disposable retired pay" as marital property upon divorce. Section 1408 is entitled "Payment of retired or retainer pay in compliance with court orders" and defines a "support order" providing for the "payment of alimony"as a court order for the purposes of that section. § 1408(a)(2)(B)(ii). Section 1408(c) authorizes a court to treat "disposable retired pay" as property of both the veteran and his spouse and § 1408(a)(4)(A) provides, in pertinent part:

> "(A) The term 'disposable retired pay' means the total monthly retired pay to which a member is entitled less amounts which--

> "....
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> "(ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38; [or]
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> "(iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list)."[3]

In Mansell v. Mansell, 490 U.S. 581 (1989), the United States Supreme Court held that the FSPA excluded from marital property subject to division in a divorce action a veteran's disability benefits that are paid in lieu of military-retirement benefits. Id. at 586. Specifically, the Court held that such veteran's disability benefits are not "disposable retired pay" subject to division.

[3]10 U.S.C. Chapter 61 (§§ 1201-1222) governs a veteran's benefits associated with retirement caused by an active military member's physical disability.

In Ex parte Billeck, 777 So. 2d 105 (Ala. 2000), our supreme court recognized the holding in Mansell and held that the FSPA and Mansell prohibit direct payment of alimony from a veteran's disability benefits received in lieu of military-retirement benefits and, moreover, that a trial court could not even consider a veteran's disability benefits received in lieu of military- retirement benefits when awarding alimony. Billeck, 777 So.2d at 108-09.

In Stone v. Stone, 26 So. 3d 1232, 1237 n.2 (Ala. Civ. App. 2009), this court recognized:

> "Veterans who receive disability benefits from the VA must waive a corresponding amount of their military retirement pay, to prevent 'double dipping.' Mansell [v. Mansell], 490 U.S. [581,] 583, 109 S.Ct. 2023 [(1989)]; 38 U.S.C. [former] § 3105 [now 38 U.S.C. § 5305]. The disability payments are exempt from federal, state, and local taxation; thus, many military retirees waive their retirement pay in favor of disability pay, which increases their after-tax income. Mansell, 490 U.S. at 583-84, 109 S.Ct. 2023."

In Nelms v. Nelms, 99 So. 3d 1228, 1230 (Ala. Civ. App. 2012), this court considered whether a veteran's disability benefits that are not paid in lieu of military benefits and, consequently, are not subject to § 1408, may be awarded as alimony. In Nelms, the evidence did not establish that

the husband's veteran's disability benefits were paid in lieu of retirement benefits.[4] Recognizing that the United States Supreme Court in Rose v. Rose, 481 U.S. 619 (1987), had held that a veteran's disability benefits could be used to satisfy his child-support obligation and that the facts in Nelms were distinguishable from the facts in Mansell and Ex parte Billeck because the evidence in Nelms did not indicate that the husband's veteran's disability benefits were being received in lieu of retirement benefits, we held that "a spouse whose income includes VA disability benefits can be ordered to pay periodic alimony, even when all or a portion of the alimony necessarily will be paid from those benefits." Id. at 1232.

In Howell v. Howell, 581 U.S. ___ , ___, 137 S. Ct. 1400, 1405 (2017), the United States Supreme Court reiterated that "federal law completely pre-empts the States from treating waived military retirement pay as divisible community property."

In Brown v. Brown, 260 So. 3d 851 (Ala. Civ. App. 2018), which the parties discuss in their briefs, this court addressed whether a trial court

[4]Nothing in Nelms indicates that the husband in that case had retired from the military.

had exceeded its discretion by ordering the husband in that case, a United States Army veteran who was considered 100% disabled by the VA and received, pursuant to 10 U.S.C. Chapter 61 (see note 3, supra), monthly retirement benefits from the DFAS, to pay the wife 25% of those monthly benefits. The evidence indicated that the United States Army had found the husband to be physically unfit to remain on active duty, had determined that the husband was 70% disabled, and had placed him on the temporary disability retired list ("the TDRL"). See 10 U.S.C. § 1201 et seq. Additional evidence indicated that the DFAS considered the entire amount of the husband's TDRL pay as disability pay. We held that, because 10 U.S.C. § 1408(a)(4)(A)(iii) excludes benefits provided pursuant to 10 U.S.C. Chapter 61 from "disposable retirement pay," and the evidence established that 100% of the husband's pay from the DFAS consisted of the TDRL benefits, the TDRL benefits were excluded from "disposable retirement pay" under § 1408(a)(4)(A)(iii) and, thus, could not be considered marital property subject to division.

Mindful of the foregoing law, we now consider whether the trial court exceeded its discretion by awarding the wife periodic alimony in an

amount that would require the husband to pay a portion of the alimony from his veteran's disability benefits. In other words, are the husband's VA disability benefits and CRSC benefits excluded from "disposable retired pay" as defined in the FSPA?

Applying the reasoning set forth in the foregoing cases, the trial court exceeded its discretion by considering the husband's VA disability benefits and CRSC benefits when awarding the wife periodic alimony. The evidence indicates that both the husband's VA disability benefits and his CRSC benefits were awarded after he retired from the military. Additionally, the VA letter establishes that the VA determined that the husband had a service-connected disability and awarded him VA disability benefits. For the husband to receive those benefits, he had to waive a corresponding amount of his military-retirement income. See Stone, supra, and 10 U.S.C. § 5305. Therefore, the husband's VA disability benefits cannot be considered as "disposable retirement pay" under FSPA. See Mansell; Ex parte Billeck; Stone; and Howell. The husband's CRSC benefits, however, were awarded pursuant to 10 U.S.C. § 1413a. Section 1413a(g) specifically provides that "[p]ayments under this section are not

retired pay." Because CRSC benefits are not "retired pay," but combat-related disability benefits, see 10 U.S.C. § 1413a(a), CRSC benefits cannot be "disposable retired pay" subject to division as a marital asset pursuant to 10 U.S.C. 1408(c), see Mansell and its progeny, or available for the court's consideration when determining an alimony award, see Ex parte Billeck. Cf. Foster v. Foster, 505 Mich. 151, 949 N.W.2d 102 (2020)(holding that CRSC benefits are not subject to division as a marital asset).

Because the record establishes that the husband's veteran's disability benefits cannot be considered "disposable retired pay," the trial court lacked the authority to consider any portion of those benefits in determining the alimony award. Accordingly, the judgment of the trial court is reversed and this case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Moore, Edwards, Hanson, and Fridy, JJ., concur.