STATE OF MINNESOTA
IN COURT OF APPEALS
A10-562

In re the Marriage of

Karen Ann Guggisberg, petitioner,
Respondent,

vs.

Todd Henry Guggisberg,
Appellant.

Filed March 15, 2011
Reversed
Shumaker, Judge

Scott County District Court
File No. 70-1999-11658

Richard J. Schieffer, Laura K. Fretland, Dove, Fretland & Van Valkenburg, PLLP, Minneapolis, Minnesota (for respondent)

Rodney H. Jensen, Mark E. Mullen, Jensen, Mullen & McSweeney, PLLP, Bloomington, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Appellant challenges the district court's marital-dissolution division of his military pension, arguing that the division is inconsistent with the unambiguous language in the

original judgment and decree. He also claims that the district court abused its discretion by awarding respondent attorney fees. Because the district court failed to distribute appellant's pension in accordance with the unambiguous direction in the original judgment and decree, and because the record does not support the award of attorney fees, we reverse.

FACTS

This appeal principally involves a dispute over how to calculate military pension benefits in a marriage-dissolution property division.

When the parties dissolved their marriage, appellant Todd Henry Guggisberg was in his 17th year as an active member of the United States Army and would be entitled to military pension benefits upon his retirement after 20 years of service. Anticipating that appellant would become eligible to receive his pension, the district court awarded a percentage of the benefits to respondent Karen Ann Guggisberg. Because the dollar amount of the benefits could not be determined until appellant retired, the district court inserted into the judgment and decree a formula for calculating that amount in the future:

> If and when [appellant] receives military retirement pay, [respondent] shall be awarded one-half of the marital interest therein. The formula to be used to determine said marital interest is as follows:
>
> $$\frac{\text{Length of Marital Pension Service}}{\text{Length of Total Military Service}} \times \frac{1}{2} = \text{[respondent's] \%}$$
>
> The actual percentage will be based upon [appellant's] disposable military retirement pay calculated at the rate effective for Rank 0-4 at 16 years of service as of 07-01-00. The length of the marital pension service shall be calculated

> from the date of the marriage through the date of the entry of the Judgment and Decree.

The district court also directed appellant's attorney to draft a separate order within 90 days of the entry of the judgment and decree that would effectuate respondent's award "if and when such benefits are paid." Appellant's attorney did not prepare a separate order but rather sent two letters to respondent's lawyer indicating that a qualified domestic-relations order was unnecessary and that respondent's interest in the pension would be triggered by application to the Defense Finance and Accounting Service (DFAS) and submission of a certified copy of the judgment and decree. Respondent did neither of those things at that time.

Appellant began receiving retirement pay in June 2008, and he calculated respondent's portion, according to the formula, to be $412.29 each month. On October 4, 2008, DFAS notified respondent that it could not approve her application for a portion of the benefits because the judgment and decree had not been certified within 90 days preceding its service on DFAS and it did not specify the length of marital pension service. DFAS noted that the deficiencies could be remedied by obtaining a court order awarding a fixed sum or a percentage of appellant's retirement pay or by providing a formula wherein the only unknown element was the length of appellant's military service.

More than a year later, respondent moved the district court for an order dividing appellant's pension benefits; for a monthly payment award of $1,221.61, which she

calculated to be the sum due under the formula; for an award of arrearages for the underpayments; and for the award of attorney fees.

In response to the motion, appellant submitted an affidavit from Mark Sullivan, an expert on military pensions, showing how the DFAS would calculate respondent's percentage. Sullivan concluded that, applying the formula, respondent is entitled to monthly benefits of $434.40.

On January 26, 2010, the district court entered its order awarding to respondent monthly benefits of $1,020.92, which it calculated to be 25.67% of appellant's "actual disposable military retirement pay"; $9,753.76 in arrearages; and attorney fees of $3,608.

In a memorandum attached to its order, the court noted that, although the parties agreed that 25.67% should be applied to appellant's pay, they "disagree as to the amount of which the 25.67% should be applied." On that issue, the court found the judgment and decree to be ambiguous "because the paragraph below the formula is reasonably susceptible to multiple meanings." The court then purported to resolve the ambiguity by applying the undisputed percentage of 25.67% to appellant's entire monthly pay of $3,977.10.

Appellant contends that the formula-award is not ambiguous and that the district court erred by ignoring the directive in the judgment and decree that appellant's disposable military retirement pay is to be calculated "at the rate effective for Rank 0-4 at 16 years of service" as of July 1, 2000. The amount the district court awarded to respondent was calculated in part at the rank of 0-5, a higher pay grade.

Appellant also challenges the awards of arrearages and attorney fees.

D E C I S I O N

Appellant argues that the provision in the judgment and decree for dividing his military pension is not ambiguous and that the court's January 26, 2010 order is in direct conflict with the clear language of that provision. "Whether a dissolution judgment is ambiguous is a legal question. If a judgment is ambiguous, a district court may construe or clarify it." *Tarlan v. Sorensen*, 702 N.W.2d 915, 919 (Minn. App. 2005) (citations omitted). "An appellate court is not bound by, and need not give deference to, the district court's decision on a question of law." *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001). This court reviews de novo whether a judgment and decree is ambiguous. *Anderson v. Archer*, 510 N.W.2d 1, 3 (Minn. App. 1993).

The judgment and decree divided appellant's military pension in accordance with the Uniformed Services Former Spouses' Protection Act (USFSPA). *See* 10 U.S.C. § 1408 (2006). The USFSPA grants states authority to treat all disposable retired pay as marital property. *Deliduka v. Deliduka*, 347 N.W.2d 52, 55 (Minn. App. 1984), *review denied* (Minn. July 26, 1984). In Minnesota, the portion of a military pension earned during a marriage is marital property as defined by Minn. Stat. § 518.003, subd. 3b (2010). In order for an award to be enforceable under the USFSPA, the award must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay under 10 U.S.C. § 1408(a)(2)(C).

The district court found the following language in the judgment and decree to be ambiguous:

> The actual percentage will be based upon [appellant's] disposable military retirement pay calculated at the rate effective for Rank 0-4 at 16 years of service as of 07-01-00.

The district court held that this language is "reasonably susceptible to multiple meanings" and that it is unclear as to what amount respondent's interest in appellant's military retirement pay should be applied. "[I]f language is reasonably subject to more than one interpretation, there is ambiguity." *Halverson v. Halverson*, 381 N.W.2d 69, 71 (Minn. App. 1986). The district court did not explain what possible alternate meanings there might be in support of its finding of ambiguity. But, purporting to clarify the judgment and decree, the court interpreted it to mean that respondent was entitled to 25.67% of appellant's disposable military retirement pay as of December 2008, and awarded respondent $1,020.92 each month. The district court explained its decision by stating, "The formula determines [respondent's] marital share of the final pension payment [appellant] receives because it considers [appellant's] total military service time."

But this interpretation radically alters respondent's award under the judgment and decree and is in conflict with the expressed intention of the document. The clarification of a judgment, ambiguous or uncertain on its face, "serves only to express more accurately the thought which, at all times, the judgment was intended to convey." *Stieler v. Stieler*, 244 Minn. 312, 319-20, 70 N.W.2d 127, 132 (1955). The district court's interpretation in effect amends the judgment and decree, which sought to limit respondent's interest to the portion of appellant's pension that constituted marital property. "'Marital property' means property . . . acquired by the parties, or either of

them, to a dissolution . . . at any time during the existence of the marriage relation between them." Minn. Stat. § 518.003, subd. 3b.

The district court also failed to recognize that calculating appellant's monthly payment to respondent was unnecessary because the DFAS calculates the award based on the certified judgment and decree and respondent's application. The DFAS asked respondent for a clarifying order awarding either a fixed amount or a percentage of appellant's retirement pay, or an order providing a formula wherein the only missing element is appellant's length of service. The court had all of the evidence necessary for the DFAS to calculate the award and none of that evidence was in dispute. The percentage of respondent's interest was undisputed and appellant's disposable military pay at rank 0-4 at 16 years of service as of July 1, 2000, was determinable. Thus, all elements necessary for the calculation were available. There was no ambiguity which could require the court to interpret the judgment and decree.

Notably, respondent does not argue that the judgment and decree is ambiguous; rather, she contends the clauses dividing the pension are contradictory. Respondent, however, did not raise this issue affirmatively on appeal within the period for appealing from the judgment and decree.

Nevertheless, we are not persuaded that there is either an ambiguity or a contradiction in the judgment and decree's language. It is clear that respondent is entitled to a portion of the military pension based on appellant's hypothetical retirement pay, had he retired at the time of the divorce. In other words, the intent of the language is to reach marital property. When the parties dissolved their marriage in August 2000, appellant's

rank was 0-4 and he had served in the military for 16 years. These facts coincide with the original judgment's language and demonstrate the district court's intent to divide the pension as if appellant had retired when the parties dissolved their marriage.

Letters in the record also indicate that the parties understood that the judgment and decree based respondent's award on appellant's disposable military retirement pay, had he retired at the time of the dissolution. Additionally, respondent's attorney appeared to acknowledge this in a 2009 letter that calculated respondent's award by applying respondent's percentage, now agreed to be 25.67%, to $4,758.90, the pay base for Rank 0-4 with 16 years of service in July 2000.

Respondent arrived at her assertion that she is entitled to $1,221.61 each month by applying her marital percentage interest to appellant's full $4,758.90 base pay. This is incorrect because respondent is entitled only to a percentage of appellant's disposable military *retirement* pay, not his entire active-duty salary for that rank and time. Therefore, appellant's hypothetical disposable military retirement pay must be calculated to determine respondent's interest.

Monthly military retirement pay is computed by multiplying (a) the member's retired pay base[1] by (b) the retired pay multiplier.[2] 10 U.S.C. § 3991(a)(1)(A)-(B) (2006).

For members entering the military service after September 7, 1980, the retired pay base, or (a), is the average of the member's highest 36 months of basic pay. 10 U.S.C.

[1] As computed under 10 U.S.C. §§ 1406(c) or 1407.
[2] Prescribed in 10 U.S.C. § 1409 (2006).

§ 1407 (2006). This will usually be the last 36 months prior to retirement. Since appellant entered the military in 1983, this method is used. The hypothetical retired pay base is the average of appellant's highest 36 months of basic pay prior to July 1, 2000, the hypothetical retirement date. This information must be submitted to the DFAS because it is specific to each member. Sullivan calculated appellant's base to be $4,230.66.[3]

The retired pay multiplier, or (b), is the product of 2.5% of the member's years of creditable service. 10 U.S.C. § 1409(b)(1)(A)-(B). Based on the judgment and decree, appellant's retired pay multiplier is 0.4.

Applying the formula, appellant's hypothetical retirement pay is $1,692.26 each month. In other words, if appellant retired when the parties divorced, his monthly retirement pay would have been $1,692.26. Respondent's 25.67% interest should be applied to this amount. Accordingly, respondent's award is $434.40 each month.[4]

Given that all the variables for this equation were provided in, or determinable under, the original judgment and decree, the district court's finding that the language in the decree is ambiguous was error.

Respondent makes multiple arguments to support the district court's calculation of her award. She argues that because appellant's pension vests only after 20 years of service, the fixed percentage should apply to appellant's total benefit, not just to a

[3] Instead of using the method required by 10 U.S.C. § 1407, respondent used appellant's base pay for Rank 0-4, 16 years of service, as of July 1, 2000, which was $4,758.90. This method for computing the member's retired pay base, or (a), is used only if the member entered the military before September 8, 1980. 10 U.S.C. § 1406(c) (2006).

[4] Our calculation is based on the evidence in the record. *See* 10 U.S.C. § 1407(a).

hypothetical benefit based on 16 years of creditable service. However, the award is deemed "hypothetical" in part because appellant would not receive retired military pay after only 16 years of service. The hypothetical retired pay amount is a fictional computation because the member might not have the required 20 years of creditable service necessary to be eligible to receive retired pay on the date his retired pay is divided. "[W]e will compute the hypothetical award as if the member had enough creditable service to qualify for military retired pay as of the hypothetical retirement date, even if he . . . did not." *Attorney Instruction: Dividing Military Retired Pay*, Garnishment Operations, Defense Finance and Accounting Service 9, Revised Jan. 4, 2010 (available at www.dfas.mil/garnishment/retiredmilitary.html).

Respondent also relies on *Taylor v. Taylor* and *Mikoda v. Mikoda* to argue that her interest in appellant's retirement pay should be applied to appellant's total retirement benefit. *See Taylor v. Taylor*, 329 N.W.2d 795 (Minn. 1983); *see also Mikoda v. Mikoda*, 413 N.W.2d 238 (Minn. App. 1987), *review denied* (Minn. Dec. 22, 1987). These cases, however, are distinguishable from the instant case. The judgment in *Taylor* specifically ordered the retirement pension to be divided based on its value at the time of retirement, rather than the date of dissolution. *Taylor*, 329 N.W.2d at 799. In *Mikoda*, the judgment awarded the wife 20% of her ex-husband's pension plan but did not state whether she was entitled to 20% of the plan as it was valued at the time of dissolution or at the time of retirement. *See Mikoda*, 413 N.W.2d at 243. In contrast, the judgment and decree here does not state that the pension is to be divided based on its value at the time of appellant's retirement, nor does it fail to specify whether respondent is entitled to the pension as it

was valued at the time of dissolution or at retirement. Rather, the judgment explicitly states that respondent's award would be based on the value of the pension at the time of the dissolution, namely, July 1, 2000.

Also unpersuasive is respondent's reliance on *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983). *Janssen* holds that a nonvested, unmatured pension is marital property which can be divided in a marital-dissolution proceeding and will be *apportioned* if and when benefits are paid. *Id*. at 755-56 (citing Minn. Stat. § 518.54, subd. 5 (1982) (emphasis added). *Janssen* does not support the proposition that interest in a pension must be based on the pension's value as of the date benefits are paid.

Respondent appears to quarrel with the fairness and soundness of the pension award in the judgment and decree. But because there was no timely appellate challenge of the judgment and decree, we are bound by its provisions.

Because the language of the judgment and decree is unambiguous, it was error for the district court to modify the division of the parties' property. *See* Minn. Stat. § 518A.39, subd. 2(f) (2010) ("all divisions of real and personal property . . . shall be final"). Therefore, we reverse the district court's January 26, 2010 order.

The district court's award of $9,753.76 to respondent for pension arrearages accrued from June 2008 to September 2009 is also reversed. Based on the correct valuation of respondent's monthly award, appellant shall pay respondent $369.44 to compensate for arrearages from June 2008 to September 2009.[5]

[5] This calculation is based on the difference between the amount appellant paid respondent from June 2008 to September 2009 and the amount she should have received.

Attorney fees

Appellant also challenges the district court's award of attorney fees to respondent. Respondent argues the district court's conduct-based award was justified because appellant's counsel failed to draft the order required by the judgment and decree. She also argues conduct-based attorney fees are warranted because of appellant's objection to the parties' children's medical treatment at a particular clinic.

"An award of attorney fees rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). Generally, the district court applies Minn. Stat. § 518.14, subd. 1 (2010), when determining whether to award need-based attorney fees. Under Minn. Stat. § 518.14, subd. 1, the district court has the discretion to award additional attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001).

The record does not indicate that the district court applied Minn. Stat. § 518.14, subd. 1, when determining appellant's request for attorney fees. The district court's memorandum does not analyze the application of Minn. Stat. § 518.14, subd. 1, to the existing findings of fact. Moreover, we cannot conclude that the evidence supports the district court's findings, or that the findings support its conclusions. Despite the

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Appellant paid respondent $412.29 from June 2008 through June 2009; he paid her $352.39 in July 2009; and he paid the correct amount, $434.40 from August 2009 to September 2009.

ostensible violation of the court's order by appellant's attorney, there is no showing of bad conduct on behalf of appellant. Furthermore, appellant's counsel was correct about how to trigger the application of the pension, and he explained this in two letters to respondent's counsel. Arguments regarding the parties' children's medical treatment at a particular clinic also do not provide a basis for an award of attorney fees. It is undisputed that appellant has continued to pay his share of the medical bills. Accordingly, we reverse the district court's award for attorney fees.

Reversed.