

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JUDITH CHAIDEZ, *Petitioner/Appellee*,

v.

KENTREZ GRANT, *Respondent/Appellant*.

No. 1 CA-CV 21-0037 FC
FILED 2-15-2022

Appeal from the Superior Court in Yuma County
No. S1400DO200900734
The Honorable R. Erin Farrar, Judge
The Honorable Claudia González, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

Judith Chaidez, Las Vegas, Nevada
Petitioner/Appellee

Kentrez Grant, El Paso, Texas
Respondent/Appellant

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OPINION

Chief Judge Kent E. Cattani delivered the opinion of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Samuel A. Thumma joined.

C A T T A N I, Chief Judge:

¶1 In this appeal from a ruling on a petition to enforce a dissolution decree, Kentrez Grant challenges the superior court’s order dividing his military retirement pay and the court’s denial of his requests for relief from that order. Because the order appears to divide Grant’s disability pay, we reverse the court’s denial of relief from the order, vacate the order regarding Grant’s military retired pay and the related award of attorney’s fees against him, and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 Grant and Judith Chaidez were divorced in 2010 by a dissolution decree entered by the Yuma County Superior Court. Although Grant did not live in Arizona – at the time, he was on active duty in the U.S. Army, deployed to Iraq and otherwise stationed in Texas – he appeared and participated in the Arizona dissolution proceedings. The decree awarded Chaidez a percentage of Grant’s future military retirement benefits, and the court opted to retain jurisdiction over the matter to calculate the amount of future payments and resolve related disputes. Grant did not appeal from the decree.

¶3 In August 2019, Chaidez filed a petition to enforce the decree’s division of Grant’s military retirement pay. Chaidez alleged that Grant had retired from the military and was receiving retirement pay but was not providing Chaidez her share. She also sought an award of attorney’s fees.

¶4 Grant and Chaidez both testified at the resulting hearing. Chaidez presented Grant’s discharge paperwork, which reflected his retirement effective January 2019, listed his reason for retirement as “disability, temporary (enhanced),” and cited “AR 635-40, Chap 4” as authority. She also presented Grant’s retiree account statements showing that he received gross monthly payments of \$2,336. Beginning with the

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August 2019 account statement, the “Message Section” explained, “Based on the compensation amount you receive from the Department of Veterans Affairs (VA) and your retired pay, your concurrent retirement disability pay (CRDP) amount is \$2,336.00.” Chaidez also gave the court a draft order directing Grant to pay her \$287.32 per month, calculated based on Grant’s monthly receipt of \$2,336 according to the formula set forth in the decree, plus a lump sum payment to make up for previous months. The draft order stated that payments would cease only upon Grant’s death and required Grant to continue paying Chaidez’s estate should she predecease Grant.

¶5 For his part, Grant, who was unrepresented, flagged several issues for the court’s consideration. As relevant here, he noted that the division was “supposed to be based off [his] disposable income,” which the decree had not addressed, and that there were mandatory deductions “for disability stuff” to be considered. And he objected to the directive in Chaidez’s draft order “where [his] benefits are extended to her -- her family or her estate,” noting that those statements regarding payments after one of them dies were contrary to law.

¶6 Both parties the submitted proposed forms of order following the hearing, and the court adopted Chaidez’s proposed order, which was (as relevant here) consistent with the draft she presented at the hearing. The court also awarded Chaidez \$5,000 in attorney’s fees.

¶7 Grant then filed a motion for reconsideration, motion for relief, and motion to alter or amend, as well as amended versions of each, which the court denied. Grant timely appealed the resulting ruling.

¶8 We have jurisdiction under A.R.S. § 12-2101(A)(2). *See Yee v. Yee*, 251 Ariz. 71, 73, ¶ 1 (App. 2021).

DISCUSSION

¶9 Grant’s primary contention on appeal is that the order for the division of military retired pay contravenes federal law. We consider de novo questions of law, including the interpretation of statutes and terms of decrees. *See Merrill v. Merrill*, 230 Ariz. 369, 372, ¶ 7 (App. 2012).

¶10 Federal law permits state courts to treat military retirement benefits earned during marriage as community property, divisible upon divorce—but it imposes precise and discrete limitations on any such division. 10 U.S.C. § 1408; *see Mansell v. Mansell*, 490 U.S. 581, 588–89 (1989); *see also Edsall v. Superior Court*, 143 Ariz. 240, 241–42 (1984). Among other restrictions, the former spouse’s portion of military retired pay is not

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transferrable, “including by inheritance.” 10 U.S.C. § 1408(c)(2). Contrary to that federal directive, the court’s order in this case required Grant to continue paying Chaidez’s estate after her death. *Id.* Grant timely raised this issue with the superior court, both before and after the ruling.

¶11 Federal law also provides that only “disposable retired pay” is subject to division. 10 U.S.C. § 1408(a)(4)(A), (c)(1). Calculation of “disposable retired pay” begins with the service member’s “total monthly retired pay,” which is statutorily defined as the amount that would have been the member’s retired pay as of the date of the decree, plus cost-of-living adjustments thereafter. *See* 10 U.S.C. § 1408(a)(4)(B)(i). But from there, “disposable” retired pay excludes disability (as opposed to length-of-service-based) benefits. *See* 10 U.S.C. § 1408(a)(4)(A)(ii)–(iii), (B)(i). Specifically, it excludes any amount of retired pay the member waived in favor of VA disability benefits. 10 U.S.C. § 1408(a)(4)(A)(ii); *see also* 38 U.S.C. §§ 5304(a), 5305; *cf.* A.R.S. § 25-318.01. And, for service members who are medically retired under Chapter 61, “disposable” retired pay also excludes the amount of retired pay calculated based on the disability percentage. 10 U.S.C. § 1408(a)(4)(A)(iii); *see also, e.g.*, 10 U.S.C. §§ 1201–1202, 1401(a) (Formula No. 1, 2).

¶12 Chapter 61 permits the military to retire a member who, while serving, suffers a physical disability that renders the member unfit to continue performing their duties. *See* 10 U.S.C. §§ 1201(a), 1202. A Chapter 61 retiree is entitled to elect the more favorable rate of retired pay based on either length of service or disability percentage. 10 U.S.C. § 1401(a) (Formula No. 1, 2), (b). Both options are calculated based on the member’s retired base pay, which is the average monthly salary of the member’s highest 36 months. *See* 10 U.S.C. § 1409(b)–(c). The member can then opt to apply a multiplier based on either length of service – a percentage equal to 2.5 times years of creditable service, 10 U.S.C. § 1409(b)(1) – or percentage of disability (up to 75%) as of retirement. 10 U.S.C. § 1401(a) (Formula No. 1, 2). Thus, for example, a member who is medically retired under Chapter 61 after 24 years of creditable service with a 55% disability percentage can elect length-of-service-based retired pay of base x 60% (2.5 x 24 years), or disability-based retired pay of base x 55%. Even if the member opts to receive benefits calculated based on length of service, the member’s disability-based amount is nevertheless excluded from “disposable retired pay” under 10 U.S.C. § 1408(a)(4)(A)(iii).

¶13 Here, although somewhat confusing, the evidence shows that Grant was medically retired under Chapter 61. Grant’s retirement record – which was admitted in evidence at the hearing – shows that his reason for

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retirement was “disability, temporary (enhanced),” and it cites “AR 635-40, Chap 4” as authority. Army Regulation 635-40 is the Army’s implementation of Chapter 61. See A.R. 635-40 ¶ 1-1. Accordingly, federal law did not allow the court to divide Grant’s total monthly retired pay under 10 U.S.C. § 1408(a)(4)(B)(i), but instead, allowed it to divide only his “disposable retired pay,” meaning his retired pay less his disability-based retired pay. See 10 U.S.C. § 1408(a)(4)(A)(iii); cf. *Howell v. Howell*, 137 S. Ct. 1400, 1405 (2017) (noting that “federal law completely pre-empts” states’ attempts to treat amounts deducted from disposable retired pay as divisible community property).

¶14 The superior court denied Grant’s motion for relief from the order because it concluded he did not raise the disability-pay issue until oral argument on his post-ruling motions. To be sure, Grant could have raised the issue more clearly. But at the hearing on Chaidez’s petition to enforce the decree, he told the court that the division of retired pay was “supposed to be based off [his] disposable income,” which the decree had not addressed, and that mandatory deductions “for disability stuff” needed to be considered. Because Grant at least minimally raised the issue, the superior court erred by denying his request for relief on this basis. We thus reverse the superior court’s denial of relief, vacate the order for the division of military retired pay, and remand for the court to calculate Grant’s disposable retired pay and enter an appropriate order consistent with federal law.

¶15 We likewise vacate the related award of \$5,000 in attorney’s fees in favor of Chaidez. We note that Grant’s arguments challenging the attorney’s fee award focus largely on a November 2019 order granting a motion to compel discovery. Although the court initially awarded fees against him on that basis, the court later effectively reconsidered that award pending resolution of the enforcement proceedings on retirement pay. And the court’s subsequent ruling authorizing an award of fees addressed only the fee request in Chaidez’s petition to enforce, not the motion to compel. Although the fees award referenced both the motion to compel and the order dividing retirement pay, the award (of ten times the amount requested with regard to the motion to compel) necessarily arises from the petition to enforce, and we thus vacate the award given our resolution of the military retirement issue.

¶16 To avoid needless litigation on remand, we note that Grant’s other arguments are unavailing. First, he urges that the superior court lacked jurisdiction to enter the original decree and thus now lacks authority to divide his retired pay, but he participated in the dissolution proceedings

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(and sought affirmative relief), thereby consenting to the Arizona court's exercise of jurisdiction. See 10 U.S.C. § 1408(c)(4)(C); see also *Davis v. Davis*, 230 Ariz. 333, 335–38, ¶¶ 13–15, 18–20, 25 (App. 2012). Second, he argues that Chaidez cannot enforce the retirement-benefits provision of the 2010 decree because she did not timely renew the decree under A.R.S. § 12-1551. But that statute does not apply to a decree's yet-to-be-calculated division of retirement benefits, see *Jensen v. Beirne*, 241 Ariz. 225, 228, ¶ 10 (App. 2016), and the court here expressly reserved jurisdiction to calculate the division of retirement benefits.

¶17 Third, Grant asserts that the superior court judges and staff committed misconduct and were biased against him. But we presume judges are free of bias and prejudice, see *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 232 Ariz. 562, 568, ¶ 21 (App. 2013), and a party asserting bias ordinarily must provide evidence other than unfavorable rulings (even erroneous rulings) to prove an extra-judicial source of prejudice. See *Liteky v. United States*, 510 U.S. 540, 555 (1994); see also *State v. Ellison*, 213 Ariz. 116, 129, ¶ 40 (2006); *State v. Thompson*, 150 Ariz. 554, 557 (App. 1986). Grant's allegations of legal error do not overcome the presumption that the court was free of bias, and the record suggests no such impropriety.

¶18 Finally, Grant asserts that the superior court wrongfully dismissed his petition to enforce parenting time and petition to modify child support. Grant first filed these petitions in June 2019, and the court dismissed them in January 2020 after Grant failed to serve Chaidez. Grant did not appeal from that dismissal and instead refiled both petitions the next month. The court fully resolved Grant's refiled petition to enforce parenting time by dismissing it in September 2020, and Grant did not timely appeal that dismissal. The court allowed Grant an additional period to serve Chaidez with the petition to modify child support, and our record does not reflect whether or how the petition to modify was resolved, so it appears that there is no final appealable ruling on this petition. Accordingly, we lack jurisdiction to review these post-decree petitions. See A.R.S. § 12-2101(A)(2); *Yee*, 251 Ariz. at 76, ¶¶ 13–14.

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CONCLUSION

¶19 We reverse the superior court's denial of post-ruling relief, vacate the order for the division of military retired pay and the related award of attorney's fees against Grant, and remand for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court
FILED: AA