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Cite as 2009 Ark. App. 682

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA08-958

GEORGE E. DOVE APPELLANT V. PATRICIA A. DOVE APPELLEE	**Opinion Delivered** OCTOBER 21, 2009 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. DR-2006-547-IV] HONORABLE MARCIA RENAUD HEARNSBERGER, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant George E. Dove and appellee Patricia A. Dove were divorced by decree filed October 16, 2007. The decree was amended upon motion of appellee after the trial court determined the specific formula for dividing appellant's pension plan and ordered a division between the parties of the $375-per-month payment for Joint and Survivor Coverage benefitting appellee. On appeal, appellant contends that the trial court erred in choosing the formula provided by the pension fund which gives him less than $200 credit for twelve years of work and in requiring him to pay half of the premium for the survivor's benefit option, which inures to appellee's benefit. We find no error and affirm.

Appellant filed for divorce June 5, 2006, after having been married to appellee for almost eighteen years. Appellee counterclaimed for divorce, seeking temporary support during the pendency of the action. A divorce decree was filed October 16, 2007, awarding

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appellant a divorce and dividing their property, both real and personal, along with any debts. Paragraph eight of the divorce decree states:

> That the Defendant [appellee] shall receive fifty per cent (50%) of the Plaintiff's [appellant's] pension benefits accrued from the date of the parties' marriage on October 18, 1988 through the date of the entry of this Decree Removed from [sic], pursuant to the terms and requirements of his pension policy with the Central Southeast and Southwest Areas Pension Fund. Defendant [appellee] is not entitled to any benefits accrued prior to the date of the parties' marriage.

On October 26, 2007, appellee filed a motion for Rule 60 relief, alleging that the language "Removed from" in the above quoted paragraph should be corrected, along with other items in the decree related to the division of personal property. *See* Ark. R. Civ. P. 60 (2007). An amended motion for Rule 60 relief was filed October 29, 2007, modifying appellee's request related to a generator owned by the parties.

A hearing was held January 18, 2008, wherein the trial court took up the Rule 60 motion along with contempt motions filed by each party. The trial court set a hearing for February 14, 2008, to determine which formula would be used to divide appellant's retirement plan, the amount, if any, appellant owed appellee as back pay for the retirement funds, and how to divide the personal property remaining in the storage units. The trial court allowed "Removed from" to be deleted from the divorce decree and determined that neither party was in contempt.

Following a hearing held February 14, 2008, the trial court, by letter of February 15, 2008, ruled on two issues taken under advisement at the conclusion of the hearing. The first was how to interpret the language of the divorce decree in paragraph eight as quoted above.

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The trial court found that, according to the policy and intent of Arkansas law, appellee is entitled to the method that best calculates the increased subsidies of appellant's plan during the years the parties were married. The trial court determined that, of the three methods presented for calculation of the division of appellant's pension plan, the first method gave appellee the full measure of the increased subsidies contributed by appellant's employer during the years of the parties' marriage. The trial court found that, on the date of the marriage, September 18, 1988, appellant had accrued an entitlement to $197.99 in monthly benefits in his pension plan. At his retirement date, he had accrued an entitlement to $2500 in monthly benefits. The difference is the marital portion, which equals $2302.01. The trial court found that appellee was entitled to one-half of this amount as marital property, which equals $1151 per month.

The trial court also found the following:

> The second issue to be decided relates to the Joint and 50% Surviving Spouse Option. Plaintiff and Defendant elected to Joint and Survivor Coverage on January 17, 2001. The Election Notice, signed by both parties, was introduced as Defendant's [appellee's] Exhibit No. 8. This election resulted in a payment of $375.00 per month to be deducted from Plaintiff's [appellant's] monthly pension check. Plaintiff [appellant] now objects to the payment from his portion of the pension check since the benefit inures to the Defendant [appellee]. Defendant [appellee] has objected to this issue being decided by the court because it was not mentioned in the Decree of Divorce signed by the parties. THE COURT FINDS this issue should be decided as additional Rule 60 relief for the same reasons giving the Court the authority to interpret the method for determining the pension amount. THE COURT FURTHER FINDS, the Plaintiff and Defendant both signed the contract electing to take the Joint and Survivor Coverage and both parties are responsible for the cost of the contract. Plaintiff [appellant] will be required to pay $187.50 per month for the coverage and Defendant [appellee] will be required to pay $187.50 per month for the coverage. This will reduce Defendant's [appellee's] monthly pension check to $963.50.

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Finally, the trial court awarded appellee her portion of the pension check retroactively for the months of November and December, 2007, and January and February, 2008. An amended decree of divorce was filed on April 17, 2008, reflecting the trial court's rulings. Appellee filed a motion to modify, review, amend and correct amended decree of divorce on April 25, 2008, requesting corrections as related to the trial court's rulings. A second amended decree of divorce was filed May 8, 2008, wherein some modifications were made pursuant to appellee's motion. By order filed May 22, 2008, the trial court declined to make the changes proposed by appellee's motion to amend second amended decree. A notice of appeal was filed May 22, 2008, and this appeal followed.

A circuit court may modify or vacate a decree to correct errors or to prevent the miscarriage of justice within ninety days of filing the decree with the clerk. Ark. R. Civ. P. 60(a). And the court may correct clerical mistakes in a decree at any time-even beyond ninety days of its entry. Ark. R. Civ. P. 60(b). Decisions rendered by courts of equity are reviewed de novo on appeal, and are not reversed unless we find that the trial judge's decision is clearly erroneous. *Abbott v. Abbott*, 79 Ark. App. 413, 90 S.W.3d 10 (2002).

I.

In "Defendant's Exhibit No. 3," Central States Southeast and Southwest Areas Pension Fund explained three methods for dividing appellant's pension fund. The letter explains that the pension fund takes no position on which formula would be appropriate, and outlines each option as follows:

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> The first method is to deduct the benefit accrued as of the marriage date from the benefit accrued as of the divorce date (or other valuation date); the difference could then be considered that portion of the benefit that was accrued between those two dates. Under this method, all of the subsidy that became applicable to the benefit when the Participant completed 20 years of service would be included in the marital portion and not spread over the entire participation history.
>
> In this case, Mr. Dove's benefit accrued as of September 18, 1988, valued at his effective date, is $168.29. Therefore, the marital portion would be $1,956.71 ($2,125.00 - $168.29 = $1,956.71).
>
> A second method would be to calculate the benefit as though the Participant were not a Participant in the Fund prior to the marriage or after the valuation date. (This method generally produces a result which include little, if any, of the subsidy that became applicable to the benefit when the Participant completed 20 years of contributory service credit). By excluding all contributions prior to and after the marriage, Mr. Dove's accrued benefit is $616.87.
>
> A third method defines the marital portion as a coverture fraction of the final benefit accrued at the Participant's effective date, determined by dividing the years of service during the marriage by the total years of service at the Participant's effective date. In Mr. Dove's case, this method results in a coverture fraction of 48.00% (12.000 years ÷ 25.000 years), applied to his current benefit; the marital portion, therefore, would equal $1,020.00 (48.00% of $2,125.00).

Appellant contends that the trial court's decision to use the first method above is in error because that option only allows $168 credit for the twelve years of work he performed prior to his marriage to appellee. *See Marshall v. Marshall*, 285 Ark. 426, 688 S.W.2d 279 (1985) (where ex-husband received retirement benefits based on thirty-five years of service to employer, twenty five of which took place before, and ten during, marriage; and wife, upon divorce and property division, was only entitled to share in that portion of retirement benefits which accrued during marriage). He argues that the third option, which spreads the total years of service among the entire twenty-five years, is the only logical choice.

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Appellee argues that the trial court was not clearly erroneous in its decision to choose the first method to determine the division of appellant's pension fund. She claims that in *Marshall*, as well as in *Askins v. Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986), our supreme court awarded a proportionate share to the non-contributing spouse based on the number of years of marriage. The instant case can be distinguished, as the trial court here was given three methods to determine the formula to be used.

We hold that the method chosen described that the enhancement to the pension was made during the marriage, and thus, can be considered marital property. Accordingly, the trial court's determination was not clearly erroneous. *See also Brown v. Brown*, 332 Ark. 235, 962 S.W.2d 810 (1998) (where the Arkansas Supreme Court acknowledged that enhancements to a retirement plan are often most dramatic in the later years and that the trial court has considerable discretion to divide marital property in affirming the trial court's decision to award former husband a percentage of the entire amount of former wife's pension benefits, including those benefits based on post-marital salary increases).

II.

Appellant argues that the trial court erred in requiring him to pay one half of the premium for the survivor's benefit option instead of requiring appellee to pay the entire premium or to disclaim the benefit. On January 17, 2001, the parties agreed to provide a survivor benefit to appellee for a monthly premium of $375. This benefit would pay over one thousand dollars per month to her for the rest of her life. This provision was not

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mentioned in the divorce settlement. Appellant claims that to require him to pay half of the monthly premium is clearly erroneous as such payment inures only to the benefit of appellee and should be her responsibility.

We hold that the trial court's decision to split the monthly premium between the parties was properly addressed pursuant to Rule 60. In *Abbott*, *supra*, we held it was within the trial court's jurisdiction to interpret, clarify, and enforce the original divorce decree pursuant to Rule 60 where the divorce decree's reference to "retirement" was shown to be latently ambiguous. Therefore, it was not clearly erroneous for the trial court to divide the monthly premium for the survivor's benefit as an interpretation of the divorce decree. Further, we find no error in the trial court's determination that appellant should remain responsible for at least half of the premium payment. In reaching an equitable division of appellant's pension, the trial court properly utilized one of the methods set forth by the fund administrator. By dividing equally between the parties the payment for the survivor's benefit, which was previously being deducted directly from appellant's monthly pension, the trial court made a proper determination of the division of that fund. *See Raney v. Raney*, 262 Ark. 747, 561 S.W.2d 287 (1978) (where the Arkansas Supreme Court held that the chancellor's decision to award the wife an interest in the existing life insurance was a proper way of awarding the wife an interest in her husband's property).

Affirmed.

VAUGHT, C.J., and MARSHALL, J., agree.