

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001605-MR

MARY ALICE MILLER

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING, JUDGE
ACTION NO. 89-CI-2589

BENNETT FOREST MILLER, SR.

APPELLEE

OPINION REVERSING AND REMANDING

* * * * *

BEFORE: GUDGEL, Chief Judge; GUIDUGLI and SCHRODER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an order entered by the Jefferson Circuit Court in a post-dissolution proceeding involving the division of pension benefits. Appellant contends that the court erred in calculating the amount of the past-due benefits which should be awarded to her. We agree. Hence, we reverse and remand.

The parties married in 1968 and divorced in July 1990, after appellee retired from his employment with the Naval Ordnance Station. The court awarded no maintenance to appellant but ordered that appellee's gross monthly retirement benefits should be allocated between the parties, such that appellant

would received twenty percent of the benefits, or \$337.80 per month, plus twenty percent of any cost of living adjustment (COLA). A qualified domestic relations order (QDRO) was entered to that effect.

As it turned out, appellee's actual pension benefit payments were less than anticipated. Thus, although the federal Office of Personnel Management (OPM) paid appellant twenty percent of appellee's benefits, those payments amounted to only \$274 per month. After appellee failed to satisfy appellant's demand that he reimburse her for the difference between the actual and anticipated benefit payments, appellant sought to have appellee held in contempt of court. On January 2, 1991, the court resolved the dispute pursuant to an agreement between the parties, whereby appellee was obligated in pertinent part (1) to pay appellant accrued arrearages of \$1,644.60 plus interest, (2) to execute the necessary documents to enable appellant to receive \$337.80 per month plus twenty percent of any COLA's from May 1990 forward, and (3) to reimburse appellant for deficiencies in OPM's payments. The court entered a supplemental/amended QDRO to this effect. Subsequently, pursuant to the amended QDRO, OPM increased appellant's monthly benefits to \$337 in March 1991, and then to \$347 based upon a December 1991 COLA.

Next, appellant filed a motion seeking an award of past-due benefits on the ground that she had not received all the benefits to which she was entitled because OPM failed to ever increase her monthly benefits by an amount equal to twenty

percent of the December 1990 COLA increase. The court's domestic relations commissioner conducted a hearing on the motion and recommended that it be denied. Appellant filed exceptions and on January 8, 1997, after a hearing, the trial court entered two orders tendered by appellant's counsel. The first order awarded appellant a common law judgment for past-due benefits, and it provided for current monthly benefits of \$398.45 per month plus twenty percent of any 1997 COLA increase. However, on May 21, 1997, the court set aside that order and denied appellant any award of past-due benefits. Nevertheless, a second order, which was a supplemental/amended QDRO entitling appellant to \$398.45 per month plus twenty percent of all COLA increases from December 1996 forward, was not changed in any respect. This appeal (initially filed pro se) from "the order of 5/21/97" followed.

First, we note that there is no issue before us regarding the January 1997 supplemental/amended QDRO order. Not only was that order drafted and tendered to the court by appellant's counsel, but there was neither a motion to amend the order nor an appeal taken therefrom. Hence, we will not address any issues raised by appellant complaining of the fact that, as of December 1996, appellant's monthly pension payment was set at \$398.45 plus twenty percent of all COLA increases.

However, we do agree with appellant's contention that she was entitled to but did not receive the additional benefits stemming from the December 1990 COLA, which would have increased her monthly payments for the six-year period between December

1990 and the entry of the January 1997 QDRO order. The January 1991 agreed order provided in pertinent part that:

2. Respondent shall pay to Petitioner her portion of the Naval Ordnance retirement in the amount of \$337.80 per month, commencing with the payment due December 1, 1990, January 1, 1991, and thereafter, by timely payments direct from Respondent to Petitioner, upon his receipt of same, until such time as Petitioner begins receiving such payments direct from the said retirement payor. If payor's remittance for any such payment from December 1, 1990 is less than \$337.80, Respondent shall be required to remit any such deficit directly to Petitioner.

3. Likewise, Respondent shall execute any and all documents, forms, applications, papers and QDRO forms necessary and proper to allow/direct/require the payor, Naval Ordnance and the United States Civil Service Retirement System/United States Office of Personnel Management retirement program/Department of the Navy, Naval Ordnance Station to pay Petitioner the sum of \$337.80 per month, as her share of his retirement, together with Twenty percent (20%) of any and all cost of living increases/adjustments to which the Respondent may have become entitled from to [sic] May 1, 1990 and subsequently. (Emphasis added.)

Thus, it is clear the parties agreed that, starting in May 1990, appellant was entitled to receive twenty percent of all COLA's paid to appellee. Despite appellee's assertion to the contrary, there is nothing in the January 1991 order to indicate that the \$337.80 monthly payment "included" the December 1990 COLA, and we cannot look outside the order's plain meaning to consider whether the parties may have had a different intent. It follows, therefore, that because it is clear from a review of the record

that appellant has never received the benefits of the December 1990 COLA increase, on remand she is entitled to a recalculation of her monthly benefits. That recalculation should incorporate the benefits of the December 1990 increase for the period between the pertinent dates listed in the January 1991 agreed order and those listed in the January 1997 QDRO. Appellee should then be ordered to pay appellant the sum of the differences between the amounts which appellant was entitled to receive, and the amounts which she actually received.

For the reasons stated, the order appealed from is reversed and remanded with directions to enter an amended order consistent with the views expressed in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Delores Pregliasco
Melanie Straw-Boone
Louisville, KY

BRIEF FOR APPELLEE:

Victoria Ann Ogden
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