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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001764-MR

MARGARET HUNT (NOW WIMMER) APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 90-CI-01517

ALLEN HUNT APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

** ** ** ** **

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,[1] SENIOR JUDGE.

NICKELL, JUDGE: This is an appeal from an order entered by the Hardin Circuit Court concerning post-dissolution division of military retirement benefits. For the reasons stated hereinafter, we affirm in part, vacate in part, and remand for further proceedings.

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The parties herein were married on May 22, 1977. Difficulties eventually arose in the marriage leading to the entry of a divorce decree by the Hardin Circuit Court on February 15, 1991. Issues of property settlement and division were reserved for later ruling and were settled by the entry of a supplemental judgment on June 3, 1993. Within that supplemental judgment, Margaret Hunt (now Wimmer) (hereinafter referred to as "Margaret") was awarded a portion of Allen Hunt's (hereinafter referred to as "Allen") military retirement benefits to be computed by utilization of the formula set forth in *Poe v. Poe*, 711 S.W.2d 849 (Ky.App. 1986). Both parties also had teacher's retirement accounts which were allocated in the divorce. Allen's military retirement account is the only account at issue in this appeal, and therefore any references herein to retirement benefits are to that account only.

Allen was an active member of the United States Army for a number of years prior to and during the marriage of the parties. He continued his military career in the United States Army Reserves after leaving active duty, ultimately retiring in 1994 as a Lieutenant Colonel. Based upon his age at the time of his retirement, Allen was unable to begin drawing his retirement benefits until November 7, 2003, when he reached the age of 60. Allen retired as a military reservist and not from active duty. The retirement for reservists is based upon a "points system" rather than the "months of service" system used to calculate retirement from active duty. Under the guidance of the supplemental judgment, the circuit court below was to calculate percentages based upon the original *Poe* formula and a modified version of that formula using the "points system" and to then

award Margaret the larger percentage. Neither party proposed to use the "months of service" calculation in the circuit court, so we limit our discussion to the calculations actually used. The "points" used in the calculations in the circuit court were stipulated between the parties and were based upon information received from Defense Finance and Accounting Service (DFAS). The parties also agreed that the *Poe* formula was the controlling law of the case and our discussion here is so limited.

On August 6, 2004, Margaret sought an order from the circuit court to determine the proper amount of Allen's retirement benefits to which she was entitled in accordance with the supplemental judgment entered in 1993. An evidentiary hearing was held on Margaret's motion wherein each of the parties provided calculations to the trial court regarding the proper percentage of Margaret's entitlement. The agreed upon percentage of her entitlement was 25.6%. However, there was a disagreement as to whether this percentage should be applied to the retirement benefits to which Allen would have been entitled at the time of the entry of the divorce decree, or to his actual retirement benefits which he began receiving on November 7, 2003.

On June 7, 2005, the trial court entered an order wherein Margaret was awarded 10.277% of Allen's current retirement pay plus 10.277% of any future cost of living adjustments to which Allen might become entitled. Both parties filed motions to alter, amend, or vacate the June 7, 2005, order. Margaret's motion alleged that the circuit court had erred in giving her a reduced percentage of the retirement benefits than had been stipulated, and in failing to order the payments to her to be retroactive to the time

when Allen actually began receiving his retirement benefits. Allen's request was that the circuit court remove language from the June 7, 2005, order referring to future cost of living increases as "surplusage." A subsequent order was entered on July 28, 2005, denying Margaret's requests to modify the percentage to 25.6% of the current retirement pay and to make the award retroactive to November 7, 2003. The July 28, 2005, order granted Allen's request to remove any language referring to future cost of living increases. This appeal followed.

Margaret contends the circuit court erred as a matter of law when calculating her percentage of entitlement to Allen's retirement benefits, and further erred by failing to make her award retroactive to November 7, 2003. Her appeal is therefore based on allegations of error surrounding both the June 7, 2005, and the July 28, 2005, orders.

The two issues on appeal are the proper application of the *Poe* formula to the facts and the question of retroactivity of the award. The parties below agreed as to the base percentage of entitlement for Margaret, and we shall accept their calculations as correct. However, for purposes of clarity, we feel it necessary to reiterate how this percentage was calculated. The June 3, 1993, supplemental judgment reveals the parties stipulated 2,759 points were accumulated by Allen during the term of the marriage. Information from DFAS revealed that the Allen had earned 5,390 points at the time of his retirement. Applying the modified *Poe* formula, 2,759 is divided by 5,390, resulting in 51.2% of Allen's points having been earned during the marriage.

The formula next requires multiplication of the resulting marital percentage by either (a) one-half of Allen's disposable retired or retainer pay, or (b) one-half of the disposable retired or retainer pay which would have been payable had Allen retired at the same rank and basic pay rate he had attained at the date of entry of the divorce decree, whichever is less. Therefore, the final percentage of entitlement is one-half of 51.2%, which is 25.6%, as was agreed upon by the parties. The issue sub judice is whether this entitlement percentage should have been applied to Allen's current disposable retirement benefits, or to the benefits to which Allen would have been entitled at the time of the entry of the divorce decree in 1991.

Margaret argues she is entitled to an award of a percentage of Allen's current disposable retired pay. Her argument is based on the fact that Allen was ineligible to retire at the time of entry of the divorce decree and Allen eventually retired at the same rank he had attained at the termination of the marriage. However, to grant Margaret the relief requested would be in clear contravention of well-settled law regarding division of retirement benefits. In *Foster v. Foster*, 589 S.W.2d 223, 225 (Ky.App. 1979), this Court ruled that "[t]he [non-employee] wife is not entitled to share in any pension benefits earned after divorce and before retirement. . . ." Additionally, *Poe* states "[t]he value of a pension, if any, should therefore be marital property for the portion accrued during coverture" [emphasis added]. *Poe*, 711 S.W.2d at 855 (quoting *Light v. Light*, 599 S.W.2d 476, 478 (Ky.App. 1980)). *See also Armstrong v. Armstrong*, 34 S.W.3d 83 (Ky.App. 2000); *Brosick v. Brosick*, 974 S.W.2d 498 (Ky.App. 1998); and

Carranza v. Carranza, 765 S.W.2d 32 (Ky.App. 1989). In all of the foregoing decisions, the benefits accrued at the time of divorce were used. We find no authority to support Margaret's argument to the contrary. Thus, Margaret's argument must fail because granting her a portion of Allen's current disposable retired pay would allow her to benefit from post-dissolution increases, a result contrary to law. Furthermore, the *Poe* formula expressly requires the use of the lesser of (a) or (b), above, in completing the calculation. We find that the circuit court correctly applied the *Poe* formula utilizing Allen's potential retired pay as of the date of divorce.

It is noted that the percentage awarded by the circuit court, 10.277%, does not facially match the agreed upon percentage of 25.6%, a fact heavily relied upon by Margaret in her argument. However, a review of the record reveals the circuit court utilized a conversion factor to obtain the proper percentage of Allen's current retired pay to be set aside for payment to Margaret. DFAS regulations require trial courts to convert awards of retirement benefits which are not based on the retiree's actual military retired pay to a percentage of this amount. In this manner, the former spouse obtains the proper amount of benefits intended by the trial court, and gets the added benefit of any future cost of living adjustments (COLA) to which the retiree may become entitled. Application of the converted, i.e., lower, percentage set forth by the trial court to Allen's current retirement benefits yields practically the same result as applying the higher percentage to Allen's potential retirement pay at the time of divorce.[2] We find the circuit court was not

[2] Uncontroverted evidence was presented in the circuit court that Allen was entitled to receive $996.00 per month at the date of divorce and that his actual retired pay is $2,481.00. Multiplying $996.00 by 25.6% equals $254.976. Multiplying $2,481.00 by 10.277% yields

clearly erroneous in applying the applicable law to the facts before it and therefore affirm that portion of the judgment.

The remaining issue on appeal is the retroactivity of Margaret's award. As correctly noted by Margaret, the circuit court was without authority to amend the commencement date of her award, as such was set by the supplemental judgment entered in June 1993. In that order, Margaret was awarded an as-then-undetermined percentage of Allen's retirement benefits. Allen now argues it was Margaret's responsibility to initiate payments, and her failure to do so eliminates her entitlement to such payments. Allen cites no authority to support his position. While Allen is correct in stating Margaret must contact DFAS to initiate direct payments to her from the government, as revealed in the documentation provided to the circuit court, her failure to do so does not relieve Allen of his obligation to follow the previous orders of the circuit court. Furthermore, Allen testified that he had paid Margaret $1,000.00 and was prepared to pay an additional $500.00 towards any arrearage due her. Allen requested a credit against any arrearage for these payments as well as taxes he had previously paid on amounts he received which would be payable to Margaret. It is clear from our review of the record that Allen was aware Margaret was entitled to draw her share of the military benefits when he became eligible to draw such payments. We find that the circuit court abused its discretion in effectively amending the supplemental judgment of 1993 and depriving

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$254.972. We find the difference of $0.004 to be de minimis and of no legal consequence.

Margaret of a portion of the benefits to which she was entitled by denying her request for benefits retroactive to November 2003.

Accordingly, the judgment of the Hardin Circuit Court as to the division of Allen's military retirement benefits is affirmed. We vacate and remand this case for determination of any amount of arrearage due Margaret and any credits due Allen against such arrearage.

PAISLEY, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority opinion in reversing the Hardin Circuit Court as concerns its failure to award Margaret retirement benefits retroactive to May 2003.

However, I would reverse as to the method of division of Allen's military retirement benefits. The circuit court erroneously applied a "conversion factor" to determine Margaret's interest in Allen's retirement, which is simply contrary to *Poe v. Poe*, 711 S.W.2d 849 (Ky. 1986). Even if the results in this case in applying the conversion factor are similar to the *Poe* computation or "*de minimis*," as described by the majority, the methodology is simply not permitted by *Poe*.

Once the actual military retirement benefits have accrued and are known, the circuit judge need only apply the *Poe* formula and thus determine the amount of benefits to which Margaret was entitled.[3] This amount should be expressly set out in the

[3] Since there is a distinction in the computation of active duty retired pay and reservist retired pay, there is no problem in substituting the points accumulated for the months on the left side of

court's final order or judgment subject to cost of living adjustments that should be determined by the court from the date of retirement. When this order is then tendered to the proper military accounting office, there would be no room for error or dispute.

For these reasons, I would reverse and remand.

BRIEF FOR APPELLANT:

G. William Bailey, Jr.
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Dawn Lonneman Blair
Elizabethtown, Kentucky

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the *Poe* equation, since points and not months is the method used by the military for computing this retirement benefits for reservists. *Poe v. Poe*, 711 S.W.2d 849 (Ky. 1986).