

RENDERED: DECEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

**OPINION OF APRIL 10, 2009, WITHDRAWN
BY ORDER ENTERED JUNE 19, 2009**

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001502-MR

AND

NO. 2007-CA-001523-MR

MARK TIMBERLAKE

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM HARDIN FAMILY COURT
v. HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 00-CI-00251

CYNTHIA FRENCH

APPELLEE/CROSS-APPELLANT

AND

NO. 2007-CA-001745-MR

MARK TIMBERLAKE

APPELLANT

APPEAL FROM HARDIN FAMILY COURT
v. HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 00-CI-00251

CYNTHIA FRENCH

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: STUMBO AND TAYLOR, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Mark Timberlake brings Appeal No. 2007-CA-001502-MR from a February 5, 2007, Findings of Fact, Conclusions of Law, and Order of the Hardin Circuit Court, Family Court Division (family court) ordering Mark to pay Cynthia French her portion of military retirement benefits Mark waived in order to receive military disability benefits. Cynthia brings Cross-Appeal No. 2007-CA-001723-MR from the same order. Mark also brings Appeal No. 2007-CA-001745-MR from an August 14, 2007, order awarding Cynthia attorney's fees and a judgment for unpaid cost of living increases to Mark's military retirement benefits. We affirm Appeal No. 2007-CA-001502-MR, Cross-Appeal No. 2007-CA-001523-MR, and Appeal No. 2007-CA-001745-MR.

Mark and Cynthia were divorced by decree of dissolution entered May 12, 2000. The decree incorporated a separation agreement signed by the parties on February 17, 2000. Relevant to this appeal, the separation agreement divided Mark's military retirement benefits pursuant to the formula first established in *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986). The separation agreement specifically provided that Cynthia would receive a percentage of one-half of the "disposable retired pay available" to Mark.

¹ Senior Judge John W. Graves 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.

In November 2003, Mark retired from the United States Army and began receiving retirement benefits. In December 2003, Cynthia began receiving her portion of Mark's retirement benefits pursuant to the terms of the separation agreement. Her monthly benefit totaled \$596.55. Subsequently, the military determined Mark was 70 percent disabled. Because retirement benefits are taxed as income and disability benefits are not, Mark elected to waive 70 percent of his retirement benefits and thereafter received disability benefits in lieu thereof. As a result of Mark's waiver, the monthly benefit to Cynthia from Mark's retirement dramatically decreased from \$596.55 to \$136.27. Mark received the difference as disability benefits.

On September 21, 2004, Cynthia filed a motion claiming that Mark violated the terms of the separation agreement by waiving a portion of his military retirement benefits and electing instead to receive disability benefits. In response, Mark claimed that Cynthia was not entitled to any of his disability benefits. On February 5, 2007, the family court rendered its Findings of Fact, Conclusions of Law and Order. The family court found that the language of the separation agreement mandated that Cynthia receive a percentage (based upon the number of years the parties were married) of one-half of the disposable retired pay "available" to Mark. As such, the court concluded that Cynthia was entitled to receive an amount equal to a percentage of one-half of the disposable retired pay "available"

to Mark as if he had not elected to receive disability pay. Thus, the circuit court determined that Cynthia was entitled to receive \$527.10 per month.²

Both parties filed postjudgment motions to vacate the court's February 5, 2007, order. The family court denied the motions. On July 26, 2007, Cynthia filed a motion for attorney's fees. The court awarded Cynthia partial attorney's fees. These appeals follow.

**APPEAL NO. 2007-CA-001502-MR
AND CROSS-APPEAL NO. 2007-CA-001523-MR**

Mark contends that the circuit court erred by determining that Cynthia was entitled to a portion of one-half of the retired military pay available to Mark as if he had not elected to waive those benefits and receive disability pay. Mark argues that Cynthia is only entitled to a portion of one-half of the retired military pay he actually receives and is not entitled to any of his disability pay. He points out that military disability pay may not be divided as marital property by the court.

We agree with Mark that military disability pay or benefits are not subject to division as marital property by a court. *See Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989). However, Cynthia's entitlement to Mark's military retirement benefits is founded in the parties' separation agreement that was incorporated into the decree of dissolution. While a court is certainly prohibited from dividing military disability benefits as marital property, there has never been a published opinion in this Commonwealth prohibiting the parties' from reaching an agreement

² We note that the Hardin Circuit Court, Family Court Division ultimately awarded Cynthia French \$527.10 per month despite Cynthia's assertion that she was entitled to receive a greater amount.

regarding division of military disability benefits. And, we are unwilling to prohibit same herein.³

As Cynthia's entitlement to Mark's military retirement is based upon the parties' separation agreement, our review necessarily revolves around the terms of such agreement. To begin, a separation or settlement agreement incorporated into a decree of dissolution or order of the court is "enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms." KRS 403.180; *Bailey v. Bailey*, 231 S.W.3d 793 (Ky. App. 2007). Interpretation and construction of an incorporated separation agreement presents a question of law for the court, and our review proceeds *de novo*. *Richey v. Richey*, 380 S.W.2d 914 (Ky. 1965); *Frear v. PTA Indus., Inc.*, 103 S.W.3d 99 (Ky. 2003).

The relevant portions of the separation agreement read as follows:

14. The parties hereby agree that they were married in 1983; [Mark] has been employed by the United States Army since 1983. The parties agree that [Cynthia] shall receive as part of the property division, her share of [Mark's] military retirement benefits per the **Poe** formula, which is as follows:

$$\frac{\text{number of years of marriage}}{\text{number of years divorced}} = \frac{\text{percentage of benefits earned during marriage}}{\text{percentage of benefits earned during marriage}}$$
$$\frac{\% \text{ earned during marriage}}{\% \text{ earned during marriage}} \times \frac{1}{2} \text{ disposable retired pay available if the military member retired at current rank} + \frac{\% \text{ of cost-of-living increase proportional}}{\% \text{ of cost-of-living increase proportional}}$$

³ KRS 403.180 provides that a separation agreement disposing of and dividing property is binding and enforceable in this Commonwealth unless the court finds the agreement unconscionable. Military disability benefits are certainly classified as "property," and the family court has previously found the parties' separation agreement conscionable.

to interest in

disposable
retired pay

It being specifically provided that once [Mark] retires [Cynthia] shall be able to take whatever steps necessary to receive her share of the retirement directly from the United States Army/retirement center.

With it being provided that in the event [Mark] decides to take an early retirement and receives a “Buy Out” or other form of compensation in exchange for his early retirement then [Mark] shall be under an obligation to so notify [Cynthia] of same and she will be entitled to her proportionate share, per the Poe formula, of any “Buy-Out” amount or by any other name.

With it being further provided, that in the event [Mark] decides to stay in the military longer [than] twenty (20) years then he shall so notify [Cynthia] of same and upon his retirement she shall receive her benefits per the Poe formula, as stated above.

Under the above provisions of the separation agreement, it is clear that the parties expressly provided that Cynthia would be entitled to receive a share of Mark’s military retirement benefits upon his retirement from the United States Army. The parties specifically provided a formula for computing Cynthia’s share of Mark’s military retirement benefits. Under the formula, Cynthia’s share was to be based on “1/2 disposable retired pay available if [Mark] retired at current rank.” Succinctly stated, Cynthia’s share was to be computed based on the retired pay “available” to Mark at his retirement. As Mark’s full military retirement pay was available to him at his retirement, Cynthia’s share of his military retirement must be computed based upon Mark’s full military retirement pay. As such, Mark’s

subsequent election to receive military disability benefits is simply of no consequence and cannot be used to reduce Cynthia's share of military retirement benefits per the separation agreement.

Thus, we conclude that the circuit court did not err by determining that Cynthia was entitled to \$527.10 per month as her share of Mark's military retirement and by ordering Mark to pay Cynthia the difference between such amount and the reduced amount she was receiving (\$136.27) in military retirement benefits. Also, the family court correctly concluded that Cynthia is entitled to her corresponding share of any cost of living increases in Mark's military retirement benefits.

Mark also claims that the family court erred by awarding Cynthia attorney's fees in the amount of \$6,000. Mark claims that Cynthia is financially able to pay her attorney's fees independently.

It is well-settled that a court has broad discretion in the award and amount of attorney's fees. KRS 403.220 provides that a family court may award reasonable attorney's fees upon consideration of a financial disparity between parties. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Our Court will not disturb a family court's decision concerning attorney's fees absent an abuse of discretion. *Id.* A family court abuses its discretion when it has acted arbitrarily, unreasonably, or unfairly, or if its decision was unsupported by sound legal principle. *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004).

The record reflects that Cynthia's income was less than half of Mark's income. Thus, it is clear that a disparity in income existed between the parties. Moreover, Cynthia's attorney's fees totaled more than \$13,000, and the family court awarded less than one-half of such amount. Upon the whole, we do not believe the family court abused its discretion by awarding Cynthia \$6,000 in attorney's fees.

We view Mark's remaining contentions as moot or without merit.

CROSS-APPEAL NO. 2007-CA-001523-MR

Cynthia argues that the family court erred by failing to award her "42.08% of Mark's retirement, severance, disability, concurrent pay or pay by any other name." Cynthia's Brief at 23. Cynthia claims entitlement to said pay under a specific provision of the parties' settlement agreement, which reads:

With it being provided that in the event [Mark] **decides to take an early retirement and receives a "Buy Out" or other form of compensation** in exchange for his early retirement, then [Mark] shall be under an obligation to so notify [Cynthia] of the same and she will be entitled to her proportionate share, per the *Poe* formula of any "Buy-Out" amount whether it be denominated as early retirement pay, severance or by any other name. . . .
(Emphasis added.)

However, we believe Cynthia has erroneously interpreted the above provision of the settlement agreement. By its plain terms, the above provision of the settlement agreement is triggered only if Mark elects to receive "early retirement." As it is undisputed that Mark did not so elect, the above provision of the settlement agreement is simply ineffectual and Cynthia's argument is without merit.

We view any remaining contentions by Cynthia as moot or without merit.

Accordingly, we affirm the judgment of the Hardin Circuit Court, Family Court Division.

ALL CONCUR.

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CROSS-APPELLEE:

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