

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000148-MR

KURT PRIEST

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 06-CI-00095

BELINDA PRIEST

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, JONES AND D. LAMBERT, JUDGES.

D. LAMBERT, JUDGE: Kurt Priest appeals the order of the Meade Circuit Court which awards his former spouse, Belinda Priest, 21% of his military pension. As the Court failed to make sufficient findings of fact as to its reasoning and application of the law, we vacate the order and remand the case for further proceedings.

The parties were married for just over ten years with the marriage ending in a bifurcated divorce decree entered on December 9, 1998. By subsequent order which divided the parties' property and debt and dealt with all other issues, the Court recognized that the Appellee (hereinafter "Belinda") would be entitled to a division of the Appellant's (hereinafter "Kurt") military pension pursuant to *Poe v. Poe*.¹

Specifically, the trial court, Hon. Janet Coleman, ordered as follows:

5. The Respondent is awarded her share of the Petitioner's retirement benefits pursuant to the formula found in *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986). Petitioner shall provide to the Respondent through Respondent's attorney a statement of the retirement account within 30 days of this date of this order.

The trial court could not then divide Kurt's retirement as he was not yet eligible to retire. Neither party appealed the order of the trial court as to the issue of the retirement division at some future date. Kurt retired September 1, 2012. While his rank remained at E-6 from the date of the divorce until his retirement, he did have basic pay increases and cost of living adjustments after the divorce. At issue herein is whether the trial court correctly applied the law as to division of Kurt's military retirement pension by order entered January 3, 2014, upon his subsequent retirement. Kurt argues that the court should have used the method set forth in the DFAS² pamphlet, entitled "Uniformed Services Former Spouse's Protection Act, Dividing Military Retired Pay." Kurt argues that to apply what he asserts was a

¹ *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986).

² Defense Finance and Accounting Service.

straight line percentage, results in an abuse of discretion by the trial court as the award includes sums that are nonmarital in nature, such as post decree pay raises and rank increases. Kurt argues that the Court was required to make findings consistent with *Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky. App. 2009).

Belinda argues that the trial court properly calculated the award of 21% of Kurt's retirement benefits and gives very specific details on the trial court's *Poe* calculations on pages 5 and 6 of her brief.³ Belinda argues that Kentucky has not adopted the DFAS pamphlets and that they are neither federal law nor the law in Kentucky. Belinda argues that for the Court to apply the DFAS hypothetical, she would only receive 5.8% of Kurt's retirement, an unjustly meager amount.

When it is alleged that a trial court failed to make sufficient findings of fact, it is incumbent upon the party seeking relief to file a timely motion for additional findings of fact and conclusions of law under CR 52.02,⁴ within 10 days of the entry of the final judgment. This procedure is meant to afford the reviewing court with insight and a basis for understanding the lower court's "view of the controversy." *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky, 1986). Appellant timely filed a motion to alter, amend and vacate the judgment pursuant to CR 59.01 and 59.05, alleging, in substance, a failure to apply the DFAS pamphlet

³ However, these calculations do not appear anywhere in the trial court order. After brief findings of fact and conclusions of law as to social security numbers and addresses and jurisdiction, the court states "**The former spouse is awarded 42% of one-half of the service member's disposable military retired pay or 21% of his current, total disposable-retirement pay.**"

⁴ Kentucky Civil Rules.

guidelines to correctly apply *Poe*; and a motion for additional findings pursuant to CR 52.02 for additional findings of fact.

Pursuant to this Court's opinion in *Snodgrass v. Snodgrass*, 297 S.W. 3d 878, 890 (Ky.App. 2009), which considered *Poe* alongside the DFAS guidelines, the *Snodgrass* court stated:

According to the DFAS pamphlet, there are three approaches (FN 17) to the division of military retired pay of an as-yet-ineligible service member. The one consistent with Kentucky law is in section IV.c. and is the first of the so called "hypothetical awards."

FN 17 The simplest approach, referred to as "formula award." Involves no hypothetical variables at all and allows the non-military spouse to share in post-divorce increases in rank and pay. This approach is inapplicable in Kentucky because *Poe, supra*, does not allow the non-military spouse to share in post-divorce increases in rank and pay. *Poe* at 851 (we divide the "disposable retired or retainer pay which would be payable to [the service member] if he retired at the same rank and basic pay rate which he had attained as of [the date of the decree]") Of the two "hypothetical awards," the second is also inapplicable in Kentucky; it is appropriate in jurisdictions, unlike Kentucky, which require determination of "a hypothetical retired pay amount using the pay table in effect at the time the member becomes eligible to receive military retired pay, instead of the pay table at the time the court divides military retired pay." *Dividing Military Retired Pay*, p. 11.

The *Snodgrass* Court cited the portion of the DFAS pamphlet which discusses how DFAS views orders calculated on hypothetical percentages.

The hypothetical retired pay amount is computed the same way as the member's actual military retired pay, but based on variables that apply to the member's hypothetical retirement date. **These variables must be**

provided to us in the applicable order. Failure to do so will cause the court order to be rejected. *The court order must provide: 1) the hypothetical retired pay base, and 2) the hypothetical years of creditable service (or reserve points, in the case of a reservist).* (Emphasis in original.) The principal problem we find with hypothetical awards is that one or more of the necessary variables for the hypothetical retired pay is often left out of the court order. If we are not able to compute a hypothetical retired pay figure from the information in the court order, the parties will have to have the court clarify the award. *Snodgrass* at 891.

Id. at 891.

While the DFAS pamphlet as a whole has not been adopted in Kentucky, the *Snodgrass* court analyzed DFAS and interpreted that section IV(c) is consistent with the longstanding *Poe* case and, thus, the pamphlet, section IV(c) may be properly considered in the division of military pensions in Kentucky. As the Court herein did not make the hypothetical calculations mandated by *Poe*, or if it did, failed to make specific findings, this matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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