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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001270-MR

BELINDA PRIEST

APPELLANT

v.

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

KURT PRIEST

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: COMBS, JOHNSON, AND D. LAMBERT, JUDGES.

JOHNSON, JUDGE: Belinda Priest (“Belinda”) appeals from the February 26, 2016 Order of the Meade Circuit Court, awarding Belinda a portion of Kurt Priest’s (“Kurt”) military retirement pay. After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM IN PART, REVERSE IN PART, AND REMAND.

BACKGROUND

Kurt and Belinda were married on March 12, 1988. At that time, Kurt was serving in the military reserve. On February 20, 1990, Kurt enlisted in the active military. On December 9, 1998, Belinda and Kurt divorced. At that time the court could not divide Kurt's retirement as he hadn't yet retired from the military. Kurt eventually retired from the military on September 1, 2012. At that time Belinda moved the court for her marital share of Kurt's retirement. The court entered an order on January 2, 2014, establishing Belinda's portion of Kurt's retirement pay. That order was appealed to this Court and an opinion issued on April 24, 2015, which reversed and remanded this matter to the trial court stating:

While the DFSA pamphlet as a whole has not been adopted in Kentucky, the *Snodgrass* court analyzed DFSA 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.

Priest v. Priest, No. 2014-CA-000148-MR, 2015 WL 1880624 (Ky. App. Apr. 24, 2015).

As a result, in accordance with our previous Opinion, the matter was sent back, resulting in the trial court's recalculating the retirement benefits due Belinda based upon the requirements of the Defense Finance and Accounting Service ("DFSA") as outlined in *Poe v. Poe*, 711 S.W.2d 849, 850 (Ky. App. 1986) and *Snodgrass v. Snodgrass*, 297 S.W.3d 878, 890-891 (Ky. App. 2009). On

February 26, 2016, the court entered an order containing findings of fact and conclusions of law, granting Belinda 6.25% of Kurt's current retirement or \$130.16 per month. The order used the DFSA hypothetical retired pay calculation based upon the example set out in the DFSA pages 10-11. On March 7, 2016, Belinda filed a motion for reconsideration. That motion was denied on July 28, 2016. Belinda now appeals the orders of February 26, 2016, and July 28, 2016.

STANDARD OF REVIEW

When reviewing a case on appeal in which a prior appellate court has ruled, we apply the law-of-the-case doctrine. If an appellate court has passed on a legal question and remanded the case to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. *Ragland v. DiGiuro*, 352 S.W.3d 908, 913 (Ky. App. 2010) (quoting *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982)).

The issue of the division of marital assets is reviewed under an abuse of discretion standard. *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W. 2d 941, 945 (Ky. 1999).

ANALYSIS

This court in *Priest v. Priest*, No. 2014-CA-000148-MR, 2015 WL 1880624 (Ky. App. Apr. 24, 2015), has previously determined that Belinda's share

of Kurt's retirement should be calculated based upon the DFSA, Section IV(c), citing it as the appropriate method to be applied.¹ The pertinent facts upon which we previously based our findings did not change after the rendering of our opinion, nor do we find the former decision to be clearly erroneous. Thus, we see no reason to disturb the court's opinion on the method of calculating Belinda's share of Kurt's retirement. *Ragland*, 352 S.W.3d at 914-15. The only issue to be reviewed is whether the court correctly applied the formula as set forth in the DFSA to the facts of this case.

The trial court in determining Belinda's portion of Kurt's retirement relied upon a hypothetical award formula as set out in the DFSA IV(c). A hypothetical award is an award based on a retired pay amount different from the member's actual retired pay. It is figured as if the member had retired on the date of divorce, not the actual date of retirement. Unlike a formula award, a hypothetical award does not give the former spouse the benefit of any of the member's pay increases due to promotions or increased service time after the divorce. We have previously held that the DFSA approach most consistent with Kentucky law is in section IV(c), which is the first of the so-called "hypothetical awards." *Snodgrass*, 297 S.W.3d at 890-91 (Ky. App. 2009). In following the court's calculations, we find that the court applied the correct formula to the facts as stated. The DFSA provides the process whereby we convert the award of a

¹ As noted in the record, Judge D. Lambert presided over the first *Priest* appeal. There appearing no conflict of interest, and none being raised by the parties, she also sat on the panel for the second appeal as assigned.

hypothetical retired pay amount into a percentage of the member's actual disposable retired pay.

The court awarded Belinda half of Kurt's military retirement pay as of December 1998, which calculated out to 21.46%. Next the court determined Kurt's hypothetical retired pay multiplier at 23.33%. Multiplying the 23.33% with \$1940.10, gives us \$452.63 which is the retirement pay Kurt would have received had he retired on December 9, 1998. At this point all parties agree with the court's calculations. Next, the court added a cost of living adjustment (COLA) per the DFSA example. However, here we believe that the court incorrectly calculated the adjusted retirement pay. The court found the adjusted pay to be \$606.52; however, we believe that Belinda has correctly applied the DFSA standard and calculated the amount to be \$639.21; thus, we reverse the court on this one calculation and remand this matter for a correction to the court's final award.

All parties agree on the next step in the formula. The adjusted retirement amount, \$639.21, is to be divided by Kurt's actual retirement amount of \$2082.00 which equals 30.70%. Under the DFSA standards that amount of 30.70% must be multiplied by the percentage awarded Belinda. Here, we agree with the court that the percentage to be used under the DFSA hypothetical formula is 21.46%, not the 50% Belinda proposes. The court amount is based upon the court's determination that Kurt only earned 42.92% of his retirement during the marriage and that Belinda is only entitled to one-half of that amount. The result of 21.46% of the 30.70% equals 6.59% which is the amount of Kurt's current

retirement to which Belinda is entitled. The final result is that Belinda should receive \$137.20 from Kurt's actual retirement pay. We believe that this amount is consistent with both the DFSA standards and the court's interpretation in *Snodgrass*, 297 S.W.3d at 889-90.

However, in reviewing this case we became aware that by applying the formula as set forth in *Poe v. Poe*, 711 S.W.2d at 850, and *Snodgrass, id.*, the result seems inconsistent with Kentucky law regarding the division of marital assets. There are two methods under the DFSA standards by which to calculate the marital share of an ex-spouse. Under *Poe*, which is current precedent, we are to take the lesser amount under the DFSA formula as the marital share due an ex-spouse of a retired military veteran. The result is that the ex-spouse's marital portion of the military retirement shrinks the longer the military ex-spouse serves after the divorce. This hardly seems the result of what the Court was trying to achieve. No other pension diminishes the marital amount as we have under *Poe*. While we are bound by precedent of the Court, and have applied the formula as specified by the Court, we believe that this issue is ripe to be revisited. Given the final result of the current law upon the division of the marital assets of a retired veteran's ex-spouse, we do not find the current application of *Poe* to be consistent with divorce law in Kentucky and implore the Kentucky Supreme Court to review the holding in *Poe*.

CONCLUSION

Based upon the foregoing, the Meade Circuit Court's Order of February 26, 2016, is hereby AFFIRMED IN PART, REVERSED IN PART AND REMANDED for entry of a judgment consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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