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NO. COA04-21

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

RICHARD CRAIG WILLIAMS,
Plaintiff,

v.

McDowell County
No. 99 CVD 620

VICKI RITTENHOUSE WILLIAMS,
Defendant.

Appeal by both plaintiff and defendant from order entered 4 November 2003 by Judge C. Randy Pool in McDowell County District Court. Heard in the Court of Appeals 15 September 2004.

W. Hill Evans for plaintiff.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for defendant.

LEVINSON, Judge.

The parties appeal from a district court order denying their respective motions concerning enforcement of a qualified domestic relations order (QDRO) distributing plaintiff's military retirement benefits. We affirm the trial court with respect to defendant's appeal. Plaintiff's appeal is dismissed.

I.

The parties, plaintiff Richard Craig Williams and defendant Vicki Rittenhouse Williams, were married on 12 August 1972, separated on 23 April 1999, and divorced by judgment entered 15

June 2000. On 5 June 2001, the district court entered, as a consent judgment, an equitable distribution order which contained the following finding of fact:

[P]laintiff [Mr. Williams] was in the military for 26 years and is drawing his retirement pension from his service in the military. . . . [T]he court finds his present gross pay is \$4,509.00[;] his VA waiver[,], which represents disability [that] is his separate property[,], is \$503.00 per month. The Court further finds that the defendant [Mrs. Williams] elected a survivor benefit plan . . . [that] reduce[d] the gross pay by the sum of \$293.12 per month. The Court determines the balance of plaintiff's military retirement pension is marital property. After reduction of his VA waiver which is disability and plaintiff's separate property and the cost of the Survivor Benefit Plan, the remaining balance should be divided equally between the parties. A separate qualified domestic relations order should be signed to make this distribution.

The court entered a separate QDRO styled "Final Decree and Order Dividing Military Retired Pay as Property." The QDRO contained the following pertinent provisions:

4. Assignment of Benefits: [Mr. Williams] by court order hereby assigns . . . an interest in [his] military disposable retired pay. [Mrs. Williams] is entitled to a direct payment in the amount specified in Paragraph 5 from the appropriate military pay center and which will be payable from [Mr. Williams'] disposable retired pay.
5. Percentage Approach. This Order assigns to Former Spouse an amount equal to fifty percent (50%) of the Member's **final disposable retired pay** after deduction of his disability payment and the Survivor Benefit Plan (SBP)

For the purposes of interpreting this Court's intention in making the division set out in this Order, "military retirement" includes retired pay paid or to which [Mr. Williams] would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code,

before any statutory, regulatory, or elective deductions are applied. It also includes all amounts of retired pay [Mr. Williams] actually or constructively waives or forfeits in any manner and for any reason or purpose, including, but not limited to, any waiver made in order to qualify for Veterans Administration benefits. . . .

. . . .

10. Qualification: The Member and the Former Spouse intend that this order qualify under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 and following. All provisions shall be construed and modified to the extent necessary in order to qualify as a Qualifying Court Order.

. . . .

15. Actions by Member: If Member takes any action that prevents, decreases, or limits the collection by Former Spouse of the sums to be paid hereunder, he shall make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the actions taken by Member.

. . . .

18. Continued Jurisdiction: The Court shall retain jurisdiction to enter further orders as are necessary to enforce the award to spouse of the military retirement benefits awarded

(emphasis added). Following entry of the equitable distribution order and the QDRO, the parties settled their remaining claims. An order and memorandum of judgment was entered which provided that it was a final order and that each party waived its right to appeal and to file motions pursuant to N.C.G.S. § 1A-1, Rules 59 and 60.

Both before and after separation and divorce of the parties, Mr. Williams sought disability compensation as a result of injury to his right knee. Pursuant to existing federal law at the time of the equitable distribution hearing, Mr. Williams was permitted to receive disability benefits only to the extent he waived a

corresponding amount of retired pay. See 10 U.S.C. § 1408(a)(4)(B) (2004). As disability benefits are not subject to taxation, a waiver of retirement pay in favor of disability benefits increased his after-tax income. See 26 U.S.C. § 104(a)(4) (2004).

As a result of a surgical knee replacement in May 2001, the Veterans Administration temporarily increased Mr. Williams' disability to one hundred percent (100%) during a six month convalescent period. During Mr. Williams' receipt of these disability payments, the amount of his pension payments decreased; consequently, the monthly pension payments made to Mrs. Williams also decreased. Mrs. Williams continued to receive fifty percent (50%) of any sum paid to Mr. Williams that was attributable to his pension; however, Mrs. Williams received a payment of \$984.98 per month instead of the usual \$1856.44 per month during Mr. Williams' receipt of disability payments.

On 27 June 2002, Mrs. Williams filed a motion for an order to enforce the QDRO, in which she asserted that Mr. Williams had wilfully violated the QDRO by accepting disability benefits without reimbursing her for the amount of income she lost as a result of his decision. Mrs. Williams sought, *inter alia*, an order requiring Mr. Williams to pay her for the income she lost during his receipt of disability benefits and directing Mr. Williams "specifically to pay [her] each month an amount equal to the monthly payment to which she is entitled during that month under the [QDRO less] the amount of his military retired pay she actually receive[d] during that month."

On 24 July 2002, Mr. Williams filed a motion to modify or interpret the QDRO. He contended that the provisions of the QDRO relied upon by Mrs. Williams in her suit against him were inadvertently permitted to remain in the order even though similar language was deleted by the trial court. Mr. Williams sought to have the court modify or interpret the QDRO in such a way as to delete or nullify any language indicating that he is required to reimburse Mrs. Williams for losses occasioned by his decision to receive military disability. On 24 September 2002, Mrs. Williams filed another motion seeking an order requiring Mr. Williams to make payments to her to neutralize the effect of his receipt of disability compensation "if for any reason the existing orders [were] read to permit [Mr. Williams] to reduce the benefits awarded to [her] by accepting disability pay in lieu of his retired pay[.]"

In an order entered 4 November 2003, the district court denied the parties' respective motions. The court made a finding that "[t]he language in the [QDRO] relates only to prohibiting [Mr. Williams] from taking any action that would keep [Mrs. Williams] from receiving her 50% of the disposable retired pay." The court concluded that "[a]t no time has [Mr. Williams] taken any action to reduce [Mrs. Williams'] 50% share of the disposable retired pay. Additionally, as provided by federal and state statute and the equitable distribution orders [Mrs. Williams] has continually received her 50% share of [Mr. Williams'] disposable retired pay."

The court denied and dismissed all of the parties' motions. From the order denying and dismissing the motions, both parties now appeal.

II.

In her first argument on appeal, Mrs. Williams contends that the trial court erred in denying her motion to enforce the QDRO because the provisions of the QDRO, particularly paragraphs five and fifteen, "protect[her] right to receive benefits which are not reduced when [Mr. Williams] elects to take disability benefits in lieu of his retired pay[.]" Mrs. Williams insists that the trial court's alleged error resulted, in part, from a misunderstanding of federal law applicable to military retirement and military disability compensation. This argument is without merit.

"Due to federal preemption, the application of state equitable distribution laws to military retirement and military disability pay is limited to those areas in which Congress has authorized state action." *Halstead v. Halstead*, __ N.C. App. __, __, 596 S.E.2d 353, 355 (2004) (citing *Mansell v. Mansell*, 490 U.S. 581, 584, 104 L. Ed. 2d 675, 682 (1989)). With respect to military retirement, Congress has enacted the Uniformed Services Former Spouses Protection Act (USFSPA), pursuant to which a state court "may treat disposable retired pay payable to a member [of the United States Armed Forces] . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of [the state] court." 10 U.S.C. § 1408(c) (2004). "The total amount of the disposable retired pay

of a member payable under all court orders pursuant to [10 U.S.C. § 1408] subsection (c) may not exceed 50 percent of such disposable retired pay." 10 U.S.C. § 1408(e) (2004). "Disposable retired pay" of a veteran of the United States Armed Forces is defined to mean "the total monthly retired pay to which a member is entitled less amounts which . . . are deducted from the retired pay of such member as a result of . . . a waiver of retired pay required by law in order to receive compensation under title 5 or title 38 [disability]." 10 U.S.C. § 1408(a)(4)(B) (2004). Thus, under USFSPA, disposable retired pay expressly excludes pension benefits that are waived in order to receive disability benefits. *Id.*

With respect to military disability compensation, federal law provides that such benefits

shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

38 U.S.C. § 5301(a) (2004).

Congress has not specifically authorized the distribution of military disability pursuant to state equitable distribution laws. *Halstead*, __ N.C. App. at __, 596 S.E.2d at 357. Moreover, though state courts are authorized to distribute veterans' "disposable retired pay" pursuant to equitable distribution laws, military disability payments are excluded from the definition of disposable retired pay; therefore, such disability payments "cannot be

classified as marital property subject to distribution under state equitable distribution laws [affecting pensions]." *Bishop v. Bishop*, 113 N.C. App. 725, 733, 440 S.E.2d 591, 597 (1994). Likewise, a court "[may] not substitute its own definition of military retired pay in lieu of the definition of disposable retirement pay as defined by the Congress." *Halstead*, __ N.C. App. at __, 596 S.E.2d at 357.

A court may consider, as a distributional factor, the impact of military disability payments to a party on the financial circumstances of both parties. *Id.* at __, 596 S.E.2d at 355-56. However, a court may not "circumvent[] the mandates of 10 U.S.C. § 1408 by increasing [a nonmilitary spouse's] share of . . . military retirement based solely upon [the military spouse's election] to waive a portion of his military retirement pay based upon the amount of his disability benefits." *Id.* As such, a court may not require a veteran to make payments to his former spouse for amounts withheld from her share of his military retirement due to future waivers of retirement pay, as doing so contravenes 38 U.S.C. § 5301. *Id.* at __, 596 S.E.2d at 357.

Halstead controls the outcome in the present case notwithstanding the fact that the present case involves review of an order entered based upon the consent of the parties and *Halstead* involved review of an order entered after a contested bench trial. Under *Halstead* the trial court is precluded from, in effect, distributing Mr. Williams' disability benefits as marital property. As such, even under the expansive reading of the QDRO

proffered by Mrs. Williams, she is not entitled to the relief she seeks.

Moreover, the language of the QDRO is consistent with *Halstead*. It distributes Mr. Williams' pension as marital property and awards Mrs. Williams "fifty percent (50%) of [Mr. Williams'] **final disposable retired pay after deduction of his disability benefit.**" Though the QDRO also includes an expansive definition of the term "military retirement," it is not drafted so as to distribute anything more than Mr. Williams' disposable retired pay. As such, the provision requiring Mr. Williams to make direct payments to neutralize action on his part that "prevents, decreases, or limits . . . the sums to be paid [pursuant to the QDRO]" refers only to action that interferes with Mrs. Williams' receipt of fifty percent of his disposable retired pay. As the trial court properly noted, the record is bereft of any indication that Mr. Williams has taken any action to cause Mrs. Williams to receive less than fifty percent of his disposable retired pay as that term is defined by both controlling federal law and the plain language of the QDRO. The corresponding assignments of error are overruled.

III.

In her second argument on appeal, Mrs. Williams contends that "[i]f [her] rights to receive an equitable distribution of the military pension are not adequately protected by the language of the [QDRO], then the court has jurisdiction to amend [the QDRO] to assure that she receives the benefits which she [was] originally

awarded." In making this argument, Mrs. Williams relies upon *White v. White*, 152 N.C. App. 588, 594, 568 S.E.2d 283, 286 (2002), *aff'd*, 357 N.C. 153, 579 S.E.2d 248 (2003). In *White*, this Court reversed a district court's determination that it was without authority to amend a qualifying order to increase a non-military spouse's share of a military spouse's retirement pay to reflect a waiver of retirement pay in favor of disability benefits. *White*, 152 N.C. App. at 594, 568 S.E.2d at 286. Mrs. Williams' reliance on *White* is misplaced because, in the instant case, the district court did not conclude that it lacked authority to amend the QDRO. Rather, the court concluded that, under the QDRO, Mrs. Williams was not entitled to reimbursement and declined to amend the QDRO. The corresponding assignments of error are overruled.

IV.

In his only argument on appeal, Mr. Williams contends that the trial court erred in denying his motion to interpret or amend the QDRO to clarify that Mrs. Williams was entitled to no more than fifty percent of his military disposable retired pay. Careful review of the record indicates that the trial court did interpret the provisions of the QDRO as limiting Mrs. Williams to receiving no more than fifty percent of Mr. Williams' military disposable retired pay, and the trial court's interpretation has been affirmed by this Court. Accordingly, we need not address this argument on appeal.

Affirmed with respect to Mrs. Williams' appeal; dismissed with respect to Mr. Williams' appeal.

-11-

Judges GEER and THORNBURG concur.

Report per Rule 30(e).