

Farmer, J.

{¶1} On September 11, 1985, appellant, Harry Ruthrauff, and appellee, Marilyn Ruthrauff, were granted a dissolution. Included in the dissolution was the parties' Separation Agreement which provided for the equal distribution of appellant's retirement benefits from the U.S. Army. On August 31, 2003, appellant retired from the military. Appellee started receiving fifty percent of appellant's benefits.

{¶2} On March 12, 2009, appellant filed a motion for release from judgment or order, a motion to modify decree of dissolution, and a motion for clarification of decree of dissolution. A hearing was held on June 23, 2009. By judgment entry filed June 26, 2009, the trial court found the terms of the separation agreement were clear and unambiguous and denied appellant's motions.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR RELEASE FROM JUDGMENT OR ORDER; MOTION TO MODIFY DECREE OF DISSOLUTION; AND MOTION FOR CLARIFICATION OF DECREE OF DISSOLUTION."

I

{¶5} Appellant claims the trial court erred in denying his motions. We disagree.

{¶6} In 1985 when the parties received their dissolution, "marital property" consisted of the following:

{¶7} "The concept of marital property is derived from the premise that marriage is a voluntary partnership of co-equal partners with a division of duties and labor that entitles each partner to a one-half interest in the assets accumulated from the fruits of the partnership activity while the marriage is functioning. *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399. On the other hand, property which comes to either party by avenues other than as a consequence of their mutual efforts owes nothing to the marriage and is not intended to be shared. Property acquired by gift, bequest, devise or descent is normally considered nonmarital property. *Wolfe*, supra at 413. All property acquired by either or both parties during the marriage is presumed to be marital property, regardless of how title is held. This presumption may be overcome by proof that the property was acquired in such a manner that it should be declared nonmarital." *Tomlin v. Tomlin* (1987), Montgomery App. No. 10094.

{¶8} In *Kingery v. Kingery*, Logan App. No. 8-05-02, 2005-Ohio-3608, ¶8, citations omitted, our brethren from the Third District stated the following:

{¶9} "Retirement benefits acquired during a marriage are a marital asset that must be divided equitably between the spouses in a decree of divorce that terminates the marriage.***Once a division of property is established in the divorce decree that decision 'is not subject to future modification by the court.' R.C. 3105.171(I). Accordingly, the trial court lacks jurisdiction to *modify* the division of marital property.***'However, a trial court does have the power to *clarify* and construe its original property division in order to effectuate its judgment.' Thus, a trial court has the authority to properly clarify the meaning of a divorce decree in the event the decree is ambiguous.***"

{¶10} "The trial court has broad discretion in clarifying ambiguous language by considering not only the intent of the parties but the equities involved.***An interpretive decision by the trial court cannot be disturbed upon appeal absent a showing of an abuse of discretion.***" *Bond v. Bond* (1990), 69 Ohio App.3d 225, 227-228, citations omitted. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶11} In denying appellant's motions, the trial court ordered the following:

{¶12} "When a divorce decree contains an ambiguous term, the trial court has broad discretion to clarify the ambiguous language. However, if the terms of the decree are unambiguous, then the courts must apply normal rules of construction. When the language of a written instrument is clear and unambiguous, the interpretation of the instrument is a matter of law and the court must determine the intent of the parties using only the language employed. *Houchins v. Houchins*, 2007 WL 926479 (Ohio App. 5 Dist.), citing *Beverly v. Parilla* (2006), 165 Ohio App.3d 802.

{¶13} "The Court finds that the terms of the Separation Agreement are clear and unambiguous and do not limit the division of the husband's Army pension to the marital portion accumulated. Accordingly, the court is required to enforce the provision as written.

{¶14} "The Court further finds no grounds exist to vacate the Separation Agreement pursuant to Ohio Civil Rule 60(B)." See, Judgment Entry filed June 26, 2009.

{¶15} The gravamen of appellant's argument is that paragraph nine of the parties' Separation Agreement, incorporated into the Decree of Dissolution, should be modified to reflect the amount of retirement benefits attributable to the time of the marriage.

{¶16} Included in the parties' Separation Agreement is the following "intentions clause":

{¶17} "WHEREAS, having separated and intending to live separate and apart from each other for life, due to irreconcilable differences, said wife and husband desire to, and by these presents, do forever and completely settle and determine:

{¶18} "A. The past, present and future support of the wife;

{¶19} "B. The right to any and all property, real and personal, each may have by virtue of their marriage; and

{¶20} "C. All other benefits and privileges conferred and all obligations imposed upon each party by the virtue of their marriage relationship or otherwise."

{¶21} Property, real and personal, alimony, child support, custody, visitation, and life insurance were addressed in paragraphs one through eight. Paragraph nine provides for "Intangible Property" as follows:

{¶22} "The husband herein agrees to share equally, with his wife, any retirement benefits that he may receive or be entitled to from the U. S. Army. Such benefits would terminate in the event that the wife herein remarries, cohabits with another person, or dies."

{¶23} Under the modern statutory scheme, a military pension and its benefits arising during the marriage would be termed "marital property":

{¶24} "(3)(a) 'Marital property' means, subject to division (A)(3)(b) of this section, all of the following:

{¶25} "(i) All real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;

{¶26} "(ii) All interest that either or both of the spouses currently has in any real or personal property, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;

{¶27} "(iii) Except as otherwise provided in this section, all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage;

{¶28} "(iv) A participant account, as defined in section 148.01 of the Revised Code, of either of the spouses, to the extent of the following: the moneys that have been deferred by a continuing member or participating employee, as defined in that section, and that have been transmitted to the Ohio public employees deferred compensation board during the marriage and any income that is derived from the investment of those moneys during the marriage; the moneys that have been deferred by an officer or employee of a municipal corporation and that have been transmitted to the governing board, administrator, depository, or trustee of the deferred compensation program of the municipal corporation during the marriage and any income that is derived from the investment of those moneys during the marriage; or the moneys that have been deferred by an officer or employee of a government unit, as defined in section 148.06 of the Revised Code, and that have been transmitted to the governing board, as defined in

that section, during the marriage and any income that is derived from the investment of those moneys during the marriage." R.C. 3105.171(A)(3).

{¶29} No where in the division of marital property is the contemplation that it would cease upon remarriage, cohabitation or death. As much as practicable, all division of marital assets are to be made contemporaneously with the divorce decree or dissolution and are not subject to review thereafter.

{¶30} From the terms of the Separation Agreement, it is clear and unambiguous that neither party treated the U.S. Army retirement benefits as marital property. The very wording and coverture conditions imply it was regarded as support.

{¶31} Based upon our review, we find the trial court did not err in denying appellant's motions.¹

{¶32} The sole assignment of error is denied.

¹This writer acknowledges this ruling appears to be contra to this court's decision in *Schneider v. Schneider* (February 16, 2010), Stark App. No. 2009CA00090. The distinguishing factor is the specific language of the QDRO in *Schneider* addressed the division of the pension benefit and the division of a marital portion of said benefit.

{¶33} The judgment of the Court of Common Pleas of Stark County, Ohio, Domestic Relations Division is hereby affirmed.

By Farmer, J.

Wise, J. concurs separately and

Hoffman, P.J. dissents.

s/ Sheila G. Farmer

SGF/sg 0202

JUDGES

Wise, J., concurring

{¶34} I concur with Judge Farmer's decision to affirm the trial court's refusal to modify or clarify the parties' decree of dissolution. I agree with the trial court's conclusion that the Separation Agreement on its face does not limit the military pension division to the marital portion accumulated. While this may appear to be a harsh result for appellant, I must presume the parties agreed to this potential outcome in negotiating the dissolution of their marriage, and I therefore apply finality over perfection under the circumstances.

s/ John W. Wise
JUDGE JOHN W. WISE

Hoffman, P.J., dissenting

{¶35} I respectfully dissent from the majority opinion.

{¶36} Because the trial court's ruling allows Appellee to share equally with Appellant in that portion of his military pension earned after their dissolution of marriage, I believe the decision should be reversed outright or, at a minimum, remanded for a hearing to determine the parties' intent at the time the separation agreement was entered.

{¶37} As cited by the majority and found by the *Tomlin* court, property acquired by either or both parties during the marriage is presumed marital. I believe the corollary is likewise true – property acquired by either party after the marriage is presumed non-marital.

{¶38} Paragraph nine of the separation agreement is arguably ambiguous in that it fails to specify whether it refers *only* to Appellant's retirement benefits already earned during the marriage or *includes* any retirement benefits Appellant earns after the marriage.² Because of the presumption the trial court has jurisdiction only to divide marital property (as distinguished from ordering future spousal support), in the absence of proof of intent to the contrary, I conclude Appellant's retirement benefits earned after the marriage are not subject to division.

{¶39} However, to the extent paragraph nine is ambiguous as discussed above, the trial court should permit Appellee a hearing to determine if she can rebut the

² The inclusion of termination language similar to that found in spousal support orders is inconsistent with treatment of the retirement benefits as marital property and buttresses an argument for ambiguity in this particular case.

presumption and demonstrate it was the parties' intent she also share equally in all of Appellant's benefits earned after the marriage.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

