



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

EDWARD S. JINDRICH, JR.,	§	No. 08-20-00203-CV
Appellant,	§	
v.	§	383 rd Judicial District Court
MICHAELA WEIHELE,	§	of El Paso County, Texas
Appellee.	§	(TC# 2017DCM2926)

OPINION

Edward S. Jindrich, Jr, Appellant, and Michaela Weihele, Appellee, married and divorced in Germany, where Appellant was stationed while serving in the United States Army. After the German court granted their divorce, Appellee sought partition of Appellant’s military retirement benefits in an El Paso trial court. Appellant appeals from the trial court’s order partitioning his military retirement.

Appellant raises four issues. In his first and fourth issues, he questions subject-matter jurisdiction—whether the trial court erred in determining the German court did not have jurisdiction over the retirement benefits and determining it did]. In his second issue, Appellant argues the German divorce decree should be interpreted under Texas contract law. In his third issue, Appellant urges the trial court erred in determining the German court had not disposed of the military retirement in its decree. We affirm the trial court’s ruling, holding the trial court

properly determined it had subject-matter jurisdiction to apportion Appellant's military retirement benefits.

Factual Background

Appellant and Appellee married in 1990, in the Republic of Germany, where Appellant was stationed with the United States Armed Forces. Appellee is a German citizen, and they resided in Germany during their entire marriage. A German family court heard their divorce proceeding and issued an order granting the divorce on October 6, 2009.

Appellant retired from the military on November 1, 2016.¹ He receives certain retirement benefits from the U.S. military. Appellee expects to retire on January 1, 2037. She has held jobs that will entitle her to benefits under the German pension system.

The German divorce decree contains two references to pensions. The first appears on page two of the decree as part of a listing of six shorter statements which appear to be holdings of the court (although there was no testimony specifically calling these statements holdings):

3. There will be no pension rights adjustments under public law. The agreement of the parties concerning this matter is approved by the family court.

(Hereinafter referred to as Ref. 1).

The second appears on page four, in a list of six longer paragraphs under the heading "Facts of the case and reasons for the decision:"

III. Pension rights adjustments. During the oral proceedings, the parties have agreed that the pension rights adjustments shall be carried out under the law of obligations. In view of the fact that the petitioner has obtained only foreign pension rights the agreement reached is appropriate and to be approved for that reason.

(Hereinafter referred to as Ref. 2).

¹ Appellant was alleged to live in El Paso. Appellant never challenged personal jurisdiction.

At trial, Appellee's expert referred to a document called the "Protocol," from which he testified about the following provision:

The parties agreed that the pension rights adjustment should be implemented according to the law of obligations and not according to public law.

hereinafter referred to as the Protocol). The Protocol, dated June 17, 2009, appears to be a paraphrasing of testimony that took place at docket call.

On January 8, 2010, Appellee filed a Petition to Register Foreign Judgment and to Partition Undivided Marital Property. At that time, Appellant was deployed with the U.S. Army to Afghanistan. Appellant availed himself of the relief provided by the Servicemembers' Civil Relief Act during his deployment. He retired on November 1, 2016 and responded to the petition on March 21, 2017.

The trial court heard the matter on March 5, 2020. Each party presented an expert witness, each of them a German attorney with expertise in German family law.

Appellee called Andreas Hanke, an attorney in Berlin. Hanke testified that Ref. 1 from the German decree is binding on the court, but Ref. 2 is not. He said the parties were divorced in this proceeding, but the German court did not have jurisdiction over the foreign pension. Germany does not have jurisdiction over American military retirement pensions. Hanke testified German law specifically says, "a foreign pension cannot be divided in a divorce proceeding." He cited a case from the German Supreme Court on Civil Matters for the proposition, because they are not subject to the jurisdiction of German courts, foreign pension benefits "cannot and must not be divided in a German court." He restated the holding: "[T]he foreign pension cannot be divided by German courts because the German courts lack jurisdiction regarding such assets."

Hanke testified, in Europe, there are many international legal instruments that allow for a choice of law or a choice of jurisdiction regarding marital property, other than pension benefits, spousal support, or even the divorce itself. However, there are no legal instruments that allow one to choose the law or the jurisdiction regarding the division of pension rights.

Hanke testified to the meaning of the public law and the law of obligations as they relate to pensions. Under public law, the division of pensions occurs according to a certain formula, and the pension entities will be bound by that order. When both parties have German pensions, the German court would divide those assets. Under the law of obligations, the parties agree to apportion rights as with a contract, but they cannot do this until both parties reach retirement age. That proceeding is only between the spouses; the pension entities are not involved. The party requesting reimbursement has the burden of proving they are owed money, such as proving there are still undivided pension assets. It is a voluntary proceeding, not automatically initiated. If one of the parties dies before both reach full retirement age, “there’s a risk that the pension rights cannot be divided or that there will be no financial compensation.” And if one of the parties has become insolvent by that time, it might be a dead end, with no money to satisfy the other party’s claim.

The parties to this case could not divide their pensions under public law because the court did not have jurisdiction over the foreign pension. Under German law there was no other way to proceed except under the law of obligations or waive their rights to the pension rights adjustment.

Hanke further testified regarding the agreement of the parties as reflected in the German divorce decree. He stated nothing in the parties’ agreement would keep the Texas trial court from dividing the U.S. military retirement. The parties, by saying the pension division shall be handled under the law of obligations, doesn’t necessarily mean they preclude another jurisdiction from

dividing pensions. The German order does not preclude Appellee from coming to the United States to have Appellant's military retirement divided. If a court in the United States divided Appellant's military retirement, then she could not later prove a claim under the law of obligations because that asset would have already been divided. The parties are not precluded from dividing Appellant's military pension in the United States. They are not bound by their agreement to proceed under the law of obligations because the law of obligations is a separate proceeding. Specifically referring to the parties' "agreement," Ref. 3, Hanke said,

[B]y that, in the German court, if they are referring to public law, they can only refer to the mechanisms of the German public law. They have excluded the formula and the mechanisms of the German public law, but they have not excluded every other method that may exist in other countries to divide foreign pension assets.

Hanke testified that Appellee has not breached the agreement to go under the law of obligations by bringing this proceeding in the United States. Her request to divide the pension now is not a violation of the law of obligations.

Hanke testified in his personal experience, if a client had a spouse with a pension benefit in the United States, his clients have sought compensation in the United States.

Michael Hemming testified as Appellant's expert. Hemming's testimony regarding subject-matter jurisdiction and the public law and the law of obligations as they relate to pensions align with Hanke's. Hemming stated a process called equalization of pension benefits takes place in every divorce. If both spouses have German pensions, that is apportioned under public law, during the divorce, within the German pension system. If that cannot be accomplished during the divorce, it is completed under the law of obligations after both spouses reach full retirement age. German law does not prevent Appellant from spending his retirement benefits before that occurs. The German court cannot prevent a foreigner from spending his retirement benefits, "[b]ut he can

be held responsible.” Pension division proceeds in this manner because under public law, the judge has jurisdiction over the German pension system, while under the law of obligations, the judge cannot direct the foreign pension carrier to pay out or transfer benefits to the other spouse, because the German judge does not possess jurisdiction over the U.S. pension system. German courts have no jurisdiction over foreign pensions.

Hemming said both spouses have an obligation at the time of the divorce to disclose the amounts in their pension accounts. While the German court cannot touch the money in a U.S. retirement account, the German court can determine the value of that account or the money in that account, and then, like in a balance sheet, add this amount to the calculation of any distribution. Hemming said Appellee’s attorney did not do this at the time of the divorce—her attorney should have asked for a monetary compensation payment or installments. Appellee could have asked for compensation instead of entering into an agreement to divide their pension rights under the law of obligations. Any compensation like this would have to be deposited into some type of account reserved for pension purposes.

Regarding the agreement the parties entered into under the German divorce decree, Hemming stated this agreement only means the pension benefits cannot be touched until both parties reach their retirement age, then new proceedings have to be initiated. In those proceedings, the monetary value of the benefits will be determined and distributed. In this divorce, the pension benefits were accounted for by the agreement between the parties, and they will be divided according to the law of obligations once all prerequisites have been met.

Hemming was questioned directly by the court about the agreement of the parties as reflected in the decree, Ref. 1:

The court: What if the parties didn't agree to that? What if they did not want to proceed under the law of obligations?

Hemming: Then the court would have made a ruling, and the ruling would have been, most likely, the same.

Hemming testified Appellee violated her agreement with Appellant by seeking in the United States a division of the pension. Appellant would have the right to bring a breach of contract claim in Germany if there were damages. Hemming testified Appellant's going to Germany to get his share of her retirement after having his retirement divided in the United States would be ignoring German law. Any order in the trial court would be a violation of the parties' agreement, thus, a violation of German law.

Hemming testified he would not advise any client divorcing a U.S. military member to divide the pension in the United States because that is the incorrect procedure.

After trial, the trial court entered an order that partitioned Appellant's military retirement benefits. Neither party requested findings of fact and conclusions of law, and none were entered.²

Discussion

Appellant contends the trial court did not have subject-matter jurisdiction to divide his military retirement benefits. He argues the German divorce decree accounted for the benefits, barring the trial court from considering the issue. Central to the trial court's determination to issue an order was an implied conclusion that it did have subject-matter jurisdiction. We agree that it did and affirm.

Subject-matter jurisdiction

² When findings of fact and conclusions of law were not requested, we will imply all necessary findings of fact to support the trial court's judgment, affirming it "if it can be upheld on any legal theory that finds support in the evidence." *Escalante v. Escalante*, 632 S.W.3d 573, 578 (Tex.App.—El Paso 2020, no pet.)(quoting *Schoeffler v. Denton*, 813 S.W.2d 742, 744 (Tex.App.—Houston [14th Dist.] 1991, no writ)).

“Whether a court has subject matter jurisdiction is a question of law[,]” and it is reviewed de novo. *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004).

In his first issue Appellant avers the trial court did not have subject-matter jurisdiction to hear Appellee’s partition suit because the German divorce decree was a final decree not subject to collateral attack, and he urges Appellee bore the burden of proving her collateral attack was valid. Appellee responds by arguing her partition suit was not a collateral attack on the German decree because the decree was not final with respect to Appellant’s military retirement benefits, and the trial court had jurisdiction to enter orders clarifying the property division under the Texas Family Code. Neither party attacks the German decree as void on its face: the arguments between them center on whether the provisions addressing their pensions are final divisions of the retirement benefits.

Appellant contends the German divorce decree divided his military retirement when it provided for a disposition of the parties’ retirements according to the German law of obligations. Appellee argues the German decree did not actually divide the pension benefits but gave the parties the option to seek an adjustment of their respective pension rights later.

While there is no real contention that the German divorce decree apportioned percentages or dollar amounts of Appellant’s military retirement benefit between the parties, Appellant interprets the decree to say the “disposition” of the military retirement benefits is sufficient to make the decree final. He argues the German court considered the retirement benefits and specifically stated that they would be apportioned later, under the law of obligations, and this is sufficient to be a final decree on the matter, binding the parties to divide their benefits in only that manner.

Both expert witnesses presented at trial testified the German court did not have subject-matter jurisdiction over Appellant’s military retirement. Without subject-matter jurisdiction, the German court could not enter a judgment validly dividing the retirement. *See Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex.2000); *Tex. Real Estate Comm’n v. Trees*, 486 S.W.3d 165, 167 (Tex.App.—El Paso 2016, no pet.). We hold the German court did not have subject-matter jurisdiction over Appellant’s military retirement benefits. Appellant’s fourth issue is overruled.

If Appellee is to recover the portion of Appellant’s military retirement benefits due to her under the Uniformed Servicemember Former Spouse Protection Act (USFSPA), she must obtain a court order stating a specific amount she is to receive. 10 U.S.C. § 1408(a)(2)(c). Because the German court did not apportion Appellant’s military retirement benefits, she did not have an order under which she could request her portion of his benefits under USFSPA. *See id.* § 1408(c). The trial court had jurisdiction to issue an order specifically apportioning the military retirement benefits because subject-matter jurisdiction is granted to Texas courts to partition property not previously divided under the Family Code as well as the Property Code. *See* TEX.FAM.CODE ANN. §§ 9.201-.205; TEX.PROP.CODE ANN. § 23.001; *see also S.C. v. M.B.*, 650 S.W.3d 428, 442-43 (Tex.2022). We overrule Appellant’s first issue.³

Contract

Appellant’s second issue states, “It appears that like Texas, divorcing German couples may enter into agreements to facilitate property division.” He makes this conclusory statement without

³ We note that Appellant attacked the trial court’s subject matter jurisdiction only on the grounds that Appellee’s partition suit is an impermissible collateral attack on a final decree. To the extent that the German decree is viewed as a division of the military retirement benefits, as is urged by Appellant, we have determined that the German court did not have subject matter jurisdiction over them, and the decree is void as to that point. *See Saudi v. Brieven*, 176 S.W.3d 108, 113 (Tex.App.—Houston [1st Dist.] 2004, pet denied)(citing *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex.1987)). Appellee’s partition action is not an impermissible collateral attack.

any reference to German law or testimony from either of the parties' expert witnesses. He posits the statements in the German decree are comparable to and should be evaluated like Texas property settlement agreements, under Texas contract law.⁴ Although Appellant has not phrased it as such, we interpret this issue as questioning the legal and factual sufficiency of the evidence to support the trial court's implied conclusion that the language in the German divorce decree was not a contract between the parties.⁵

Because this point of error is tantamount to a challenge to the legal and factual sufficiency of the evidence that there was no contract between the parties, a point on which Appellant had the burden of proof, we "examine the record first for evidence that supports the trial court's finding, and ignore all other evidence to the contrary." *Pearl Res. LLC v. Charger Servs., LLC*, 622 S.W.3d 106, 114 (Tex.App.—El Paso 2020, pet. denied).

A party seeking to establish a valid, enforceable contract must establish these elements: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) mutual assent to the essential terms of the contract, a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intention that it be mutual and binding. *Fibela v. Wood*, No. 08-20-00019-CV, 2022 WL 4538878, at *7 (Tex.App.—El Paso Sept. 28, 2022, no pet. h.)(quoting *E-Learning LLC v. AT&T Corp.*, 517 S.W.3d 849, 858 (Tex.App.—San

⁴ Appellant did not bring a breach of contract action in the court below.

⁵ Apparently neither party complied with the Texas Rule of Civil Procedure 308b, "Determining the Enforceability of a Judgment or Arbitration Award Based on Foreign Law in Certain Suits Under the Family Code." Had that rule been complied with, the trial court would have conducted a hearing on the record to determine whether to enforce the German decree. *See* TEX.R.CIV.P. 308b(f)(1). The trial court would have entered findings of fact and conclusions of law. *Id.* at (f)(2). It would have made an independent determination whether to enforce the judgment even if neither party opposed enforcing it. *Id.* at (f)(4).

Antonio 2017, no pet.). As Appellant is the party urging the agreement language in the German decree is equivalent to a contract, it would have the burden of proof on the issue. *See id.*

At trial, evidence regarding the meaning and effect of the German decree's phrases regarding agreeing to be subject to the law of obligations was offered by both parties, and there is no issue raised on appeal regarding the admission of any evidence. The trial court had wide latitude to consider evidence in any event, under Rule of Evidence 203, "Determining Foreign Law," which states: "In determining foreign law, the court may consider any material or source, whether or not admissible." TEX.R.EVID. 203(c).

Two experts on German law testified, and neither of them suggested the oral agreement reflected in the Protocol and the decree is comparable to a Texas marital property agreement. Appellee's expert testimony indicates that the agreement to proceed under the law of obligations is more of a ministerial act due to the fact a German court must address division of pensions in every divorce.

Both experts discussed an opinion by the German Supreme Court of Civil Matters. Hanke testified that the case states that foreign pension benefits are not subject to the jurisdiction of German courts. An additional portion of the opinion is instructive. The higher court recognized the lower court did not expressly reserve the right of a pension rights adjustment pursuant to the law of obligations, which was a ground for the appeal. The higher court stated this fact was of no relevance because only declaratory importance could be attached to any such pronouncement.

Appellee testified as to the parties' intentions and a recommendation that she seek division of Appellant's retirement in Texas. Appellee said she and Appellant discussed his military pension many times. She said it was supposed to be a friendly thing, that the procedure to divide it was to take place in the United States right after Appellant retired. She also said she was directed by the

German court to “go to the United States and file for it in the United States.” Appellant did not testify as to his intention regarding any agreement that was made regarding property division. He did not testify about any offer or acceptance, any meeting of the minds. Indeed, Appellant’s own attorney did not question him at all.

Although Appellant’s expert testified that the language in Reference 2 and the Protocol constitutes an agreement between the parties to be bound to the law of obligations for division of their retirement benefits, he also gave perhaps the most telling testimony demonstrating that the German court did not consider the parties’ opinions on the subject to be of much import:

The Court: What if the parties didn’t agree to that? What if they did not want to proceed under the law of obligations?

Hemming: Then the court would have made a ruling, and the ruling would have been, most likely, the same.

At best, any agreement between the parties might be viewed as a choice of law or forum selection provision, limiting them to the German court system for the division of their retirement benefits. Mr. Hanke testified there are no legal instruments in Germany that allow you to choose the jurisdiction regarding the division of pension rights. If this agreement were considered a forum selection clause, however, the trial court had discretion to refuse to enforce it if Appellee clearly showed: “(1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.” *Reider v. Woods*, 603 S.W.3d 86, 93 (Tex.2020).

There was ample testimony at trial to differentiate between the claim Appellee could bring against Appellant’s retirement benefits in the United States as opposed to the claim she would be relegated to under the law of obligations in Germany. First and foremost, Appellee’s claim in the

United States is a claim against the actual asset and the actual asset will be divided. In Germany, under the law of obligations, her claim would only result in a money judgment. Enforcement of the agreement would effectively preclude Appellee from collecting the portion of Appellant's retirement to which she is entitled under the Uniformed Servicemembers Former Spouse Protection Act. Applying these phrases as a choice of law provision would lead to an unreasonable or unjust outcome.

There was sufficient evidence presented at trial on which the trial court could determine the language in the German divorce decree did not constitute an agreement of the parties to limit themselves to the jurisdiction of the German court system for the purposes of dividing their retirement. The trial court did not abuse its discretion in doing so. We overrule Appellant's second issue.

Appellant's remaining issue

In his third issue, Appellant argues the German decree was final on the issue of dividing the retirement benefits, even though it was an agreement to dispose of them later, under the law of obligations. As we have discussed above, the German court did not have subject-matter jurisdiction to divide the benefits, neither during the divorce proceeding nor in a later proceeding under the law of obligations. As also discussed above, to the extent that Appellant urges us to consider the agreement of the parties one that binds Appellee to seek redress only under the law of obligations, we decline to do so. Appellant's third issue is overruled.

Law from other jurisdictions

In *Fox v. Fox*, the Kansas Court of Appeals considered an appeal from the wife's petition to divide property not divided at the time of divorce, filed in a Kansas court some years after a divorce had been rendered in Germany. *Fox v. Fox*, 322 P.3d 400, 401 (Kan.Ct.App. 2014). The

court noted the German court did not attempt to enter a judgment regarding the military pensions (at husband's request and over wife's objection), but instead the German court reserved the question of whether wife was entitled to husband's pensions to the law of obligation. *Id.* at 402.

The *Fox* court affirmed dismissal of the wife's claims on the basis that Kansas did not have subject-matter jurisdiction over the type of claim brought by Veronica Fox. *Id.* at 404.

The *Fox* court stated Veronica Fox filed suit seeking to divide property not divided at the time of their German divorce. *Id.* at 402. The court affirmed dismissal for lack of subject matter jurisdiction, noting that Kansas did not have a law granting courts subject matter jurisdiction to determine matters of property division after a marriage has been dissolved in a foreign forum. *Id.* at 404. Texas courts do have such a statute.⁶

Illinois also examined a German divorce decree reserving pensions, including military retirement benefits, to the law of obligations in *In re Marriage of Brown*, 587 N.E.2d 648 (Ill.App.Ct. 1992). The decree provisions read:

The parties have agreed that a pension equalization shall proceed between the parties by way of the law of obligations (contracts). A regulation under U.S. law that possibly put the wife into a better position is specifically reserved to the wife. This agreement is appropriate and reserves to the parties their rights for pension equalization, it therefore was agreed to by the Family Court.

...

The parties are agreed that there is to be a pension equalization between them by way of the law of obligations (contract).

“Possible further rights of the wife under U.S. law remain reserved.”

Marriage of Brown, 587 N.E.2d at 650-51.

⁶ The Texas statute, Family Code Section 9.204, is, by its language, limited to courts of other states. TEX.FAM.CODE ANN. § 9.204.

This case involved a petition for dissolution of marriage followed by a petition to register a foreign judgment and for supplemental relief. *Id.* The appellate court determined that the trial court properly dismissed the case for lack of subject matter jurisdiction because the Illinois Dissolution Act requires the existence of a marriage. *Id.* at 653. The trial court recognized the previous divorce in Germany and stated the Dissolution Act did not extend subject matter jurisdiction to dividing property owned by parties already divorced. *Id.* at 653-54. The court recognized the harshness of this conclusion and the inequitable result, as it might have deprived Ms. Brown of her entitlement to part of her ex-husband’s military pension. *Id.* The court urged the consideration of a legislative scheme allowing for jurisdiction in cases such as these. *Id.* at 654.

Following the state court case, Ms. Brown sought to have the military retirement divided in federal court. That Virginia federal district court discussed the same provisions considered above. *See Brown v. Harms*, 863 F. Supp. 278, 279 (E.D.Va. 1994). The federal court viewed these provisions as deliberately omitting any partition of the retirement pay and explicitly contemplating that the parties would pursue partition in another forum. *Id.* at 279.

The *Brown* court noted the German court apparently believed it had no power to divide the military retirement. *Id.* at 280. The power to divide military retirement lies with “any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.” *Id.* (quoting 10 U.S.C. § 1408(a)(C)(1988)). And “[t]he United States has no such agreement with Germany.” *Id.* The court dismissed the case, noting federal courts do not have subject-matter jurisdiction under USFSPA. *Id.* at 282.

CONCLUSION

The German divorce court did not divide Appellant's United States military retirement benefit. The trial court did not abuse its discretion in determining that language in the German decree regarding an agreement to reserve the division of pensions to the law of obligations did not amount to a contract between the parties to limit themselves to that forum. For these reasons, the trial court properly exercised subject-matter jurisdiction over Appellant's retirement benefits. We affirm the ruling of the trial court.

Yvonne T. Rodriguez, Chief Justice

October 31, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.