

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00693-CV

John Karl Rudolph, Appellant

v.

Debra Ann Jamieson, Appellee

**FROM THE DISTRICT COURT OF BELL COUNTY, 146TH JUDICIAL DISTRICT
NO. 236,883-B, HONORABLE JACK WELDON JONES, JUDGE PRESIDING**

MEMORANDUM OPINION

John Karl Rudolph appeals an order of the trial court ordering him to pay specified amounts of his military-retirement benefits, both in arrears and going forward monthly, to his ex-wife, Debra Ann Jamieson. Rudolph contends that the trial court's order improperly modified the parties' agreed divorce decree and is, therefore, void. *See* Tex. Fam. Code § 9.007(a), (b) (prohibiting court from altering or changing substantive division of property made in divorce decree). For the following reasons, we affirm the trial court's order.

BACKGROUND

The parties were married on April 3, 1993, and divorced on November 12, 2009, by an agreed divorce decree. Rudolph served in the Army the entire time that the parties were married, and Jamieson served in the Army for some of that time. In its provisions related to division of the marital estate, the divorce decree awarded each spouse a percentage of the other's "United States

Army disposable retired pay.” Rudolph was awarded 24% of Jamieson’s military retired pay; because Rudolph was not yet retired, Jamieson’s percentage was expressed as a formula. Specifically, the decree awarded to Jamieson:

W-6. All right, title and interest in and to the monthly percentage amount determined under the formula set forth below of the United States Army disposable retired pay to be paid as a result of JOHN KARL RUDOLPH’S service in the United States Army, and the same percent of all increases in the United States Army disposable retired pay due to cost of living or other reasons, if, as, and when received.

$$\frac{199 \text{ number of months of marriage during military service}}{\text{number of months of actual military service}} \times \frac{1}{2} = \text{wife's \% award}$$

The decree provided that the term “disposable retired pay” “has the meaning provided in the Uniformed Services Former Spouses’ Protection Act [USFSPA] (10 U.S.C. § 1408 *et seq.*),” *see* 10 U.S.C. § 1408(a)(4)(A),¹ and that the term “retired pay” “means monetary pay to which Servicemember is, or may hereafter be, entitled to receive on completion of the requisite number of years of creditable service to be entitled to nondisability retired pay as a result of service in the United States Armed Forces (active duty, reserve component, or national guard), whether called retired pay, retainer pay, or retirement pay.”

¹ 10 U.S.C. § 1408(a)(4)(A) defines “disposable retired pay” as the “total monthly retired pay to which a member is entitled” (i.e., the retired pay a member would receive based on years of service) minus, as applicable here, “the amount of retired pay of the member under [] chapter [61, pertaining to retirement due to physical disability] computed using the percentage of the member’s disability on the date when the member was retired.”

In bold typeface,² the agreed decree further provided:

IT IS SO ORDERED that the same percentage interest awarded in this decree to DEBRA ANN JAMIESON includes all amounts of retired pay JOHN KARL RUDOLPH actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made to qualify for Veteran’s Administration benefits and any waiver from electing not to retire, being qualified to retire. It also includes any sum taken by JOHN KARL RUDOLPH in addition to or in lieu of retirement benefits, including but not limited to exit bonuses, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of the military retirement benefits normally payable to a retired member. All sums payable to DEBRA ANN JAMIESON as a portion of military retirement shall be payable from JOHN KARL RUDOLPH’S disposable retired or retainer pay to the extent that it is so restricted by law.

In February 2015, Jamieson filed a “Petition for Enforcement of Military Retirement and Personal Property Division by Contempt/Motion for Clarification of Prior Court Order” alleging that Rudolph had retired from the Army and had violated the decree in various ways, including, as relevant to this appeal, failing to pay Jamieson “her share of [his military] retired pay” since he had retired. After filing an answer to Jamieson’s petition, Rudolph later filed a counterpetition for enforcement alleging that Jamieson had failed to pay him his percentage of her retired pay for certain specified months. While the cause was pending, the trial court rendered an “Order on Clarification of Domestic Relations Order [Military Retirement]” in which it precisely set out the amount of Jamieson’s percentage of Rudolph’s disposable retired pay, as Rudolph had by then retired: “41.1157 percent of the hypothetical pay of an O-5 with 20 years and 2 months of creditable service towards

² This cited paragraph is the only substantive text in the decree that appears in bold typeface, apart from one sentence specifying the number of shares of Rudolph’s Individual Retirement Account that Jamieson was awarded.

retirement as of the date of divorce, with an average high-36 month base pay average of \$7,163.02 on the date of divorce, to be determined from Servicemembers [sic] monthly **disposable** retired pay at retirement.” In addition to specifying the exact percentage of Rudolph’s disposable retired pay to which Jamieson is entitled, the Order on Clarification recited—without modification—the other portions of the agreed decree pertaining to the award to Jamieson of Rudolph’s military-retirement benefits, including the bolded paragraph quoted above.

The trial court conducted more than one evidentiary hearing³ on Jamieson’s petition. Evidence from the March 8, 2017 hearing indicates that Rudolph was severely injured in combat in 2007 yet continued to serve in the Army while undergoing treatment for his injuries. He was placed on the Army’s “Temporary Disability Retired List” in 2014 and, in 2016, on its “Permanent Disability Retired List” and retired thereunder in 2016. At the time the Army retired him due to his disability (finding him to be 100% disabled), *see* 10 U.S.C. § 1201 (providing that Secretary of Defense may retire servicemember due to physical disability incurred while on active duty and providing for servicemember’s entitlement to retired pay therefor computed under section 1401), Rudolph was also eligible for retirement due to his length of creditable service exceeding twenty years, *see id.* §§ 3911 (providing that commissioned officer of Army who has at least twenty years of creditable service is entitled to be retired), 3929 (providing that Army member who is retired for

³ The reporter’s record contains the transcript of only one of the hearings, conducted on March 8, 2017, at which one witness testified: James Higdon, an attorney hired by Rudolph as an “expert in military retirement.” At the hearing, the court admitted into evidence Higdon’s written report. The hearing transcript indicates that at prior hearings, other witnesses testified and the court admitted exhibits relevant to the retirement issues, but transcripts of those hearings have not been included in the reporter’s record.

length of service is entitled to retired pay computed under chapter 371 of title 10); *see also id.* § 3991 (providing for computation of retired pay of member retired for length of creditable service).

The evidence and argument at the hearing focused primarily on whether Rudolph was receiving any “disposable retired pay” from the military and, if not, whether he was nonetheless bound by the decree to pay Jamieson some amount of the military-retirement payments that he was receiving due to his actual or constructive waiver or forfeiture of his retired pay earned for years of creditable service, however the military characterized the payments. The uncontroverted evidence shows that, at the time of the hearing, Rudolph was receiving two monthly payments as a result of his retirement from the Army: (a) one in the amount of \$5,976 as non-taxable income, out of which two deductions were made—a “VA waiver” in the amount of \$586 and an “SBP” [Survivor Benefit Plan] payment of \$388)—resulting in a net monthly payment of \$5,001.50; and (b) a second payment of \$2,586.13 denoted in the record as “CRDP.”⁴ With respect to these payments, the following exchange took place at the hearing between Jamieson’s counsel and Rudolph’s expert witness, Higdon:

Jamieson’s counsel: So Mr. Rudolph, as a result of either actual or constructive elections, is receiving over \$8000 in retirement disability and VA of which my client, according to the result if you looked at the decree literally on disposable retired pay, would receive zero.

Higdon: That would be correct.

On cross-examination, Higdon agreed that the military “is not going to pay Mr. Rudolph both his time of service retirement and a retirement based on medical retirement” and that language such as

⁴ CRDP is not defined or explained in the record or by the parties in their briefs.

that in the bolded paragraph of the decree referring to actual or constructive waiver or forfeiture of “retired pay” would include “time-of-service” retired pay.⁵

After taking the issue of Jamieson’s entitlement to Rudolph’s military-retirement payments under advisement, the trial court rendered an order (the Order) on July 26, 2017, in which it ordered Rudolph to pay Jamieson “the monthly sum of \$1,540.00 per month, which is equivalent to 41.1157% of any benefits paid regularly to him⁶ as a result of his military service, regardless of how they may be characterized by DFAS [Defense Financing and Accounting Service].” The Order also found that Jamieson had failed to pay military-retirement benefits due to Rudolph in the amount of \$10,611.60 and that Rudolph had failed to pay military-retirement benefits to Jamieson in the amount of \$67,000. The Order credited the arrearage amount that Rudolph was owed by Jamieson against the arrearage amount that he owed her and awarded Jamieson attorney’s fees in the amount of \$7,145.97. On appeal, Rudolph takes issue with the trial court’s award of any of his military-retirement benefits to Jamieson, claiming that he receives no “disposable retired pay” and, therefore, owes Jamieson nothing under the terms of the decree.

⁵ Higdon also admitted on cross-examination that he taught a seminar on advanced family law shortly before the agreed decree was signed and “would not be surprised” if the written appendices to his seminar suggested that practitioners use language similar to that appearing in the bolded paragraph “to avoid situations similar” to Jamieson’s.

⁶ Basic algebra indicates that the \$1,540.00 monthly award to Jamieson derives from 41.1157% of monthly “benefits paid regularly” to Rudolph in the amount of \$3,745.53. However, it is not clear from the record how the trial court arrived at the \$3,745.53 figure as the amount of monthly “benefits paid regularly to [Rudolph].” Rudolph does not take issue with the amount of the monthly award to Jamieson except to assert that she should receive *no* monthly payment.

DISCUSSION

Rudolph raises four issues on appeal that are all variations on the same complaint: the trial court's Order "substantively modified" both its prior order on clarification and the divorce decree by ordering Rudolph to pay Jamieson a percentage of his "gross retired pay" (i.e., his disability retired pay) rather than the same percentage of his "disposable retired pay" (which is, Rudolph asserts, equal to zero and results, therefore, in no payments owed to Jamieson). Jamieson responds that the decree's bolded provision quoted above provided for an equivalent, equitable distribution of Rudolph's military-retirement pay in the event that he received payments other than or in addition to those attributable to ordinary retirement pay based on years of service, such as the disability-retirement payments that he receives. We agree with Jamieson.

We review a trial court's ruling on a motion for enforcement for an abuse of discretion, and we review issues regarding the trial court's interpretation of a divorce decree de novo. *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003). Similarly, settlement agreements incorporated into final divorce decrees—as we have here—are treated as contracts and governed by contract law. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984). We therefore construe the disputed bolded provision in the agreed decree to determine whether the trial court "substantively modified" the provision or merely enforced it.

While some evidence supports Rudolph's contention that he receives no "disposable retired pay" and that he, accordingly, owes Jamieson nothing under paragraph W-6 of the decree, his argument on appeal ignores the agreed decree's bolded provision, which grants to Jamieson the same percentage interest as that awarded in W-6 of: (a) all amounts of "retired pay" that Rudolph

“actually or constructively waives or forfeits in any manner and for any reason or purpose,” as well as (b) “any sum taken by [him] in addition to or in lieu of retirement benefits . . . including any form of compensation attributable to separation from military service instead of or in addition to payment of the military benefits normally payable to a retired member.” This broad language unambiguously includes the payments that Rudolph receives from the military at issue here, whether he is deemed to have constructively waived or forfeited his years-of-service retired pay to be eligible for the disability compensation or whether his “disability retired pay” or the undefined CRDP pay is deemed the taking of a sum that is in lieu of or in addition to his years-of-service retired pay.

Although Rudolph contends that he was retired by the Army *at its election* (not his) under chapter 61 due to his permanent disability and that he receives “disability retirement payments” rather than retirement benefits earned by his years of service, it nonetheless remains that he has, at the very least, *constructively* waived or forfeited his earned years-of-service retirement pay in order to receive the disability compensation. *See Constructive, Black’s Law Dictionary* 356 (9th ed. 2009) (defining “constructive” as “Legally imputed; existing by virtue of legal fiction though not existing in fact. . . . Courts usu. give something a constructive effect for equitable reasons”); *Webster’s 3d New Int’l Dictionary* 489 (2002) (defining “constructive” as “derived from or depending on construction or interpretation : not directly expressed : INFERRED—often used in law of an act or condition assumed from other acts or conditions which are considered by inference or by public policy as amounting to or involving the act or condition assumed”); *see also* 10 U.S.C. § 1201.

While Rudolph cites federal caselaw interpreting the USFSPA as prohibiting state courts from dividing as community property a military retiree’s retirement pay waived in order to

receive veterans' disability benefits, *see* 10 U.S.C. § 1408(c)(1); *Howell v. Howell*, 137 S. Ct. 1400, 1405 (2017); *Mansell v. Mansell*, 490 U.S. 581, 589 (1989), at this procedural stage he cannot challenge the trial court's alleged unlawful property division, *see Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003) ("Errors other than lack of jurisdiction, such as 'a court's action contrary to a statute or statutory equivalent,' merely render the judgment voidable [rather than void] so that it may be 'corrected through the ordinary appellate process or other proper proceedings.'" (citations omitted)); *Gainous v. Gainous*, 219 S.W.3d 97, 110 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("A division awarding a spouse the other spouse's separate property is unconstitutional and erroneous, but not void."). His remedy for that assertion would have been a direct appeal from the divorce decree, an avenue that he appears not to have pursued. Having failed to do so, he cannot now collaterally attack the trial court's division of property, even if it is allegedly unlawful. *See Reiss*, 118 S.W.3d at 443; *Gainous*, 219 S.W.3d at 110.

Furthermore, Rudolph *agreed* to the bolded paragraph granting to Jamieson the specified percentage of any waived retired pay or receipt of other compensation attributable to separation from military service. A property settlement agreement incorporated into a divorce decree is treated as a contract in Texas, and its meaning is governed by the law of contracts. *McGoodwin*, 671 S.W.2d at 882. Rudolph has not pleaded any theory in avoidance of the contract's provision for alternative distributions to Jamieson in the event of his waiver of retired pay or receipt of other separation compensation.

On this record, we conclude that the trial court properly construed and clarified the agreed decree to provide Jamieson a percentage of the military payments actually received by

Rudolph, even though those payments do not constitute “disposable retired pay,” in light of the decree’s provision that Jamieson receive equivalent, equitable retirement benefits in the event that Rudolph receives retirement compensation in a form other than “disposable retired pay.” Accordingly, we overrule Rudolph’s issues on appeal.

CONCLUSION

The trial court’s order did not modify the division of property in the parties’ agreed decree but, rather, merely clarified the decree’s division of retirement benefits in light of Rudolph’s recent retirement from the Army and receipt of retirement payments. Accordingly, the order was not in error, and we affirm it.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: June 5, 2018