

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:

No. 28351-8-III

KERRI LEI SHIRLEY,

Respondent,

and

WILLIAM SCOTT SHIRLEY,

Appellant.

Division Three

UNPUBLISHED OPINION

Sweeney, J.—This appeal follows ancillary proceedings in a dissolution action. A superior court commissioner clarified the terms of a dissolution decree to award the wife a share of the husband’s military pension. The commissioner concluded that the decree required the award despite language that would suggest any award of the pension would end after the couple’s two children graduated from college. We conclude that the award was an appropriate reading of the original decree and its intended disposition of property, and we affirm the judgment of the trial court.

FACTS

No. 28351-8-III
In re Marriage of Shirley

William and Kerri Shirley (now Sadowski) divorced in 2002 after 12 years of marriage. The decree awarded property to Kerri Shirley including various items and funds as her separate property, and it included this language, “The wife’s share of the husband’s Military Pension (50%) during the period they were married (12 years) and he was in the service will be set aside for the benefit of the children’s college education.” Clerk’s Papers (CP) at 5. The same language was used to describe the husband’s liabilities. The child support order required Mr. Shirley to pay child support until each of the two children (at that time, a daughter age 11 and a son age 8) were no longer in high school or turned 18. The decree included a section on post-secondary support that provided, “The right to petition for post secondary support is reserved, provided that the right is exercised before support terminates.” CP at 11.

Mr. Shirley retired from the Air Force after 22 years in June 2006. The older child turned 18 in April 2008 and began college that fall. Ms. Sadowski tried unsuccessfully to apply for her share of the military pension benefits; the military required an order with an approved formula to distribute. She moved for clarification of the military pension award to comply with the military’s requirements in September 2008. Mr. Shirley responded that he was sending his ex-wife’s share of the pension directly to his daughter, along with additional funds to pay her college expenses. He calculated Ms. Sadowski’s monthly

share of the pension at 27 percent of his disposable retirement, or \$135 per month.

A superior court commissioner held a hearing and entered an order on May 11, 2009. The commissioner found that the dissolution decree awarded a share of the military pension as Ms. Sadowski's separate property, to be set aside for the children's college education. The commissioner also found that the military pension awarded to Ms. Sadowski was not an offset to her post-secondary educational support obligation because the order of child support provided that the right to petition for post-secondary support was reserved. The commissioner computed Ms. Sadowski's award as: $.5 \times (152/276) = .551 = 27.5\%$ where 276 equals the total number of months of military service and 152 represents the number of months of military service while married." CP at 72. The commissioner then ordered that Ms. Sadowski receive 27.5 percent of Mr. Shirley's retirement pay, "which shall be set aside for the benefit of the children's college education." CP at 72.

Mr. Shirley moved for reconsideration. In particular, he sought to clarify his obligations after the children completed college. He argued that the decree did not award any military retirement to Ms. Sadowski personally. He also asserted that a present value amount must be calculated and paid into a college account for the children. The commissioner entered an order on the motion to reconsider on June 12, 2009. He

No. 28351-8-III
In re Marriage of Shirley

awarded the 27.5 percent interest in the retirement to Ms. Sadowski as her separate property; once all college expenses are paid the monthly payment goes to Ms. Sadowski. The superior court denied Mr. Shirley's motion to revise the commissioner's order. He appeals.

DISCUSSION

Clarification of Dissolution Decree

Mr. Shirley assigns error to the commissioner's award of a portion of his pension to Ms. Sadowski as her separate property. He contends the original award to Ms. Sadowski of a percentage of his military pension was intended to provide sufficient funds to cover her share of a post-secondary educational obligation and necessarily then it was not intended to be a permanent award. To the extent that the language of the dissolution decree is ambiguous on this, he asserts, the language must be interpreted against Ms. Sadowski, who drafted it.

Interpretation of a dissolution decree is a question of law, and so we will review de novo. *In re Marriage of Thompson*, 97 Wn. App. 873, 877, 988 P.2d 499 (1999). Here, we are called upon to review a "clarification" of a dissolution decree. Generally a clarification is reviewed de novo, while a modification of a decree is reviewed for abuse of discretion. *In re Marriage of Michael*, 145 Wn. App. 854, 859, 188 P.3d 529 (2008).

No. 28351-8-III
In re Marriage of Shirley

A clarification defines the rights and obligations already given to the parties in the decree; a modification extends or reduces those rights and duties. *Id.* “An ambiguous decree may be clarified, but not modified.” *Thompson*, 97 Wn. App. at 878. Ms. Sadowski requested a clarification of the military pension award. Mr. Shirley now suggests that the commissioner modified the decree.

When a decree is ambiguous, we try to determine the intent of the court by applying general rules of contract and statutory interpretation. *Id.* We start with the decree. *In re Marriage of Gimlett*, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981). The court may clarify a decree by defining the parties’ rights and obligations when they cannot agree on the meaning of a particular provision. *In re Marriage of Christel*, 101 Wn. App. 13, 22, 1 P.3d 600 (2000).

Here, the decree states that Ms. Sadowski is awarded as her separate property the property set out in an attached exhibit, including “[t]he wife’s share of the husband’s Military Pension (50%) during the period they were married (12 years) and he was in the service.” CP at 5. It provides that this share “will be set aside for the benefit of the children’s college education.” CP at 5. Mr. Shirley contends the court intended to award Ms. Sadowski only so much of his pension as is necessary to cover her share of the children’s college expenses.

No. 28351-8-III
In re Marriage of Shirley

First, to the extent that the duration of the award of military pension is ambiguous, the commissioner properly clarified the language. *Michael*, 145 Wn. App. at 859; *Thompson*, 97 Wn. App. at 878. Pension benefits are deferred compensation property rights that are properly distributed in a marital dissolution. *See In re Marriage of Bulicek*, 59 Wn. App. 630, 636, 800 P.2d 394 (1990). The court has discretion to make a just and equitable distribution of property. *Id.*

Here, the court originally awarded Ms. Sadowski as her separate property one-half of the community interest in the military pension, a car, household furnishings, firearms, other items, and \$1,000 in exchange for a quitclaim deed to the family home. Mr. Shirley received as his separate property the family home (subject to a mortgage), a truck, a car, two boats, and various other tools, equipment, and furnishings. These items were not valued, nor were some of the liabilities assigned to each, including the mortgage. With the record as it is, and relying on the plain language of the decree, the commissioner concluded that changing the language so that Ms. Sadowski would receive less than a full 50 percent share of the community interest in the pension would affect the overall equitable division of the property.

The commissioner also noted that the order for child support did not refer to the share of the military pension as a source of post-secondary educational support. The

No. 28351-8-III
In re Marriage of Shirley

order of child support simply provides that the right to petition for post-secondary support was “reserved.” CP at 11. Read together, the terms of the decree and the child support order suggest to us that the court originally awarded Ms. Sadowski one-half of the military pension that accrued during the marriage as her separate property, to be set aside and used for the children’s college expenses as long as necessary.

Mr. Shirley also contends that the commissioner ordered Ms. Sadowski to use the pension funds only for student loans, rather than for the actual costs of the education. The commissioner ordered that the funds were to be used to pay tuition, housing, books, meal plans, college fees, and student loans after graduation: “If the children receive scholarships, do not attend, etc., and there is no college obligation, then the retirement payments shall go directly to Ms. Sadowski.” CP at 76. Mr. Shirley argues that Ms. Sadowski will get a windfall if the children work for college expenses or get scholarships. But there is no showing that the court failed to consider this possibility in its attempt to fairly distribute the assets and liabilities at the time of the dissolution.

The commissioner looked at the language of the decree and the child support order and concluded that the court intended to award Ms. Sadowski a share of the community interest in the military pension as her separate property. Although those funds must be used for the children’s college expenses, any remainder belongs to Ms. Sadowski. The

No. 28351-8-III
In re Marriage of Shirley

decree and child support order support that interpretation. *Gimlett*, 95 Wn.2d at 705.

Present Cash Value Determination

Mr. Shirley next argues that a proper interpretation of the decree would require that the court calculate the present cash value of Ms. Sadowski's share of the military pension so that those funds are available now for their children's education. He notes that the decree fails to state how the children will receive these funds. And he argues that such silence on the payment terms should be fairly construed as a mutual mistake. He argues then that the value should be paid to Ms. Sadowski in a lump sum and set aside in a savings fund until needed for college expenses.

According to Mr. Shirley's accountant, Ms. Sadowski's expected lifetime share is \$157,756 (based on Mr. Shirley's life expectancy of 35 more years). Using an average interest rate of 6 percent, investment of a lump sum of \$20,525 increases to about \$157,756 in 35 years. Rather than seek to make a lump sum payment of \$20,525, however, Mr. Shirley suggests that the payments should be spread equally over the eight expected years of college for the children. He asks that the \$20,525 be divided into payments of \$2,565.61 per year for eight years. The commissioner rejected a present value calculation as inconsistent with the language of the decree.

Reduction of a retirement pension to its present value is certainly a recognized

No. 28351-8-III
In re Marriage of Shirley

method to value dissolution assets. *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992). But “[a]n award of pension rights on an as-received basis is to be encouraged, because it avoids difficult valuation problems and shares in the risks inherent in deferred income.” *In re Marriage of Chavez*, 80 Wn. App. 432, 437, 909 P.2d 314 (1996). By this method, the court determines a percentage division of the monthly amount of the pension, which will remain constant throughout the time the pension is payable. *Bulicek*, 59 Wn. App. at 637. Here, the commissioner used the recognized “time rule method” to calculate Ms. Sadowski’s interest in the military pension. *See In re Marriage of Rockwell*, 141 Wn. App. 235, 252, 170 P.3d 572 (2007).

The commissioner divided the number of months of military service during marriage by the total number of months of service to get the community percentage of the retirement benefit. This number was divided by one-half for Ms. Sadowski’s percentage of the benefit and amounts to 27.5%. When applied to Mr. Shirley’s monthly military retirement benefit, Ms. Sadowski’s percentage equals about \$376 per month, and Mr. Shirley admits as much in a declaration filed in March 2009. CP at 30.

Mr. Shirley urges that the failure to mention the payment terms of the military pension in the decree reflects a mutual mistake. But a mistake is a belief that does not accord with the facts. *In re P’ship of Rhone & Butcher*, 140 Wn. App. 600, 607, 166

No. 28351-8-III
In re Marriage of Shirley

P.3d 1230 (2007). We see no mutual mistake here. Nothing in this record suggests that anything other than monthly payments of a constant percentage of the disposable retirement income was anticipated. In fact Mr. Shirley's March 2009 declaration refers to Ms. Sadowski's monthly share as \$376. CP at 30.

Finally, Mr. Shirley contends a lump payment makes the funds available to the children as soon as they enter college, avoiding interest fees on student loans. He also notes that the benefits would end when the parents die. He claims that this shows that the parties originally intended to determine the present value of the funds and to place the funds in an interest-bearing account for college expenses.

If that were the intent, however, Mr. Shirley would not have begun paying Ms. Sadowski's monthly share of the military pension to his daughter after she began college. And, as Ms. Sadowski notes, the education funds are needed now, so they could not be invested for 35 years. It makes more sense for the funds to be paid over time to cover education expenses and loans as they arise for both children. And the contingency that Mr. Shirley may die early is likely built into the decree's property allocation. *See Chavez*, 80 Wn. App. at 437 (payment of pension rights on an as-received basis shares in the risks inherent in deferred income).

The record then supports the commissioner's computation of Ms. Sadowski's

No. 28351-8-III
In re Marriage of Shirley

share of the military pension and clarification of the decree to provide for payment of her share on a monthly basis. The record also supports the commissioner's conclusion that the intent of the dissolution court was to provide this share as Ms. Sadowski's separate property, to be used for her children's college education, with the remainder to her after the college expenses are paid.

The commissioner's order on the motion for clarification and the superior court's order on the motion to revise are affirmed.

Attorney Fees

Ms. Sadowski requests attorney fees on appeal. RAP 18.1. She contends she has the need for assistance and Mr. Shirley has the ability to pay. RCW 26.09.140.

A party seeking attorney fees on the basis of financial need must file an affidavit of financial need no fewer than 10 days before the date the case is set for oral argument. RAP 18.1(c). Ms. Sadowski has not filed an affidavit of financial need; therefore, we deny her request.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

No. 28351-8-III
In re Marriage of Shirley

Sweeney, J.

WE CONCUR:

Korsmo, A.C.J.

Brown, J.