

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 20, 2014 Session

DANIEL LOUIS PINKAVA v. TAWANIA LEIGH KOVACS-PINKAVA

**Appeal from the Chancery Court for Montgomery County
No. 2000050161 Laurence M. McMillan, Jr., Judge**

No. M2013-02375-COA-R3-CV - Filed November 26, 2014

This appeal involves the interpretation of a marital dissolution agreement (“MDA”). Wife filed suit to clarify the terms of the MDA regarding the apportionment of Husband’s future military retirement. The trial court held that the MDA granted Wife twenty-five percent of Husband’s retirement benefits at the rank of captain, his rank at the time of divorce, including cost-of-living adjustments that will be in effect when he elects to retire. Husband appeals and argues that the award of retirement benefits was intended to be alimony in solido and was ascertainable at the time of divorce rather than at the time he elects to retire. We agree with the trial court’s interpretation and affirm the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Gregory D. Smith and Sharon T. Massey, Clarksville, Tennessee, for the appellant, Daniel Louis Pinkava.

Mark A. Rassas, Clarksville, Tennessee, for the appellee, Tawania Leigh Kovacs-Pinkava.

OPINION

Daniel Pinkava (“Husband”) and Tawania Kovacs-Pinkava (“Wife”) were married in 1987.¹ The parties were divorced in 2000. During their marriage, Husband served in the United States Air Force and accrued military retirement benefits. The final decree of divorce

¹ Husband and Wife had one son who reached the age of majority in 2012.

ratified and incorporated a marital dissolution agreement (“MDA”) that contained the following language regarding Husband’s military retirement:

17. RETIREMENT. a. The parties agree that [Wife] shall receive twenty-five percent (25%) of [Husband]’s military retirement based on [Husband]’s current rank as a Captain. In the alternative, should [Husband] decide to receive an early-out or separation bonus such as VSI or SSB, [Wife] shall receive twenty-five percent (25%) of that amount after the taxes are paid. [Wife] shall be named as SBP for the twenty-five percent (25%) agreed retirement amount. [Husband] agrees to set up an allotment for the above mentioned amount, to a bank account of [Wife]’s choosing. [Husband] does not waive any of his Rights under the Right to Privacy Act.

In late 2011, Wife contacted Defense Finance and Accounting Services (“DFAS”) to assure that proper payment of her interest in Husband’s retirement would be remitted to her upon Husband’s retirement. DFAS responded to Wife’s request by letter dated December 20, 2011, and explained that her application for payment of a portion of Husband’s retirement could not be approved. The letter stated:

The court order you submitted provides for a division of retired/retainer pay by means of a hypothetical amount of retired pay as of the time of divorce - 25% of the husband’s military retirement based on the husband’s current rank as Captain. However, the court order does not provide enough information to calculate the amount of the hypothetical retired pay. You must obtain a certified copy of a clarifying order which awards the former spouse a fixed dollar amount or percentage of the member’s actual disposable retired pay.

On April 24, 2012, Wife filed a petition to amend the final decree of divorce, requesting the court to modify or clarify the wording of the MDA’s retirement clause to meet with DFAS regulations and to require Husband to designate Wife as a beneficiary on the Survivor Benefit Plan. On June 18, 2012, Husband answered the petition and requested the court to dismiss the petition. On December 14, 2012, Wife amended her petition,² and Husband filed an answer on December 28, 2012.

A hearing was held on September 3, 2013, at which both parties testified. The trial court entered an order on September 27, 2013, “amending” the final decree of divorce as follows:

² The amended petition included a request for civil contempt, which the trial court denied, and which is not a subject of this appeal.

- a. The former spouse, Tawania Leigh Kovacs, is designated as an irrevocable beneficiary under the Survivor's Benefit Plan (SBP) for 25% of the former husband's, Daniel Louis Pinkava, retirement, and because this is an amendment to the original Final Decree of Divorce, which relates back to the date of divorce, she may make application for such coverage directly with the SBP under DD Form 2656-1, or other appropriate form as provided by DFAS, for former spouse's coverage.
- b. The former spouse, Tawania Leigh Kovacs, is awarded 25%, plus all cost of living increases, of the military member's, Daniel Louis Pinkava, military retired pay at the date of his retirement and based on the rank of O3-E.³

Husband appeals.

STANDARD OF REVIEW

This appeal concerns the interpretation of an MDA. "A marital dissolution agreement is a contract between parties contemplating divorce." *Hannahan v. Hannahan*, 247 S.W.3d 625, 627 (Tenn. Ct. App. 2007) (citing *Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998)). Therefore, an MDA is subject to the rules governing construction of contracts. *Barnes v. Barnes*, 193 S.W.3d 495, 498 (Tenn. 2006). "Because 'the interpretation of a contract is a matter of law, our review is de novo on the record with no presumption of correctness in the trial court's conclusions of law.'" *Id.* (quoting *Honeycutt v. Honeycutt*, 152 S.W.3d 556, 561 (Tenn. Ct. App. 2003)).

ANALYSIS

The language at issue in the MDA states: "The parties agree that [Wife] shall receive twenty-five percent (25%) of [Husband's] military retirement based on [Husband's] current rank as a Captain." Husband argues that the award of twenty-five percent of his future military retirement benefits was intended to be an award of alimony in solido and, thus, it was not modifiable by the trial court. In support of his argument, Husband insists that the amount of the court's award was ascertainable at the time of divorce. Specifically, Husband posits that Wife is entitled to \$525.00 per month of his future military retirement benefits. He comes to this conclusion based on a calculation using his monthly income at the time of divorce. In August 2000, Husband's pay as a captain was \$4,200.00 per month and, if he was eligible to retire at the time, his retirement pay would have been half of that amount, or \$2,100.00 per month. Twenty-five percent of \$2,100.00 is \$525.00.

³ The rank of O3-E is captain, Husband's rank at the time of divorce.

Wife contends the trial court was correct in holding that the award of retirement benefits should be based on the amount of retirement income a captain would receive at the time Husband chooses to retire. Wife asserts this amount necessarily includes cost-of-living adjustments and was not ascertainable at the time of divorce. In sum, the parties in this appeal are arguing over whether Wife is entitled to twenty-five percent of the amount of a captain's retirement in 2000 or whether she is entitled to twenty-five percent of a captain's retirement at the time Mr. Pinkava chooses to retire.⁴

To interpret the MDA, we first look to the language of the agreement, "to ascertain the intention of the parties" *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). If the contract language is clear and unambiguous, the language must be interpreted "according to its plain terms and ordinary meaning." *BSG, LLC v. Check Velocity, Inc.*, 395 S.W.3d 90, 93 (Tenn. 2012) (citing *Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 704 (Tenn. 2008)). "We seek to avoid rewriting an agreement under the guise of construing it, as the parties are not entitled to an agreement different from the one they negotiated." *Lambert v. Lambert*, No. M2013-01885-COA-R3-CV, 2014 WL 3563630, at *7 (Tenn. Ct. App. July 18, 2014) (citing *Long v. McAllister-Long*, 221 S.W.3d 1, 9 (Tenn. Ct. App. 2006)).

Husband urges this Court to interpret the award of retirement benefits as alimony in solido. Alimony in solido is a form of long-term support that is "set on the date of the divorce decree and is either paid in a lump sum payment of cash or property, or paid in installments for a definite term." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 108 (Tenn. 2011) (citing Tenn. Code Ann. § 36-5-121(h)(1); *Broadbent v. Broadbent*, 211 S.W.3d 216, 222 (Tenn. 2006)). Alimony in solido may not be modified. *Broadbent*, 211 S.W.3d at 222. At the time of divorce, Husband was active service in the Air Force and was not yet eligible to receive his retirement pay. Thus, in 2000, Husband's military retirement was "a benefit not yet realized and potentially never obtained" because it was not yet clear whether Husband would serve the requisite number of years to achieve retirement. *See Cohen v. Cohen*, 937 S.W.2d 823, 831 (Tenn. 1996) (discussing the valuation methods for distributing retirement benefits). The language in the MDA does not contain a specific monetary amount due to Wife, as Husband suggests, nor does it state that Husband's salary at the time of divorce should be used to determine the amount of retirement benefits Wife should receive. There is nothing in the MDA to suggest the award of Husband's future military retirement benefits was intended to be alimony in solido. Rather, the MDA states that Wife will receive a percentage of Husband's military retirement based on his ranking at the time of divorce.

⁴ The value of a captain's retirement when Husband elects to retire will be greater than the value of a captain's retirement in 2000 due to cost-of-living increases in monthly income.

The trial court construed the MDA and determined Wife should be awarded “25%, plus all cost of living increases, of the military member’s . . . military retired pay at the date of his retirement and based on the rank of O3-E.” We agree with the trial court’s interpretation of the MDA and decline to accept Husband’s argument that the award of future military retirements was alimony in solido and not modifiable. Wife will not receive the benefit of Husband’s advancements in rank following the divorce; however, she will receive twenty-five percent of the value of a captain’s retirement. The percentage of Husband’s military retirement benefits that she is owed will simply be calculated based on Husband’s former rank of captain when Husband elects to retire. We affirm the trial court’s interpretation of the MDA.

Wife argues that she is entitled to attorney’s fees on appeal. Exercising our discretion, we respectfully deny her request.

CONCLUSION

For the foregoing reasons, we affirm the trial court’s interpretation of the parties’ MDA. We decline to award Wife her attorney’s fees. Costs of the appeal are assessed against the appellant, Daniel Louis Pinkava, for which execution may issue, if necessary.

ANDY D. BENNETT, JUDGE