

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000814-MR

RONALD FORGIE

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 97-CI-00944

SUSAN E. FORGIE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI and TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: The single issue in this appeal is whether the trial court erred in calculating appellee's share of appellant's military retirement benefits. Our review of the record discloses no error in the methodology employed by the commissioner based upon the information provided prior to the issuance of her report. Accordingly, we affirm the trial judge's order overruling appellant's objection to the report.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Pursuant to the terms of an amended property settlement agreement, the domestic relations commissioner of the Hardin Circuit Court undertook a division of appellant's military retirement benefits. Based upon an application of the Poe² formula, as provided for in the amended agreement, the commissioner concluded that appellee was entitled to 39.6% of those benefits. Appellant filed objections to that determination alleging that the calculation was based upon an erroneous number of months of military service and that the award failed to take into consideration the second part of the Poe formula. The circuit court order overruling those objections precipitated this appeal.

Disposable military retirement pay is now subjected to state law regarding division of marital assets in a dissolution proceeding by virtue of the federal Uniformed Services Former Spouses Protection Act.³ Courts of this Commonwealth adhere to a utilization of the formula prescribed in Poe in calculating a spouse's share of military retirement pay. In this case, the parties entered into an amended separation agreement which contained the following provision as to the division of the military retirement pay:

4. MILITARY RETIREMENT: WIFE will be entitled to 50% of HUSBAND's retirement

² Poe v. Poe, 711 S.W.2d 849 (Ky.App. 1986).

³ 10 U.S.C. Section 1408.

benefits. Both parties agree that based upon Poe v. Poe, Ky.App., 711 S.W.2d 849 (1986), WIFE's share of HUSBAND's benefits shall be computed as follows:

*months (duration of marriage) = 50% of future monthly
total months of military service retirement payments which were earned during the marriage.

50% of future monthly retirement payments **X** earned during the marriage

½ OF HUSBAND'S disposable retired or retainer pay **X** (as defined in 10 U.S.C. Section 1408 (c)(1)),

OR

½ of the disposable retired or retainer pay which would be payable to HUSBAND if he retired at the same rank and basic pay rate which he had attained as of (date of judgment)

that portion of any post-retirement cost-of living increase (10 U.S.C. Section 140(a)) which are proportional to [the non-military spouse's] interest in the disposable retired or retainer pay computed as of the date of retirement.

WHICHEVER IS LESS

The order dissolving the parties' marriage was entered on September 9, 1997 and appellant retired from the military on October 31, 2002. Appellee thereafter moved the circuit court for entry of an order awarding her 50% of appellant's retirement benefits under the terms of the parties' separation agreement.

Because at the time of the motion neither party resided in Kentucky, the matter was submitted to the commissioner on stipulated information submitted by the parties without apparent argument. The supplied information which consisted of appellant's certificate of discharge from active duty and what appears to be a current pay statement.

The commissioner subsequently entered a report finding that the amended separation agreement had not been incorporated into the dissolution decree, but it was nevertheless enforceable as a contract between the parties; that the parties had been married for almost exactly nineteen years or 228 months; that it appeared from the supplied documentation that appellant retired with 24 years of military service or 288 months. Applying the cited formula to these findings, the commissioner concluded that dividing the months of marriage by the months of service equaled 79% and that appellee was entitled to 50% of that amount, or 39.6%. She then noted that because appellant was an E-8 both at the time of divorce and at the time of retirement, appellee was entitled to 39.6% of appellant's presently payable benefits, but that a specific dollar amount had not been provided.

Appellant filed objections to the report alleging that the commissioner did not properly apply the Poe formula in that she failed to take into account the difference in appellant's pay rate from the amount owing at the time of the decree to the

amount as of the date of retirement. Appellant also contended that the commissioner erroneously omitted four months from the total months of military service. The trial judge, after a brief hearing on the objections, entered orders overruling appellant's objections and awarding appellee 39.6% of appellant's divisible military retirement benefits.

We note at the outset that neither party requested an evidentiary hearing before the commissioner nor did either party offer any written argument as to the legal effect of the documents supplied the commissioner. The record supplied this Court is devoid of any transcript of oral argument before the commissioner. Our review of this matter is therefore confined to evidence appearing in the circuit court record and the argument offered at the brief oral hearing on the objections.

Appellee's motion, supported by her affidavit, simply stated that pursuant to the parties' separation agreement, which had been incorporated into the dissolution decree, she was entitled to 50% of appellant's military retirement benefits. In her report, the commissioner stated that the matter was submitted to her on January 7, 2003 and that she utilized documentation supplied by appellee's counsel on that date in reaching her recommendation on appellee's motion. That documentation consisted of two items: appellant's certificate of release or discharge from active duty and an earning

statement for the period ending October 31, 2002. The number 25 was supplied in the block for years of service on the earnings statement and appellant's discharge from active duty contained a service record total of twenty-four years and four months in one section and a slightly bolder statement of 24 years, 0 months service as an armor senior sergeant in another section.

Relying upon this documentation and the parties' separation agreement, the commissioner concluded that appellee was entitled to 50% of the benefits accrued during the marriage. The commissioner arrived at that amount of benefits accrued during the marriage by dividing 24 years or 288 months of military service by the 228 months of marriage, which equaled 79% under the Poe calculation. The commissioner then divided the 79% figure by 50% pursuant to the parties' agreement, for an award of 39.6%. The commissioner then noted that because appellant was an E-8 at the time of divorce and that he was an E-8 when he retired, appellee was entitled to 39.6% of his present payable benefits.

In appellant's memorandum in support of his objections to the report, he advances arguments supported by figures which were not supplied to the commissioner without having moved to supplement the record at the time he lodged his objections. On this state of the record, we are thus convinced that any argument as to the improper application of the Poe formula to

appellant's particular requirement benefits has been waived by his failure to supply to the commissioner, prior to the issuance of her report, the information upon which he now relies, as well as by his failure to submit any argument concerning how his particular retirement factors fit into the Poe formulation. We are convinced that, based upon the information before her, the commissioner could properly conclude that appellant had retired after 24 years of service at the same rank and basic pay grade which he had attained at the date of dissolution. To permit injection of supplemental figures and argument after issuance of the report thwarts the very purpose of referencing a matter to the commissioner in the first place. In reaching this conclusion, we are not unmindful of the guidance provided by our Supreme Court in Eiland v. Ferrell⁴ as to the utilization of domestic relations commissioners or as to the trial judge's broad authority as to the use of the commissioner's report. Nevertheless, it seems plain almost beyond dispute that if commissioners are to serve any useful function in the reception of evidence, parties cannot remain silent until after the issuance of a report and then complain of factors not supplied the commissioner. Clearly, the trial judge had authority to grant a motion to supplement the evidence, but no such motion was made.

⁴ 937 S.W.2d 713 (Ky. 1997).

Finally, we do not agree with appellant's argument concerning the proper method of applying Poe to the facts. Appellant's most persuasive argument is that the commissioner should have used a denominator of 292 months in the initial Poe equation, rather than 288 months. As noted previously, the finding of 288 was reasonable based upon the information supplied the commissioner. Furthermore, even if we were to agree that 292 is the correct denominator, the result would be a difference of only .6 percent, an amount we find to be de minimus under the facts presented.

Thus, we agree with the trial judge that the commissioner's findings and conclusions comport with the information presented to her prior to issuance of the report. Accordingly, the judgment overruling appellant's objections to that report is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeremy S. Aldridge
Radcliff, Kentucky

BRIEF FOR APPELLEE:

Jeffrey L. England
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