

RENDERED: June 17, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court Of Appeals**

NO. 2004-CA-001270-MR

JOHN CARPENTER

APPELLANT

v. APPEALS FROM BREATHITT CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 91-CI-00081

PATSY CARPENTER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: John Carpenter appeals from a post-decree order of the Breathitt Circuit Court ordering him to pay Patsy Carpenter an additional \$266.64 per month that Patsy would have been entitled to receive if John's military retirement benefits had not been partially converted to disability benefits. John argues that the trial court lacked jurisdiction to re-open the decree and that the change in his benefit status was not barred by the

parties' separation agreement. We find that the trial court had jurisdiction to enforce the provisions of the agreement as incorporated into the decree and that John failed to rebut Patsy's claim that the change in benefit status violated the terms of the agreement. Hence, we affirm.

The marriage of John and Patsy Carpenter was dissolved by a decree entered on January 20, 1995. The decree incorporated the parties' property separation agreement, which provided, among other things, that Patsy would receive a one-half interest in John's military and retirement benefits. The military order dividing these benefits further specifies that John shall only claim his entitlement as disposable retired or retainer pay and not as disability benefits as defined by the Uniform Services Former Spouses Protection Act (USFSPA).<sup>1</sup>

At the time of the divorce, John was not eligible to receive military retirement. In 2002, the military determined that John had a disability and re-classified a portion of his retirement benefits as disability benefits. As a result, beginning in March of 2003, Patsy's direct benefit from John's military retirement was reduced from \$747.60 per month to \$480.96 per month.

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<sup>1</sup> 10 U.S.C. §§ 1408 *et seq.*

In response to the reduction in benefits, Patsy filed a motion asking the trial court to require John to comply with the terms of the separation agreement. The matter was referred to a special domestic relations commissioner (DRC), who ultimately concluded that John had failed to comply with the terms of the settlement agreement. Consequently, the DRC recommended that John be required to pay Patsy the difference between the amount Patsy would have been entitled to receive under the separation agreement and the amount actually paid to Patsy by the military. The trial court overruled John's objections to the DRC's report and ordered John to pay Patsy the sum of \$266.64 per month from March of 2003, including any arrearages. John now appeals.

John first argues that the trial court did not have jurisdiction to re-open the judgment. He correctly notes that Patsy never invoked any provision of CR 60.02 to re-open the judgment. However, terms of a separation agreement incorporated into the decree are enforceable by all remedies available for the enforcement of a judgment, including contempt.<sup>2</sup> A trial court has continuing jurisdiction to enforce the terms of a judgment or decree.<sup>3</sup> Because Patsy merely sought to enforce the terms of the

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<sup>2</sup> KRS 403.180(5).

<sup>3</sup> Penrod v. Penrod, 489 S.W.2d 524, 527 (Ky. 1972). See also Peniston v. Peniston, 511 S.W.2d 675 (Ky. 1974).

separation agreement, she was not required to show grounds for modification of the judgment as required by CR 60.02.<sup>4</sup>

John next argues that that the provisions of the separation agreement were not applicable to the change in benefit levels in this case. Military retirement benefits earned during the marriage are marital property subject to division by the court.<sup>5</sup> On the other hand, the USFSA provides that military disability benefits are exempt from division as marital property.<sup>6</sup> Thus, the separation agreement specified that John could not claim any disability benefits in lieu of his retirement benefits. John asserts that he never sought to change the status of his benefits. Rather, he claims that the military unilaterally altered his benefits following a pre-retirement physical in 2002. Consequently, John contends that he has not violated the terms of the separation agreement.

However, Patsy clearly established that John's benefit status had changed. Contrary to the intention expressed in the separation agreement and military order, John is now receiving military disability benefits and as a result Patsy's share of those benefits has been reduced. Patsy therefore made a *prima*

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<sup>4</sup> Penrod, 489 S.W.2d at 527.

<sup>5</sup> Jones v. Jones, 680 S.W.2d 921, 921-22 (Ky. 1984).

<sup>6</sup> 10 U.S.C. § 1408(a)(4)(C).

*facie* showing that John breached his obligations under the separation agreement. The burden then shifted to John to show that the change in status did not constitute a breach of the separation agreement. John failed to respond to Patsy's interrogatories or to present any evidence showing that the change in benefit status was not covered by the separation agreement. Therefore, the trial court correctly ruled as a matter of law that Patsy is entitled to enforcement of the separation agreement as written. Because the trial court could not order division of John's disability benefits, the trial court properly ordered John to pay Patsy the additional amount to which she would have been entitled had he not breached the separation agreement.

Accordingly, the May 28, 2004, order of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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