

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

MURPHY V. MURPHY

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

JOHN G. MURPHY, APPELLANT,
V.
JULIE R. MURPHY, APPELLEE.

Filed March 27, 2012. No. A-11-460.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge.
Affirmed.

Paul W. Madgett for appellant.

Michael N. Schirber, of Schirber & Wagner, L.L.P., for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. John G. Murphy appeals from an order of the district court for Sarpy County, which order dismissed his motion to amend, clarify, and/or modify the decree and entered a judgment in favor of Julie R. Murphy on her cross-complaint for payments under the decree for military pension benefits, and awarded her attorney fees. Based on the reasons that follow, we affirm.

BACKGROUND

John and Julie were married on December 6, 1986. No children were born during the marriage. On July 16, 1998, John filed a petition for dissolution of marriage, and Julie subsequently filed a response and cross-petition. The parties entered into a settlement agreement relative to the division of marital property, as well as debts, alimony, and John's military pension. A hearing was held on the settlement agreement, and it was approved by the court and

incorporated into a decree of dissolution entered on March 18, 1999. In regard to John's military pension, the decree stated, "[Julie] is awarded 33% of [John's] Military Pension Benefits, as provided for in a Qualified Domestic Relations Order to be prepared by counsel for [Julie]."

Pursuant to the decree, Julie's counsel prepared an "Order Re: Military Pension Benefits Division." The court entered the order on April 1, 1999. Under "Amount of Payments," the order states, "The Former Spouse [Julie] shall receive thirty three percent (33%) of the Member's [John's] disposable retired pay." The order provided that Julie would be paid directly by the government pursuant to the Uniformed Services Former Spouses' Protection Act. See 10 U.S.C. § 1408 et seq. (2006 & Supp. 2010). No appeal was taken by either party from the entry of the decree or order.

On March 24, 2010, John filed a motion to amend, clarify, and/or modify the decree, asking the court to clarify or change the portions of the decree and subsequent order that awarded Julie a portion of John's military pension benefits.

Julie filed a response and cross-complaint on June 7, 2010. In her cross-complaint, she alleged that John had retired from the U.S. Army National Guard and had been receiving his military pension benefits since February 1, 2009, in a gross monthly amount of \$2,164, and that John had refused and failed to pay her the 33 percent of his disposable retired pay as ordered in the decree. Julie asked the court for a determination of the sum of money owed to her by John beginning February 1, 2009, for a judgment in her favor for the total of such determined sum, for an order directing John to pay her 33 percent of his net disposable military pension benefits on a monthly basis, and for an award of attorney fees.

Following a hearing, the court entered an order dismissing John's motion to amend, clarify, and/or modify and entered judgment in favor of Julie on her cross-complaint in the amount of \$14,828.58 and awarded her \$2,500 in attorney fees. In dismissing John's motion to amend, clarify, and/or modify, the trial court found that the parties reached a negotiated settlement on all issues in the divorce, including the division of property. It noted that as part of the negotiated settlement, in lieu of alimony, John agreed to give Julie one-third of his military pension at the time of his retirement. The court further held that it would have to speculate as to what it would have done had the case been tried to determine if John's agreement created a gross inequity, and as such, the court was not in a position to say the agreement between the parties constituted a gross inequity.

In regard to Julie's cross-complaint, the court noted that pursuant to the terms of the decree, Julie was to receive one-third of John's military pension benefit, and that the evidence showed that beginning in March 2009, John was receiving \$1,711 per month. The court ordered that Julie was to receive \$570.33 per month commencing March 1, 2009, and that because no payments had been received, the total due to Julie through April 1, 2011, was \$14,828.58.

ASSIGNMENTS OF ERROR

John assigns that the trial court erred in (1) failing to find that the provisions within the decree concerning the division of marital debts and military pension were null and void, (2) failing to carefully scrutinize and independently evaluate the property settlement with respect to the division of debts and military pension, (3) failing to clarify the phrase "marital estate" to mean only that portion of the pension which was earned during the marriage, (4) failing to find

that John approved of the content and signed the decree out of ignorance and improvidence, (5) failing to find that the provisions of the decree concerning the division of marital debts and military pension were “grossly inequitable,” (6) awarding Julie back retirement benefits in the amount of \$14,828.58, and (7) awarding Julie attorney fees in the amount of \$2,500.

STANDARD OF REVIEW

Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Rouse v. Rouse*, 18 Neb. App. 128, 775 N.W.2d 457 (2009).

ANALYSIS

John assigns numerous errors by the trial court related to the court’s failure to modify the division of his military pension. However, the evidence shows that after negotiations back and forth, the parties entered into a property settlement agreement that was incorporated into the decree entered on March 18, 1999. Both parties were represented by counsel, and both parties voluntarily entered into the property settlement agreement.

Before the trial court entered the decree in March 1999, a hearing was held and the court questioned John about the property settlement agreement. John acknowledged that he and Julie had entered into an agreement that divided all the assets and debts that were accumulated during the marriage. When asked if the agreement divides the assets and debts of the marriage on an equal basis, John replied, “An agreeable one. I’m not sure about equal, but it’s agreeable to me.” He was then asked if, under the agreement, Julie was to receive 33 percent of his military pension after he retires, and he responded, “Yes.” The next question was whether 33 percent was the percentage she was entitled to based on the length of the marriage and his term of service, and he again responded, “Yes, it is.”

Although Julie was not present at the hearing regarding the property settlement and did not sign the proposed decree indicating her approval as to content, her attorney was present at the hearing and the evidence indicates that Julie did consent to the settlement agreement that was incorporated into the decree. As previously mentioned, neither party filed a direct appeal from the decree.

A consent decree is usually treated as an agreement between the parties and is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties. *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998). Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of pension benefits will not thereafter be vacated or modified in the absence of fraud or gross inequity. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). There is no allegation of fraud in the case before us. Therefore, the only issue before us in regard to the division of John’s military pension is whether the division as set forth in the decree would result in a gross inequity.

The consent decree awarded Julie “33% of [John’s] Military Pension Benefits.” John argues that it is grossly inequitable to award Julie 33 percent of John’s entire military pension at the time he retired. John contends that the parties intended the award of “military pension

benefits” to Julie to apply to only those pension benefits earned during the parties’ marriage, rather than John’s total military pension.

After the time for appeal has passed, the meaning of a dissolution decree is determined as a matter of law from its language; neither what the parties thought the decree meant nor what the judge intended is of any relevance. *Dennis v. Dennis*, 6 Neb. App. 461, 574 N.W.2d 189 (1998). Therefore, what the parties intended the phrase “military pension benefits” to mean is of no consequence at this point. The plain language of the consent decree refers to John’s military pension benefits, without limiting that term to pension benefits earned during the marriage.

Further, the parties agreed to the terms as set forth in the decree and did not appeal from it or the “Order Re: Military Pension Benefits Division” after they were entered. Both parties were represented by counsel at the time the settlement agreement was entered into, and the evidence shows that the division of military pension benefits was in lieu of Julie’s receiving alimony. We conclude, after a de novo review, that John failed to prove that a gross inequity would result if the consent decree is not modified.

John also argues that the trial court abused its discretion by awarding Julie back retirement benefits in the amount of \$14,828.58. John retired from active military duty on January 31, 2009. At the time Julie filed her cross-complaint on June 7, 2010, she had not received any benefits from John’s military pension. John contends that the court cannot order him to pay Julie back retirement benefits because there was no provision in the decree or “Order Re: Military Pension Benefits Division” requiring him personally to pay anything to Julie. Rather, the order provided for direct payments to Julie from the U.S. Army National Guard.

In August 2008, prior to his retirement, John sent an e-mail to the U.S. Department of Finance and Accounting Services regarding his retirement pay and payments to Julie. He subsequently learned that payments could not be made directly to Julie by the government because the parties had not been married for a period of 10 years or more during which John had performed at least 10 years of military service, as required by the Uniformed Services Former Spouse’s Protection Act.

The fact that Julie’s share of John’s retirement benefits cannot be paid directly by the government does not mean that Julie is not entitled to the portion of John’s retirement that she was awarded in the decree. It does not appear that either John or Julie knew at the time of the divorce that Julie could not be directly paid by the government. However, John knew prior to his retirement on January 31, 2009, that the government would not make direct payments to Julie. After discovering that fact, he did nothing and began receiving his full monthly retirement in April 2009, knowing that Julie was not being paid any portion of his benefits. He did not advise Julie that he had retired, and he has not distributed any portion of the funds to Julie in accordance with the terms of the decree.

The parties agreed that Julie would receive 33 percent of John’s military pension when he retired. As of the date of trial, she had not received any money from John’s pension. The order stating that payments would come from the government, rather from John, does not negate her award of 33 percent. It would be grossly inequitable to deny Julie the military retirement she was awarded pursuant to the settlement simply because she cannot be paid directly by the government. She is entitled to a judgment for the amount she should have been receiving from

the time John retired. The trial court was clearly within its discretion and authority in awarding such judgment. This assignment of error is without merit.

Lastly, John assigns that the trial court abused its discretion by awarding Julie \$2,500 in attorney fees. On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

At trial, an affidavit of attorney time signed by Julie's attorney was offered into evidence and received without objection. The affidavit requested \$7,200 in attorney fees. Attached to the affidavit was an itemized list of the time spent by Julie's attorney on this matter, showing a total of 28.8 billable hours. The trial court's award of \$2,500 is supported by the affidavit and supporting document and, therefore, is not an abuse of discretion. This assignment is without merit.

CONCLUSION

For the above-stated reasons, we affirm the district court's order in its entirety.

AFFIRMED.