

Affirmed and Opinion filed August 10, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01284-CV

DOLORES ELENA TAYLOR, Appellant

V.

RONALD DEAN TAYLOR, Appellee

**On Appeal from the 247th District Court
Harris County, Texas
Trial Court Cause No. 88-46892**

OPINION

In this divorce case, Dolores Elena Taylor (“Dolores”) appeals a clarifying order entered in favor of Ronald Dean Taylor (“Ronald”) on the grounds that: (1) the trial court erred by ruling that the original divorce decree was ambiguous; (2) the clarifying order is itself ambiguous; and (3) the evidence is legally and factually insufficient to award Ronald all retirement pay attributable to cost of living adjustments (“COLAs”) from 1989 to 1997. We affirm.

Background

Ronald entered the military in 1967 and married Dolores in 1969. They divorced in 1989. At the time of their divorce, Ronald’s military rank was E-8. Ronald retired in July

of 1997 with the rank of E-9. The original divorce decree, a consent decree (the “decree”), awarded Dolores forty percent of Ronald’s “disposable retirement pay.”

Following Ronald’s retirement, the Defense Finance and Accounting Service (“DFAS”) began paying Dolores forty percent of Ronald’s retirement benefits based on his rank and period of service at the time of his retirement in 1997. In September of 1997, Ronald filed a motion to clarify the decree such that Dolores would instead receive forty percent of Ronald’s retirement pay based on his rank and period of service at the time of the divorce in 1989. The trial judge found that the language of the final decree was vague because it did not address whether the retirement benefits were to be divided as of the time of the divorce or the time of retirement. The judge therefore entered a clarifying order (the “clarifying order”) awarding Dolores forty percent of the “disposable retired pay of an E-8 with 21 years of active duty as of May 10, 1989.”¹ In addition, although the decree did not specifically mention COLAs, the clarifying order also awarded Dolores forty percent of all COLAs “in the percentage of the disposable military retired pay . . . awarded to her herein.”

Propriety of Entering Clarifying Order

Dolores’s first point of error argues that the trial court erred in finding that the divorce decree was ambiguous because the federal statute referenced in the original divorce decree clearly provides that “disposable retirement pay” means the retirement pay due to Ronald at the time of his retirement, not the date of their divorce. She argues further that the fact that the DFAS was making payment to her reflects that the decree had a clear and definite legal meaning and was not ambiguous. Dolores’s second point of error asserts that the trial court erred because the clarifying order is itself ambiguous in not specifying whether the hypothetical E-8 with twenty-one years of active duty as of May 10, 1989, begins receiving COLAs on the retirement pay as of the time of the divorce or only as of Ronald’s actual retirement in 1997.

¹ The clarifying order recites *May* 10, 1989 as the date of divorce whereas the decree is dated *March* 10, 1989.

Effect of Original Decree

The decree contained the following provisions:

6. DIVISION OF MARITAL ESTATE

The Court finds that the parties have entered into an agreement regarding the division of their *community* estate . . .

* * * *

[Dolores] is awarded the following as [her] sole and separate property, and [Ronald], is hereby divested of all right, title and interest in and to such property:

* * * *

6.6 Forty (40%) per cent interest of disposable retirement pay due to [Ronald], in accordance with title 10 U.S.C. #1408 U.S.I.S.P.A.

[Ronald], is awarded the following as [his] sole and separate property, and [Dolores], is hereby divested of all right, title and interest in and to such property:

* * * *

6.11 Sixty (60%) percent interest of the disposal [sic] pay due to [Ronald] in accordance with Title 10 U.S.C. #1408 U.S.I.S.P.A.

(emphasis added).

In apportioning military retirement benefits upon divorce, the valuation of the community's interest in such benefits is based on the retirement pay that corresponds to the rank held by the service person on the date of the divorce. *See Grier v. Grier*, 731 S.W.2d 931, 932 (Tex. 1987); *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983). Therefore, an order awarding a service person's spouse a share of any retirement benefits earned based on a rank attained after the divorce impermissibly invades the separate property of the service person. *See Grier*, 731 S.W.2d at 932. Further, COLAs are not the result of any post-divorce labor, but are rights accrued along with the retirement benefits during marriage. *See Sutherland v. Cobern*, 843 S.W.2d 127, 131 (Tex. App.— Texarkana 1992, writ denied). They are a means of offsetting the otherwise declining value of retirement benefits during marriage and are, thus, community property subject to division. *See id.*

When interpreting a contract, we examine the entire agreement in an effort to harmonize and give effect to all provisions so that none will be rendered meaningless. *See*

MCI Telecomms. V. Texas Utils. Elec. Co., 995 S.W.2d 647, 652 (Tex. 1999). In this case, the preamble of section 6 of the decree indicates that only community property is being divided. Paragraph 6.6 of the decree then awards forty percent of Ronald’s “disposable retirement pay” to Dolores. Read in the context of the preamble language specifying that only community property was being divided, this “disposable retirement pay” does not include amounts attributable to the rank or period of service attained by Ronald after the divorce because those amounts are separate property. *See Grier*, 731 S.W.2d at 932.

Effect of the Clarifying Order

The clarifying order provides:

6. Division of Marital Estate

- 6.6 Forty (40%) per cent of the disposable retired pay of an E-8 with 21 years of active duty as of May 10, 1989, IF, AS and WHEN it is received by RONALD DEAN TAYLOR, on and after the date of his retirement, the same being earned during the marriage of the parties.

- 6.11 The rest and remainder of the military pay due to RONALD DEAN TAYLOR be, and it is hereby awarded to RONALD DEAN TAYLOR as his separate property.

- 6.12 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DOLORES ELENA TAYLOR be entitled to receive all cost of living increases in the percentage of the disposable military retired pay of RONALD DEAN TAYLOR awarded to her herein.

On a finding by the court that the original form of the division of property is not specific enough to be enforceable by contempt, the court may render a clarifying order setting forth specific terms to enforce compliance with the original division of property awarded by the divorce decree. *See* TEX. FAM. CODE ANN. § 9.008 (Vernon 1998).² To be enforceable by contempt, a decree must "set forth the terms of compliance in clear, specific and unambiguous terms so that the person charged with obeying the decree will readily know

² A court cannot give retroactive effect to a clarifying order. *See* TEX. FAM. CODE ANN. § 9.008(c) (Vernon 1998).

exactly what duties and obligations are imposed upon him." *See Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex.1995). Orders for enforcement are limited to orders in aid or clarification of the prior order. *See Chandler v. Chandler*, 991 S.W.2d 367, 396 (Tex. App.–El Paso 1999, pet. denied), *cert. denied*, 120 S. Ct. 1557 (2000); *McPherren v. McPherren*, 967 S.W.2d 485, 490 (Tex. App.–El Paso 1998, no writ). Such orders may more precisely specify the manner of carrying out the property division previously ordered so long as the substantive division of the property is not altered. *See McPherren*, 967 S.W.2d at 490; *Dechon v. Dechon*, 909 S.W.2d 950, 956 (Tex App.–El Paso 1995, no writ).

In this case, the effect of both the decree and the clarifying order is to award Dolores the retirement benefits earned during the marriage and, as discussed below, any COLAs attributable to those benefits. Neither the decree nor the clarifying order is ambiguous in the sense of being reasonably susceptible to more than one legal meaning. *See, e.g., DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). However, in order to ascertain the correct legal meaning of the decree, it is necessary to not only read the preamble to section 6 and paragraph 6.6. together, but to also read them by reference to case law such as *Grier and Sutherland*. In this sense, the decree did not set forth this obligation in terms that would alone enable an ordinary obligor to readily know what obligations were imposed on him. Therefore, we believe that entry of the clarifying order was justified in order to make the decree enforceable by contempt. However, even if sufficient ambiguity did not exist to warrant a clarifying order, Dolores was not harmed by its entry because its effect was the same as the terms of the decree.³ Therefore, it was not error for the trial court to enter the clarifying order, nor is the clarifying order ambiguous or harmful. Therefore, Dolores's first two points of error are overruled.

Sufficiency of the Evidence

Dolores's third and fourth points of error argue that the evidence is legally and factually insufficient to award Ronald all retirement pay attributable to COLAs arising after

³ Because the clarifying order is consistent with the decree, it does not alter the substantive division of the property. *See McPherren*, 967 S.W.2d at 490.

their divorce. Dolores argues that there is not “a scintilla of evidence” as to the intent of the parties regarding the distribution of COLAs and therefore, “[t]his lack of evidence does not justify awarding Ronald . . . 100 percent of the COLA between 1989 to 1997.”

We do not agree with Dolores’s assertion that the clarifying order awards to Ronald all COLAs from 1989 to 1997. As previously noted, COLAs are rights that accrue along with the corresponding retirement benefits, and those attributable to the period of marriage are community property subject to division upon divorce. *See Sutherland*, 843 S.W.2d at 131. In this case, Dolores was awarded forty percent of all COLAs attributable to the retirement pay of an E-8 with twenty-one years of active duty as of May 10, 1989. According to this distribution, she would be entitled to forty percent of any COLAs attributable to Ronald’s years of service up to May 10, 1989, including those arising after 1989 on that portion of his retirement benefits. Thus, although the exact calculation of this amount would be made by the DFAS, the clarifying order does not award Ronald all COLAs from 1989 to 1997 but only all of those attributable to the increases in his pay or retirement benefits which occurred after the divorce. Therefore, we overrule Dolores’s third and fourth points of error and, accordingly, affirm the judgment of the trial court.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed August 10, 2000.

Panel consists of Justices Edelman, Wittig, and Lee.⁴

Do not publish — TEX. R. APP. P. 47.3(b).

⁴ Senior Justice Norman R. Lee sitting by assignment.