

[Cite as *Dean v. Dean*, 2008-Ohio-754.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

KIMBERLY DEAN (nka Cheadle)	:	
	:	Appellate Case No. 07-CA-04
Plaintiff-Appellant	:	
	:	Trial Court Case No. 95-DS-0241
v.	:	
	:	(Civil Appeal from
CHARLES H. DEAN, JR.	:	Common Pleas Court)
	:	
Defendant-Appellee	:	

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OPINION

Rendered on the 22nd day of February, 2008.

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BROGAN, J.

{¶ 1} Kimberly Cheadle appeals from the trial court’s decision and entry finding her entitled to 28.25 percent of appellee Charles Dean’s military retirement benefits and overruling her motions for contempt sanctions and for attorney fees.

{¶ 2} Cheadle advances four assignments of error on appeal. First, she contends the trial court erred in finding her entitled to 28.25 percent rather than 34.3

percent of the military retirement benefits. Second, she claims the trial court erred in not holding Dean in contempt for failing to designate her to receive survivor benefits. Third, she asserts that the trial court erred in not holding Dean in contempt for failing to maintain life insurance for her benefit. Fourth, she contends the trial court erred in not awarding her attorney fees in connection with her contempt motions.

{¶ 3} The record reflects that Cheadle and Dean married in 1980 and obtained a dissolution in 1995. At the time of the dissolution, Dean was a dentist in the U.S. Air Force. The trial court's 1995 final judgment and decree of dissolution incorporated a separation agreement that addressed, inter alia, retirement and insurance benefits. With regard to retirement benefits, the agreement stated:

{¶ 4} "It is the agreement of the parties that the portion of the retirement benefits of the PARTIES which were earned during this marriage are a joint marital asset. It is therefore the agreement of the PARTIES that they will divide the accrued benefits equally when they are received.

{¶ 5} "The measure of each PARTY'S interest in the retirement benefits accrued by the other PARTY shall be the number of years of marriage divided by the eventual number of years of retirement benefit accrual times one half.

{¶ 6} "The parties shall maintain the survivor benefits for the benefit of WIFE on the retirement benefits and shall share equally the payment of the premium for the said survivor benefits out of the gross receipts from retirement benefits before distribution."

{¶ 7} With regard to insurance benefits, the separation agreement stated, in part:

{¶ 8} "It is the further agreement of the PARTIES that HUSBAND shall maintain

the ADA life insurance policy or other life insurance policy of WIFE'S choosing on his own life for the benefit of WIFE in its current amount or Three Hundred Thousand Dollars (\$300,000), whichever is greater. WIFE shall pay the premium costs for the policy."

{¶ 9} Dean retired from the military effective September 1, 2001 at the rank of lieutenant colonel. A dispute subsequently arose regarding the proper division of his retirement benefits. The trial court filed a March 2003 clarifying order in which it found Cheadle entitled to 27.4 percent of Dean's retirement pay.

{¶ 10} Thereafter, in March 2004, Cheadle filed a combined Civ.R. 60(B) motion for relief from judgment, motion for contempt, and motion for attorney fees. She sought Civ.R. 60(B) relief from the trial court's determination in its clarifying order that she was entitled to 27.4 percent of Dean's retirement pay. According to Cheadle, she actually was entitled to approximately 36 percent. Cheadle also requested contempt findings based on Dean's alleged violation of the separation agreement by (1) failing to maintain survivor benefits on her behalf and (2) failing to maintain life insurance with her named as the beneficiary. Finally, Cheadle moved for an award of reasonable attorney fees.

{¶ 11} The trial court held a two-day hearing on Cheadle's motions in March and April 2006. At the hearing, the parties recognized that the separation agreement entitled Cheadle to a coverture fraction of Dean's retirement benefits.¹ Specifically, the

¹“The coverture fraction takes the total years of marriage divided by the total years of husband's service. Under this method, wife receives half of the coverture fraction multiplied by the value of the pension' at the time of retirement.” *Benfield v. Benfield* (Nov. 7, 2003), Montgomery App. No. 19363, quoting *Cox v. Cox* (Feb. 1, 1999), Warren App. Nos. CA98-04-045, CA98-05-054. “The result of this method of computation is that the recipient wife obtains a proportionate share of any post-divorce

agreement provided that Cheadle's interest "shall be the number of years of marriage divided by the eventual number of years of retirement benefit accrual times one half." During the hearing, the parties converted years to months and agreed that the correct numerator for the coverture fraction was either 165 or 166 months. (Hearing transcript at 13-14, 74). The disputed issue concerned the proper denominator. Cheadle argued that the correct denominator was 242 months, which represented the length of Dean's "active service for retirement." For his part, Dean asserted that the correct denominator was 292 months, which represented his years of active service plus credit for prior time he spent in dental school. After hearing testimony from the parties and expert testimony from a witness for Dean, the trial court accepted 292 months as the proper denominator. Using 165 months as the numerator and 292 months as the denominator, the trial court found that 56.51 percent of the military retirement benefits were earned during the marriage and that Cheadle was entitled to half of that amount, or 28.25 percent. As a result, the trial court granted Civ.R. 60(B) relief insofar as its prior clarifying order had awarded her 27.4 percent.

{¶ 12} The trial court next rejected Cheadle's argument that Dean should be held in contempt for failing to maintain survivor benefits and life insurance. With regard to survivor benefits, the court reasoned that there was nothing for Dean to "maintain" because Cheadle was ineligible for such benefits. As to life insurance, the trial court found a lack of proof that Dean had engaged in any contemptuous conduct. Finally, the trial court rejected Cheadle's attorney fee request based on its finding that Dean was

increase in the value of her former husband's pension." Id

not in contempt. This timely appeal followed the trial court's issuance of findings of fact and conclusions of law to support its ruling.

{¶ 13} In her first assignment of error, Cheadle contends the trial court erred in finding her entitled to 28.25 percent rather than 34.3 percent of Dean's military retirement benefits. She specifically challenges the trial court's selection of 292 months as the proper denominator to compute her coverture fraction. She argues, as she did below, that the proper denominator is 242 months. To support her argument, Cheadle relies on retirement records showing that Dean had 20 years, one month, and 27 days of "active service for retirement," or 242 months. The record reflects that "active service for retirement" means the amount of time Dean served on active duty. The parties agree that he was required to have at least 20 years of active duty service to be eligible to retire. Because Dean served on active duty for 242 months (i.e., 20 years, one month, and 27 days), Cheadle insists that the proper denominator for the coverture fraction was 242 months.

{¶ 14} Upon review, we find her argument to be without merit. Under the separation agreement, the denominator was to be the "number of years of retirement benefit accrual[.]" Although Dean's active duty service was 242 months, the record reflects that his number of years of retirement benefit accrual was 24 years, four months, and three days, or 292 months. The difference arises from the fact that his years of retirement benefit accrual included credit for time he spent attending dental school.

{¶ 15} Expert witness Edwin Schilling, an attorney who previously worked for the Defense Department evaluating military retirement plans and property division orders,

confirmed that Dean's retirement benefits were computed based on 24 years, four months, and three days of service credit. Although Dean's time in dental school did not count toward the 20 years of active duty service needed to retire, Schilling demonstrated that it did count toward his accrual of retirement benefits. This fact was confirmed by retirement pay computations performed by the Defense Finance and Accounting Service at the time of Dean's retirement. Those computations, which were introduced into evidence at the hearing, reveal that 24.33 years of service (i.e., 292 months) were multiplied by two and one-half percent to calculate gross monthly retirement pay of \$3,628, which represented 60.83 percent of Dean's final active duty pay. As a result, the record makes clear that "the number of years of retirement benefit accrual" was 24 years, four months, and three days, or 292 months, and not 242 months. Therefore, we find no error in the trial court's use of 292 months as the denominator in Cheadle's coverture fraction.² The first assignment of error is overruled.

{¶ 16} In her second assignment of error, Cheadle claims the trial court erred in not holding Dean in contempt for failing to designate her to receive survivor benefits. As set forth above, the separation agreement provided that "[t]he parties shall maintain the survivor benefits for the benefit of WIFE on the retirement benefits and shall share equally the payment of the premium for the said survivor benefits * * *." Dean admittedly did not designate Cheadle to receive survivor benefits when he retired in 2001. He

² Parenthetically, we note that using 292 months as the denominator also results in a higher amount of retirement pay than 242 months. This is so because Dean was entitled to two and one-half percent of his final salary for every year of service. Thus, although Cheadle's benefit is smaller in percentage terms using 292 months as the denominator, she receives a smaller piece of a larger retirement check.

contends his failure to do so was inadvertent based on inaccurate advice he received from the government, whereas Cheadle claims he intentionally violated the separation agreement. For its part, the trial court found that Dean did not act in contempt of the dissolution decree, which incorporated the separation agreement. The trial court reasoned that there were no survivor benefits to “maintain” upon Dean’s retirement because Cheadle’s remarriage rendered her ineligible for them. Cheadle does not dispute her ineligibility for survivor benefits at the time of Dean’s retirement. She asserts, however, that if Dean had elected survivor benefits, a right to receive them would arise if her current marriage ends in a divorce or if she becomes a widow.

{¶ 17} A prima facie case of contempt is made by establishing a prior court order and a violation under its terms. *Nielsen v. Meeker* (1996), 112 Ohio App.3d 448. A court’s contempt finding must be supported by clear and convincing evidence. *Dozer v. Dozer* (1993), 88 Ohio App.3d 296, 302. Absent an abuse of discretion, which implies that the court’s reasoning is unreasonable, arbitrary, or unconscionable, we will not reverse the trial court’s findings. *Id.* Neither will we weigh the evidence nor judge credibility of witnesses when reviewing factual findings of the trial court relating to its contempt determinations because both of these functions are solely within the province of the trial court. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 18} With the foregoing standards in mind, we find no abuse of discretion in the trial court’s refusal to hold Dean in contempt. Based on the literal language of the separation agreement, the trial court was correct when it stated: “* * * Ms. Cheadle was not entitled to survivor benefits as of August 31, 2001 when Mr. Dean retired because of

her remarriage and therefore the credible evidence suggests that Mr. Dean could not have complied with that portion of the parties' prior Decree of Dissolution filed April 25, 1995 which would have obligated him to 'maintain' survivor benefits for Ms. Cheadle. In essence, there was nothing to 'maintain' * * *

{¶ 19} Because there were no survivor benefits to "maintain" at the time of the separation agreement or even later on the date of Dean's retirement, the trial court technically is correct. The separation agreement purported to obligate the parties to "maintain" non-existent benefits. Therefore, Dean could not comply with its terms. We suspect, however, that the purpose of the separation agreement, although poorly drafted, was to protect Cheadle's inchoate right to receive survivor benefits in the future. Nevertheless, based on the wording of the parties' own agreement, we cannot say the trial court abused its discretion in declining to find Dean in contempt.

{¶ 20} We note too that the separation agreement actually obligated *both parties*, not just Dean, to maintain the survivor benefits. Undisputed testimony reveals that Cheadle had one year after the parties' dissolution to elect survivor benefits on her own without assistance from Dean. (Hearing Tr. at 83-84, 96). Given that both parties had an opportunity to elect survivor benefits upon Dean's retirement, Cheadle's failure to take advantage of the opportunity militates against her effort to hold Dean in contempt for the same inaction. The second assignment of error is overruled.

{¶ 21} In her third assignment of error, Cheadle asserts that the trial court erred in not holding Dean in contempt for failing to maintain life insurance for her benefit. Cheadle contends Dean's life insurance through the American Dental Association (ADA) was cancelled when he declined to renew his membership in the organization.

According to Cheadle, she attempted to obtain other life insurance on Dean but he failed to cooperate when she insisted on being the policy owner. Cheadle argues that Dean acted contemptuously by allowing the ADA policy to be cancelled and failing to cooperate with her attempt to obtain other life insurance.

{¶ 22} Upon review, we cannot say the trial court abused its discretion in finding no contempt. As set forth above, the separation agreement obligated Dean to maintain either the ADA policy or other life insurance of Cheadle's choice "on his own life for the benefit of [Cheadle]," with her being responsible for the premiums. The separation agreement did not obligate Dean to keep the ADA policy. Therefore, his act of allowing it to be cancelled was not contemptuous. Moreover, as Cheadle concedes, Dean's lack of cooperation in obtaining a substitute policy stemmed from her insistence on being the owner of the new policy. It is reasonable to infer from the language of the separation agreement, however, that Dean was intended to be the owner of the policy with Cheadle being designated the beneficiary. This is so because the separation agreement required Dean himself to maintain insurance on his own life for her benefit. Although Cheadle was required to pay the premium, the agreement appears to contemplate Dean being the policy owner. Because Cheadle insisted on being the owner of any new policy, the trial court did not abuse its discretion in finding Dean's conduct non-contemptuous. We note, however, that if Cheadle will abandon her insistence on being the owner of a new life insurance policy, Dean will be obligated under the terms of the separation agreement to cooperate with her in obtaining such a policy. The third assignment of error is overruled.

{¶ 23} In her fourth assignment of error, Cheadle contends the trial court erred in

not awarding her attorney fees in connection with her contempt motions. The trial court rejected the fee request after finding that Dean was not in contempt. Because we have found no abuse of discretion in the trial court's contempt ruling, we likewise find no abuse of discretion in the trial court's denial of Cheadle's attorney fee request. The fourth assignment of error is overruled.

{¶ 24} Based on the reasoning set forth above, the judgment of the Clark County Common Pleas Court, Domestic Relations Division, is affirmed.

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Wolff, P.J., concurs.

Grady, J., dissenting:

{¶ 25} Contempt consists of disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer. R.C. 2705.02. The domestic relations court abused its discretion when it failed to find Dr. Dean in contempt for disobedience of and resistance to duties imposed on him by the judgment and decree of dissolution terminating his marriage to Mrs. Cheadle.

{¶ 26} The Final Judgement And Decree of Dissolution of Marriage (Dkt. 8) journalized by the domestic relations court on April 25, 1995, provides that "the SEPARATION AGREEMENT filed with the PETITION herein is made an ORDER of this COURT. THE PARTIES are ORDERED to fulfill each and every obligation imposed by the SEPARATION AGREEMENT."

{¶ 27} Under the caption Insurance Benefits, the Separation Agreement provides:

{¶ 28} "It is the agreement of the PARTIES that HUSBAND shall maintain the ADA life insurance policy or other life insurance policy of WIFE'S choosing on his own

life for the benefit of WIFE in its current amount of Three Hundred Thousand Dollars (\$300,000.00), whichever is greater. WIFE shall pay the premium costs for the policy.

{¶ 29} “HUSBAND shall maintain any other life insurance upon his life, naming the children of the PARTIES as irrevocable beneficiaries. WIFE shall be trustee of such benefits until the children each become twenty-one (21) years of age.”

{¶ 30} The ADA policy to which that provision of the Separation Agreement refers was a policy of insurance on his life that Dr. Dean had maintained through his membership in the American Dental Association. Following their divorce, Kim Cheadle paid the premiums on the ADA policy (T. 21) until, without notice to Mrs. Cheadle, Dr. Dean allowed his membership in ADA to lapse, terminating the policy of insurance he was obligated by the decree to maintain.

{¶ 31} Kim Cheadle testified that when she learned the ADA policy was no longer in effect, and Dr. Dean not having obtained the replacement coverage he was required by the decree to “maintain,” she applied for insurance coverage on his life in the same amount from several other insurers. Though Dr. Dean cooperated in submitting to the required medical examinations, he refused to sign a waiver of ownership rights the insurers required. (T. 21). As a result, since 2002 Mrs. Cheadle has not had the life insurance benefit Dr. Dean was ordered to maintain for her benefit.

{¶ 32} Dr. Dean did not dispute Mrs. Cheadle’s testimony. Instead, he testified that he believed the insurance on his life payable to his wife was intended to benefit their two sons, and that he therefore instead purchased two policies of insurance on his life in the face amount of \$250,000, one for the benefit of each son. (T. 85). Dr. Dean did not deny that he refused to waive ownership rights of the policies Mrs. Cheadle

wished to procure. Neither did he offer any reason for why he had.

{¶ 33} The trial court declined to find Dr. Dean in contempt for failure to provide insurance on his life for the benefit of Mrs. Cheadle, holding that the issue was not properly before the court because it had not been presented in the motion alleging contempt that Mrs. Cheadle filed on March 1, 2004 (Dkt. 48), but was instead alleged in the Memorandum Mrs. Cheadle filed in support of her motion. (Dkt. 49). However, the court wrote that it would address the issue “[r]egardless of the foregoing,” and then made the following finding:

{¶ 34} “At the hearing herein, Ms. Cheadle did not sustain her burden of proof in establishing that Mr. Dean himself caused any termination of an ADA life insurance policy or that he failed to cooperate with her choice of another life insurance policy of her choosing. In consideration of the foregoing, this Court does not find Mr. Dean in contempt of this Court’s prior Orders concerning this issue even if the issue was properly before the Court, which it was not.”

{¶ 35} Dr. Dean did not object or move to strike the allegation in the Memorandum Mrs. Cheadle filed concerning his failure to provide life insurance. At the hearing on her motion, evidence concerning his alleged failure was admitted without objection. Civ.R. 15(B) provides: “When issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” The same provision applies to “all motions and other papers provided for by these rules.” Civ.R. 7(B).

{¶ 36} The trial court erred when it held that the issue of Dr. Dean’s alleged contempt for disobedience of or resistance to the court’s order that he provide insurance

on his life in the face amount of \$300,000, payable to Mrs. Cheadle, was not properly before the court, after evidence on the claim was admitted without objection. Civ.R. 15(B), 7(B).

{¶ 37} The trial court further abused its discretion when, in a wholly conclusory statement, the court found that Mrs. Cheadle “failed to sustain her burden of proof” on the issue. Mrs. Cheadle had requested findings by the court pursuant to Civ.R. 52. The court was then required to state its “conclusions of fact” in writing. The finding the court made fails to satisfy that standard, which required the court to explain why or how Mrs. Cheadle failed to satisfy her burden of proof.

{¶ 38} The court’s finding is inexplicable on this record. In fact, contrary to the court’s conclusion, the evidence is undisputed that Dr. Dean caused the coverage provided by the ADA policy to terminate by quitting his membership in the ADA, and he failed to provide the substitute coverage the decree requires him to maintain in that event. Dr. Dean thereby disobeyed an obligation expressly imposed on him by the decree. Dr. Dean’s explanation that he believed the requirement that he provide insurance for Mrs. Cheadle’s benefit was intended for the benefit of the parties’ two sons does not excuse his failure. Indeed, a separate, companion provision of the Separation Agreement, quoted above, imposes an independent duty on Dr. Dean to provide “other life insurance upon his life” for the benefit of his sons. Doing that does not excuse his disobedience of a resistance to the provision of the decree requiring him to maintain a policy of life insurance with benefits of \$300,000.00 payable to Mrs. Cheadle.

{¶ 39} The majority finds no abuse of discretion because, after Dr. Dean allowed

his ADA coverage to lapse and had not obtained other coverage, Mrs. Cheadle insisted on owning a replacement policy she applied for. That was not an impediment or consideration that Dr. Dean cited in his testimony. Further, after his prior failures, and in view of her own obligation to pay the policy premiums, Mrs. Cheadle was justified in wishing to own a replacement policy. Otherwise, and if Dr. Dean owned it, he could allow the policy to lapse as he had before. The issue of which party “owns” the policy is no more than a red herring contrived to justify plain and undisputed contempt on the part of Dr. Dean.

{¶ 40} It’s worth noting that Dr. Dean is a highly-trained professional, a dentist, who retired from the United States Air Force in 2001 with the rank of Lieutenant Colonel, after twenty years service. He now maintains a lucrative dental practice from which in 2003 his income was \$193,000. In addition, his Air Force retirement pay in the year 2005 was almost \$50,000. For a person of his accomplishments, Dr. Dean’s claimed inability to fathom his obligation to provide insurance on his life for the benefit of Mrs. Cheadle lacks credibility.

{¶ 41} Even more inexplicable is Dr. Dean’s claimed befuddlement with respect to his duty to maintain survivor’s benefits from his military retirement for Mrs. Cheadle. The Separation Agreement provides, under the caption “Retirement Benefits”:

{¶ 42} “It is the agreement of the PARTIES that the portion of the retirement benefits of the PARTIES which were earned during this marriage are a joint marital asset. It is therefore the agreement of the PARTIES that they will divide the accrued benefits equally when they are received.

{¶ 43} “The measure of each PARTY’S interest in the retirement benefits

accrued by the other PARTY shall be the number of years of marriage divided by the eventual number of years of retirement benefit accrual times one half.

{¶ 44} “The parties shall maintain the survivor benefits for the benefit of WIFE on the retirement benefits and shall share equally the payment of the premium for the said survivor benefits out of the gross receipts from retirement benefits before distribution.”

{¶ 45} From his current monthly retirement benefit of \$4,093, Dr. Dean remits a 28.25% share to Mrs. Cheadle. When Dr. Dean dies, his retirement benefit will terminate, and along with it Mrs. Cheadle’s right to the share of the benefit she is due. In order to avoid a termination of benefits to Mrs. Cheadle, the decree provides that the parties will maintain separate “survivor benefits” for Mrs. Cheadle.

{¶ 46} Dr. Dean’s expert witness, Edwin C. Schilling, testified that because a military retiree’s benefits terminate upon his death, “the Government has established a benefit which would permit a portion of the member’s retired pay to continue after the death of the member to be paid to certain named beneficiaries.” (4-28-06 hearing, T. 38). The plan is called the Survivor Benefit Plan, or “SBP.” Mr. Schilling further testified that when the decree of dissolution became final, in 1995, Mrs. Cheadle was not eligible for SBP coverage because Dr. Dean had not then accrued twenty years of military service, which is the minimum service requirement for SBP eligibility. (T. 56). Mr. Schilling also testified that had an application for SBP coverage then been submitted, it would have been rejected because Dr. Dean lacked the necessary years of service. (T. 39).

{¶ 47} Dr. Dean retired in August of 2001, with slightly in excess of twenty years actual service in the Air Force. When he retired, Dr. Dean signed a form captioned

“Data For Payment of Retired Persons,” (Plaintiff’s Exhibit 7). Paragraph 26 of the form permits the retiree to select from among seven options for SBP coverage. One permits the applicant to “elect coverage for my former spouse.” Dr. Dean did not elect that coverage. Instead, Plaintiff’s Exhibit 7 reflects that he selected the following option: “I elect not to participate in SBP.”

{¶ 48} Payment of SBP benefits are subject to two conditions: the retiree must have died, after electing SBP coverage, and the former spouse who is designated a beneficiary may not then have remarried. Mrs. Cheadle had remarried when Dr. Dean retired in 2001. He testified that because of that, as well as unspecified “conflicting statements” (3-7-06 hearing, T. 81), he rejected SBP coverage for Mrs. Cheadle.

{¶ 49} When it was discovered that Dr. Dean had rejected SBP coverage for Mrs. Cheadle, he attempted to amend his election. In a letter to the Board for Correction of Air Force Records dated July 22, 2002 (Plaintiff’s Exhibit 6), Dr. Dean wrote:

{¶ 50} “I am requesting a correction of an error on my DD Form 2656, Data For Payment of Retired Personnel, that I completed during my out-processing for Retirement from the U.S. Air Force on August 3, 2001. I misunderstood the former spouses section of the Survivor Benefit Plan Information Guidebook. I felt that due to my former spouses (sic) remarriage that she did not qualify for this benefit even though our Decree of Dissolution of Marriage directed it (see Separation Agreement, Retirement Benefits, page 5, paragraph 3).

{¶ 51} “I now understand that she is entitled to this but would not receive any monetary benefits upon my death unless she was single (divorced or widowed). I also understand that no premiums can be taken from my retirement pay while she is

remarried. I am requesting that the SBP be calculated on my selection of my base pay amount to be the minimum possible which is \$300 per month.”

{¶ 52} The Board of Corrections denied Dr. Dean’s request. However, at the April 28, 2006 hearing, Mr. Schilling, Dr. Dean’s expert, testified that an open enrollment for SBP coverage was then available through September of that year. (T. 58). Exercise of that option would require payment of back-premiums. Even though the decree requires the parties to “share equally the payment of the premiums,” Dr. Dean testified that in his view, due to the amount of back-premiums he projected, the whole cost should instead be borne by Mrs. Cheadle. (3/7/06 hearing, T. 83). The audacity of his contention ignores the fact that the failure to comply with the requirement of the decree was his, not Mrs. Cheadle’s. It also reflects the attitude he has taken with respect to his obligations under the decree, including his election of the \$300 minimum monthly benefit when he attempted to obtain SBP coverage for Mrs. Cheadle in his letter dated July 22, 2002.

{¶ 53} The trial court nevertheless found that Dr. Dean’s failure to obtain SBP coverage for Mrs. Cheadle when it was available to him upon his retirement in 2001 did not represent disobedience of or resistance to the orders of the decree, and therefore cannot constitute contempt. R.C. 2705.01(A). In arriving at that conclusion the court reasoned that Dr. Dean could not then have acted to “maintain survivor benefits for the benefit of” Mrs. Cheadle, as the decree requires him to, because Mrs. Cheadle had remarried when Dr. Dean retired.

{¶ 54} It is undisputed that a former spouse for whom SBP coverage was obtained is nevertheless ineligible for payment of SBP benefits upon the retiree’s death

if the beneficiary is then remarried. However, remarriage is not likewise a bar to obtaining SBP coverage for a former spouse when the retiree has sufficient service credits to obtain it. The trial court's rationale relies on a confusion of SBP "benefits" with SBP "coverage."

{¶ 55} The court's conclusion that SBP "benefits" could not have been paid to Mrs. Cheadle when Dr. Dean retired because she was then remarried is correct. It is also correct that SBP benefits were then unavailable because Dr. Dean was yet alive. However, in order to "maintain survivor benefits for the benefit of" Mrs. Cheadle payable after his death, Dr. Dean was required to obtain SBP coverage for her while he is alive. As with insurance, coverage must proceed payment of the benefit when the insurable event occurs. Dr. Dean rejected SBP coverage when it was available to him, disobeying the requirement of the decree to "maintain survivor benefits for the benefit of" Mrs. Cheadle.

{¶ 56} The majority finds no abuse of discretion, agreeing with the trial court that there were no "survivor benefits" to "maintain" when Dr. Dean retired, because Mrs. Cheadle had remarried. The majority acknowledges the defect in that conclusion, however, stating that Mrs. Cheadle's right was "inchoate;" that is, a right to future benefits for which she could be eligible if Dr. Dean obtains SBP coverage and Mrs. Cheadle is unmarried when Dr. Dean dies. Nevertheless, papering over the matter, the majority concludes that, because Mrs. Cheadle failed to elect survivor benefits on her own without Dr. Dean's assistance, and because both are charged by the decree to maintain the benefits, the fault is hers, not Dr. Dean's. The majority cites "undisputed" testimony at pp. 83-84 of the transcript of the March 7, 2006 hearing.

{¶ 57} The majority misconstrues the evidence. Dr. Dean testified that Mrs. Cheadle could have acted within one year following their divorce to seek SBP coverage for benefits of “up to half of my or half of her pay which is not 100 percent but up to 55 percent of her pay.

{¶ 58} “If she does not elect to do this, which she did not do, that if I do directive action or changes that I do to initiate this myself, it’s my choosing and I’m allowed to choose the minimum, which is \$300.” (3-7-06 hearing, T. 84).

{¶ 59} There is no evidence that Mrs. Cheadle was aware that she had the option of applying for SBP coverage during the year following her 1995 divorce from Dr. Dean. From the record, it appears that Mrs. Cheadle’s opportunity was merely to advise the Air Force that her marriage to Dr. Dean had terminated, not to apply for SBP coverage. Applying the trial court’s rationale for excusing Dr. Dean from seeking SBP coverage during that same time, Mrs. Cheadle’s application would have been unavailing because Dr. Dean did not then have the minimum twenty years service for SBP coverage, and didn’t have the required minimum service until he retired in 2001. That fact was confirmed by Dr. Dean’s expert, Mr. Schilling, who testified that an application for SBP coverage would have been denied had one been submitted prior to Dr. Dean’s satisfaction of the minimum service requirement. (T. 39).

{¶ 60} The pertinent and decisive fact is that Dr. Dean, after achieving twenty years service and electing to retire, rejected SBP coverage for Mrs. Cheadle when he executed the document in the record marked as Plaintiff’s Exhibit 7. Dr. Dean, a senior officer and an educated professional, attributes his act to “conflicting statements” (3-7-06 hearing, T. 81) he received at the time, but doesn’t explain what those statements

were or who made them. The decree and separation agreement imposed an affirmative duty on Dr. Dean to “maintain survivor benefits for the benefit of” Mrs. Cheadle. Dr. Dean acknowledged that duty when he wrote to the Board of Corrections seeking SBP coverage for Mrs. Cheadle. (Plaintiff’s Exhibit 6). By rejecting SBP coverage when it was available to him, Dr. Dean not only resisted the command of the court’s order but disobeyed its express terms, and is guilty of contempt as that is defined by R.C. 2705.01(A). The distinction between SBP “benefits,” which were not available, and SBP “coverage,” which was, bears no genuine relation to what the decree required Dr. Dean to do, and what he failed to do.

{¶ 61} As a result of the trial court’s judgment, and the majority’s unfortunate endorsement of it, Mrs. Cheadle has been deprived of valuable rights and benefits which the parties agreed in their separation agreement she would have and which the court’s decree ordered Dr. Dean to provide her. The trial court abused its discretion when it failed to find Dr. Dean in contempt and failed to grant relief to Mrs. Cheadle by ordering Dr. Dean to cooperate in obtaining life insurance coverage in the amount of \$300,000, payable to Mrs. Cheadle and ordering him to purchase some additional form of insurance or annuity to take the place of SBP coverage he rejected. Dr. Dean’s own expert, Mr. Schilling, testified that is often done when survivor benefits are unavailable in a retirement plan, as the SBP benefits to which Mrs. Cheadle is entitled now appear to be due to Dr. Dean’s act of disobedience.

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