[Cite as *Blythe v. Blythe*, 2004-Ohio-575.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SUSAN MARIE BLYTHE

Plaintiff-Appellee

-vs-

JOHN MICHAEL BLYTHE

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Julie A. Edwards, J.

Case No. 03CA8

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Domestic Relations Division, Case No. 2000DR378
JUDGMENT:	Affirmed in part, Reversed in part and Remanded
DATE OF JUDGMENT ENTRY:	February 4, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
PHILIP M. COLLINS CHRISTINE E. WATCHORN 21 East State Street, Ste. 930 Columbus, Ohio 43215-4228	JEROME R. HAMILTON 2990 Maginn Drive Beavercreek, Ohio 45434 MARK EDWARD STONE 42 Woodcroft Tr., Ste. A Beaverscreek, Ohio 45430

Hoffman, P.J.

{¶1} Defendant-appellant John Michael Blythe ("husband") appeals the January 13, 2003 Judgment Entry/Decree of Divorce entered by the Fairfield County Court of Common Pleas, Domestic Relations Division, which adopted the military qualifying court order ("MQCO") proposed by plaintiff-appellee Susan Marie Blythe ("wife") as order of the court.

STATEMENT OF THE FACTS AND CASE

{¶2} Husband and wife were married on September 4, 1982, at Offutt Air Force Base in Nebraska. Husband entered the United States Air Force on June 2, 1976. At the time of the marriage, husband had been on active duty for approximately six years and three months. Six children were born as issue of said union, all of whom are minors.

{¶3} On August 16, 2000, wife filed a Complaint for Legal Separation, which she subsequently amended to a Complaint for Divorce on April 23, 2001. Husband filed a timely answer and counterclaim. The parties entered into an Agreed Joint Shared Parenting Plan, which resolved all issues relative to child support and parenting time, on October 24, 2002. Also on October 24, 2002, the parties voluntarily entered into and executed a Separation Agreement.

{¶4} Pursuant to the Separation Agreement, husband and wife agreed upon a mutual waiver of spousal support, and upon the division of all their marital and separate property and debts. The parties agreed husband would assign to wife an amount equal to 50% of the marital portion of his disposable military retirement account paid during the marriage. The parties agreed to submit their proposed respective military qualifying orders by November 7, 2002. The trial court gave the parties until December 6, 2002, to file

affidavits and memorandums in support of his/her proposed order. The trial court would determine the precise substance and wording of the military qualifying order after consideration of all the documents filed by the parties. Via Judgment Entry/Decree of Divorce filed January 13, 2003, the trial court adopted the qualified military order proposed by wife.

{¶5} It is from this judgment entry husband appeals raising the following assignments of error:

{¶6} "I. THE PROVISIONS IN THE MILITARY QUALIFYING COURT ORDER REGARDING ANY VA DISABILITY BENEFITS THAT MAY BE AWARDED TO APPELLANT IN THE FUTURE ARE CONTRARY TO FEDERAL AND STATE LAW AND CONSTITUTE AN ABUSE OF DISCRETION.

{¶7} "II. THE PROVISIONS IN THE MILITARY QUALIFYING COURT ORDER AWARDING TO APPELLEE THE SURVIVOR'S BENEFIT ARE CONTRARY TO LAW AND CONSTITUTE AN ABUSE OF DISCRETION.

{¶8} "III. PROVISIONS IN THE MILITARY QUALIFYING COURT ORDER GRANTING THE COURT JURISDICTION TO AWARD "ALIMONY" IS CONTRARY TO THE EXPRESS TERMS OF THE PARTIES' SEPARATION AGREEMENT.

{¶9} "IV. PROVISIONS IN THE MILITARY QUALIFYING COURT ORDER MAKE APPELLANT LIABLE TO APPELLEE FOR REDUCTION IN APPELLEE'S PAYMENTS RESULTING FROM EVENTS OUTSIDE OF APPELLANT'S CONTROL CONSTITUTES AN ABUSE OF DISCRETION."

I

{¶10} In his first assignment of error, husband maintains the provisions in the trial court's MQCO regarding VA disability benefits are contrary to federal and state law, and constitute an abuse of discretion. Specifically, husband argues the trial court included veterans' disability benefits as "disposable retired pay" to which wife was entitled to 50%.

{¶11} Military retirement pensions are the subject of specific Federal statute and controlled by United States Supreme Court authority, which provide when military retirement pay is waived for receipt of veterans' disability benefits, a state court may not treat the waived portion as property that is divisible upon divorce. See, Uniformed Services Former Spouses' Protection Act, Section 1408, Title 10 U.S.Code, and *Mansell v. Mansell* (1989), 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed. 675.

{¶12} The MQCO the trial court issued in the instant action reads:

{¶13} "**15. Merger of Benefits and Indemnification:** The Member agrees not to merge the Member's disposable military retired pay with any other pension and not to pursue any course of action that would defeat the Former Spouse's right to receive a portion of the disposable military retired pay of the Member. The Member agrees not to take any action by merger of the military retirement pension so as to cause a limitation in the amount of the total retired pay in which the Member has a vested interest and, therefore, the Member will not cause a limitation of the Former Spouse's monthly payments as set forth above. If the Member becomes employed or otherwise has his military pension merged, which employment or other condition causes the merger of the Member's disposable military retired pay, the Member will pay the Former Spouse directly the monthly

amount provided in Paragraph 6, under the same terms and conditions as if those payments were made pursuant to the terms of this order.

{¶14} "**16. Direct Payment By Member:** If in any month, direct payment is not made to Former Spouse by DFAS * * * Member shall pay the amounts called-for above directly to Former Spouse * * * This includes any amounts received by the Member in lieu of disposable retired pay, including but not limited to, any amounts waived by Member in order to receive Veterans Administration (ie: disability) benefits or any amounts received by Member as a result of an early-out provision, such as VSI or SSB benefits.

{¶15} "**17. Actions by Member:** If Member takes any action that prevents, decreases, or limits the collection by Former Spouse of the sums to be paid hereunder, he shall make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the actions taken by Member.

* * *

{¶16} "**19. Continued Jurisdiction:** The Court shall retain jurisdiction to enter such further orders as are necessary to enforce the award to spouse of the military retirement benefits awarded herein, including the recharacterization thereof as a division of Civil Service or other retirement benefits, or to make an award of alimony in the event that the Member or DFAS fail [sic] to comply with the provisions contained above requiring said payments to Former Spouse by any means, including the application for a disability award * * *

"* * *

{¶17} "**Definition of military retirement:** * * * "military retirement" includes retired pay paid or to which Member would be entitled * * * before any statutory, regulatory, or

elective deductions are applied. For purposes of calculating the Former Spouse's share of the benefits awarded to her by the Court, the marital property interests of the Former Spouse shall also include a pro-rata share of all amounts the Member actually or constructively waives or forfeits in any manner and for any reason or purpose, including, but not limited to, any waiver made in order to qualify for Veterans Administration or disability benefits."

{¶18} The plain language of the aforeqouted provisions establish the trial court did not, contrary to husband's assertion, include disability benefits within the definition of disposable retired pay. Rather, these provisions are a means to insure husband does not take any action to reduce the total retired pay, for example, by waiving certain amounts of those monies for receipt of veterans' disability benefits. If husband does, he is responsible for making wife whole. At the time of the divorce, husband was not receiving any disability benefits. The trial court was clearly protecting wife's interests in the military retirement. We find in doing so, the trial court neither violated federal law nor abused its discretion.

{¶19} Husband's first assignment of error is overruled.

II

{¶20} In his second assignment of error, husband takes issue with the trial court's requiring him to designate wife as the irrevocable beneficiary of the plan.

{¶21} Section 1450, et seq. Title 10 of the United States Code permits a state court to award survivor benefit protection to a non-participant former spouse. Subsection (f)(4) of Section 1450, Title 10, specifically provides, "A court order may require a person to elect * * * to provide an annuity to a former spouse." Furthermore, Subsection (f)(2) of Section 1450, Title 10 states:

{¶22} “(2) Limitation on change in beneficiary when former spouse coverage in effect.--A person who, incident to a proceeding of divorce, dissolution, or annulment, is required by a court order to elect under section 1448(b) of this title to provide an annuity to a former spouse (or to both a former spouse and child), or who enters into a written agreement (whether voluntary or required by a court order) to make such an election, and who makes an election pursuant to such order or agreement, may not change that election under paragraph (1) unless, of the following requirements, whichever are applicable in a particular case are satisfied:

{¶23} “(A) In a case in which the election is required by a court order, or in which an agreement to make the election has been incorporated in or ratified or approved by a court order, the person--

{¶24} “(i) furnishes to the Secretary concerned a certified copy of a court order which is regular on its face and which modifies the provisions of all previous court orders relating to such election, or the agreement to make such election, so as to permit the person to change the election; and

{¶25} “(ii) certifies to the Secretary concerned that the court order is valid and in effect.

{¶26} “(B) In a case of a written agreement that has not been incorporated in or ratified or approved by a court order, the person--

{¶27} “(i) furnishes to the Secretary concerned a statement, in such form as the Secretary concerned may prescribe, signed by the former spouse and evidencing the former spouse's agreement to a change in the election under paragraph (1); and

{¶28} "(ii) certifies to the Secretary concerned that the statement is current and in effect."

{¶29} We find the trial court's provision requiring husband to name wife as the irrevocable beneficiary is fully consistent with the aforementioned code sections. Contrary to husband's contention, this order does not provide wife with a windfall. The MQCO specifically states, "the level of [survivor benefit plan] coverage required for the Former Spouse shall be that which will provide her with the same benefit payments after [husband's] death that she was eligible to receive or receiving before this death."

{¶30} Husband further argues this provision was unnecessary as he agreed to provide a $100,000 life insurance policy under the Joint Shared Parenting Plan. We find such requirement under the Shared Parenting Plan to be irrelevant. The trial court only required husband to maintain this life insurance policy until the parties' youngest child reaches the age of majority in 2013. Obviously, this provision is designed to protect the children and not wife as wife's interest in husband's military retirement far exceeds $100,000.

{¶31} Husband's second assignment of error is overruled.

III

{¶32} In his third assignment of error, husband contends the provision in the MQCO under which the court retained jurisdiction to award alimony is contrary to the expressed terms of the parties' Separation Agreement. We agree.

{¶33} Pursuant to para. 18 of the Separation Agreement, the parties agreed the trial court would retain jurisdiction to enforce the terms of the MQCO. The Separation Agreement also specifically provided the trial court would not retain jurisdiction over

spousal support. Pursuant to para. 19 of the MQCO, which is set forth supra, the trial court retained jurisdiction to enforce the terms of the MQCO. Para. 19 authorizes the trial court to enforce the division of the military retirement benefits by recharacterizing it to an award of alimony. Spousal support and the division of marital assets such as the military retirement benefits are two separate interests. The trial court is not permitted to modify a property division order by subsequently reclassifying divided property as spousal support. Although a trial court has inherent power to make further orders in aid of the property division it orders, the trial court may not reclassify property after the parties waived spousal support.

{¶34} Appellant's third assignment of error is well taken and sustained. Part portion of para. 19 allowing the trial court to award alimony and this issue is reversed and remanded to the trial court to restate para. 19 to comply with our opinion.

IV

{¶35} In his final assignment of error, husband asserts the trial court abused its discretion by including a provision in the MQCO which held him liable to wife for any reductions in his military pension. Husband submits para. 15 of the MQCO, which is set forth supra, holds him liable to wife for events outside his control, such as Acts of Congress and changes in federal law. The plain language of para. 15 indicates husband is only responsible for his own actions. Again, we find this provision is merely providing the trial court with a means of protecting wife's interest. Accordingly, we find the trial court did not abuse its discretion in including this provision in the MQCO.

{¶36} Husband's fourth assignment of error is overruled.

{¶37} The judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part, and remanded to the trial court for further proceedings consistent with our opinion and the law.

By: Hoffman, P.J. and

Farmer, J. concur.

Edwards, J. concurs in part and dissents in part

EDWARDS, J., DISSENTING, IN PART, CONCURRING, IN PART

{¶37} I respectfully dissent from the analysis and disposition of the first assignment of error by the majority.

{¶38} As the majority sets forth, *Mansell v. Mansell* (1989), 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.675 states that, when military retirement pay is waived for receipt of veterans' disability benefits, a state court may not treat the waived portion as property that is divisible upon divorce. In the case sub judice, the trial court has ordered that, if the appellant chooses to take disability pay in lieu of his pension, appellant still must provide to appellee the same amount of money she would have received had the pension remained in tact. As a former domestic relations court judge, I understand this order, but it appears that it violates *Mansell.*

{¶39} While, I would find that the appellant could agree to an order such as the one issued by the trial court, it does not appear to me that that is what happened in the case sub judice. In the case sub judice, the trial court adopted the appellee's proposed order regarding the military pension and appellant filed an appeal.

{¶40} I would, therefore, sustain appellant's first assignment of error.

{¶41} Even though I concur with the majority, I write separately as to the third assignment of error, also. I write separately in order to explain my concurrence. Assuming that the word alimony, in paragraph 19 of the MQCO, is meant to connote only spousal support, I concur. But, I would find that paragraph 19 of the MQCO would be acceptable to me if modified to indicate that said MQCO could be enforced, if necessary, by ordering a periodic, i.e. monthly, payment of the wife's share of the property division. (But, as set forth in my discussion of the first assignment of error, these periodic payments could not be used to pay any pension benefits that were reduced because appellant opted to receive disability benefits in lieu of pension benefits.)

{¶42} I concur in all other respects with the decision of the majority.

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Judge Julie A. Edwards