



waived spousal support and divided all their property. Among the divided marital property was Ronald's Air Force retirement, from which he was eligible to begin receiving payments on September 1, 1995. The separation agreement states that Ellen is entitled to receive directly 46.75% of the retirement pay to which Ronald was entitled on September 1 (50% minus 3.25% for Ellen's share of the Survivor Benefits Plan premium, which ensures that she will continue to receive retirement benefits if Ronald were to die). On January 16, 1996, they filed an agreed qualifying military court order (QMCO) with the trial court. Although the separation agreement and the dissolution decree had not contained a clause terminating the retirement payments if Ellen remarried, the January 16, 1996 QMCO contained a "remarriage clause," which provided that Ellen would cease to receive her share of Ronald's retirement benefits if she remarried. Ellen remarried in August 2002, and she stopped receiving her share of the benefits in October of that year.

{¶ 2} On March 7, 2007, Ellen filed a motion for relief from the QMCO under Civ.R. 60(B)(5) and 60(A) that asked the trial court to remove the remarriage clause. Alternatively, Ellen moved the court to clarify the QMCO's provisions. She contended that she never intended to give up her share of Ronald's retirement benefits upon remarriage. On August 2, 2007, the trial court granted Ellen's motion for relief under both sections of Civ.R. 60. Ronald appealed to this court. On March 3, 2008, this court dismissed his appeal for lack of a final, appealable order, because the trial court had not yet determined the date on which Ellen's retirement benefits were to resume.<sup>1</sup> On July 18, 2008, the trial court determined the date issue. Finally, on July 25, 2008, the trial court entered an Amended QMCO that reflected its

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<sup>1</sup>Case No. 2007 CA 0067.

August 2, 2007 and July 18, 2008 decisions.

{¶ 3} Also on July 25, 2008, Ronald again appealed the trial court's grant of relief under Civ.R. 60. On February 13, 2009, we affirmed the trial court's decision, though not its rationale. *Bagley v. Bagley*, 181 Ohio App.3d 141, 2009-Ohio-688. We held that, while the court should not have granted relief under Civ.R. 60(B)(5) or (A), it was clear that relief was appropriate. See *Bagley*, at ¶21. We said that a remarriage contingency may not be placed on payments that result from the division of marital property. We also said that the remarriage provision, in effect, modified the property division in the separation agreement, which the trial court lacked jurisdiction to do, rendering the QMCO void.

{¶ 4} At some point after the parties divorced, Ronald learned that he qualified for veterans' disability benefits from the Veterans' Administration. In order to receive these benefits, though, he was required by law to waive an equal amount of his retirement pay from the Air Force. This waiver meant that the amount Ellen received directly from the Air Force was reduced (46.75% of a smaller amount). Sometime after July 25, 2008, Ellen apparently submitted a proposed Amended QMCO. (There is nothing recorded on the docket about this submission.) Ellen's proposal not only removed the remarriage clause and stated the benefits resumption date but also contained language and provisions clarifying the effect that Ronald's retirement-pay waiver would have on her share of his retirement pay. The Amended QMCO required Ronald to pay Ellen an amount equal to the reduction of her portion of the retirement caused by his election to receive partial veteran's disability benefits and the corresponding waiver of a portion of his retirement. On November 4, 2009, Ronald filed with the trial court objections to the new Amended QMCO. He argued that it effectively modified the parties'

separation agreement and violated federal law. On February 12, 2010, the trial court held a hearing on the objections, which the court overruled the same day (save an immaterial typographical error). On February 19, 2010, the trial court entered the new Amended QMCO, vacating the January 16, 1996 agreed QMCO.

{¶ 5} Ronald appealed.

## II

{¶ 6} Ronald presents a single assignment of error:

{¶ 7} “The Qualifying Military Court Order Grants Substantive Rights Exceeding the Scope of the Separation Agreement of the Parties by Granting to Wife a Portion of the Husband’s Veterans Affairs Benefits that were Waived by Husband to Receive Disability Benefits.”

{¶ 8} Ronald alleges that the Amended QMCO awards Ellen a share of the retirement pay that he waived in order to receive veterans’ disability benefits. This, he contends, is not consistent with their separation agreement. Moreover, Ronald contends, by dividing this waived pay as marital property the Amended QMCO violates the federal Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. § 1408.

### **A. The Trial Court Properly Clarified the Dissolution Decree**

{¶ 9} Essentially, a QMCO is a qualified domestic relations order (QDRO) that directs a military service, rather than a civil pension plan administrator, to make direct payments of a military retiree’s retirement pay to a former spouse. See Section 1408(d)(1), Title 10, U.S.Code. “[A] QDRO is essentially a mechanism through which marital property is allocated.” *Weller v. Weller* (1996), 115 Ohio App.3d 173, 178 (Citation omitted.). “[It] is []

an order in aid of execution on the property division *ordered* in the divorce or dissolution decree.” *Bagley*, at ¶26. Therefore, the dispute here is not over the Amended QMCO per se but over the meaning of the parties’ separation agreement, specifically, the part that divides Ronald’s military retirement benefits.

{¶ 10} The parties’ separation agreement divides Ronald’s retirement as follows: “[Ronald] will be eligible for USAF retirement pay beginning September 1, 1995. In view of the fact that [Ellen] is entitled to part of the marital portion thereof, the parties agree that said retirement pay shall be payable for the parties’ joint lives and [Ellen] shall qualify for and be paid directly one-half (1/2) of the amount available to [Ronald] under the 20/20/20 Rule, less 3.25%, which covers one-half of the premium for Survivor Benefits Plan. \* \* \*” Neither here, nor anywhere else in the separation agreement, is waived retirement-pay explicitly addressed. For this reason, Ronald contends, Ellen is not entitled to any of the waiver portion of his retirement.

{¶ 11} When necessary, the trial court may interpret or clarify a separation agreement. See *Klug v. Klug*, Montgomery App. No. 19369, 2003-Ohio-3042, at ¶19 (Citation omitted.). “[A] court can, pursuant to R.C. 3105.65, enforce a decree of dissolution and, ‘[w]here there is confusion over the interpretation to be given to a particular clause, the trial court in enforcing the agreement has the power to hear the matter, clarify the confusion, and resolve the dispute.’” *Weller*, at 178, quoting *In re Dissolution of Marriage of Seders* (1987), 42 Ohio App.3d 155, 156-157; see *Perko v. Perko*, Geauga App. No. 2004-G-2561, 2005-Ohio-3777, at ¶19 (“[A] trial court has broad discretion to interpret ambiguous or vague provisions contained in a separation agreement incorporated into a divorce decree.”). Since a separation

agreement is agreed to by the parties, the trial court must base its clarification on a determination of the parties' intent. See *McKinney v. McKinney* (2001), 142 Ohio App.3d 604, 609.

{¶ 12} Here, according to the Amended QMCO, the trial court determined that the division of Ronald's retirement was to be paid by Ellen's receipt, directly from the Air Force, of an amount equal to 46.75% of the retirement pay that Ronald was entitled to receive on September 13, 1995 (the date the dissolution decree was filed). This amount excludes any disability payment to Ronald as of the date of division.<sup>2</sup> To secure the distribution of Ellen's portion of the divided asset, in the Amended QMCO the trial court included a provision, in paragraph (M), that prohibits Ronald from taking any action that would reduce the amount that Ellen is entitled to receive directly by, for example, waiving retirement pay in order to receive veterans' disability benefits.<sup>3</sup> If Ronald does do something that reduces the amount that Ellen receives directly, paragraph (O) requires him to pay Ellen the difference between the reduced amount she receives directly from the Air Force and 46.75% of the amount she received directly on September 13, 1995.<sup>4</sup> This provision is commonly referred to as an indemnity

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<sup>2</sup>“(A) [Ronald] assigns to [Ellen] an interest in [Ronald's] gross military pay. [Ellen] shall receive a direct payment in the amount of 46.75% per month of [Ronald's] Gross Monthly Military Retirement Benefits, excluding his Disability Payment as it existed on September 13, 1995. \* \* \*

“(B) [Ellen] shall be entitled to receive an amount equal to the sum of 46.75% per month of [Ronald's] Gross Monthly Military Retirement Benefits excluding his Disability Payment as it existed on September 13, 1995 \* \* \*.” February 19, 2010 Amended Qualifying Military Court Order.

<sup>3</sup>“(M) [Ronald] shall not take any action that prevents, decreases, or limits the collection by [Ellen] of the sums to be paid hereunder, including receipt of any future disability payments not otherwise acknowledged above in lieu of Military Retirement.” February 19, 2010 Amended Qualifying Military Court Order.

clause.

{¶ 13} For analytical clarity, the court will use specific dollar examples, although the parties do not state any actual amounts. For example, suppose that on September 13, 1995, Ronald was entitled to monthly retirement pay of \$1,000. From this amount \$65 must be deducted (6.5%) to cover the Survivor Benefits Plan premium. Since each party is responsible for half of this premium, the Air Force would send Ronald and Ellen directly 46.75% of \$1000 each, or \$467.50. Later, Ronald learned that he qualified for, as an another example, \$500 in veterans' disability benefits. In order to receive these benefits, the law required Ronald to waive an equal amount of his retirement benefits, which he does. Now, from the Air Force, the gross monthly retirement pay is only \$500 because the remainder has been waived for Ronald to receive a like sum of \$500 in veterans' benefits which are not divisible and not subject to attachment. This means that the Air Force now sends Ronald and Ellen only \$233.75 (46.75% of \$500). (Of course, since Ronald also receives from the Veterans' Administration \$500 in tax-free benefits, he receives a total of \$733.75 each month.) But Ellen, the trial court determined, had a property interest in Ronald's retirement pay valued, in this example, at \$467.50 per month (46.75% of his September 13, 1995 retirement pay). To protect this interest, the trial court ordered Ronald not do anything that would reduce the amount (\$467.50) that Ellen received directly from the Air Force. If he does something that causes the Air Force to send Ellen less than this amount, Ronald must make Ellen whole.

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<sup>4</sup>“(O) If in any month, [Ellen's] share of [Ronald's] benefits are paid to [Ronald], then [Ronald] shall pay the amounts paid to him which represent [Ellen's] share of his military retirements benefits directly to [Ellen]. \* \* \* This includes any amount received by [Ronald] in lieu of disposable retired pay including, but not limited to, any amounts waived by [Ronald's] benefits.” February 19, 2010 Amended Qualifying Military Court Order.

{¶ 14} We determine that the trial court's clarification contained in the Amended QMCO is consistent with the separation agreement. There, Ronald implicitly agreed that Ellen has a property interest in his military retirement pay equal to the \$467.50 per month example, and he explicitly agreed that the Air Force would pay her this amount directly. Since it was Ronald's voluntary act of waiving the example's \$500 in retirement pay that caused the Air Force to pay Ellen less than the agreed value of her interest, Ronald himself must make up the \$233.75 difference.

{¶ 15} We find support for the trial court's clarification in the original QMCO, which was agreed to by Ronald. There, Ronald agreed that it was his intent to provide Ellen with an amount that fairly represented her marital share of his retired pay: "The parties agree that their mutual intent is to provide [Ellen] with a retirement pay that fairly represents [Ellen's] marital share of the retired and/or retainer pay as defined in paragraph 3." January 16, 1996 Decree Dividing Military Retired Pay (QDRO), ¶15. Paragraph 3 states:

{¶ 16} "[Ellen] shall receive the following amount from each payment of [Ronald's] retired or retainer pay:

{¶ 17} "A. Formula: [Ellen] shall receive 46.75% of [Ronald's] retired or retainer pay directly from the U.S. Government. (50% less a one-half part of the 6.50% cost of the survivor benefit premium.)"

{¶ 18} January 16, 1996 Decree Dividing Military Retired Pay (QDRO), ¶3. By including provisions in the Amended QMCO that protect Ellen's interest, the trial court was trying to ensure that she received her share of the value agreed upon, just as Ronald intended.

{¶ 19} Also, while the effect of disability benefits is not addressed in the separation

agreement, the effect of Ronald's future employment on Ellen's interest is: it would have no effect. In the retirement-plan-division section of the separation agreement, they agreed that Ellen would continue to receive an amount equal to 46.75% of Ronald's September 1, 1995 retirement pay even if Ronald's retirement pay is reduced because he obtains other employment: "In the event [Ronald] takes up civil service employment so as to reduce the amount of [Ronald's] Air Force Retirement pay, [Ellen] shall receive an undiminished portion of the Air Force Retirement pay as if [Ronald] had not undertaken such civil service employment." This provision is enforced in paragraph 11 of the agreed QMCO: "[Ronald] agrees not to merge [Ronald's] retired or retainer pay with any other pension, and not to pursue any course of action that would defeat [Ellen's] right to receive a portion of the full retired or retainer pay of [Ronald]. [Ronald] 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 net monthly retirement or retainer pay in which [Ronald] has a vested interest and, therefore, [Ronald] will not cause a limitation of [Ellen's] monthly payments as set forth above. \* \* \*" January 16, 1996 Decree Dividing Military Retired Pay (QDRO), ¶11. If Ronald did take action that would diminish Ellen's receipt of their property division, he agreed that he would make Ellen whole: "[Ronald] agrees to indemnify [Ellen] for any breach of this paragraph." January 16, 1996 Decree Dividing Military Retired Pay (QDRO), ¶11. These provisions, too, suggest that Ronald intended that Ellen's portion of his retirement pay be unaffected by any voluntary action he takes that might reduce it.

{¶ 20} The trial court was permitted to clarify the separation agreement, and its clarification in the Amended QMCO is supported by credible, competent evidence of the

parties' intent. See *McKinney*, at 609.

{¶ 21} The first assignment of error is overruled.

**B. The Amended QMCO Does Not Violate the Uniformed Services Former Spouses' Protection Act**

{¶ 22} The Former Spouses' Protection Act (FSPA) authorizes state courts to treat "disposable retired pay" as marital property subject to equitable division. Section 1408(c)(1), Title 10, U.S.Code. The statutory definition of "disposable retired pay" is "total monthly retired pay to which a member is entitled" minus certain deductions. Section 1408(a)(4), Title 10, U.S.Code. Among the deductions are any amounts waived in order to receive veterans' disability benefits. Section 1408(c)(1)(B), Title 10, U.S.Code. Interpreting this section, the United States Supreme Court in *Mansell v. Mansell* (1989), 490 U.S. 581, 594-595, 109 S.Ct. 2023, 104 L.Ed.2d 675, held that state courts may not "treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."

{¶ 23} We determine that the trial court's clarification of the parties' separation agreement in the Amended QMCO does not divide Ronald's waived retirement-pay. Had Ronald already retired and waived a portion of his retirement prior to the parties' dissolution, then the court would be prohibited from considering the example of Ronald's \$500.00 veterans' disability income stream as property subject to division, but that is not the case here. As we said above, the Amended QMCO protects Ellen's property interest in Ronald's retirement pay by in essence requiring Ronald to compensate Ellen for failing to convey the interest in the amount and manner to which he agreed in the separation agreement. The relief

that the Amended QMCO grants Ellen is not a division of the waived retirement-pay “but rather an award of damages equal to the value of the property not conveyed—the amount of retirement benefits lost.” 2 Turner, *Equitable Distribution of Property* (3 Ed.) Section 6:10.

{¶ 24} The Fifth District has concluded similarly. In *Blythe v. Blythe*, Fairfield App. No. 03CA8, 2004-Ohio-575, the parties agreed in a separation agreement, incorporated into the divorce decree, that husband would assign to wife an amount equal to 50% of his military retirement account. The parties submitted their proposed QMCOs, and the trial court adopted the one proposed by the wife, which contained provisions similar to those in the Bagleys’ Amended QMCO. One provision provided: “If in any month, direct payment is not made to Former Spouse by [the Air Force] \* \* \* 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.” *Id.* at ¶14. Another provision provided: “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.” *Id.* at ¶15. Husband argued that these provisions violated the FSPA. The appellate court disagreed.

{¶ 25} Noting that when they divorced husband was not yet receiving veterans’ disability benefits, the court said that “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.” *Id.* at ¶18. “If husband does,” the

court continued, “he is responsible for making wife whole.” Id. Finding that the trial court did not violate the FSPA, the appellate court concluded that “[t]he trial court was clearly protecting wife’s interests in the military retirement.” Id.

{¶ 26} Other courts from other jurisdictions are divided on whether the FSPA is violated when adjustments are considered to compensate the non-military spouse for military retirement that is diminished by the retiree’s waiver of retirement in order to receive veterans’ disability benefits. Compare *Abernethy v. Fishkin* (Fla.1997), 699 So.2d 235 and *Johnson v. Johnson* (Tenn.2001), 37 S.W.3d 892 with *In re Marriage of Pierce* (1999), 26 Kan.App.2d 236, review denied 268 Kan. 887, and *Youngbluth v. Youngbluth* (Vt.2010), 6 A.3d 677. We believe the better reasoned conclusion is that maintaining the original intent of the property division distribution does not violate the FSPA as long as the military retiree would be able to satisfy the obligation from other than disability retirement assets.

{¶ 27} The Amended QMCO in this case does not treat Ronald’s waived retirement-pay as divisible marital property, and it does not violate the FSPA.

{¶ 28} The second assignment of error is overruled.

{¶ 29} The judgment of the trial court is Affirmed.

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FROELICH and BROGAN, JJ, concur.

(Hon. James A. Brogan, retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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