IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

BRENDA SASNETT CUMMINGS)
)
Petitioner/Appellee,)
)
vs.) Case No. 120,418
)
LUTHER GREGORY CUMMINGS,)
)
Respondent/Appellant.)

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE MARTHA OAKES, TRIAL JUDGE

REVERSED

George H. Brown
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Oklahoma City, Oklahoma — For Petitioner/Appellee

Beau Williams
Oklahoma City, Oklahoma — For Respondent/Appellant

OPINION BY STACIE L. HIXON, JUDGE:

Luther Gregory Cummings (Husband) appeals the trial court's Journal Entry filed September 8, 2022, requiring him to pay Brenda Sasnett Cummings (Wife) a total of $216,290.45 out of his Oklahoma Firefighters Pension and Retirement

System Deferred Option Plan account, which was formed approximately ten years after their divorce and was explicitly not awarded to her in the decree. Based on our review of the record and applicable law, we reverse the journal entry.

BACKGROUND

This case involves Husband's participation in the Oklahoma Firefighters Pension and Retirement System (Firefighters Pension), governed by 11 O.S.2021, §§ 49-100.1-143.7. Under the traditional path to retirement, any firefighter who reaches the retirement date and retires from service is paid a monthly pension equal to their accrued retirement benefit, referred to by the parties as "Plan A" benefits and by the Supreme Court as "traditional" retirement benefits. *Baggs v. Baggs*, 2016 OK 117, ¶ 8, 385 P.3d 68; 11 O.S.Supp.2023, § 49-106.

Alternatively, a member may elect to participate in a Deferred Option Plan, known as the DROP or Plan B retirement option. Under the DROP, in lieu of terminating employment and accepting the traditional retirement pension, an eligible member may continue working for a period not to exceed five years and defer the receipt of retirement benefits. *Baggs*, 2016 OK 117, ¶ 9; 11 O.S.Supp.2023, §§ 49-106.1(A), (C). When the member participates in the DROP, the contributions of the member cease, but the employer contributions continue and are partially credited to a DROP account. *Baggs*, 2016 OK 117, ¶ 10; 11 O.S.Supp.2023, § 49-106.1(D). The monthly retirement benefits that would have been payable had the member

elected to cease employment and receive a traditional service retirement are also paid into the member's DROP account and earn interest. *Id.* at § 49-106.1(D), (E)(2). At the end of the DROP period and upon leaving employment, the participant receives both a lump-sum payment from the account equal to the payments which were made into the account and a monthly pension payment, calculated as if the member retired on the day they elected to participate in the DROP. *Baggs*, 2016 OK 117, ¶ 11; 11 O.S.Supp.2023, § 49-106.1(F).

Moreover, pursuant to 11 O.S.Supp.2023, § 49-106.1(H), the participant has the option of back dating his or her election of the DROP, with the "back drop date" being the member's normal retirement date or the date five years before the member elects to participate in the DROP. When a participant elects this option, upon the member terminating employment as an active firefighter, the monthly pension benefit is calculated on the earlier attained credited service and on the final average salary as of the drop back date, i.e., as if he or she retired on the drop back date. *Id.* Additionally, the member's DROP account is credited with an amount equal to the "deferred benefit balance," which includes the monthly retirement benefits that would have been payable had the member elected to cease employment on the "back drop date" and received traditional service retirement from the back drop date to the termination date. *Id.*

In the present case, Paragraph 3(a)(v) of the parties' decree filed April 9, 2010 awarded Wife a portion of Husband's Firefighter Pension as follows:

> 50% of the benefits attributable to [Husband's] participation in the Oklahoma Firefighter Plan A retirement program from date of marriage, 1/26/1985, through date of the filing of the Petition in this case, 2/17/2009, same to be accomplished by separate Qualified Domestic Relations Order to be prepared by [Wife's] attorney (*no share of Plan B being awarded* because [Husband] testified that he has not elected and does not participate in Plan B)[.]

(emphasis added).

About ten years after the decree was entered, Husband retired on May 1, 2020. At that time, he elected to enter the DROP, selecting a "back drop date" of May 1, 2015. In April 2021, Wife filed a motion to enforce the decree, alleging Husband was required to pay her the portion of the Plan A benefits that funded Husband's DROP, or Plan B account, along with interest that had accrued on those funds. Husband filed a response, arguing *inter alia*, that Wife was not entitled to any portion of his DROP account under the terms of the decree.

An evidentiary hearing was held on November 5, 2021, during which Wife presented evidence that $118,448.40 of Plan A funds that she would have received if Husband retired on the "back drop date" were used to fund his DROP account. The amount of interest that had accrued on this amount could not be determined at the time because certain necessary calculations had yet to be made by the State of

Oklahoma.[1] On September 8, 2022, the final journal entry was filed, requiring Husband to pay Wife an amount equal to $118,448.40, plus interest in the amount of $97,842.05, totaling $216,290.45. Husband was ordered to roll over such amount into an individual retirement account which he was then required to transfer to Wife, tax free. Husband appeals.

STANDARD OF REVIEW

Husband argues the trial court erred by ordering him to transfer $216,290.45 from his DROP account to Wife, because she was not awarded this sum under the terms of the decree. This presents an issue of law, which we review *de novo*. *Jackson v. Jackson*, 2002 OK 25, ¶ 2, 45 P.3d 418. Such review involves a plenary, independent, and non-deferential examination of a trial court's legal ruling. *Id.*

ANALYSIS

In reaching its decision that Wife was entitled to enforce the decree by receiving a portion of the funds in Husband's DROP account, the trial court relied on the Supreme Court's decision in *Baggs*, 2016 OK 117, involving Wife's appeal

[1] After the hearing, the trial court entered an interlocutory journal entry in January 2022, awarding Wife her requested amount of $118,448.40 but delaying its decision on the interest award. Husband filed a motion for a new trial before the issue regarding interest was resolved, which the court denied in April 2022. Pursuant to 12 O.S.2021, § 653, when a motion for a new trial is filed after the announcement of the decision "on all issues" in the case but before for filing of the judgment, the motion shall be deemed filed immediately after the filing of the judgment. At the time Husband filed his motion for new trial, however, the trial court had not announced its decision on all issues. He also never refiled the motion after the filing of the final journal entry of September 2022. Thus, we do not review the denial of the motion for new trial.

of a divorce decree. In *Baggs*, the wife argued the trial court erred by not awarding her a portion of the husband's DROP account in the decree because the husband became vested to become eligible in the future to elect to participate in the DROP, and if he eventually elected to participate, his DROP account would be partially funded by funds attributable to the marriage. *Id.* at ¶ 7. The Court found that because the husband had vested in the Firefighter's Pension during the marriage, and thus his eligibility to elect to participate in the DROP had also vested during the marriage, the wife would be entitled to any portions of the DROP account that were accrued during the marriage. *Id.* at ¶ 19. The Court remanded for the trial court to enter a decree that protected the wife's interest in the husband's DROP account should he select the option in the future. *Id.* at ¶ 21.

In the present case, the parties' decree was entered and became final years before *Baggs* was decided.[2] The Supreme Court has consistently held that absent fraud, a final property division judgment is not subject to modification at a later date. *Jackson*, 2002 OK 25, ¶ 13 (citing *In re Key*, 1996 OK 130, ¶ 11, 930 P.2d 824; *Clifton v. Clifton*, 1990 OK 88, ¶ 1, 801 P.2d 693). *Baggs* provided no exception to this rule and was concerned only with a prospective award.[3] Fraud is the only

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[2] The record does not indicate the decree was ever appealed.

[3] Wife discusses multiple cases from other jurisdictions the Court cited in *Baggs* as support for reaching its decision. However, none of these cases were cited for the proposition that a final decree may be modified years later to include an award of a spouse's DROP account, particularly when an award was specifically not made in the decree.

recognized exception to the rule that a final property division judgment is final, and it was not alleged in this case. Thus, in determining whether Wife was entitled to enforce the decree by receiving an award of $216,290.45, the decree's language was the paramount consideration. *See Jackson*, 2002 OK 25, ¶ 19 (explaining that the purpose and function of a court in construing a previously entered, final divorce decree "is to give effect to that which is already in the judgment," and that the court has "no authority to add new provisions to the decree or to change substantive provisions already in the decree.").

As noted above, Wife was awarded in the decree:

> 50% of the benefits attributable to [Husband's] participation in the Oklahoma Firefighter Plan A retirement program from date of marriage, 1/26/1985, through date of the filing of the Petition in this case, 2/17/2009, same to be accomplished by separate Qualified Domestic Relations Order to be prepared by [Wife's] attorney (no share of Plan B being awarded because [Husband] testified that he has not elected and does not participate in Plan B)[.]

Under the plain language of the decree, which neither party asserted was ambiguous, Wife was awarded 50% of the benefits attributable to Husband's participation in the Plan A retirement program from the date of the marriage to the date of filing the petition for divorce. The decree specifically ordered this division to be accomplished via a Qualified Domestic Relations Order (QDRO). It is undisputed that upon Husband's retirement, Wife began receiving a monthly benefit of approximately $1,975 via a QDRO in May 2020. This monthly benefit amount

Wife was awarded under the decree was unaffected by Husband's election to participate in the DROP. Although Wife's receipt of this monthly benefit was delayed for the years Husband decided to continue working, nothing about Husband's decision to continue working and to participate in the DROP ran afoul of the decree.[4] Under the decree, Wife's right to receive a portion of Husband's Plan A benefits did not accrue until the time of his actual retirement in May 2020. Thus, at the time Wife filed her motion to enforce the decree, she was already receiving the award of the Firefighter Pension benefits that she was awarded under the decree.

Rather than seeking to enforce the decree as written, Wife effectively sought to impermissibly modify the decree to award her with an additional portion of Husband's DROP account. Based on the decree's plain language, Wife was not awarded any share of Husband's now-existing DROP account. The decree explicitly states "no share of Plan B [is] being awarded. . . ." Moreover, it is undisputed that Husband's DROP account is not divisible via QDRO, which is the only mechanism for payment contemplated by the decree.[5] The language of the decree certainly did

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[4] The decision of when to retire was Husband's to make. The court did not have the authority to require Husband to retire at a certain date so that Wife could begin receiving her Plan A retirement benefits, nor did it purport to do so in the decree.

[5] At the evidentiary hearing, Chase Rankin, the Executive Director of the Firefighter's Pension, testified that he would be unable to accept a QDRO to divide Husband's DROP account pursuant to 11 O.S.2021, § 49-126(B)(9), which states:

> The alternate payee shall have a right to receive benefits payable to a member of the System under the [DROP] provided for pursuant to Section 49-106.1 of this

not require Husband to transfer a portion of the funds in his DROP account to an individual retirement account that he was then required to transfer to Wife, as required by the journal entry under review. Thus, Wife was not entitled to a portion of Husband's DROP account under the terms of the decree.

Not only do the unmodifiable terms of the decree explicitly not award Wife a share of Husband's DROP account, retroactively applying *Baggs* to modify the plain language of the decree results in inequity. Specifically, Husband was only eligible to participate in the DROP because he worked for additional years beyond his traditional retirement date. Husband elected to forgo the higher monthly pension benefit amount under Plan A and opted to continue working, sacrificing years of retirement, in exchange for receiving a lump sum at the time of his ultimate retirement.[6] In weighing the advantages and disadvantages of selecting the DROP option, Husband had no notice under the terms of the decree (entered approximately ten years before he ultimately retired) that he would be required to share a significant portion of his to-be-formed DROP account with Wife from whom he had been divorced for a significant amount of time and whose monthly benefit amount under

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> title, *but only to the extent such benefits have been credited or paid* into the member's [DROP] account *during the term of the marriage*.

(emphasis added).

[6] Husband would have received an additional amount of approximately $900 a month had he not elected to participate in the DROP.

Plan A remained unaffected by his decision to elect the DROP option.[7] This inequitable result did not occur in *Baggs*, because there the issue was whether a spouse was entitled to a *prospective* and contingent award of a DROP account in the decree before the husband made his election to participate in the DROP. Under *Baggs*, the vested firefighter spouse would have notice by virtue of the terms in the decree that if he forgoes several years of retirement to obtain a DROP account and a higher monthly benefit amount in exchange for a lump sum payment, he will be required to share a portion of that account with his former spouse and can take this result into consideration when deciding whether to retire under Plan A or to delay retirement and participate in the DROP. Given the language of the decree in this case, Husband had no such notice.

Thus, we find the trial court erred by modifying the terms of the decree to award $216,290.45 out of Husband's DROP account to Wife. We therefore reverse the September 8, 2022 journal entry.

REVERSED.

HUBER, P.J., concurs, and BLACKWELL, J., dissents.

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[7] We believe a divorced spouse should be able to rely on the plain terms of a final decree when making post-divorce personal career and financial decisions rather than be required to remain apprised of later decided case law and hedge an over $200,000.00 bet as to whether it would or would not retroactively apply to his case. Such a result would not be in accordance with well-established law generally prohibiting modifications of final property awards nor would it inspire confidence in the judicial system.

BLACKWELL, J., dissenting:

In my view, the application of *Baggs v Baggs*, 2016 OK 117, 385 P.3d 68, compels affirmance in this case. In *Baggs*, the Court held:

> Although the Plan B is not immediately divisible because it has not yet been funded, or selected, if it is chosen upon his retirement, the former wife is entitled to any portions thereof which were accrued during the marriage. While this calculation may not be easy to make, it is not impossible, nor is its difficulty a reason to deny to the wife what is fair, just and reasonable.

Id. ¶ 19. In this case, the trial court correctly calculated and awarded to the wife those portions of the deferred benefits that were attributable to the wife's vested marital interest. That decision, pursuant to *Baggs*, should be affirmed.

I do not view either the language of the decree or the equities of the case to be in favor of the husband here. To me it appears the decree simply did not contemplate a decision by the husband to participate in "Plan B."[1] In such circumstances, under *Baggs*, the wife's vested interest in her retirement benefits, which were used to fund a substantial portion of the deferred benefit account, did not lose their status as wife's vested benefits upon transfer to that account. *Id.* ¶ 6, 70 ("In the event the Plan B

[1] In my view, use of the phrases "Plan A" and "Plan B," while understandable and convenient, are potentially misleading. The statute does not use these terms at all, but rather concerns itself more generally with "benefits." While some of these benefits may be deferred under § 49-106.1, they do not lose their character as vested marital benefits simply because they are moved to a new account or ledger by the fund's accountants. When a member elects to defer receipt of benefits, the member might simultaneously defer receipt on behalf of an alternate payee, such as the wife in this case. However, a key lesson of *Baggs,* in my view, is that the member's deferral of another's benefits does not transform those benefits, which were vested in the other, back to the member.

option is chosen by a firefighter upon retirement, it is divisible to the extent any funds were deposited into it attributable to the marital years.") (heading between ¶¶ 6-7) (capitalization modified). Husband's selection only deferred wife's receipt of her benefits.

Additionally, the equities in this case do not necessarily favor the husband. When the husband made his decision to retire in 2020 he was presented with the option to take an additional monthly payment for as long as he lived, or a lesser monthly payment plus an immediate a lump sum payment. At the time he was making this decision *Baggs*, which in my view did not change the law but merely clarified it, had been on the books for four years. Even if the husband had known of the wife's claim, he may have made the exact same decision. We simply cannot say on this record with any certainty whether the husband made his decision to elect an immediate payment only because he erroneously believed his ex-wife would have no claim to the benefits he elected to defer on her behalf. Even if he did make that decision, he made a gamble that, under my reading of *Baggs*, was ill-advised.[2]

[2] The same could be said as to the husband's decision to not retire in 2015. It is critical to understand that the husband did not opt to defer benefits at that time, although he could have. *See* 11 O.S. § 49-106.1(A)-(F). Rather, his decision regarding deferred benefits was not made in until 2020 under § 49-106.1(H). There are many of factors that likely went into the husband's decision not to retire in 2015. None of them are presented in this record. And even if they were, they could not override wife's interest in the retirement funds that vested in her due to the marriage.

Finally, I note that in *Baggs* the Court cited 11 O.S. § 49-126(9) as supporting its result. While, if writing on a blank slate I might come to a different conclusion as to the effect of that statutory language, the *Baggs* Court did not evidently view it as an impediment to finding in favor of the member's spouse. We must give the same reading to the statute that the Supreme Court apparently made in *Baggs*.[3]

For these reasons, I respectfully dissent.

April 4, 2024

[3] As the majority notes the executive director of the firefighter's pension testified that, in his view, the statute forbids him from accepting a QDRO dividing the husband's Plan B account because none of the funds in the account were "credited or paid into" the deferred account "during the term of the marriage." 11 O.S. § 49-126(B)(9). Given the context of this statute within the statutory scheme as a whole, one plausible reading of it, consistent with the result in *Baggs*, is that it places a limitation QDROs only. However, no QDRO is at issue here.